Philip G. Kiko
Chief Administrative Officer

Office of the Chief Administrative Officer U.S. House of Representatives

HB–28, The Capitol
Washington, DC 20515–6860

MEMORANDUM

DATE: May 10, 2019

TO: Susan Grundmann, Executive Director
Office of Congressional Workplace Rights

THRU: Philip G. Kiko
Chief Administrative Officer

FROM: L. Wilhite, Director
CAO Office of Employee Advocacy

SUBJECT: OOEA Comments and Revisions to Proposed Procedural Rules of the Office of Congressional Workplace Rights for CAA Amendments as of June 2019

Dear Ms. Grundmann:

The Office of Congressional Workplace Rights, Legislative Branch, posted for public comment on April 9, 2019, its Proposed Procedural Rules of the Office of Congressional Workplace Rights as Amended June 2019 (herein referenced by section as "Proposed Procedural Rule" or "Proposed Rule"). The Proposed Procedural Rules set forth processes and timetables that will govern the dispute resolution process under the Congressional Accountability Act of 1995 (CAA). The revision of the OCWR's procedural rules follows the substantial amendments to the CAA by the CAA Reform Act in December 2018.

The following comments are submitted before finalization of the Proposed Procedural Rules and their publication in the Congressional Record. We appreciate this opportunity to comment.

COMMENTS

§ 1.02 Definitions

- Section 1.02(e) currently reads:

  (e) Claim Form.— The term "claim form" means the written pleading an individual files to initiate proceedings with the Office of Congressional Workplace Rights that describes the facts and law supporting the alleged violation of part A of title II of the Act, which includes sections 102(c) and 201-207 of the Act. The "claim form" also may be referred to as the "documented claim."

Suggested revision:

(e) Claim Form.— The term "claim form" means the written pleading filed by an individual, or his or her designated representative, to initiate proceedings with the Office of Congressional Workplace Rights that describes the facts and law supporting the alleged violation of part A of title II of the Act, which includes sections 102(c) and 201-207 of the Act. The "claim form" also may be referred to as the "documented claim."

Comment:

We suggest that § 1.02(e) be revised as set forth above for clarity, because individuals may have outside legal counsel, another designated representative filing a claim on their behalf or, in the case of the House of Representatives, counsel from the Office of Employee Advocacy.

❖ Section 1.02(g) currently reads:

(g) *Complaint.*—The term "complaint" means the written pleading filed by the Office by the General Counsel with the Office of Congressional Workplace Rights that describe the facts and law supporting the alleged violation of sections 210(d)(3), 215(c)(3) or 220(c)(2) of the Act.

Suggested revision:

(g) *Complaint.*— The term "complaint" means the written pleading filed by the Office of the General Counsel with the Office of Congressional Workplace Rights under sections 210(d)(3), 215(c)(3) or 220(c)(2) of the Act that describes the facts and law supporting the alleged violation.

Comment:

We suggest that § 1.02(g) be revised to correct the typographical or grammatical error: "describe" should be "describes." ... ... In addition, the phrase, "...by the Office by the General Counsel ....." contains a typographical error. The word "by" should be deleted. Further, the cited sections of the Act should be inserted earlier in the sentence to make clear that the cited sections discuss the complaint filing process; the sections do not describe alleged violations of the Act.

❖ Section 1.02(h) currently reads:

(h) *Confidential Advisor.*— "A 'Confidential Advisor' means, pursuant to section 382 of the Act ...."

Suggested revision:

(h) *Confidential Advisor.*— "A 'Confidential Advisor' means, pursuant to

section 302 of the Act ...."

Comment:

We suggest that § 1.02(h) be revised to correct the citation to the proper statutory section: "302."

- Section 1.02(i) currently reads:

(i) *Designated Representative.*—The term "designated representative" means an individual, firm, or other entity designated in writing by a party to represent the interests of that party in a matter filed with the Office.

Suggested revision:

(i) *Designated Representative.*— The term "designated representative" means an individual, firm, or other entity designated in writing by a party to represent the interests of that party in a matter filed with the Office of Congressional Workplace Rights.

Comment:

We suggest that §1.02(i) be revised to write out the "Office of Congressional Workplace Rights." For clarity and consistency, before the term "Office" is defined in subsection (ee), the Rules should identify the Office by its full name.

- Section 1.02(m) reads:

(m) *Employee, Covered.*—The term "covered employee" means any employee of

(1) the House of Representatives;
(2) the Senate;
(3) the Office of Congressional Accessibility Services;
(4) the Capitol Police;
(5) the Congressional Budget Office;
(6) the Office of the Architect of the Capitol;
(7) the Office of the Attending Physician;
(8) the Library of Congress, except for section 220 of the Act;
(9) the Office of Congressional Workplace Rights;
(10) the John C. Stennis Center for Public Service Training and Development;
(11) the China Review Commission, the Congressional Executive China Commission, and the Helsinki Commission;
(12) to the extent provided by sections 204-207 and 215 of the Act, the Government Accountability Office; or

(13) unpaid staff, as defined below in subparagraph 1.02(r) of the Rules.

Suggested revision:

(m) *Employee, Covered.*—The term "covered employee" means any employee of

...

(9) the Office of Congressional Workplace Rights;
(10) the Office of Technology Assessment;
(11) the John C. Stennis Center for Public Service Training and Development;
(12) the China Review Commission, the Congressional Executive China Commission, and the Helsinki Commission;
(13) to the extent provided by sections 204-207 and 215 of the Act, the Government Accountability Office; or
(14) unpaid staff, as defined below in subparagraph 1.02(r) of the Rules.

Comment:

We suggest that § 1.02(m) be revised to reflect the listed covered employees in the Congressional Record. The "Office of Technology Assessment" should be added as term (10) and the remainder of numerical listings adjusted accordingly.

❖ Section 1.02(r)(1) currently reads:

(r) *Employee, Unpaid Staff.*—The term "unpaid staff" means:

(1) any staff member of an employing office who carries out official duties of the employing office but who is not paid by the employing office for carrying out such duties (also referred to as an "unpaid staff member"), including an intern, an individual detailed to an employing office, and an individual participating in a fellowship program, in the same manner and to the same extent that section 201(a) and (b) of the Act applies to a covered employee; and

Suggested revision:

(r) *Employee, Unpaid Staff.*—The term "unpaid staff" or "unpaid staff member" means:

(1) any staff member of an employing office who carries out official duties of the employing office but who is not paid by the employing office for carrying out such duties (including an intern, an individual detailed to an employing office, and an individual participating in a fellowship program), and who is covered in the same manner and to the same extent that section 201(a) and (b) of the Act applies to a covered employee; and

Comment:

We suggest that § 1.02(r) be revised to make clear at the outset of the definition that there are two terms being defined, and to place the "including" clause within a parenthetical to be more coherent.

❖ Section 1.02(u) currently reads:

(u) *Final Disposition.*—The term "final disposition" of a claim under section 416(d) of the Act means any of the following:

(1) An order or agreement to pay an award or settlement, including an agreement reached pursuant to mediation under section 404 of the Act;

(2) A final decision of a hearing officer under section 405(g) of the Act that is no longer subject to review by the Board under section 406;

(3) A final decision of the Board under section 406(e) of the Act that is no longer subject to appeal to the United States Court of Appeals for the Federal Circuit under section 407;

(4) A final decision in a civil action under section 408 of the Act that is no longer subject to appeal; or

(5) A final decision of an appellate court, to include the United States Court of Appeals for the Federal Circuit, that is no longer subject to review.

Suggested revision:

(u) *Final Disposition.*—The term "final disposition" of a claim under section 416(e) of the Act means any of the following:....

Comment:

We suggest that § 1.02(u) be revised to cite "§ 416(e)" of the Act, rather than "§ 416(d)," because the language of this definition is drawn, verbatim, from § 416(e)(6). Section 416(d) provides that records of proceedings hereunder may be made public if required for the purpose of judicial review, and thus, that section does not involve the final disposition of claims.

❖ Section 1.02(y) currently reads:

(y) *Hearing Officer, Merits.*—The term "Merits Hearing Officer" means any individual appointed by the Executive Director to preside over an administrative hearing conducted on matters within the Office's jurisdiction under section 405 of the Act.

Suggested revision:

(y) *Hearing Officer, Merits.*—The term "Merits Hearing Officer" means any individual appointed by the Executive Director to preside over an administrative hearing conducted on matters within the jurisdiction of the Office of Congressional Workplace Rights under section 405 of the Act.

Comment:

For clarity and consistency in § 1.02(y), before the term "Office" is defined in subsection (ee), the Rules should identify the Office by its full name.

- Section 1.02(bb)(2) currently reads:

(2) file a claim with the Office under section 402 of the Act and continue with the corresponding procedures of this Act available and applicable to a covered employee.

Suggested revision:

(2) file a claim with the Office of Congressional Workplace Rights under section 402 of the Act and continue with the corresponding procedures of this Act available and applicable to a covered employee.

Comment:

We suggest a revision to § 1.02(bb)(2) to write out the "Office of Congressional Workplace Rights." For clarity and consistency, before the term "Office" is defined in subsection (ee), the Rules should identify the Office by its full name.

§1.03 Filing and Computation of Time

- Section 1.03(a)(3) reads (relevant portion highlighted):

(3) *By Fax*. Documents transmitted by fax machine will be deemed filed on the date received at the Office at 202-426-1913, or on the date received at the Office of the General Counsel at 202-426-1663 if received by 11:59 p.m. Eastern Time. Faxed documents received after 11:59 p.m. Eastern Time will be deemed filed the following business day. A fax filing will be timely only if the document is received no later than 11:59 p.m. Eastern Time on the last day of the applicable filing period. Any party using a fax machine to file a document is responsible for ensuring both that the document is timely and accurately transmitted and confirming that the Office has received a facsimile of the document. The time displayed as received by the Office on its fax status report will be used to show the time that the document was filed. When the Office serves a document by fax, the time displayed as sent by the Office on its fax status report will be used to show

the time that the document was served. A fax filing cannot exceed 75 pages, inclusive of table of contents, table of authorities, and attachments. Attachments exceeding 75 pages must be submitted to the Office in person or by electronic delivery. The filing date is determined by the date the brief, motion, response, or supporting memorandum is received in the Office, rather than by the date the attachments are received in the Office.

Suggested revision (relevant portion highlighted):

(3) *By Fax*. Documents transmitted by fax machine will be deemed filed on the date received at the Office at 202-426-1913, or when applicable on the date received at the Office of the General Counsel at 202-426-1663, if received by 11:59 p.m. Eastern Time. Faxed documents received after 11:59 p.m. Eastern Time will be deemed filed the following business day. A fax filing will be timely only if the document is received no later than 11:59 p.m. Eastern Time on the last day of the applicable filing period. Any party using a fax machine to file a document is responsible for ensuring both that the document is timely and accurately transmitted and confirming that the Office or the Office of the General Counsel has received a facsimile of the document. The party must confirm receipt within ___ business days of the filing. A party may confirm receipt by ____. The time displayed as received by the Office on its fax status report will be used to show the time that the document was filed and received. When the Office serves a document by fax, the time displayed as sent by the Office on its fax status report will be used to show the time that the document was served. If a party raises a concern regarding the accuracy of the Office's or the General Counsel's fax status report, the party may submit its fax status report to offer evidence of timely transmission. The Office or General Counsel will make the final determination regarding timeliness based on available information. A fax filing cannot exceed 75 pages, inclusive of table of contents, table of authorities, and attachments. Attachments exceeding 75 pages must be submitted to the Office in person or by electronic delivery within the applicable deadline. The filing date is determined by the date the brief, motion, response, or supporting memorandum is received in the Office, rather than by the date the attachments are received in the Office.

Comment:

We suggest a revision to § 1.03 such that all of its subsections that reference the General Counsel will apply to the Office of General Counsel the same processes and procedures that apply to "the Office." As currently drafted, the Rules reference the Office of General Counsel in the first sentence of various sections, but subsequently in the section only "the Office" is discussed. Also, § 1.03(a)(3) should be revised to make clear what timetable applies for a party to confirm that its filing has been received. Also, the method of confirmation should be set forth. This revision is needed because a party would be unable to confirm receipt of a facsimile on the same day it is due if the party has until well-past close of business to send the fax. Further, the section should be revised to allow a party's time display on its fax status report to serve as evidence of filing. This revision is needed because a party could raise a reasonable concern about the time and date on the

Office's fax status report, as it is not uncommon for a fax's time and date stamps to reset inadvertently. Claimants and Respondents should have the opportunity to show evidence of timely filing. Finally, the section should be revised to make clear that lengthy attachments must be received in a timely manner.

- Section 1.03(a)(4) reads (relevant portion highlighted):

(4) *By Electronic Mail.* Documents transmitted electronically will be deemed filed on the date received at the Office at ocwrefile@ocwr.gov, or on the date received at the Office of the General Counsel at OSH@ocwr.gov if received by 11:59 p.m. Eastern Time. Documents received electronically after 11:59 p.m. Eastern Time will be deemed filed the following business day. An electronic filing will be timely only if the document is received no later than 11:59 p.m. Eastern Time on the last day of the applicable filing period. Any party filing a document electronically is responsible for ensuring both that the document is timely and accurately transmitted and for confirming that the Office has received the document. The time displayed as received by the Office will be used to show the time that the document has been filed. When the Office serves a document electronically, the time displayed as sent by the Office will be used to show the time that the document was served. The time displayed as received or sent by the Office will be based on the document's timestamp information and used to show the time that the document was filed or served.

Suggested revision (relevant portion highlighted):

(4) *By Electronic Mail.* Documents transmitted electronically will be deemed filed on the date received at the Office at ocwrefile@ocwr.gov, or on the date received at the Office of the General Counsel at OSH@ocwr.gov if received by 11:59 p.m. Eastern Time. Documents received electronically after 11:59 p.m. Eastern Time will be deemed filed the following business day. An electronic filing will be timely only if the document is received no later than 11:59 p.m. Eastern Time on the last day of the applicable filing period. Any party filing a document electronically is responsible for ensuring both that the document is timely and accurately transmitted and for confirming that the Office has received the document. A party will use a delivery receipt generated by Outlook or another electronic mail system will be used to show that the document was received by the Office. The time displayed as received by the Office will be used to show the time that the document has been filed. When the Office serves a document electronically, the time displayed as sent by the Office will be used to show the time that the document was served. The time displayed as received or sent by the Office will determine the document's timestamp information and be used to show the time that the document was filed or served.

Comment:

We suggest a revision to § 1.03(a)(4) to reference the General Counsel throughout the subsection alongside the references to "the Office.' It should be revised to apply to the Office of General Counsel the same processes and procedures that apply to "the Office." Also, the section should be revised to allow the parties to show evidence of delivery/receipt of an e-mail filing. Both Claimant and Respondent should have an opportunity to show evidence of timely filing/service of an electronic document.

- Section 1.03(b) reads:

(b) *Service by the Office*. At its discretion, the Office may serve documents by mail, fax, electronic transmission, or personal or commercial delivery.

Suggested revision:

(b) *Service by the Office*. Unless a specific manner of service has been selected and communicated by the Board or Hearing Officer, the Office at its discretion may serve documents by mail, fax, electronic transmission, or personal or commercial delivery.

Comment:

We suggest that § 1.03(b) be revised to make clear that the Office has discretion on manner of service, but a Hearing Officer can elect a particular mode of service to govern the proceeding.

- Section 1.03(d) reads:

(d) *Time Allowances for Mailing, Fax, or Electronic Delivery of Official Notices*. When documents are served electronically or by fax, the prescribed period shall be calculated from the date of transmission by the Office.

Suggested revision:

(d) *Time Allowances for Mailing, Fax, or Electronic Delivery of Official Notices*. When documents are served electronically or by fax, the prescribed period shall be calculated from the date of transmission by the Office, General Counsel, person or party.

Comment:

We suggest that § 1.03(d) be revised to clarify that the period for the opposing party to respond begins to run when the serving office or party serves the document.

§ 1.04 Filing, Service, and Size Limitations of Motions, Briefs, Responses, and Other Documents.

- Section 1.04(a) reads:

  (a) .... A party may file an electronic version of any submission in a format designated by the Board, the Executive Director, the General Counsel, or the Merits Hearing Officer, with receipt confirmed by electronic transmittal in the same format.

  Suggested revision:

  (a) .... A party may, but is not required to, file an electronic version of any submission in a format designated by the Board, the Executive Director, the General Counsel, or the Merits Hearing Officer, with receipt confirmed by electronic transmittal in the same format. A party may also submit filings by mailing, fax, or by hand delivery.

  Comment:

  We suggest that § 1.04(a) be revised to make clear that electronic transmission to the Office is not required; the parties' options for service on each other are also options for filing with the Board. Due to confidentiality concerns, some employees strongly disfavor submitting filings by electronic mail.

- Section 1.04(c) reads:

  (c) *Time Limitations for Response to Motions or Briefs and Reply.* Unless otherwise specified by the Merits Hearing Officer or these Rules, a party shall file a response to a motion or brief within 15 days of the service of the motion or brief upon the party....

  Suggested revision:

  (c) *Time Limitations for Response to Motions or Briefs and Reply.* Unless otherwise specified by the Merits Hearing Officer or these Rules, a party shall file and serve a response to a motion or brief within 15 days of the service of the motion or brief upon the party.....

  Comment:

  We suggest that § 1.04(c) be revised to add "and serve" to the first sentence to make clear that a party has an obligation to file and serve within the applicable deadline.

- Section 1.04(d) reads (relevant portion highlighted):

(d) *Size Limitations.* Except as otherwise specified, no brief, motion, response, or supporting memorandum filed with the Office shall exceed 35 double-spaced pages, exclusive of the table of contents, table of authorities and attachments. The Board, the Executive Director, or the Merits Hearing Officer may modify this limitation upon motion and for good cause shown, or on their own initiative. Briefs, motions, responses, and supporting memoranda shall be on standard letter-size paper (8-1/2" x 11"). If a filing exceeds 35 double-spaced pages, the Board, the Executive Director, or the Merits Hearing Officer may, in their discretion, reject the filing in whole or in part, and may provide the parties an opportunity to refile.

Suggested revision (relevant portion highlighted):

(d) *Size Limitations.* Except as otherwise specified, no brief, motion, response, or supporting memorandum filed with the Office shall exceed 35 double-spaced pages, exclusive of the table of contents, table of authorities and attachments. Footnotes, endnotes, and block quotes may be single spaced. The Board, the Executive Director, or the Merits Hearing Officer may modify this limitation upon motion and for good cause shown, or on their own initiative. Briefs, motions, responses, and supporting memoranda shall be on standard letter-size paper (8-1/2" x 11"). If a filing exceeds 35 double-spaced pages without the filing party first having filed a motion to exceed the page limitations, the Board, the Executive Director, or the Merits Hearing Officer may, in their discretion, reject the filing in whole or in part, and may provide the parties an opportunity to refile.

Comment:

We suggest that § 1.04(d) be revised to follow standard practice in federal court to: 1) exclude footnotes, endnotes and block quotes from the double-spaced requirement to make for cleaner, shorter documents; 2) allow a party to request leave to exceed the page limitations; and 3) sanction only those parties that violate the limitations without seeking prior leave.

§ 1.07 Designation of Representative

- Section 1.07(a) reads:

(a) A party wishing to be represented must file with the Office a written notice of designation of representative. No more than one representative, firm, or other entity may be designated as representative for a party for the purpose of receiving service, unless approved in writing by the Hearing Officer or Executive Director. The representative may be, but is not required to be, an attorney. If the representative is an attorney, he or she may sign the designation of representative on behalf of the party.

Suggested revision:

(a) *Designation of Representative.* A party wishing to be represented must file with the Office a written notice of designation of representative. A designated representative may prepare and file submissions, receive service and otherwise act on behalf of the designating party in any matter filed with the Office. No more than one representative, firm, or other entity may be designated as representative for a party for the purpose of receiving service, unless approved in writing by the Hearing Officer or Executive Director. The representative may be, but is not required to be, an attorney.

Comment:

We suggest that § 1.07(a) be revised to include a title to match the format of the other procedural rules. In addition, it should be revised to make clear that the representative's role is not limited to receiving service on behalf of the employee. The revision recommended above indicates that a representative may also submit filings, send and receive correspondence, and orally represent the employee. Under this revision, the Executive Director or Hearing Officer retains the right to limit the point of contact for receiving service to one designated representative, in the event a party has representatives acting as co-counsel. Finally, the section should be revised to delete the provision allowing an attorney to file the designation of representative on behalf of the party. A third party should not be allowed to act on behalf of an individual without the individual him/herself first making clear that the third party has authority to act on the individual's behalf.

§1.08 Confidentiality

- Section 1.08(c) reads:

(c) *Prohibition.* Unless specifically authorized by the provisions of the Act or by these rules, no participant in the confidential advising process, mediation, or other proceedings made confidential under section 416 of the Act may disclose a written or an oral communication that is prepared for the purpose of or that occurs during the confidential advising process, mediation, and the proceedings and deliberations of Hearing Officers and the Board.

Suggested revision:

(c) *Prohibition.* Unless specifically authorized by the provisions of the Act or by these rules, no participant in the confidential advising process, mediation, or other proceedings made confidential under section 416 of the Act may disclose a written or an oral communication that is prepared for the purpose of or that occurs during the confidential advising process, mediation, and the proceedings and deliberations of Hearing Officers and the Board. This rule shall not apply to disclosures made between a party and that party's representative.

Comment:

We suggest the addition of the final sentence recommended above to § 1.08(c) to make clear that the prohibitions do not apply between the parties and their counsel.

§3.03 Requests for Inspections by Employees and Covered Employing Offices

- Section 3.03(a)(2) reads:

(2) If upon receipt of such notification the General Counsel's designee determines that the notice meets the requirements set forth in subparagraph (a)(1) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he or she shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. Inspections under this section shall not be limited to matters referred to in the notice.

Suggested revision:

(2) If upon receipt of such notification the General Counsel's designee determines that the notice meets the requirements set forth in subparagraph (a)(1) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he or she shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. A representative of the covered employee may accompany the General Counsel's designee during the physical inspection of any workplace in accordance with section 3.07. Inspections under this section shall not be limited to matters referred to in the notice.

Comment:

We suggest the addition of the second sentence recommended above to § 3.03(a)(2) to allow counsel for the requesting employee to be present during an inspection.

§3.06 Advance Notice of Inspections

- Section 3.06(a)(3) reads:

(3) where necessary to assure the presence of representatives of the employing office and employees or the appropriate personnel needed to aid in the inspection; and

Suggested revision:

(3) where necessary to assure the presence of representatives of the employing office and employees or the appropriate personnel needed to aid in the inspection; or

Comment:

We suggest that § 3.06(a)(3) be revised to say "or" instead of "and" after the semicolon. This change is needed to make clear that the four subsections in Section 3.06(a) are independent of each other, and that not all conditions need to occur for advance notice of an inspection to occur.

§3.07 Conduct of Inspections

- Section 3.07(c) reads:

(c) In taking photographs and samples, the General Counsel's designees shall take reasonable precautions to insure that such actions with flash, spark-producing, or other equipment would not be hazardous....

Suggested revision:

(c) In taking photographs and samples, the General Counsel's designees shall take reasonable precautions to ensure that such actions with flash, spark-producing, or other equipment would not be hazardous....

Comment:

We suggest that § 3.07(c) be revised to correct a typo in the first sentence: "insure" to "ensure."

- Section 3.07(g)(1) reads (relevant portion highlighted):

(1) At the commencement of an inspection, the employing office may identify areas in the establishment which contain or which might reveal a trade secret as referred to in section 15 of the OSHAct and section 1905 of title 18 of the United States Code. If the General Counsel's designee has no clear reason to question such identification, information contained in such areas, including all negatives and prints of photographs, and environmental samples, shall be labeled "confidential-trade secret" and shall not be disclosed by the General Counsel and/or his designees, except that such information may be disclosed to other officers or employees concerned with carrying out section 215 of the Act or when relevant in any proceeding under section 215....

Suggested revision:

(1) At the commencement of an inspection, the employing office may identify areas in the establishment which contain or which might reveal a trade secret as referred to in section 15 of the Williams-Steiger Occupational Safety and Health Act of 1970, as applied to covered employees and employing offices under section 215 of the Act ("OSHAct") and section 1905 of title 18 of the United States Code. If the General

Counsel's designee has no clear reason to question such identification, information contained in such areas, including all negatives and prints of photographs, and environmental samples, shall be labeled "confidential-trade secret" and shall not be disclosed by the General Counsel and/or his designees, except that such information may be disclosed to other officers or employees charged with carrying out section 215 of the Act or when relevant in any proceeding under section 215....

Comment:

We suggest that § 3.07(g)(1) be revised to list the complete name of the OSHAct when the acronym is first used. In addition, the word "charged" should replace the word "concerned" to ensure that only officers/employees who are directly responsible for enforcing the Act have access to confidential-trade secret information.

§3.11 Citations

- Section 3.11(a) reads:

(a) ... he or she shall issue to the employing office responsible for correction of the violation, either a citation or a notice of de minimis violations that has no direct or immediate relationship to safety or health.... No 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 filing the citation.

Suggested revision:

(a) ... he or she shall issue to the employing office responsible for correction of the violation, either a citation or a notice of de minimis violations that have no direct or immediate relationship to safety or health.... No citation may be issued under this section after the expiration of 6 months following the inspection unless the violation is continuing or the employing office has agreed to toll the deadline for filing the citation.

Comment:

We suggest that § 3.11(a) be revised to change "has" to have" in the first sentence, to achieve subject/verb agreement. Also, in the final sentence, the section should be revised to refer to "6 months following the inspection" rather than "6 months following the occurrence." This change is needed to preclude the possibility that violations will be excused (except for continuing violations) because they occurred more than six months in the past, and to ensure that employing offices are given timely notice of violations after an inspection has occurred.

§4.02 Requests for Advice and Information

- Section 4.02 reads:

At any time, an employee or an employing office may seek from the Office informal advice and information on the procedures of the Office and under the Act and information on the protections, rights and responsibilities under the Act and procedures available under the Act. The Office will maintain the confidentiality of requests for such advice or information.

Suggested revision:

At any time, an employee or an employing office may seek from the Office informal advice and information on the procedures of the Office under the Act; information on the protections, rights and responsibilities under the Act; and procedures available under the Act. The Office will maintain the confidentiality of requests for such advice or information and shall ensure that any employee or agent of the Office who obtains factual information from an employee or employing office regarding a matter arising under the Act shall not be involved in the mediation or hearing regarding the same matter.

Comment:

We suggest that § 4.02 be revised to insert punctuation to correct a run-on sentence. Without the punctuation, the section is more difficult to understand. In addition, text should be added to the second sentence to ensure that the Office will protect against potential conflicts of interest. Specifically, it should make clear that no employee or agent of the Office who informally advises or obtains information from an employee or employing office regarding a matter arising under the Act should be involved in the mediation or hearing regarding the same matter.

§4.03 Confidential Advising Services

- Section 4.03(c)(2)(B) reads:

(B) the relative merits of securing private counsel, designating a nonattorney representative, or proceeding without representation for proceedings before the Office;

Suggested revision:

(B) the relative merits of securing the private counsel services of the Office of Employee Advocacy (where applicable), securing the services of private counsel outside the Legislative Branch, designating a nonattorney representative, or proceeding without representation for proceedings before the Office;

Comment:

We suggest that § 4.03(c)(2)(B) be revised to include a reference to the Office of Employee Advocacy and adding text to distinguish OOEA services from outside private counsel, because the OOEA is a key resource established by a chamber of the Legislative Branch for certain covered employees who believe a violation of the Act has occurred.

§4.04 Claims

- Section 4.04(c) currently reads:

(c) *Form and Contents.* All claims shall be on the form provided by the Office either on paper or electronically, signed manually or electronically under oath or affirmation by the claimant or the claimant's representative, and contain the following information, if known:

Suggested revision:

(c) *Form and Contents.* All claims shall be on the form provided by the Office either on paper or electronically, signed manually or electronically under oath or affirmation by the claimant, and contain the following information, if known:

Comment:

We suggest that § 4.04(c) be revised to delete "or the claimant's representative" in order to limit who can attest to the claim. Subsection (c), requires "oath or affirmation" of the claim by the claimant or the claimant's representative. This affirmation should be made only by a claimant him/herself pursuant to Section 102 of the Congressional Accountability Act of 1995 Reform Act ("CAARA"), which amends Section 402 of the Act. More specifically, Section 402(a)(1) - (2), as amended by the CAARA, provides that "a covered employee" may commence a proceeding under this title by filing a claim with the Office, in writing and under oath or affirmation, describing the facts that form the basis of the complaint, the alleged violation, and identifying the employing office.

Congress' choice in language in CAARA Section 402(a) and its requirement that the claimant identify the basic facts and circumstances of the claim to initiate the proceeding suggests that only the claimant can provide the oath or affirmation of the required factual allegations. This is similar to filing a verified complaint in federal court where, even if represented, the plaintiff must still attest to the accuracy of the factual allegations set forth in the complaint. Thus, the claimant's representative should not be providing the oath or affirmation required under this Section and would not be in a position to swear to the accuracy of the allegations. Instead, the claimant's or employing office's representative would be bound by Section 401(f), as amended by CAARA, which now requires that all parties and their representatives ensure that all pleadings, claims, and contentions are non-frivolous, tracking the exact language of Federal Rule of Civil Procedure 11. Thus, the Rule 11 obligations imposed on the parties and their representatives throughout the course of administrative proceedings under the CAA is separate from the oath or affirmation of the factual allegations provided by claimant to initiate proceedings under this section. The recommended change would not limit the claimant's ability to have his/her designated representative file the claim.

- Section 4.04(c)(1) currently reads:

(1) the name, mailing and e-mail addresses, and telephone number(s) of the claimant;

Suggested revision:

(1) the name, mailing and e-mail addresses, and telephone number(s) of the claimant, unless claimant has designated a representative in accordance with § 1.07 herein, in which case the claimant may, but need not, provide any contact information other than claimant's name;

Comment:

We suggest that § 4.04(c)(1) be revised to make clear that if the claimant is represented by counsel (or other designated representative), provision of claimant's telephone number and mailing and email addresses should not be required, as all contact with claimant must go through the claimant's attorney or other designated representative. Claimant should only be required to provide this additional information in the event of the withdrawal of his or her designated representative.

- Section 4.04(c)(4) – (5) currently reads:

(4) a description of the conduct being challenged, including the date(s) of the conduct;

(5) a description of why the claimant believes the challenged conduct is a violation of the Act;

Suggested revision:

(4) a description of the conduct being challenged, including the date(s) of the conduct

(i) No specific format is required.

(ii) The description must be sufficiently detailed to contain either direct or inferential allegations that address all the material elements of a claim under one or more sections of the Act;

(5) a description of why the claimant believes the challenged conduct is a violation of the Act

(i) A claimant may set forth two or more statements alternatively or hypothetically of why the conduct is a violation, either in a single allegation or in separate ones.

(ii) If the claimant makes alternative statements, the description of the alleged violation is sufficient if any one of them is sufficient;

Comment:

We suggest that §§ 4.04(c)(4) and (c)(5) be revised to make clear the pleading standard, including the level of detail that is needed to state a claim. Without such information, a claimant is left without guidance on how detailed their claim should be. A claimant, or his or her representative, could be under the impression that federal district courts' "notice pleading" standard applies, as under Rule 8 of the Federal Rules of Civil Procedure. Or a claimant could conclude that state courts' "fact pleading" standard applies. The CAA Reform Act and these Rules at § 4.08(c) give Preliminary Hearing Officers authority to dismiss a claimant's Claim with prejudice and without the ability to appeal for failing to state a claim. Further, as these Rules are currently drafted the Preliminary Hearing Officer has such dismissal authority without granting a claimant the opportunity to cure any perceived defect in the Claim (these comments recommend a revision of these proposed rules below). Therefore, it is important for § 4.04(c) to provide clear procedural guidance to maximize a claimant's chances of submitting a Claim that contains sufficient information to allow the Preliminary Hearing Officer to assess the Office's jurisdiction over the claim and to determine whether the claimant can state a claim over which relief can be granted under the Act. Because of the possibility of *sua sponte* dismissal, the additional language recommended here mirrors the "fact pleading" standard in state courts and incorporates the alternative pleading option in both state and federal courts.

In addition to revising §4.05, we suggest that the Claim Form be revised to set forth a pleading standard. Further, that pleading standard should be articulated in these Procedural Rules (see Comment to §4.08 below). The draft Claim Form states only that the claimant must set forth "a clear and concise statement of the conduct being challenged." For the reasons stated above within this Comment and in the Comment regarding § 4.08 below, the Claim Form's description of the required narrative is presently insufficient to provide adequate guidance to a claimant, especially a claimant that is proceeding without an attorney and does not utilize the services of the Office's Confidential Advisor.

§4.05 Right to File a Civil Action

- Section 4.05 reads:

(a) A covered employee may file a civil action in Federal district court pursuant to section 401(b) of the Act if the covered employee:

(1) has timely filed a claim as provided in section 402 of the Act; and

(2) has not submitted a request for an administrative hearing on the claim pursuant to section 405(a) of the Act.

(b) *Period for Filing a Civil Action.* A civil action pursuant to section 401(b) of the Act must be filed within a 70-day period beginning on the date the claim form was filed.

(c) *Effect of Filing a Civil Action.* If a claimant files a civil action concerning a claim during a preliminary review of that claim pursuant to section 403 of the Act, the review terminates immediately upon the filing of the civil action, and the Preliminary Hearing Officer has no further involvement.

(d) *Notification of Filing a Civil Action.* A claimant filing a civil action in Federal district court pursuant to section 401(b) of the Act shall notify the Office within 10 days of the filing.

Suggested revision:

(a) *Civil Filing Requirements.* A covered employee may file a civil action in Federal district court pursuant to section 401(b) of the Act if the covered employee:

(1) has timely filed a claim as provided in section 402 of the Act; and

(2) has not submitted a request for an administrative hearing on the claim pursuant to section 405(a) of the Act.

(b) *Period for Filing a Civil Action.* A civil action pursuant to section 401(b) of the Act must be filed within a 70-day period beginning on the date the claim form was filed,~~,~~ except where: (1) the 70-day period is tolled as a result of the parties engaging in mediation prior to the conclusion of the 70-day period, or (2) the Preliminary Hearing Officer determines that the claimant is not a covered employee or has not stated a claim for which relief may be granted, as provided in Section 4.08(f) of the Rules.

(c) *Effect of Filing a Civil Action.* If a claimant files a civil action concerning a claim during a preliminary review of that claim pursuant to section 403 of the Act, the review terminates immediately upon the filing of the civil action, and the Preliminary Hearing Officer has no further involvement.

(d) *Notification of Filing a Civil Action.* A claimant filing a civil action in Federal district court pursuant to section 401(b) of the Act shall notify the Office within 10 days of the filing.

Comment:

We suggest that § 4.05(a) be revised to begin with "*Civil Filing Requirements*" to contain a title in keeping with the format of the other subsections of 4.05 and the other procedural rules. Section 4.05(b) should be revised to add the exceptions to the 70-day rule as noted in the Act where a Preliminary Hearing Officer makes a determination that the claimant is not a covered employee or has not stated a claim for which relief may be granted under the Act, or where the deadlines are tolled because a party requested mediation. Section

104(c) of the CAA Reform Act includes language stating that "[a]ny deadline in this Act relating to a claim for which mediation has been agreed to in this section, that has not already passed by the first day of the mediation period, shall be stayed during the mediation period." It appears that the CAA Reform Act intended to toll a claimant's deadline to file a civil action where the parties agree to participate in mediation.

§4.06 Initial Processing and Transmission of Claim; Notification Requirements

- Section 4.06(a) reads:

(a) After receiving a claim form, the Office shall record the pleading, transmit immediately a copy of the claim form to the head of the employing office and the designated representative of that office, and provide the parties with all relevant information regarding their rights under the Act. An employee filing an amended claim form pursuant to §4.04 of these Rules shall serve a copy of the amended claim form upon all other parties in the manner provide by §1.04(b). A copy of these Rules also may be provided to the parties upon request. The Office shall include a service list containing the names and addresses of the parties and their designated representative.

Suggested revision:

(a) After receiving a claim form, the Office shall record the pleading, transmit within two (2) business days a copy of the claim form to the head of the employing office and the designated representative of that office, and provide the parties with all relevant information regarding their rights under the Act. An employee filing an amended claim form pursuant to §4.08(d) of these Rules shall serve a copy of the amended claim form upon all other parties in the manner provide by §1.04(b). A copy of these Rules also may be provided to the parties upon request. The Office shall include a service list containing the names and addresses of the parties and their designated representative.

Comment:

We suggest that § 4.06(a) be revised because the term "immediately" in the first sentence is vague. We recommend that the section be revised to add a timetable for when the Office will record and transmit a pleading ("two (2) business days" is recommended here). Undefined timeframes provide insufficient notice of what can be expected and can result in delayed action. Further, because employees are held to strict deadlines for the filing of a claim with the Office and for filing a civil action, and many of the deadlines in the Act are triggered from the date the employing office receives notice, employees would be unduly disadvantaged if the Office is not held to the same standards such that employees can be assured that notice will be provided to employing offices within a fixed period of time. In addition, we suggest that the second sentence of § 4.06(a) be revised to substitute "§4.08(d)" for the reference to "§4.04." Section 4.04 does not reference amended claims. The proper internal citation for provisions regarding an amended claim is § 4.08(d).

4.06 Initial Processing and Transmission of Claim; Notification Requirements.

❖ Section 4.06(b)(2) reads:

(b) *Notification of Availability of Mediation.*

...

(2) Upon transmission to the employing office of the claim, the Office shall notify the employing office about the mediation process under the Act and the deadlines applicable to mediation.

Suggested revision:

(b) *Notification of Availability of Mediation.*

...

(2) Upon transmission to the employing office of the claim, the Office shall notify the employing office about the mediation process under the Act and the deadlines applicable to mediation. Upon promulgation of these Procedural Rules, each employing office shall identify for the Office the individual or entity designated to receive service, notices, documents and information from the Office. The Office shall direct the notice regarding the mediation process to the designated individual.

Comment:

We suggest that § 4.06(b)(2) be revised to indicate how the Office will know to whom to direct notices in each employing office. Alternatively to revising this section, the Rules can be revised at § 1.02 *Definitions* to define a term such as "Point of Contact." The definition could describe the "point of contact" as "the individual or entity identified by an employing office after promulgation of these Procedural Rules as the individual or entity to receive service, notices, correspondence, documents and other information from the Office of Congressional Workplace Rights on behalf of the employing office." Further, the definition should provide a process for each employing office of the Legislative Branch to update its Point of Contact when there is a change.

4.07 Mediation

❖ Section 4.07(d) reads:

(d) *Notice of Commencement of the Mediation.* The Office shall promptly notify the opposing party or its designated representative of the request for mediation and the deadlines applicable to such mediation. When a claim alleges a violation described in subparagraphs (A) and (B) of section 402(b)(2) of the Act that consists of a violation described in section 415(d)(1)(A) by a Member of Congress, the Office shall notify

immediately such Member of the right to intervene in any mediation concerning the claim.

Suggested revision:

(d) *Notice of Commencement of the Mediation.* The Office shall notify the opposing party or its designated representative of the request for mediation and the deadlines applicable to such mediation within two (2) business days of the Office's receipt of the request When a claim alleges a violation described in subparagraphs (A) and (B) of section 402(b)(2) of the Act that consists of a violation described in section 415(d)(1)(A) by a Member of Congress, the Office shall notify such Member within two (2) business days of the right to intervene in any mediation concerning the claim.

Comment:

We suggest that § 4.07(d) be revised to add specific timetables, because the terms "promptly" and "immediately" are vague. Undefined timeframes provide insufficient notice of what can be expected and can result in delayed action. Further, because employees are held to strict deadlines for the filing of a claim with the Office and for filing a civil action, they would be unduly disadvantaged if the Office is not held to the same standards such that employees can be assured that notice will be received no later than a fixed period of time.

❖ Section 4.07(g) reads:

(g) *Effect of Mediation on Proceedings*

Upon the parties' agreement to mediate a claim, any deadline relating to the processing of that claim that has not already passed by the first day of the mediation period, shall be stayed during the mediation period.

Suggested revision:

(g) *Effect of Mediation on Proceedings*

Upon the parties' agreement to mediate a claim, any deadline relating to the processing of that claim that has not already passed by the first day of the mediation period, shall be stayed during the mediation period, including the deadline for filing a civil action.

Comment:

For purposes of clarity, we suggest a revision to § 4.07(g) to include language explicitly providing that the deadline to file a civil action is also tolled by the agreement of the parties to participate in mediation.

❖ Section 4.07(h)(1) reads:

(1) *The Mediator's Role*. After assignment of the case, the mediator will contact the parties. The mediator has the responsibility to conduct the mediation, including deciding how many meetings are necessary and who may participate in each meeting. The mediator may accept and may ask the parties to provide written submissions.

Suggested revision:

(1) *The Mediator's Role*. After assignment of the case, the mediator will contact the parties. The mediator has the responsibility to conduct the mediation, including deciding how many meetings are necessary and who may participate in each meeting. The mediator may accept and may ask the parties to provide written submissions, which shall be submitted within five (5) business days of the mediator's request. Upon request by either party, the mediator may extend the deadline for written submissions up to an additional five (5) business days.

Comment:

We suggest that § 4.07(h)(1) be revised to indicate that the parties are required to make the written submission in response to the mediator's request and to include a timetable for when the parties will have to do so (we recommend "five (5) business days").Without a revision, this Rule appears to leave some discretion with the parties as to whether they will comply with the request for written submissions. In a case where the mediator determines that a written submission would be beneficial, the parties should be required to comply.

❖ Section 4.07(i) reads:

(i) The parties, including an intervenor Member, may elect to participate in mediation proceedings through a designated representative, ... At the request of any of the parties, the parties shall be separated during medation [sic].

Suggested revision:

(i) *Participation Through Designated Representative.* The parties, including an intervenor Member, may elect to participate in mediation proceedings through a designated representative, ... At the request of any of the parties, the parties shall be separated during mediation.

Comment:

We suggest that § 4.07(i) be revised to add the title "*Participation Through Designated Representative*" to the section to conform with the format of the other subsections of § 4.07 and the other procedural rules. Also, the last word of the section should be revised to "mediation" to correct a typo.

§4.08 Preliminary Review of Claims

- Section 4.08(b)(3) reads:

(3) The Preliminary Hearing Officer shall promptly rule on the withdrawal motion. If the motion is granted, the Executive Director will appoint another Preliminary Hearing Officer within 3 days. Any objection to the Preliminary Hearing Officer's ruling on the withdrawal motion shall not be deemed waived by a party's further participation in the preliminary review process. Such objection will not stay the conduct of the preliminary review process.

Suggested revision:

(3) The Preliminary Hearing Officer shall promptly rule on the withdrawal motion. If the motion is granted, the Executive Director will appoint another Preliminary Hearing Officer within 3 days. If the motion is denied, the filing party may, within 3 days of receiving the Preliminary Hearing Officer's ruling, file a request that the ruling be reviewed by the Board. Any objection to the Preliminary Hearing Officer's ruling on the withdrawal motion shall not be deemed waived by a party's further participation in the preliminary review process. Such objection will not stay the conduct of the preliminary review process. However, if the Board reverses the denial of the withdrawal motion, any Preliminary Hearing Report issued in the interim shall be deemed vacated automatically and the Executive Director will appoint another Preliminary Hearing Officer within 3 days.

Comment:

In the event that a motion that a Preliminary Hearing Officer withdraw is denied by that Preliminary Hearing Officer, we suggest that § 4.08(b)(3) be revised to allow for review by the Board of the Preliminary Hearing Officer's ruling. It is standard practice for recusal motions to be reviewable by an individual or panel besides the subject of the motion, because it is reasonable to conclude that bias or lack of objectivity could result in denial of a withdrawal motion. Further, in the event that a Preliminary Hearing Officer rules that the claimant has failed to state a claim for which relief may be granted, Proposed Rule § 8.01(b) does not allow for review of that decision and forces a claimant to file a civil action (see below for Comment to revise § 8.01). For this reason, a second review on the withdrawal motion is imperative to protect claimants from situations where an employee has reason to believe that the Preliminary Hearing Officer has a personal bias or interest in the case. Section 4.08(b)(3) should be further revised to indicate that a Board decision alone that a Preliminary Hearing Officer should have withdrawn will vacate any report issued by that Preliminary Hearing Officer (*i.e.,* without further action needed to vacate the report), and that a new Preliminary Hearing Officer will be appointed.

❖ Section 4.08(c) reads:

(c) *Assessments Required.* In conducting a preliminary review of a claim or claims under this section, the Preliminary Hearing Officer shall assess each of the following:

(1) whether the claimant is a covered employee authorized to obtain relief relating to the claim(s) under the Act;

(2) whether the office which is the subject of the claim(s) is an employing office under the Act;

(3) whether the individual filing the claim(s) has met the applicable deadlines for filing the claim(s) under the Act;

(4) the identification of factual and legal issues in the claim(s);

(5) the specific relief sought by the claimant;

(6) whether, on the basis of the assessments made under paragraphs (1) through (5), the claimant is a covered employee who has stated a claim for which, if the allegations contained in the claim are true, relief may be granted under the Act; and

(7) the potential for the settlement of the claim(s) without a formal hearing as provided under section 405 of the Act or a civil action as provided under section 408 of the Act.

This should be changed to revise subsection (c)(6) to read:

(c) *Assessments Required.* In conducting a preliminary review of a claim or claims under this section, the Preliminary Hearing Officer shall assess each of the following:

....

(6) whether, on the basis of the assessments made under paragraphs (1) through (5), the claimant is a covered employee who, under the standard of Federal Rule of Civil Procedure 12(b)(6), has stated a claim for which, if the allegations contained in the claim are true, relief may be granted under the Act; and....

Comment:

We suggest that § 4.08(c) be revised to clarify the exact standard that will be used to determine whether a claimant fails to state a claim. The language of the Act indicates that the appropriate standard is the standard imposed by Federal Rule of Civil Procedure 12(b)(6) and related caselaw.

Different Preliminary Hearing Officers also means no consistency in standards or bases for dismissals.

❖ Section 4.08(c) and **New Section 4.08(d)**

We suggest that the following language be added after § 4.08(c) to insert a new § 4.08(d):

(d) In determining whether a covered employee has stated a claim for which relief can be granted under the Act, the Preliminary Hearing Officer shall be guided by judicial and Board decisions under Rule 12(b)(6) of the Federal Rules of Civil Procedure and the laws made applicable by Section 102 of the Act, considering the following principles:

(1) The claim or claims must be construed liberally in the claimant's favor, and the Preliminary Hearing Officer shall grant the claimant the benefit of all inferences that can be derived from the facts alleged;

(2) The claim or claims should contain either direct or inferential allegations respecting material elements necessary to sustain recovery and sufficient factual content that, if accepted as true, states a claim for relief that is plausible on its face;

(3) A claim or claims is plausible on its face when the pleaded factual content allows the Preliminary Hearing Officer to draw the reasonable inference that the respondent is liable for the misconduct alleged.

(4) Where the legal contentions that the claimant advocates are not warranted by existing law, consideration should be given to whether the legal contentions present a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

Comment:

The standard that the Preliminary Hearing Officer must apply to determine whether a claimant has stated a claim for which relief may be granted is better situated here, immediately following § 408(c), rather than where a brief standard is currently placed at Proposed Rule § 4.08(e)(2). Section 408(c) sets forth the "Assessment Required" by the Preliminary Hearing Officer. The next logical section is the standard that governs that assessment.

We recommend that the revised language suggested above be added after §4.08(c) to provide much needed guidance to Preliminary Hearing Officers and a desired uniformity of practice when deciding whether a claimant has stated a claim. Without a clear standard for dismissal, outcomes by individual Preliminary Hearing Officers can vary widely, as well as outcomes across different Preliminary Hearing Officers. The recommended added language parallels the federal court practice regarding the evaluation of whether a plaintiff has failed to state a claim, as established by the Supreme Court in the cases *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal.* Under this liberal pleading standard, Preliminary Hearing Officers should only dismiss a complaint that is merely deficient if amendment would be futile or unfairly prejudicial.

In addition, language from Proposed Rule § 4.08(e)(2)(B) has been added to supplement the standard.

In conformity with this Comment, the following language would be stricken from the current Proposed Rule §4.08(e) below (which, pursuant to these Comments, will be the renumbered §4.08(f)):

> (2) In determining whether a claimant has stated a claim for which relief may be granted under the Act, the Preliminary Hearing Officer shall:
>
> (A) be guided by judicial and Board decisions under the laws made applicable by section 102 of the Act; and
>
> (B) consider whether the legal contentions the claimant advocates are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

As such, §4.08(e) (renumbered §4.08(f)) would retain only the first and third numbered paragraphs of the Proposed Rules. Additional paragraphs are recommended for the new § 4.08(f) to provide procedures for claimant to submit a response to a finding that the claimant has failed to state a claim. See the Comment regarding §4.08(e) below.

❖ Section 4.08(d) reads:

(d) *Amendments to Claims.* Amendments to the claim(s) may be permitted in the Preliminary Hearing Officer's discretion taking the following factors into consideration:

Suggested revision:

(e) *Amendments to Claims*. Amendments to the claim(s) may be made once, as of right. A claimant may request to amend within 15 days of the filing of the claim. Absent a request by the claimant, the Preliminary Hearing Officer shall direct a claimant to file an amended claim within 15 days of the filing of the claim if the Preliminary Hearing Officer finds the claim to be deficient. Thereafter, additional amendments to the claim may be permitted in the Preliminary Hearing Officer's discretion, taking the following factors into consideration:

Comment:

First, as described above, we suggest that this section be renumbered because we recommend inserting additional language after § 4.08(c) to compose a new § 4.08(d). Thus, the currently proposed § 4.08(d) would become § 4.08(e).

Second, we suggest that § 4.08(d) (revised as § 4.08(e)) be revised to allow a claimant to amend his or her claim once as a matter of right rather than relying solely on the Hearing Officer's discretion. This right to amend at least once mirrors the practice

followed in federal court. The Supreme Court and federal circuit courts have directed that a plaintiff should generally be provided an opportunity to file an amended complaint if it appears that the deficiencies can be corrected, even if the plaintiff does not request the amendment. The right to amend is so firmly established that many federal district courts have been reversed on appeal for failing to *sua sponte* grant leave to amend when not requested. Third, § 4.08(d) should be revised to provide a timeframe within which a claimant can amend his or her claim. Section 103 of CAA Reform Act amends Title IV (2 U.S.C. § 1401) by inserting a new Section 403, "Preliminary Review of Claims." The section provides that when the Preliminary Hearing Officer submits the Preliminary Review Report within 30 days of the filing of a claim, such submission "shall conclude the preliminary review." It is silent, however, as to what action(s) the Preliminary Hearing Officer may take during that 30-day review period (or the extended 30-day period), prior to the issuance of the report. Allowing amendment as of right within the first 15 days of filing the claim would not create a conflict with the 30-day review period.

Because the Procedural Rules permit amendment to claims as set forth in § 4.08(d), and subsection (e)(1) provides for the conclusion of the preliminary review once the Preliminary Hearing Officer submits the report to the parties, there must be guidance for claimants or their representatives as to how and when they may amend the claim before a potentially final determination by the Preliminary Hearing Officer of whether a claim has been stated. The language employed by Congress and reiterated in § 4.08(c) (Assessments Required) and (d) (Amendments) tracks the language of the Federal Rules of Civil Procedure.

❖ Section 4.08(e) reads:

(e) *Report on Preliminary Review*

(1) Except as provided in subparagraph (2), not later than 30 days after a claim form is filed, the Preliminary Hearing Officer shall submit to the claimant and the respondent(s) a report on the preliminary review....

(2) In determining whether a claimant has stated a claim for which relief may be granted under the Act, the Preliminary Hearing Officer shall:

(A) be guided by judicial and Board decisions under the laws made applicable by section 102 of the Act; and

(B) consider whether the legal contentions the claimant advocates are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law

(3) *Extension of Deadline.* The Preliminary Hearing Officer may, upon notice to the individual filing the claim(s) and the respondent(s), use an additional period of not to exceed 30 days to conclude the preliminary review.

Suggested revision:

(f) *Report on Preliminary Review*

(1) Except as provided in subparagraph (3), not later than 30 days after a claim form is filed, the Preliminary Hearing Officer shall submit to the claimant and the respondent(s) a report on the preliminary review....

(2) Prior to submission of the report to the parties as provided in subsection (1), if the Preliminary Hearing Officer's initial determination is that claimant is not a covered employee or has not stated a claim for which relief may be granted under the Act, the Preliminary Hearing Officer shall:

(A) provide written notice to the parties of the Preliminary Hearing Officer's preliminary assessment that the claimant is not a covered employee or has failed to state a claim for which relief may granted, including an identification of the claim(s) to which the assessment is applicable and the bases of the Preliminary Hearing Officer's initial assessment;

(B) give the claimant 15 days from the date the initial claim was filed to file an amendment of the claim(s);

(C) if the claimant's initial amendment as of right has been exhausted, discretionary amendments are denied or exhausted, or no amendment is filed, provide the parties with an opportunity to submit written briefs in response to the assessment that the claimant has failed to state a claim for which relief may be granted; and

(D) if upon reviewing the parties' written submissions, the Preliminary Hearing Officer determines that the claimant is not a covered employee or has failed to state any claim(s) for which relief can be granted, the Preliminary Hearing Officer shall complete the Preliminary Review Report, including the details of such determinations.

(3) *Extension of Deadline*. The Preliminary Hearing Officer may, upon notice to the individual filing the claim(s) and the respondent(s), use an additional period not to exceed 30 days to conclude the preliminary review.

Comment:

First, as described above, this section would be renumbered because we recommend inserting additional language after § 4.08(c) to compose a new § 4.08(d). Thus, the currently proposed § 4.08(e) would become § 4.08(f).

Second, we suggest that the first sentence in subsection (1) be revised to correct a typo in the cross reference to the subparagraph. It should reference the numbered subparagraph titled *Extension of Deadline.*

Third, we suggest that § 4.08(e)(3) be revised to delete the proposed subparagraphs (A) and (B), because the dismissal standard set forth in the subparagraphs is vague. We recommend a clearer standard be inserted as a new subsection §4.08(d) (see Comment above).

Finally, § 4.08(e)(3) should be revised to include provisions that reference the amendment procedures at § 4.08(d) and add procedures that permit claimants to respond to a finding that the claimant is not a covered employee or that the claimant has failed to state a claim(s). Subsections (d) and (e), when read together, provide the opportunity for a claimant to amend his or her claim in the Preliminary Hearing Officer's discretion, but the right or potential opportunity to do so requires a procedural rule that provides claimant with notice and the right to seek amendment prior to the issuance of the report provided for in this section. Without procedures that allow a claimant to respond to an assessment that the employee is not covered by the Act or has failed to state a claim, the Rules will be unduly prejudicial to claimants. Proposed Rule 8.01(b) does not allow for review of such a determination. For that reason, it is imperative that the parties be entitled to brief the issues before a Preliminary Hearing Officer issues a report making such a determination, and that a claimant be granted leave to amend at least once before a report is issued determining that the claimant has failed to state a claim and is foreclosed from proceeding through the administrative process.

❖ Section 4.08(f)(1)(B) reads:

(B) the Preliminary Hearing Officer shall provide the claimant and the Executive Director with written notice that the claimant may file a civil action as to the claim in accordance with section 408 of the Act.

Suggested revision:

(B) the Preliminary Hearing Officer shall provide the claimant and the Executive Director with written notice that the claimant may file a civil action as to the claim in accordance with section 408 of the Act and provide the deadline for filing such action.

Comment:

First, as described above, this section would be renumbered because we recommend inserting additional language after § 4.08(c) to compose a new § 4.08(d). Thus, the currently proposed § 4.08(f) would become § 4.08(g).

Second, we suggest that § 4.08(f)(1)(B) be changed so that a claimant receives information not only about the right to file a civil action, but, more importantly, also about the deadline for doing so.

§4.09 Request for Administrative Hearing

- Section 4.09(a) reads:

  (a) Except as provided in subparagraph (b), a claimant may submit to the Executive Director a written request for an administrative hearing under section 405 of the Act not later than 10 days after the Preliminary Hearing Officer submits the report on the preliminary review of a claim under section 403(c).

  Suggested revision:

  (a) Except as provided in subparagraph (b), a claimant may submit to the Executive Director a written request for an administrative hearing under section 405 of the Act not later than 10 days after the Preliminary Hearing Officer submits the report on the preliminary review of a claim under section 403(c). If the report on the preliminary review indicates that the claimant has stated at least one claim upon which relief may be granted, each of the claimant's alleged claims shall be preserved and claimant's written request for an administrative hearing shall encompass each claim alleged in the claim form.

  Comment:

  We suggest that § 4.09(a) be revised to specify the procedure for situations where the Preliminary Hearing Officer finds that a covered employee has alleged multiple claims, some of which the Preliminary Hearing Officer determines to have stated a claim upon which relief can be granted and some that have not. A covered employee should be entitled to proceed to a Merits Hearing Officer on all claims if they have stated at least one upon which relief can be granted. This is particularly important because the current Proposed Rules do not allow for review of the Preliminary Hearing Officer's § 4.08(c)(6) assessment decision. Allowing plaintiffs to move forward on all claims does not prejudice the defending party in any way, as defense counsel always has the option to file a Motion to Dismiss after the covered employee files a written request for an administrative hearing. At that juncture, the parties will have the opportunity to fully brief the issues. The alternative option, requiring an employee to bifurcate multiple claims arising from the same sets of facts and simultaneously pursue a civil action and an administrative claim, is unduly burdensome on all parties.

- Section 4.09(d)(4) reads:

  (4) A respondent's motion for leave to amend an answer to interpose a denial or affirmative defense will ordinarily be granted unless to do so would unduly prejudice the rights of the other party or unduly delay or otherwise interfere with or impede the proceedings.

  Suggested revision:

  (4) A respondent's motion for leave to amend an answer to interpose a denial or

affirmative defense may be granted by the Merits Hearing Officer unless doing so would unduly prejudice the rights of the other party or unduly delay or otherwise interfere with or impede the proceedings.

Comment:

We suggest that § 4.09(d)(4) be revised to read more concisely and to make clear that the responsibility for granting the motion for leave is held by the Merits Hearing Officer. The clarification of who holds this role and responsibility is useful because the subsections of § 4.09 reference various individuals within the dispute resolution process: subsection (a) mentions the Executive Director and the Preliminary Hearing Officer; subsection (c) mentions the Executive Director, the Preliminary Hearing Officer and the Merits Hearing Officer; subsection (d)(1) which pertains to answers, mentions the filing of an answer with "the Office." Without this revision, one could infer that the Office acts to grant or deny a motion for leave to amend.

§4.10 Summary Judgment and Withdrawal of Claims

- Section 4.10 (b) currently reads:

(b) *Summary Judgment.* A Merits Hearing Officer may, after notice and an opportunity for the parties to address the question of summary judgment, issue summary judgment on the claim. A motion before the Merits Hearing Officer asserting that the covered employee has failed to state a claim upon which relief can be granted shall be construed as a motion for summary judgment on the ground that the moving party is entitled to judgment as to that claim as a matter of law.

Suggested revision:

(b) *Summary Judgment.* A Merits Hearing Officer may, after notice and an opportunity for the parties to address the question of summary judgment, issue summary judgment on the claim. A party may move for summary judgment no later than 30 days before the commencement of the hearing, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The party opposing a summary judgment motion shall have 10 days after service of the motion to file an opposition brief. The Merits Hearing Officer may grant an extension of these deadlines for good cause shown. The Merits Hearing Officer may grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.

Comment:

We suggest that § 4.10(b) be revised for several reasons: (1) there should be uniformity of practice concerning deadlines applicable to summary judgment proceedings; (2) guidance should be provided to Hearing Officers on the standard for deciding summary judgment motions; and (3) the standard for surviving a motion to dismiss for failure to

state a claim is much different than the standard for surviving a motion for summary judgment; hence, equating the two motions under the same standard is unfair to claimants.

§6.01 Discovery

- Section 6.01(a) reads:

(a) *Description.* Discovery is the process by which a party may obtain from another person, including a party, information that is not privileged and that is reasonably calculated to lead to the discovery of admissible evidence, to assist that party in developing, preparing and presenting its case at the hearing. No discovery, whether oral or written, by any party shall be taken of or from an employee of the Office of Congressional Workplace Rights (including but not limited to a Board member, the Executive Director, the General Counsel, a Confidential Advisor, a mediator, a hearing officer, or unpaid staff), including files, records, or notes produced during the confidential advising, mediation, and hearing phases of a case and maintained by the Office, the Confidential Advisor, the mediator, or the hearing officer.

Suggested revision:

(a) *Description.* Discovery is the process by which a party may obtain from another person, including a party, the information needed to assist that party in developing, preparing and presenting its case at the hearing.

(1) Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) No discovery, whether oral or written, by any party shall be taken of or from an employee of the Office of Congressional Workplace Rights (including but not limited to a Board member, the Executive Director, the General Counsel, a Confidential Advisor, a mediator, a hearing officer, or unpaid staff), including files, records, or notes produced during the confidential advising, mediation, and hearing phases of a case and maintained by the Office, the Confidential Advisor, the mediator, or the hearing officer.

Comment:

We suggest that § 6.01(a) be revised because the discovery standard cited in Proposed Rule § 6.01(a) is not in keeping with typical present-day discovery rules. Section 6.01(a) should be a brief introduction to discovery, and the remaining paragraphs in this Section should provide guidance on discovery practice.

The new § 6.01(a)(1) would be added after revised Section 6.01(a) to give guidance to practitioners and Hearing Officers on the proper scope of discovery as it is currently applied by the federal courts. The language in new §6.01(a)(2) is needed to describe the limits of discovery regarding the Office of Congressional Workplace Rights.

❖ Section 6.01(b) reads:

(b) *Initial Disclosure.* Within 14 days after the prehearing conference in cases commenced by the filing of a claim pursuant to section 402(a) of the Act, and except as otherwise stipulated or ordered by the Merits Hearing Officer (the hearing officer appointed by the Executive Director to conduct the administrative hearing), a party must, without awaiting a discovery request, provide to the other parties: the name and, if known, mail and e-mail addresses, and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its causes of action or defenses; and a copy or a description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.

Suggested revision:

(b) *Initial Disclosure.* Within 14 days after a request for an administrative hearing has been made under section 402(a) of the Act, and except as otherwise stipulated or ordered by the Merits Hearing Officer, a party must, without awaiting a discovery request, provide to the other parties: (1) the name and, if known, the postal and e-mail addresses, and telephone number, of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses; and (2) a copy or a description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment.

Comment:

We suggest that § 6.01(b) be revised to ensure that the initial discovery description is clear, clarifies that "mail" means "postal mail," and explains that impeachment materials need not be provided as part of initial disclosures.

❖ Section 6.01(c) reads:

(c) *Discovery Availability.* Pursuant to section 405(e) of the Act, reasonable prehearing discovery may be permitted at the Merits Hearing Officer's discretion.

(1) The parties may take discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; physical and mental examinations; and requests for

admissions. Nothing in section 415(d) of the Act – dealing with reimbursements by Members of Congress of amounts paid as settlements and awards – may be construed to require the claimant to be deposed by counsel for the intervening member in a deposition that is separate from any other deposition taken from the claimant in connection with the hearing or civil action.

(2) The Merits Hearing Officer may adopt standing orders or make any order setting forth the forms and extent of discovery, including orders limiting the number of depositions, interrogatories, and requests for production of documents, and also may limit the length of depositions.

(3) The Merits Hearing Officer may issue any other order to prevent discovery or disclosure of confidential or privileged materials or information, as well as hearing or trial preparation materials and any other information deemed not discoverable, or to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Suggested revision:

(c) *Discovery Availability.* Pursuant to section 405(e) of the Act, reasonable prehearing discovery may be permitted at the Merits Hearing Officer's discretion. The Merits Hearing Officer may adopt standing orders or make any order setting forth the forms and extent of discovery, including orders limiting the number of depositions and requests for production of documents.

(1) The parties may take discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; physical and mental examinations; and requests for admissions. Nothing in section 415(d) of the Act – dealing with reimbursements by Members of Congress of amounts paid as settlements and awards – may be construed to require the claimant to be deposed by counsel for the intervening Member in a deposition that is separate from any other deposition taken from the claimant in connection with the hearing or civil action.

(2) The responding party must serve its responses and any objections to discovery within 14 days after being served with the request, or no later than 30 days prior to the administrative hearing, whichever comes first. A shorter or longer time may be permitted by the Merits Hearing Officer.

(3) Unless otherwise stipulated or ordered by the Merits Hearing Officer, a party may serve on any other party no more than 25 written interrogatories, *including all discrete subparts*. Leave to serve additional interrogatories may be granted by the Merits Hearing Officer for good cause shown.

(A) Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(B) If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: (1) specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

(4) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(5) A matter is deemed admitted unless, within the time period set forth in section (c)(2) above, the party to whom a request for admission is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.

(6) Unless otherwise stipulated or ordered by the Merits Hearing Officer, a deposition is limited to 1 day of 7 hours of testimony (excluding breaks and lunch).

(7) The Merits Hearing Officer may issue any order limiting or expanding discovery, preventing or safeguarding the disclosure of confidential or privileged materials or information as well as any other information deemed not discoverable, or to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

Comment:

We suggest that § 6.01(c) be revised significantly to clarify discovery procedures. We recommend a procedure that models the Federal Rules of Civil Procedure. First, § 6.01(c)(2) is combined into §6.01(c) so that the section reads concisely. Second, we recommend the language added in new §§ 6.01(c)(2) through (c)(6) to provide proper guidance on discovery procedures and to align the discovery procedures with the procedures followed in federal court. Third, Proposed Rule § 6.01(c)(2) and (3) are combined into new § 6.01(c)(7) to provide clearer guidance on discovery procedures and to align the discovery procedures with the procedures followed in federal court.

§§6.03 through 6.07 – Titles

- Section 6.03 through 6.07 titles should read:

§6.03 Service of Subpoena.

§6.04 Proof of Service of Subpoena.

§6.05 Motion to Quash or Limit Subpoena.

§6.06 Enforcement of Subpoena.

§6.07 Requirements for Sworn Statements in Support of Subpoena.

Comment:

The titles to Sections 6.03 through 6.07 do not specify that each section addresses subpoenas. We suggest that they do so for clarity, because not all of the titles in the "6" range are devoted to subpoenas. The first title addresses Discovery more broadly.

§6.05 Motion to Quash or Limit

- Section 6.05 reads at the last sentence:

  .... The Merits Hearing Officer should promptly rule on a motion to quash or limit and ensure that the person receiving the subpoena is made aware of the ruling.

  Suggested revision:

  .... The Merits Hearing Officer should rule on a motion to quash or limit within 7 days and ensure that the person receiving the subpoena is made aware of the ruling.

  Comment:

  We suggest that § 6.05 be revised to provide a timetable for the Merits Hearing Officer's ruling. The term "promptly" is vague. Undefined timeframes provide insufficient notice of what can be expected and can result in delayed action.

§6.06 Enforcement

- Section 6.06(b)(2) reads:

  (2) On request of the objecting witness or any party, the Merits Hearing Officer shall -- or on the Hearing Officer's own initiative, the Hearing Officer may -- refer the ruling to the Board for review.

  Suggested revision:

  (2) On request of the objecting witness or any party, the Merits Hearing Officer shall -- or on the Hearing Officer's own initiative, the Hearing Officer may -- refer the ruling to the Board for review. Any party shall be given the opportunity to submit a motion to the Board opposing changes to the ruling, and the Board shall consider such motions before issuing a decision regarding the ruling.

Comment:

We suggest that § 6.06(b)(2) be revised to provide a party that finds the ruling of the Merits Hearing Officer to be well supported with the opportunity to oppose changes to the ruling.

§7.02 Sanctions

- Section 7.02(b)(2) reads:

  (2) *Failure to Prosecute or Defend.* If a party fails to prosecute or defend a position, the Merits Hearing Officer may dismiss the action with prejudice or decide the matter, when appropriate.

  Suggested revision:

  (2) *Failure to Prosecute or Defend.* If a party fails to prosecute or defend a position in a timely manner, the Merits Hearing Officer may dismiss the action without prejudice.

  Comment:

  First, we suggest that § 7.02(b)(2) be revised to add a metric that the Merits Hearing Officer will use to determine if there has been a failure to prosecute or defend. We recommend that timeliness be used as the metric for assessing whether the matter is being prosecuted or defended diligently. Second, we suggest that § 7.02(b)(2) be revised to eliminate the harsh sanction of a dismissal with prejudice for failure to prosecute a claim. Equity dictates that any such dismissal be without prejudice. The burden would then be on the party to refile if he or she wishes to prosecute the claim further if the statute of limitations has not run.

- Section 7.02(b)(4) reads:

  (4) *Frivolous Claims, Defenses, and Arguments.* If a party or a representative files a claim that fails to meet the requirements of section 401(f) of the Act, the Merits Hearing Officer may dismiss the claim, in whole or in part, with prejudice, or decide the matter for the opposing party....

  Suggested revision:

  (4) *Frivolous Claims, Defenses, and Arguments.* If a party or a representative files a claim that fails to meet the requirements of section 401(f) of the Act, the Merits Hearing Officer may dismiss the claim, in whole or in part, with or without prejudice, or decide the matter for the opposing party....

Comment:

We suggest that § 7.02(b)(4) be revised to provide the Merits Hearing Officer with the ability to dismiss with or without prejudice. This is can lead to a more just result.

§7.04 Motions and Prehearing Conference

- Section 7.04(a) reads:

(a) *Motions.* Motions shall be filed with the Merits Hearing Officer and shall be in writing except for oral motions made on the record during the hearing. All written motions and any responses to them shall include a proposed order, when applicable. Only with the Merits Hearing Officer's advance approval may either party file additional responses to the motion or to the response to the motion. Motions for extension of time will be granted only for good cause shown.

Suggested revision:

(a) *Motions.* Motions shall be filed with the Merits Hearing Officer and shall be in writing except for oral motions made on the record during the hearing. All written motions and any responses to them shall include a proposed order, when applicable. Except as set forth in Section 1.04(c), only with the Merits Hearing Officer's advance approval may either party file additional responses to the motion or to the response to the motion. Motions for extension of time will be granted only for good cause shown.

Comment:

We suggest that § 7.04(a) be revised to add an exception for the provisions of § 1.04(c) (the response and reply allowed in § 1.04(c)), so that § 7.04(a) does not conflict with § 1.04(c).

- Section 7.04(c)(4) reads:

(4) the names of potential witnesses for the party's case, except for potential impeachment or rebuttal witnesses, and the purpose for which they will be called, and a list of documents that the party is seeking from the opposing party, and, if discovery was permitted, the status of any pending request for discovery. (It is not necessary to list each document requested. Instead, the party may refer to the request for discovery.); and

Suggested revision:

(4) the names of potential witnesses for the party's case (except for potential impeachment or rebuttal witnesses) and the purpose for which they will be called, a list of documents that the party is seeking from the opposing party, and the status

of any pending request for discovery. (It is not necessary to list each document requested. Instead, the party may refer to the request for discovery.); and

Comment:

We suggest that § 7.04(c)(4) be revised to: (1) read more clearly; and (2) eliminate the suggestion that discovery may not be permitted in any given case, which would conflict with Proposed Rule § 6.01.

§7.05 Scheduling the Hearing

- Section 7.05(a) reads:

(a) *Date, Time, and Place of Hearing.* The Office shall issue the notice of hearing, which shall fix the date, time, and place of hearing. Absent a postponement granted by the Office, a hearing must commence no later than 60 days after the filing of the claim(s).

Suggested revision:

(a) *Date, Time, and Place of Hearing.* The Office shall issue the notice of hearing, which shall fix the date, time, and place of hearing. A hearing must commence no later than 90 days after the claimant's request for administrative hearing, but the Office may grant an extension of up to 30 days.

Comment:

We suggest that § 7.05(a) be revised to set the hearing commencement date at "90 days" instead of "60 days." This revision is in line with the new language of Section 405(d)(2) of the Act, which was amended by the CAA Reform Act at Section 103(d).

- Section 7.05(b) reads:

(b) *Motions for Postponement or a Continuance.* Motions for postponement or for a continuance by either party shall be made in writing to the Merits Hearing Officer, shall set forth the reasons for the request, and shall state whether or not the opposing party consents to such postponement. A Merits Hearing Officer may grant such a motion upon a showing of good cause. In no event will a hearing commence later than 90 days after the filing of the claim form.

Suggested revision:

(b) *Motions for Postponement or a Continuance.* Motions for postponement or for a continuance by either party shall be made in writing to the Merits Hearing Officer, shall set forth the reasons for the request, and shall state whether or not the

opposing party consents to such postponement. A Merits Hearing Officer may grant such a motion upon a showing of good cause.

Comment:

We suggest that § 7.05(b) be revised to conform to the revised Section 405(d)(2) of the Act. The CAA Reform Act allows the hearing commencement date to exceed 90 days by up to an additional 30 days. This revision is the new language of Section 405(d)(2) of the Act, which was amended by the CAA Reform Act at Section 103(d).

§7.06 Consolidation and Joinder of Cases

- Section 7.06(b) reads:

(b) *Authority.* The Executive Director (before assigning a Merits Hearing Officer to adjudicate a claim); a Merits Hearing Officer (during the hearing); or the Board (during an appeal) may consolidate or join cases on their own initiative or on the motion of a party if to do so would expedite case processing and not adversely affect the parties' interests, taking into account the confidentiality requirements of section 416 of the Act.

Suggested revision:

(b) *Authority.* The Executive Director (before assigning a Merits Hearing Officer to adjudicate a claim), a Merits Hearing Officer, or the Board may consolidate or join cases on their own initiative or on the motion of a party if to do so would expedite case processing and not adversely affect the parties' interests, taking into account the confidentiality requirements of section 416 of the Act.

Comment:

We suggest that § 7.06(b) be revised to eliminate the parenthetical "(during the hearing)" to eliminate the suggestion that a consolidation or joinder may only occur during the actual hearing or appeal.

§7.16 Merits Hearing Officer Decisions; Entry in Office Records; Corrections to the Record; Motions to Alter, Amend, or Vacate the Decision

- Section 7.16(h) reads:

(h) After a Merits Hearing Officer's decision has been issued, but before an appeal is made to the Board, or absent an appeal, before the decision becomes final, a party to the proceeding before the Merits Hearing Officer may move to alter, amend, or vacate the decision. The moving party must establish that relief from the decision is warranted because: (1) of mistake, inadvertence, surprise, or excusable neglect; (2) there is newly

discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new hearing; (3) there has been fraud (misrepresentation, or misconduct by an opposing party); (4) the decision is void; or (5) the decision has been satisfied, released, or discharged; it is based on an earlier decision that has been reversed or vacated; or applying it prospectively is no longer equitable. The motion shall be filed within 15 days after service of the Merits Hearing Officer's decision. No response shall be filed unless the Merits Hearing Officer so orders. The filing and pendency of a motion under this provision shall not relieve a party of the obligation to file a timely appeal or operate to stay the Merits Hearing Officer's action unless the Merits Hearing Officer so orders.

Suggested revision:

(h) After a Merits Hearing Officer's decision has been issued, but before an appeal is made to the Board, or absent an appeal, before the decision becomes final, a party to the proceeding before the Merits Hearing Officer may move to alter, amend, or vacate the decision. The moving party must establish that relief from the decision is warranted because: (1) of mistake, inadvertence, surprise, or excusable neglect; (2) there is newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new hearing; (3) there has been fraud (misrepresentation, or misconduct by an opposing party); (4) the decision is void; or (5) the decision has been satisfied, released, or discharged; it is based on an earlier decision that has been reversed or vacated; or applying it prospectively is no longer equitable. The motion shall be filed within 15 days after service of the Merits Hearing Officer's decision. The filing and pendency of a motion under this provision shall not relieve a party of the obligation to file a timely appeal or operate to stay the Merits Hearing Officer's action unless the Merits Hearing Officer so orders.

Comment:

We suggest that § 7.16(h) be revised to allow a party against whom a motion to vacate has been filed to submit a response to the motion. Preventing an opportunity to respond could lead to an unjust result.

§8.01 Appeal to the Board

- Section 8.01(b) reads:

(b) A Report on Preliminary Review pursuant to section 402(c) of the Act is not appealable to the Board.

Suggested revision:

(b) A Report on Preliminary Review pursuant to section 403(c) of the Act is appealable to the Board.

Comment:

First, we suggest that § 8.01(b) be revised to replace "402(c)" with "403(c)" to state the correct section of the CAA that sets forth the Preliminary Review provisions.

Second, we suggest that this section be revised to strike the word "not." The CAA Reform Act does not state that a Preliminary Review Report is not reviewable or appealable, so the Rules should not create that bar for an assessment as impactful as the Preliminary Review.

It appears that the OCWR has reached the conclusion that the determination is not appealable based only on the CAA's silence on the issue. The CAA Reform Act Section 103 inserts the new CAA Section 403, including Section 403(d). CAA Section 403(d) provides two options regarding the result of a determination of failure to state a claim:

> (d) EFFECT OF DETERMINATION OF FAILURE TO STATE CLAIM FOR WHICH RELIEF MAY BE GRANTED.—If the hearing officer's report on the preliminary review of a claim under subsection (c) includes the determination that the individual filing the claim is not a covered employee or had not stated a claim for which relief may be granted under this title—
>
> (1) the individual (including an individual who is a Library claimant, as defined in section 401(d)(1)) may not obtain a formal hearing with respect to the claim as provided under section 405; and
>
> (2) the hearing officer shall provide the individual and the Executive Director with a written notice that the individual may file a civil action with respect to the claim in accordance with section 408.

Nothing in the foregoing CAA text says that any initial determination is final and not subject to review. Such a conclusion could only be inferred, and such an inference would not be logical or consistent with the CAA, other statutes, federal civil procedures, the OCWR's previous procedural rules, or even other sections of these Proposed Procedural Rules. An initial determination could be reviewed, then lead to a final determination of failure to state a claim that is subject to the effects set forth in CAA Section 403(d).

In its silence on the issue of appealability, the new CAA Section 403 is similar to many other statutes that indicate that a judge or other adjudicator can make a decision or issue a ruling but do not state explicitly whether the ruling is appealable. It is the procedural rules that clarify that impactful decisions in dispute resolution processes are appealable, such as the Federal Rules of Civil Procedure, state rules of civil procedure, and the hearing rules of the Equal Employment Opportunity Commission.

to respond and the severe consequence of a dismissal without an opportunity to appeal, in § 5.03(e) a dismissal for failure to state a claim under § 5.03(a) *is* appealable.

The opportunity to appeal a dismissal is critical. Where a House employee is forced to file a civil action as his or her only option, he or she loses the benefits of the OCWR administrative process.

The employee also loses the right to fee-free legal representation through the Office of Employee Advocacy, which was created to place House employees on equal footing with employing offices which have automatic representation through the Office of House Employment Counsel. If employees are routinely forced to file civil actions, the purpose for which the Office of Employee Advocacy was created will be thwarted.

- Section 8.01(h) reads:

(h) In making determinations under paragraph (f), above, the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Suggested revision:

(h) In making determinations under paragraph (g), above, the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Comment:

We suggest that § 8.01(h) be revised to refer to subparagraph "(g)" instead of "(f)" to correct a typo.

§8.02 Reconsideration

- Section 8.02 reads:

After a final decision or order of the Board has been issued, a party to the proceeding before the Board, who can establish in its moving papers that reconsideration is necessary because the Board has overlooked or misapprehended points of law or fact, may move for reconsideration of such final decision or order. The motion shall be filed within 15 days after service of the Board's decision or order. No response shall be filed unless the Board so orders. The filing and pendency of a motion under this provision shall not relieve a party of the obligation to file a timely appeal or operate to stay the action of the Board unless so ordered by the Board. The decision to grant or deny a motion for reconsideration is within the sole discretion of the Board and is not appealable.

Suggested revision:

After a final decision or order of the Board has been issued, a party to the proceeding before the Board, who can establish in its moving papers that reconsideration is necessary because the Board has overlooked or misapprehended points of law or fact, may move for reconsideration of such final decision or order. The motion shall be filed within 15 days after service of the Board's decision or order. The filing and pendency of a motion under this provision shall not relieve a party of the obligation to file a timely appeal or operate to stay the action of the Board unless so ordered by the Board. The decision to grant or deny a motion for reconsideration is within the sole discretion of the Board and is not appealable.

Comment:

We suggest that § 8.02 be revised to delete the third sentence, which bars a response to a motion for reconsideration absent an order by the Board. Proposed Rule § 8.02 should allow a party against whom a motion for reconsideration has been filed to submit a response to the motion. Preventing an opportunity at a response can lead to an unjust result.

§9.01 Attorney's Fees and Costs

- Section 9.01(b)(5) reads:

(5) evidence of an established attorney-client relationship.

Suggested revision:

(5) evidence of an established attorney-client relationship (if a copy of the fee agreement is not available).

Comment:

We suggest that § 9.01(b)(5) be revised because a copy of the terms of the fee agreement (as requested in Section 9.01(b)(2)) should suffice to establish the existence of an attorney-client relationship.

§9.03 Informal Resolution and Settlement Agreements.

- Section 9.04(h)(1) reads:

(1) *Members of Congress.* Section 415(d) of the Act requires Members of the House of Representatives and the Senate to reimburse the "compensatory damages" portion of a decision, award or settlement for a violation of section 201(a), 206(a), or 207 that the Member is found to have "committed personally." Reimbursement shall be in accordance with the timetable and procedures established by the applicable congressional

committee for the withholding of amounts from the compensation of an individual who is a Member of the House of Representatives or a Senator.

Suggested revision:

(1) *Members of Congress.* Section 415(d) of the Act requires Members of the House of Representatives and the Senate to reimburse the "compensatory damages" portion of a decision, award or settlement for a violation of section 201(a), 206(a), or 207 that the Member is found to have "committed personally." Within 10 days after the Executive Director is made aware that a payment of an award or settlement under this Act has been made from the Section 415(a) Treasury Account in connection with a claim alleging a violation of section 201(a) or 206(a) of the Act by a Member or Senator, the Executive Director will notify the designated Point of Contact for the Office of the Chief Administrative Officer of the House and the Office of the _____ of the Senate. After such notification, reimbursement shall be in accordance with the timetable and procedures established by the applicable congressional committee for the withholding of amounts from the compensation of an individual who is a Member of the House of Representatives or a Senator.

Comment:

We suggest that § 9.04(h)(1) be revised to include provisions for the OCWR to provide notice of settlements and awards that will trigger the reimbursement requirement. Due to the new CAA reimbursement provisions, there is a need for the House and Senate offices that handle payroll and Member/Senator reimbursable accounts to receive information concerning CAA awards and settlements in the event that the relevant House and Senate offices must impose withholdings or garnishment from a Member or Senator's salary to ensure that Treasury is reimbursed. The appropriate office in the House is the Office of the Chief Administrative Officer. The appropriate office in the Senate should be inserted.

The need to provide notice that a reimbursement scenario has arisen is recognized elsewhere in § 9.04(h). Specifically, notice procedures and a timetable are set forth for "other employing offices" in § 9.04(h)(2). Despite the recognized need for a notice provision, the Proposed Procedural Rules may be silent regarding notice provisions for Members of Congress so as not to invade the congressional committees' realm in determining reimbursement procedures. Section 9.03(h)(1) mirrors the CAA Reform Act by indicating that the relevant congressional committee for the House and Senate will compose the timetables and procedures for the withholding of amounts from compensation. However, for those timetables and procedures to be triggered, the House and Senate must first learn from OCWR if there is a settlement or award that requires reimbursement. Thus, § 9.04(h)(1) should be revised to include a notice provision. The OCWR can use the same notice procedures set forth at § 9.04(h)(2)(A) concerning "other employing offices." The recommended revision to those notice procedures

would be to substitute a time certain ("10 days") for the term "as soon as practicable." The latter term is vague. Undefined timeframes provide insufficient notice of what can be expected and can result in delayed action.

Attachment: Tracked Changes to the Proposed Procedural Rules by the Office of Employee Advocacy

ATTACHMENT

TRACKED CHANGES TO THE PROPOSED PROCEDURAL RULES BY THE OFFICE OF EMPLOYEE ADVOCACY

TRACKED CHANGES BY THE OFFICE OF EMPLOYEE ADVOCACY

PROCEDURAL RULES
OF THE OFFICE OF CONGRESSIONAL WORKPLACE RIGHTS AS AMENDED JUNE 2019

Subpart A—General Provisions

§1.01 Scope and Policy

§1.02 Definitions

§1.03 Filing and Computation of Time

§1.04 Filing, Service, and Size Limitations of Motions, Briefs, Responses, and Other Documents

§1.05 Signing of Pleadings, Motions, and Other Filings; Violation of Rules; Sanctions

§1.06 Availability of Official Information

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§1.01 Scope and Policy.

These Rules of the Office of Congressional Workplace Rights (OCWR) govern the procedures for considering and resolving alleged violations of the laws made applicable under parts A, B, C, and D of title II of the Congressional Accountability Act of 1995, as amended by the Congressional Accountability Act of 1995 Reform Act of 2018. The Rules include definitions and procedures for seeking confidential advice, preliminary review, mediation, filing a claim or complaint, and electing between filing a claim with the OCWR and filing a civil action in a United States district court under part A of title II of the CAA. The Rules also address the procedures for compliance, investigation, and enforcement under part B of title II, and for compliance, investigation, enforcement, and variance under part C of title II. The Rules include procedures for the conduct of hearings held as a result of the filing of a claim or complaint and for appeals to the OCWR Board of Directors from Merits Hearing Officers' decisions; as well as other matters of general applicability to the dispute resolution process and to the OCWR's operations. It is the OCWR's policy that these Rules shall be applied with due regard to the rights of all parties and in a manner that expedites the resolution of disputes.

§1.02 Definitions.

Except as otherwise specifically provided, the following are the definitions of terms used in these Rules:

(a) *Act.*—The term "Act" means the Congressional Accountability Act of 1995, as amended by the Congressional Accountability Act of 1995 Reform Act of 2018.

(b) *Board.*—The term "Board" means the Board of Directors of the Office of Congressional Workplace Rights.

(c) *Chair.* —The term "Chair" means the Chair of the Board of Directors of the Office of Congressional Workplace Rights.

(d) *Claim.*— The term "claim" means the allegations of fact that the claimant contends constitute a violation of part A of title II of the Act, which includes sections 102(c) and 201-207 of the Act.

(e) *Claim Form.*— The term "claim form" means the written pleading filed by an individual, or his or her designated representative, ~~files~~ to initiate proceedings with the Office of Congressional Workplace Rights that describes the facts and law supporting the alleged violation of part A of title II of the Act, which includes sections 102(c) and 201-207 of the Act. The "claim form" also may be referred to as the "documented claim."

(f) *Claimant.*—The term "claimant" means the individual filing a claim form with the Office of Congressional Workplace Rights.

(g) *Complaint.*—The term "complaint" means the written pleading filed by the Office ~~by~~ of the General Counsel with the Office of Congressional Workplace Rights under sections 210(d)(3), 215(c)(3) or 220(c)(2) of the Act that describes the facts and law supporting the alleged violation ~~of sections 210(d)(3), 215(c)(3) or 220(c)(2) of the Act~~.

(h) *Confidential Advisor.*—A "Confidential Advisor" means, pursuant to section 302~~382~~ of the Act, a lawyer appointed or designated by the Executive Director to offer to provide covered employees certain services, on a privileged and confidential basis, which a covered employee may accept or decline. A Confidential Advisor is not the covered employee's designated representative.

Covered Employee.—see "Employee, Covered," below.

(i) *Designated Representative.*—The term "designated representative" means an individual, firm, or other entity designated in writing by a party to represent the interests of that party in a matter filed with the Office of Congressional Workplace Rights.

(j) *Direct Act.*—The term "direct act," with regard to a Library claimant, means a statute (other than the Act) that is specified in sections 201, 202, or 203 of the Act.

(k) *Direct Provision.*—The term "direct provision," with regard to a Library claimant, means a direct act provision (including a definitional provision) that applies the rights or protections of a direct act (including the rights and protections relating to nonretaliation or noncoercion).

(l) *Employee.*—The term "employee" includes an applicant for employment and a former employee.

(m) *Employee, Covered.*—The term "covered employee" means any employee of

(1) the House of Representatives;

(2) the Senate;

(3) the Office of Congressional Accessibility Services;

(4) the Capitol Police;

(5) the Congressional Budget Office;

(6) the Office of the Architect of the Capitol;

(7) the Office of the Attending Physician;

(8) the Library of Congress, except for section 220 of the Act;

(9) the Office of Congressional Workplace Rights;

(10) <u>the Office of Technology Assessment</u>;

(11) the John C. Stennis Center for Public Service Training and Development;

(12) the China Review Commission, the Congressional Executive China Commission, and the Helsinki Commission;

(13) to the extent provided by sections 204-207 and 215 of the Act, the Government Accountability Office; or

(14) unpaid staff, as defined below in subparagraph 1.02(r) of the Rules.

(n) *Employee of the Office of the Architect of the Capitol.* —The term "employee of the Office of the Architect of the Capitol" includes any employee of the Office of the Architect of the Capitol, or the Botanic Garden.

(o) *Employee of the Capitol Police.*—The term "employee of the Capitol Police" includes civilian employees and any member or officer of the Capitol Police.

(p) *Employee of the House of Representatives* —The term "employee of the House of Representatives" includes an individual occupying a position the pay for which is disbursed by the Chief Administrative Officer of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives, but not any such individual employed by any entity listed in subparagraphs (3) through (13) of paragraph (m) above.

(q) *Employee of the Senate.*—The term "employee of the Senate" includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (13) of paragraph (m) above.

(r) *Employee, Unpaid Staff.*—The term "unpaid staff" means:

(1) any staff member of an employing office who carries out official duties of the employing office, but who is not paid by the employing office for carrying out such duties ~~(also referred to as an "unpaid staff member"),~~ (including an intern, an individual detailed to an employing office, and an individual participating in a fellowship program), and who is covered in the same manner and to the same extent that section 201(a) and (b) of the Act applies to a covered employee; and

(2) a former unpaid staff member, if the act(s) that may be a violation of section 201(a) of the Act occurred during the service of the former unpaid staffer for the employing office.

(s) *Employing Office.*—The term "employing office" means:

(1) the personal office of a Member of the House of Representatives or a Senator;

(2) a committee of the House of Representatives or the Senate or a joint committee;

(3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate;

(4) the Office of Congressional Accessibility Services, the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, and the Office of Congressional Workplace Rights;

(5) the Library of Congress, except for section 220 of the Act;

(6) the John C. Stennis Center for Public Service Training and Development, the Office of Technology Assessment, the China Review Commission, the Congressional Executive China Commission, and the Helsinki Commission; or

(7) to the extent provided by sections 204-207 and 215 of the Act, the Government Accountability Office.

(t) *Executive Director.*—The term "Executive Director" means the Executive Director of the Office of Congressional Workplace Rights.

(u) *Final Disposition.*—The term "final disposition" of a claim under section 416(d) of the Act means any of the following:

(1) An order or agreement to pay an award or settlement, including an agreement reached pursuant to mediation under section 404 of the Act;

(2) A final decision of a hearing officer under section 405(g) of the Act that is no longer subject to review by the Board under section 406;

(3) A final decision of the Board under section 406(e) of the Act that is no longer subject to appeal to the United States Court of Appeals for the Federal Circuit under section 407;

(4) A final decision in a civil action under section 408 of the Act that is no longer subject to appeal; or

(5) A final decision of an appellate court, to include the United States Court of Appeals for the Federal Circuit, that is no longer subject to review.

(v) *General Counsel.*—The term "General Counsel" means the General Counsel of the Office of Congressional Workplace Rights.

(w) *Hearing.*—A "hearing" means an administrative hearing as provided in section 405 of the Act, subject to Board review as provided in section 406 of the Act and judicial review in the United States Court of Appeals for the Federal Circuit as provided in section 407 of the Act.

(x) *Hearing Officer.*—The term "Hearing Officer" means any individual appointed by the Executive Director to preside over administrative proceedings within the Office of Congressional Workplace Rights.

(y) *Hearing Officer, Merits.*—The term "Merits Hearing Officer" means any individual appointed by the Executive Director to preside over an administrative

hearing conducted on matters within the ~~Office's~~ jurisdiction of the Office of Congressional Workplace Rights under section 405 of the Act.

(z) *Hearing Officer, Preliminary.*—The term "Preliminary Hearing Officer" means an individual appointed by the Executive Director to make a preliminary review of the claim(s) and to issue a preliminary review report on such claim(s), as provided in section 403 of the Act.

(aa) *Intern.*—The term "intern," for purposes of section 201(a) and (b) of the Act, means an individual who, for an employing office, performs service which is uncompensated by the United States to earn credit awarded by an educational institution or to learn a trade or occupation, and includes any individual participating in a page program operated by any House of Congress.

(bb) *Library Claimant.*—A "Library claimant" is a covered employee of the Library of Congress who initially brings a claim, complaint, or charge under a direct provision for a proceeding before the Library of Congress and who may, prior to requesting a hearing under the Library of Congress' procedures, elect to—

(1) continue with the Library of Congress' procedures and preserve the option (if any) to bring any civil action relating to the claim, complaint, or charge, that is available to the Library claimant; or

(2) file a claim with the Office under section 402 of the Act and continue with the corresponding procedures of this Act available and applicable to a covered employee.

(cc) *Library Visitor.*—The term "Library visitor" means an individual who is eligible to allege a violation under title II or III of the Americans with Disabilities Act of 1990 (other than a violation for which the exclusive remedy is under section 201 of the Act) against the Library of Congress.

(dd) *Member or Member of Congress.*—The terms "Member" and "Member of Congress" mean a United States Senator, a Representative in the House of Representatives, a Delegate to Congress, or the Resident Commissioner from Puerto Rico.

Merits Hearing Officer.—see "Hearing Officer, Merits," above.

(ee) *Office.*—The term "Office" means the Office of Congressional Workplace Rights.

(ff) *Party.*—The term "party" means:

(1) an employee or employing office in a proceeding under part A of title

II of the Act;

(2) a charging individual, an entity alleged to be responsible for correcting a violation, or the General Counsel in a proceeding under part B of title II of the Act;

(3) an employee, employing office, or as appropriate, the General Counsel in a proceeding under part C of title II of the Act;

(4) a labor organization, individual employing office or employing activity, or as appropriate, the General Counsel in a proceeding under part D of title II of the Act; or

(5) any individual, office, Member of Congress, or organization that has intervened in a proceeding.

Preliminary Hearing Officer.—see "Hearing Officer, Preliminary," above.

(gg) *Respondent.*—The term "respondent" means the party against which a claim, a complaint, or a petition is filed.

(hh) *Senior Staff.*—The term "senior staff," for purposes of the reporting requirement of the House and Senate Ethics Committees under the Act, means any individual who is employed in the House of Representatives or the Senate who, at the time a violation occurred, was required to file a report under title I of the Ethics in Government Act of 1978 (5 U.S.C. App. 101 *et seq.*).

Unpaid Staff.—see "Employee, Unpaid Staff," above.

§1.03 Filing and Computation of Time.

(a) *Method of Filing.* Documents may be filed in person, electronically, by facsimile (fax), or by mail, including express, overnight, and other expedited delivery. The filing of all documents is subject to the limitations set forth below. The Board, Hearing Officers, the Executive Director, or the General Counsel may, in their discretion, determine the method by which documents may be filed in a particular proceeding, including ordering one or more parties to use mail, fax, electronic filing, or personal delivery. Parties and their representatives are responsible for ensuring that the Office always has their current postal mailing and e-mail addresses and fax numbers.

(1) *In Person.* A document shall be deemed timely filed if it is hand delivered to the Office at: Adams Building, Room LA-200, 110 Second Street, S.E., Washington, D.C. 20540-1999, before 5:00 p.m. Eastern Time on the last day

of the applicable time period.

(2) *By Mail.* Documents are deemed filed on the date of their postmark or proof of mailing to the Office. Parties, including those using franked mail, are responsible for ensuring that any mailed document bears a postmark date or other proof of the actual date of mailing. Absent a legible postmark, a document will be deemed timely filed if it is received by the Office at Adams Building, Room LA 200, 110 Second Street, SE, Washington, D.C. 20540-1999, by mail within five (5) days of the expiration of the applicable filing period.

(3) *By Fax.* Documents transmitted by fax machine will be deemed filed on the date received at the Office at 202-426-1913, or when applicable on the date received at the Office of the General Counsel at 202-426-1663, if received by 11:59 p.m. Eastern Time. Faxed documents received after 11:59 p.m. Eastern Time will be deemed filed the following business day. A fax filing will be timely only if the document is received no later than 11:59 p.m. Eastern Time on the last day of the applicable filing period. Any party using– a fax machine to file a document is responsible for ensuring both that the document is timely and accurately transmitted and- confirming that the Office or the Office of the General Counsel has received a facsimile of the document. The party must confirm receipt within ___ business days of the filing. A party may confirm receipt by _____. The time displayed as received by the Office on its fax status report will be used to show the time that the document was filed and received. When the Office serves a document by fax, the time displayed as sent by the Office on its fax status report will be used to show the time that the document was served. If a party raises a concern regarding the accuracy of the Office's or the General Counsel's fax status report, the party may submit its fax status report to offer evidence of timely transmission. The Office or General Counsel will make the final determination regarding timeliness based on available information. A fax filing cannot exceed 75 pages, inclusive of table of contents, table of authorities, and attachments. Attachments exceeding 75 pages must be submitted to the Office in person or by electronic delivery within the applicable deadline. The filing date is determined by the date the brief, motion, response, or supporting memorandum is received in the Office, rather than by the date the attachments are received in the Office.

(4) *By Electronic Mail.* Documents transmitted electronically will be deemed filed on the date received at the Office at ocwrefile@ocwr.gov, or on the date received at the Office of the General Counsel at OSH@ocwr.gov if received by 11:59 p.m. Eastern Time. Documents received electronically after 11:59 p.m. Eastern Time will be deemed filed the following business day. An electronic filing will be timely only if the document is received no later than 11:59 p.m. Eastern Time on the last day of the applicable filing period. Any party filing a document electronically is responsible for ensuring both that the document is timely and

accurately transmitted and for confirming that the Office has received the document. A party will use a delivery receipt generated by Outlook or another electronic mail system will be used to show that the document was received by the Office. The time displayed as received by the Office will be used to show the time that the document has been filed. When the Office serves a document electronically, the time displayed as sent by the Office will be used to show the time that the document was served. The time displayed as received or sent by the Office will be based on the document's timestamp information and used to show the time that the document was filed or served.

(b) *Service by the Office*. Unless a specific manner of service has been selected and communicated by the Board or Hearing Officer~~At its discretion~~, the Office at its discretion may serve documents by mail, fax, electronic transmission, or personal or commercial delivery.

(c) *Computation of Time*. All time periods in these Rules that are stated in terms of days are calendar days unless otherwise noted. However, when the period of time prescribed is five (5) days or less, intermediate Saturdays, Sundays, Federal government holidays, and other full days that the Office is officially closed for business shall be excluded in the computation. To compute the number of days for taking any action required or permitted under these Rules, the first day shall be the day after the event from which the time period begins to run and the last day for filing or service shall be included in the computation. When the last day falls on a Saturday, Sunday, Federal government holiday, or a day the Office is officially closed, the last day for taking the action shall be the next regular Federal government workday.

(d) *Time Allowances for Mailing, Fax, or Electronic Delivery of Official Notices* . Whenever a person or party has the right or is required to do some act within a prescribed period after the service of a notice or other document upon him or her and the notice or document is served by mail, five (5) days shall be added to the prescribed period. When documents are served by certified mail, return-receipt requested, the prescribed period shall be calculated from the date of receipt as evidenced by the return receipt. When documents are served electronically or by fax, the prescribed period shall be calculated from the date of transmission by the Office, General Counsel, person or party.

§1.04 Filing, Service, and Size Limitations of Motions, Briefs, Responses, and Other Documents.

(a) *Filing with the Office; Number and Form*. One copy of claims, General Counsel complaints, requests for mediation, requests for inspection under OSH, unfair labor practice charges, charges under titles II and III of the Americans with Disabilities Act of 1990, all motions, briefs, responses, and other documents must be filed with the

Office. A party may, but is not required to, file an electronic version of any submission in a format designated by the Board, the Executive Director, the General Counsel, or the Merits Hearing Officer, with receipt confirmed by electronic transmittal in the same format. A party may also submit filings by mailing, fax, or by hand delivery.

(b) *Service*. The parties shall serve on each other one copy of all motions, briefs, responses and other documents filed with the Office, other than the request for advising, the request for mediation, and the claim. Service shall be made by mailing, by fax or e-mailing, or by hand delivering a copy of the motion, brief, response, or other document to each party, or if represented, the party's representative, on the service list previously provided by the Office. Each of these documents must be accompanied by a certificate of service specifying how, when and on whom service was made. It shall be the duty of each party to notify the Office and all other parties in writing of any changes in the names or addresses on the service list.

(c) *Time Limitations for Response to Motions or Briefs and Reply* . Unless otherwise specified by the Merits Hearing Officer or these Rules, a party shall file and serve a response to a motion or brief within 15 days of the service of the motion or brief upon the party. Any reply to such response shall be filed and served within 5 days of the service of the response. Only with the Merits Hearing Officer's advance approval may either party file additional responses or replies.

(d) *Size Limitations*. Except as otherwise specified, no brief, motion, response, or supporting memorandum filed with the Office shall exceed 35 double-spaced pages, exclusive of the table of contents, table of authorities and attachments. Footnotes, endnotes, and block quotes may be single spaced. The Board, the Executive Director, or the Merits Hearing Officer may modify this limitation upon motion and for good cause shown, or on their own initiative. Briefs, motions, responses, and supporting memoranda shall be on standard letter-size paper (8-1/2" x 11"). If a filing exceeds 35 double-spaced pages without the filing party first having filed a motion to exceed the page limitations, the Board, the Executive Director, or the Merits Hearing Officer may, in their discretion, reject the filing in whole or in part, and may provide the parties an opportunity to refile.

§1.05 Signing of Pleadings, Motions, and Other Filings; Violation of Rules; Sanctions.

(a) *Signing*. Every pleading, motion, and other filing of a party represented by an attorney or other designated representative shall be signed by the attorney or representative. A party who is not represented shall sign the pleading, motion, or other filing. In the case of an electronic filing, an electronic signature is acceptable. The signature of a representative or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other filing; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, each of

the following is correct:

(1) It is not presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of resolution of the matter;

(2) The claims, defenses, and other legal contentions the party advocates are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) The factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further review or discovery; and

(4) The denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

(b) *Sanctions.* If a pleading, motion, or other filing is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person who is required to sign. If a pleading, motion, or other filing is signed in violation of this rule, a Hearing Officer or the Board, as appropriate, upon motion or upon their own initiative, may impose an appropriate sanction, which may include the sanctions specified in section 7.02 of these Rules.

§1.06 Availability of Official Information.

(a) *Policy.* It is the policy of the Board, the Executive Director, and the General Counsel, except as otherwise ordered by the Board, to make available for public inspection and copying final decisions and orders of the Board and the Office, as specified and described in subparagraph (d) below.

(b) *Availability.* Any person may examine and copy items described in paragraph (a) above at the Office of Congressional Workplace Rights, Adams Building, Room LA-200, 110 Second Street, SE, Washington, D.C. 20540-1999, under conditions prescribed by the Office, including requiring payment for copying costs, and at reasonable times during normal working hours so long as it does not interfere with the efficient operations of the Office. As ordered by the Board, the Office may withhold or place under seal identifying details or other necessary matters, and, in each case, the reason for the withholding or sealing shall be stated in writing.

(c) *Copies of Forms.* Copies of blank forms prescribed by the Office for the filing of claims, complaints, and other actions or requests may be obtained from the Office or online at www.ocwr.gov.

(d) *Final Decisions.* Pursuant to section 416(e) of the Act, a final decision entered by a Hearing Officer or by the Board under section 405(g) or 406(e) of the Act that is in favor of the claimant, or in favor of the charging party under section 210 of the Act, or reverses a Hearing

Officer's decision in favor of a claimant or charging party, shall be made public, except as otherwise ordered by the Board. The Board may make public any other decision at its discretion.

(e) *Release of Records for Judicial Action.* The records of Hearing Officers and the Board may be made public if required for the purpose of judicial review under section 407 of the Act.

§1.07 Designation of Representative.

(a) A party wishing to be represented must file with the Office a written notice of designation of representative. A designated representative may prepare and file submissions, receive service and otherwise act on behalf of the designating party in any matter filed with the Office. No more than one representative, firm, or other entity may be designated as representative for a party for the purpose of receiving service, unless approved in writing by the Hearing Officer or Executive Director. The representative may be, but is not required to be, an attorney. ~~If the representative is an attorney, he or she may sign the designation of representative on behalf of the party.~~

(b) *Service When there is a Representative.* Service of documents shall be on the representative unless and until such time as the represented party or representative, with notice to the party, notifies the Executive Director in writing of a modification or revocation of the designation of representative. Where a designation of representative is in effect, all time limitations for receipt of materials shall be computed in the same manner as for those who are unrepresented, with service of the documents, however, directed to the representative.

(c) *Revocation of a Designation of Representative.* A revocation of a designation of representative, whether made by the party or by the representative with notice to the party, must be made in writing and filed with the Office. The revocation will be deemed effective the date of receipt by the Office. Consistent with any applicable statutory time limit, at the discretion of the Executive Director, General Counsel, mediator, hearing officer, or Board, additional time may be provided to allow the party to designate a new representative as consistent with the Act.

§1.08 Confidentiality.

(a) *Policy.* Except as provided in sections 302(d) and 416(c), (d), and (e) of the Act, the Office shall maintain confidentiality in the confidential advising process, mediation, and the proceedings and deliberations of hearing officers and the Board in accordance with sections 302(d)(2)(B) and 416(a)-(b) of the Act.

(b) *Participant.* For the purposes of this rule, "participant" means an individual or entity who takes part as either a party, witness, or designated representative in confidential advising under section 302(d) of the Act, mediation under section 404, the claim and hearing process under section 405, or an appeal to the Board under section 406 of the Act, or any related proceeding which is expressly or by necessity deemed confidential under the Act or these rules.

(c) *Prohibition.* Unless specifically authorized by the provisions of the Act or by these rules, no participant in the confidential advising process, mediation, or other proceedings made confidential under section 416 of the Act may disclose a written or an oral communication that is prepared for the purpose of or that occurs during the confidential advising process, mediation, and the proceedings and deliberations of Hearing Officers and the Board. This rule shall not apply to disclosures made between a party and that party's representative.

(d) *Exceptions.* Nothing in these rules prohibits a party or its representative from disclosing information obtained in mediation or hearings when reasonably necessary to investigate claims, ensure compliance with the Act, or prepare its prosecution or defense. However, the party making the disclosure shall take all reasonably appropriate steps to ensure that persons to whom the information is disclosed maintain the confidentiality of such information. These rules do not preclude a mediator from consulting with the Office, except that when the covered employee is an employee of the Office, a mediator shall not consult with any individual within the Office who is or who might be a party or witness. These rules do not preclude the Office from reporting information to the Senate and House of Representatives as required by the Act.

(e) *Contents or Records of Mediation or Hearings.* For the purpose of this rule, the contents or records of the confidential advising process, mediation or other proceeding includes the information disclosed by participants to the proceedings, and records disclosed by the opposing party, witnesses, or the Office. A participant is free to disclose facts and other information obtained from any source outside of the mediation or hearing. For example, an employing office or its representatives may disclose information about its employment practices and personnel actions, provided that the information was not obtained in a confidential proceeding. However, a claimant who obtains that information in mediation or other confidential proceeding may not disclose such information. Similarly, information forming the basis for the allegation of a claimant may be disclosed by that claimant, provided that the information contained in those allegations was not obtained in a confidential proceeding. However, the employing office or its representatives may not disclose that information if it was obtained in a confidential proceeding.

(f) *Sanctions.* The Executive Director will advise all participants in the mediation and hearing at the time they became participants of the confidentiality requirements of section 416 of the Act and that sanctions may be imposed by a Hearing Officer for a violation of those requirements. No sanctions may be imposed except for good cause and the particulars of which must be stated in the sanction order.

Subpart B—Compliance, Investigation, and Enforcement under Section 210 of the Act (ADA Public Services)—

Inspections and Complaints

[Reserved]

Subpart C—Compliance, Investigation, Enforcement and Variance Process under Section 215 of the Act (Occupational Safety and Health Act of 1970)—Inspections, Citations, and Complaints

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Inspections, Citations and Complaints

§3.01 Purpose and Scope.

The purpose of sections 3.01 through 3.15 of this subpart is to prescribe rules and procedures for enforcement of the inspection and citation provisions of sections 215(c)(1) through (3) of the Act. For the purpose of sections 3.01 through 3.15, references to the "General Counsel" include any authorized representative of the General Counsel. In situations where sections 3.01 through 3.15 set forth general enforcement policies rather than substantive or procedural rules, such policies may be modified in specific circumstances where the General Counsel or the General Counsel's designee determines that an alternative course of action would better serve the objectives of section 215 of the Act.

§3.02 Authority for Inspection.

(a) Under section 215(c)(1) of the Act, upon written request of any employing office or covered employee, the General Counsel is authorized to enter without delay and at reasonable times any place where covered employees work ("place of employment"); to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits, and in a reasonable manner, any such place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein; to question privately any employing office, operator, agent or employee; and to review records maintained by or under the control of the covered entity.

(b) Prior to inspecting areas containing information which is classified by an agency of the United States Government (and/or by any congressional committee or other authorized entity within the legislative branch) in the interest of national security, and for which security clearance

is required as a condition for access to the area(s) to be inspected, the individual(s) conducting the inspection shall have obtained the appropriate security clearance.

§3.03 Requests for Inspections by Employees and Covered Employing Offices.

(a) *By Covered Employees and Representatives.*

(1) Any covered employee or representative of covered employees who believes that a violation of section 215 of the Act exists in any place of employment may request an inspection of such place of employment by giving notice of the alleged violation to the General Counsel. Any such notice shall be reduced to writing on a form available from the Office, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or the representative of the employees. A copy shall be provided to the employing office or its agent by the General Counsel or the General Counsel's designee no later than at the time of inspection, except that, upon the written request of the person giving such notice, his or her 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 by the General Counsel.

(2) If upon receipt of such notification the General Counsel's designee determines that the notice meets the requirements set forth in subparagraph (a)(1) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he or she shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. A representative of the covered employee may accompany the General Counsel's designee during the physical inspection of any workplace in accordance with section 3.07. Inspections under this section shall not be limited to matters referred to in the notice.

(3) Prior to or during any inspection of a place of employment, any covered employee or representative of employees may notify the General Counsel's designee in writing of any violation of section 215 of the Act which he or she has reason to believe exists in such place of employment. Any such notice shall comply with the requirements of subparagraph (1) of this section.

(b) *By Employing Offices.* Upon written request of any employing office, the General Counsel or the General Counsel's designee shall inspect and investigate places of employment under section 215(c)(1) of the Act. Any such requests shall be reduced to writing on a form available from the Office.

§3.04 Objection to Inspection.

Upon a refusal to permit the General Counsel's designee, in exercise of his or her official duties,

to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employing office, operator, agent, or employee, in accordance with section 3.02 of these Rules, or to permit a representative of employees to accompany the General Counsel's designee during the physical inspection of any workplace in accordance with section 3.07, the General Counsel's designee shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The General Counsel's designee shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to the General Counsel, who shall take appropriate action.

§3.05 Entry Not a Waiver.

Any permission to enter, inspect, review records, or question any person, shall not imply or be conditioned upon a waiver of any cause of action or citation under section 215 of the Act.

§3.06 Advance Notice of Inspections.

(a) Advance notice of inspections may not be given, except in the following situations:

(1) in cases of apparent imminent danger, to enable the employing office to abate the danger as quickly as possible;

(2) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection;

(3) where necessary to assure the presence of representatives of the employing office and employees or the appropriate personnel needed to aid in the inspection; ~~and~~or

(4) in other circumstances where the General Counsel determines that the giving of advance notice would enhance the probability of an effective and thorough inspection.

(b) In the situations described in paragraph (a) of this section, advance notice of inspections may be given only if authorized by the General Counsel, except that in cases of apparent imminent danger, advance notice may be given by the General Counsel's designee without such authorization if the General Counsel is not immediately available. When advance notice is given, it shall be the employing office's responsibility promptly to notify the authorized representative of employees, if the identity of such representative is known to the employing office. (See subparagraph 3.08(b) of these Rules as to situations where there is no authorized representative of employees.) Upon the request of the employing office, the General Counsel will inform the authorized representative of employees of the inspection, provided that the employing office furnishes the General Counsel's designee with the identity of such representative and with such

other information as is necessary to enable him promptly to inform such representative of the inspection. Advance notice in any of the situations described in subparagraph (a) of this section shall not be given more than 24 hours before the inspection is scheduled to be conducted, except in apparent imminent danger situations and in other unusual circumstances.

§3.07 Conduct of Inspections.

(a) Subject to the provisions of section 3.02 of these Rules, inspections shall take place at such times and in such places of employment as the General Counsel may direct. At the beginning of an inspection, the General Counsel's designee shall present his or her credentials to the operator of the facility or the management employee in charge at the place of employment to be inspected; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection and the records specified in section 3.02 which he or she wishes to review. However, such designation of records shall not preclude access to additional records specified in section 3.02.

(b) The General Counsel's designee shall have authority to take environmental samples and to take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately, any employing office, operator, agent, or employee of a covered facility. As used herein, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges, and other similar devices to employees in order to monitor their exposures.

(c) In taking photographs and samples, the General Counsel's designees shall take reasonable precautions to ~~insure~~ ensure that such actions with flash, spark-producing, or other equipment would not be hazardous. The General Counsel's designees shall comply with all employing office safety and health rules and practices at the workplace or location being inspected, and they shall wear and use appropriate protective clothing and equipment.

(d) The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employing office.

(e) At the conclusion of an inspection, the General Counsel's designee shall confer with the employing office or its representative and informally advise it of any apparent safety or health violations disclosed by the inspection. During such conference, the employing office shall be afforded an opportunity to bring to the attention of the General Counsel's designee any pertinent information regarding conditions in the workplace.

(f) Inspections shall be conducted in accordance with the requirements of this subpart.

(g) Trade Secrets.

(1) At the commencement of an inspection, the employing office may identify areas in the establishment which contain or which might reveal a trade secret as referred to in section 15 of the Williams-Steiger Occupational Safety and Health Act of 1970, as applied to covered employees and employing offices under section 215 of the Act ("OSHAct") ~~OSHAct~~ and section 1905 of title 18 of the United States Code. If the General Counsel's designee has no clear reason to question such identification, information contained in such areas, including all negatives and prints of photographs, and environmental samples, shall be labeled "confidential-trade secret" and shall not be disclosed by the General Counsel and/or his designees, except that such information may be disclosed to other officers or employees ~~concerned~~ charged with carrying out section 215 of the Act or when relevant in any proceeding under section 215. In any such proceeding the Merits Hearing Officer or the Board shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

(2) Upon the request of an employing office, any authorized representative of employees under section 3.08 of these Rules in an area containing trade secrets shall be an employee in that area or an employee authorized by the employing office to enter that area. Where there is no such representative or employee, the General Counsel's designee shall consult with a reasonable number of employees who work in that area concerning matters of safety and health.

§3.08 Representatives of Employing Offices and Employees.

(a) The General Counsel's designee shall be in charge of inspections and questioning of persons. A representative of the employing office and a representative authorized by its employees shall be given an opportunity to accompany the General Counsel's designee during the physical inspection of any workplace for the purpose of aiding such inspection. The General Counsel's designee may permit additional employing office representatives and additional representatives authorized by employees to accompany the designee where he or she determines that such additional representatives will further aid the inspection. A different employing office and employee representative may accompany the General Counsel's designee during each different phase of an inspection if this will not interfere with the conduct of the inspection.

(b) The General Counsel's designee shall have authority to resolve all disputes as to who is the representative authorized by the employing office and employees for the purpose of this section. If there is no authorized representative of employees, or if the General Counsel's designee is unable to determine with reasonable certainty who is such representative, he or she shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(c) The representative(s) authorized by employees shall be an employee(s) of the employing

office. However, if in the judgment of the General Counsel's designee, good cause has been shown why accompaniment by a third party who is not an employee of the employing office (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the General Counsel's designee during the inspection.

(d) The General Counsel's designee may deny the right of accompaniment under this section to any person whose conduct interferes with a fair and orderly inspection. With regard to information classified by an agency of the U.S. Government (and/or by any congressional committee or other authorized entity within the legislative branch) in the interest of national security, only persons authorized to have access to such information may accompany the General Counsel's designee in areas containing such information.

§3.09 Consultation with Employees.

The General Counsel's designee may consult with employees concerning matters of occupational safety and health to the extent he or she deems necessary for the conduct of an effective and a thorough inspection. During the course of an inspection, any employee shall be afforded an opportunity to bring any violation of section 215 of the Act which he or she has reason to believe exists in the workplace to the attention of the General Counsel's designee.

§3.10 Inspection Not Warranted; Informal Review.

(a) If the General Counsel's designee determines that an inspection is not warranted because there are no reasonable grounds to believe that a violation or danger exists with respect to a notice of violation under subparagraph 3.03(a) of these Rules, he or she shall notify the party giving the notice of such determination in writing. The complaining party may obtain review of such determination by submitting and serving a written statement of position with the General Counsel and the employing office. The employing office may submit and serve an opposing written statement of position with the General Counsel and the complaining party. Upon the request of the complaining party or the employing office, the General Counsel, at his or her discretion, may hold an informal conference in which the complaining party and the employing office may orally present their views. After considering all written and oral views presented, the General Counsel shall affirm, modify, or reverse the designee's determination and furnish the complaining party and the employing office with written notification of this decision and the reasons therefor. The decision of the General Counsel shall be final and not reviewable.

(b) If the General Counsel's designee determines that an inspection is not warranted because the requirements of subparagraph 3.03(a)(1) of these Rules have not been met, he or she shall notify the complaining party in writing of such determination. Such determination shall be without prejudice to the filing of a new notice of alleged violation meeting the requirements of

subparagraph 3.03(a)(1).

§3.11 Citations.

(a) If, on the basis of the inspection, the General Counsel believes that a violation of any requirement of section 215 of the Act, including any occupational safety or health standard promulgated by the Secretary of Labor under title 29 of the U.S. Code, section 655, or of any other regulation, rule or order promulgated pursuant to section 215 of the Act, has occurred, he or she shall issue to the employing office responsible for correction of the violation, either a citation or a notice of de minimis violations that ~~has~~ have no direct or immediate relationship to safety or health. ~~An appropriate citation or notice of de minimis violations shall be issued even though, after being informed of an alleged violation by the General Counsel, the employing office immediately abates, or initiates steps to abate, such alleged violation. Any citation shall be issued with reasonable promptness after termination of the inspection.~~ No citation may be issued under this section after the expiration of 6 months following the ~~occurrence of any alleged violation~~inspection unless the violation is continuing or the employing office has agreed to toll the deadline for filing the citation.

(b) Any citation shall describe with particularity the nature of the alleged violation, including a reference to the provision(s) of the Act, standard, rule, regulation, or order alleged to have been violated. Any citation shall also fix a reasonable time or times for the abatement of the alleged violation.

(c) If a citation or notice of de minimis violations is issued for a violation alleged in a request for inspection under subparagraph 3.03(a)(1) of these Rules, or a notification of violation under subparagraph 3.03(a)(3), a copy of the citation or notice of de minimis violations shall also be sent to the employee or representative of employees who made such request or notification.

(d) After an inspection, if the General Counsel determines that a citation is not warranted with respect to a danger or violation alleged to exist in a request for inspection under subparagraph 3.03(a)(1) of these Rules or a notification of violation under subparagraph 3.03(a)(3), the informal review procedures prescribed in section 3.15 shall be applicable. After considering all views presented, the General Counsel shall affirm the previous determination, order a reinspection, or issue a citation if he or she believes that the inspection disclosed a violation. The General Counsel shall furnish the party that submitted the notice and the employing office with written notification of the determination and the reasons therefor. The determination of the General Counsel shall be final and not reviewable.

(e) Every citation shall state that the issuance of a citation does not constitute a finding that a violation of section 215 of the Act has occurred.

(f) No citation may be issued to an employing office because of a rescue activity undertaken by an employee of that employing office with respect to an individual in imminent danger

unless:

(1) (A) such employee is designated or assigned by the employing office to have responsibility to perform or assist in rescue operations; and

(B) the employing office fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

(2) (A) such employee is directed by the employing office to perform rescue activities in the course of carrying out the employee's job duties; and

(B) the employing office fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

(3) (A) such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life- threatening accidents is foreseeable, such as a workplace operation where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water; and

(B) such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual; and

(C) the employing office has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.

For the purpose of this policy, the term "imminent danger" means the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

§3.12 Imminent Danger.

Whenever and as soon as a designee of the General Counsel concludes on the basis of an inspection that conditions or practices exist in any place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided for by section 215(c) of the Act, he or she shall inform the affected employees and employing offices of the danger and that he or she is recommending the filing of a petition to restrain such conditions

or practices and for other appropriate relief in accordance with section 13(a) of the OSHAct, as applied by section 215(b) of the Act. Appropriate citations may be issued with respect to an imminent danger even though, after being informed of such danger by the General Counsel's designee, the employing office immediately eliminates the imminence of the danger and initiates steps to abate such danger.

§3.13 Posting of Citations.

(a) Upon receipt of any citation under section 215 of the Act, the employing office shall immediately post such citation, or a copy thereof, unedited, at or near each place an alleged violation referred to in the citation occurred, except as provided below. Where, because of the nature of the employing office's operations, it is not practicable to post the citation at or near each place of alleged violation, such citation shall be posted, unedited, in a prominent place where it will be readily observable by all affected employees. For example, where employing offices are engaged in activities which are physically dispersed, the citation may be posted at the location to which employees report each day. Where employees do not primarily work at or report to a single location, the citation may be posted at the location from which the employees operate to carry out their activities. 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 employing office shall take steps to ensure that the citation or notice is not altered, defaced, or covered by other material. Notices of de minimis violations need not be posted.

(b) Each citation, notice, or a copy thereof, shall remain posted until the violation has been abated, or for 3 working days, whichever is later. The pendency of any proceedings regarding the citation shall not affect its posting responsibility under this section unless and until the Board issues a final order vacating the citation.

(c) An employing office to which a citation has been issued may post a notice in the same location where such citation is posted indicating that the citation is being contested before the Board, and such notice may explain the reasons for such contest. The employing office may also indicate that specified steps have been taken to abate the violation.

§3.14 Failure to Correct a Violation for Which a Citation Has Been Issued; Notice of Failure to Correct Violation; Complaint.

(a) If the General Counsel determines that an employing office has failed to correct an alleged violation for which a citation has been issued within the period permitted for its correction, he or she may issue a notification to the employing office of such failure prior to

filing a complaint against the employing office under section 215(c)(3) of the Act. Such notification shall fix a reasonable time or times for abatement of the alleged violation for which the citation was issued and shall be posted in accordance with section 3.13 of these Rules. Nothing in these rules shall require the General Counsel to issue such a notification as a prerequisite to filing a complaint under section 215(c)(3) of the Act.

(b) If after issuing a citation or notification, the General Counsel believes that a violation has not been corrected, the General Counsel may file a complaint with the Office against the employing office named in the citation or notification pursuant to section 215(c)(3) of the Act. The complaint shall be submitted to a Merits Hearing Officer for a decision pursuant to subsections (b) through (h) of section 405 of the Act, subject to review by the Board pursuant to section 406. The procedures of sections 7.01 through 7.16 of these Rules govern complaint proceedings under this section.

§3.15 Informal Conferences.

At the request of an affected employing office, employee, or representative of employees, the General Counsel may hold an informal conference for the purpose of discussing any issues raised by an inspection, citation, or notice issued by the General Counsel. Any settlement entered into by the parties at such conference shall be subject to the approval of the Executive Director under section 414 of the Act and section 9.03 of these Rules. If the conference is requested by the employing office, an affected employee or the employee's representative shall be afforded an opportunity to participate, at the discretion of the General Counsel. If the conference is requested by an employee or representative of employees, the employing office shall be afforded an opportunity to participate, at the discretion of the General Counsel. Any party may be represented by counsel at such conference.

Rules of Practice for Variances, Limitations, Variations, Tolerances, and Exemptions

§3.20 Purpose and Scope.

Sections 3.20 through 3.31 of these Rules contain rules of practice for administrative proceedings to grant variances and other relief under sections 6(b)(6)(A) and 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970, as applied by section 215(c)(4) of the Act.

§3.21 Definitions.

As used in sections 3.20 through 3.31 of these Rules, unless the context clearly requires otherwise—

(a) "OSHAct" means the Williams-Steiger Occupational Safety and Health Act of 1970, as applied to covered employees and employing offices under section 215 of the Act.

(b) "Party" means a person admitted to participate in a hearing conducted in accordance with this subpart. An applicant for relief and any affected employee shall be entitled to be named parties. The General Counsel shall be deemed a party without the necessity of being named.

(c) "Affected employee" means an employee who would be affected by the grant or denial of a variance, limitation, variation, tolerance, or exemption, or any one of the employee's authorized representatives, such as the employee's collective bargaining agent.

§3.22 Effect of Variances.

All variances granted pursuant to this part shall have only future effect. In its discretion, the Board may decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employing office involved and a proceeding on the citation or a related issue concerning a proposed period of abatement is pending before the General Counsel, a Merits Hearing Officer, or the Board until the completion of such proceeding.

§3.23 Public Notice of a Granted Variance, Limitation, Variation, Tolerance, or Exemption.

The Board will transmit every final action granting a variance, limitation, variation, tolerance, or exemption under this part to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that such final action be published in the Congressional Record. Every such final action shall specify the alternative to the standard involved which the particular variance permits.

§3.24 Form of Documents.

Any applications for variances and other papers which are filed in proceedings under sections 3.20 through 3.31 of these Rules shall be written or typed. All applications for variances and other papers filed in variance proceedings shall be signed by the applying employing office, by its attorney or other authorized representative, and shall contain the information required by sections 3.25 or 3.26 of these Rules, as applicable.

§3.25 Applications for Temporary Variances and Other Relief.

(a) *Application for Variance.* Any employing office, or class of employing offices, desiring a variance from a standard, or portion thereof, authorized by section 6(b)(6)(A) of the OSHAct, as applied by section 215 of the Act, may file a written application containing the information specified in paragraph (b) of this section with the Board. Pursuant to section 215(c)(4) of the Act, the Board shall refer any matter appropriate for hearing to a Merits Hearing Officer under subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406. The procedures set forth at sections 7.01 through 7.16 of these Rules shall govern hearings under this subpart.

(b) *Contents.* An application filed pursuant to subparagraph (a) of this section shall include:

(1) the name and address of the applicant;

(2) the address of the place or places of employment involved;

(3) a specification of the standard or portion thereof from which the applicant seeks a variance;

(4) a representation by the applicant, supported by representations from qualified persons having first-hand knowledge of the facts represented, that the applicant is unable to comply with the standard or portion thereof by its effective date and a detailed statement of the reasons therefor;

(5) a statement of the steps the applicant has taken and will take, with specific dates where appropriate, to protect employees against the hazard covered by the standard;

(6) a statement of when the applicant expects to be able to comply with the standard and of what steps the applicant has taken and will take, with specific dates where appropriate, to come into compliance with the standard;

(7) a statement of the facts the applicant would show to establish that:

(A) the applicant is unable to comply with a standard by its effective date because of the unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date;

(B) the applicant is taking all available steps to safeguard its employees against the hazards covered by the standard; and

(C) the applicant has an effective program for coming into compliance with the standard as quickly as practicable;

(8) a statement that the applicant has informed its affected employees of the application by giving a copy thereof to their authorized representative, posting a statement, giving a summary of the application, and specifying where a copy may be examined, at the place or places where notices to employees are normally posted, and by other appropriate means; and

(9) a description of how affected employees have been informed of the application and of their right to petition the Board for a hearing.

(c) Interim Order.

(1) *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The Merits Hearing Officer to whom the Board has referred the application may rule ex parte upon the application.

(2) *Notice of Denial of Application.* If an application filed pursuant to subparagraph (c)(1) of this section is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the Grant of an Interim Order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties and the terms of the order shall be transmitted by the Board to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record. It shall be a condition of the order that the affected employing office shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

§3.26 Applications for Permanent Variances and Other Relief.

(a) *Application for Variance.* Any employing office, or class of employing offices, desiring a variance authorized by section 6(d) of the OSHAct, as applied by section 215 of the Act, may file a written application containing the information specified in paragraph (b) of this section with the Board. Pursuant to section 215(c)(4) of the Act, the Board shall refer any matter appropriate for hearing to a Merits Hearing Officer under subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406.

(b) *Contents.* An application filed pursuant to subparagraph (a) of this section shall include:

(1) the name and address of the applicant;

(2) the address of the place or places of employment involved;

(3) a description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the applicant;

(4) a statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide employment and places of employment to employees which are as safe and healthful as those required by the standard from which a variance is sought;

(5) a certification that the applicant has informed its employees of the application by:

(A) giving a copy thereof to their authorized representative;

(B) posting a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and

(C) other appropriate means; and

(6) a description of how employees have been informed of the application and of their right to petition the Board for a hearing.

(c) Interim Order.

(1) *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The Merits Hearing Officer to whom the Board has referred the application may rule ex parte upon the application.

(2) *Notice of Denial of Application.* If an application filed pursuant to subparagraph (c)(1) of this section is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the Grant of an Interim Order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties, and the terms of the order shall be transmitted by the Board to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record. It shall be a condition of the order that the

affected employing office shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

§3.27 Modification or Revocation of Orders.

(a) *Modification or Revocation.* An affected employing office or an affected employee may apply in writing to the Board for a modification or revocation of an order issued under section 6(b)(6)(A), or 6(d) of the OSHAct, as applied by section 215 of the Act. The application shall contain:

(1) the name and address of the applicant;

(2) a description of the relief which is sought;

(3) a statement setting forth with particularity the grounds for relief;

(4) if the applicant is an employing office, a certification that the applicant has informed its affected employees of the application by:

(A) giving a copy thereof to their authorized representative;

(B) posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and

(C) other appropriate means;

(5) if the applicant is an affected employee, a certification that a copy of the application has been furnished to the employing office; and

(6) any request for a hearing, as provided in this part.

(b) *Renewal.* Any final order issued under section 6(b)(6)(A) of the OSHAct, as applied by section 215 of the Act, may be renewed or extended as permitted by the applicable section and in the manner prescribed for its issuance.

§3.28 Action on Applications.

(a) Defective Applications.

(1) If an application filed pursuant to sections 3.25(a), 3.26(a), or 3.27 of these Rules does not conform to the applicable section, the Merits Hearing Officer or the Board, as applicable, may deny the application.

(2) Prompt notice of the denial of an application shall be given to the applicant.

(3) A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial.

(4) A denial of an application pursuant to this paragraph shall be without prejudice to the filing of another application.

(b) Adequate Applications.

(1) If an application has not been denied pursuant to subparagraph (a) of this section, the Office shall cause to be published a notice of the filing of the application, which the Board will transmit to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record.

(2) A notice of the filing of an application shall include:

(A) the terms, or an accurate summary of the application;

(B) a reference to the section of the OSHAct applied by section 215 of the Act under which the application has been filed;

(C) an invitation to interested persons to submit within a stated period of time written data, views, or arguments regarding the application; and

(D) information to affected employing offices, employees, and appropriate authority having jurisdiction over employment or places of employment covered in the application of any right to request a hearing on the application.

§3.29 Consolidation of Proceedings.

On the motion of the Merits Hearing Officer or the Board or that of any party, the Merits Hearing Officer or the Board may consolidate or contemporaneously consider two or more proceedings which involve the same or closely related issues.

§3.30 Consent Findings and Rules or Orders.

(a) *General.* At any time before the reception of evidence in any hearing, or during any hearing, a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceeding. The allowance of such opportunity and the duration thereof shall be in the discretion of the Merits Hearing Officer, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an

agreement which will result in a just disposition of the issues involved.

(b) *Contents.* Any agreement containing consent findings and rule or order disposing of a proceeding shall also provide:

(1) that the rule or order shall have the same force and effect as if made after a full hearing;

(2) that the entire record on which any rule or order may be based shall consist solely of the application and the agreement;

(3) a waiver of any further procedural steps before the Merits Hearing Officer and the Board; and

(4) a waiver of any right to challenge or contest the validity of the findings and of the rule or order made in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) submit the proposed agreement to the Merits Hearing Officer for his or her consideration; or

(2) inform the Merits Hearing Officer that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and rule or order is submitted within the time allowed therefor, the Merits Hearing Officer may accept such agreement by issuing his or her decision based upon the agreed findings.

§3.31 Order of Proceedings and Burden of Proof.

(a) *Order of Proceeding.* Except as may be ordered otherwise by the Merits Hearing Officer, the party applicant for relief shall proceed first at a hearing.

(b) *Burden of Proof.* The party applicant shall have the burden of proof.

Subpart D—Claims Procedures Applicable to Consideration of Alleged Violations of Sections 102(c) and 201-07 of the Congressional Accountability Act of 1995, as amended by the CAA Reform Act of 2018.

§4.01 Matters Covered by this Subpart.

§4.02 Requests for Advice and Information.

§4.03 Confidential Advising Services.

§4.04 Claims.

§4.05 Right to File a Civil Action.

§4.06 Initial Processing and Transmission of Claim; Notification Requirements.

§4.07 Mediation.

§4.08 Preliminary Review of Claim.

§4.09 Request for Administrative Hearing.

§4.10 Summary Judgment and Withdrawal of Claims.

§4.11 Confidentiality.

§4.12 Automatic Referral to Congressional Ethics Committees.

§4.01 Matters Covered by this Subpart.

(a) These rules govern the processing of any allegation that sections 102(c) or 201 through 206 of the Act have been violated and any allegation of intimidation or reprisal prohibited under section 207 of the Act. Sections 102(c) and 201-06 of the Act apply to covered employees and employing offices certain rights and protections of the following laws:

(1) the Fair Labor Standards Act of 1938

(2) title VII of the Civil Rights Act of 1964

(3) title I of the Americans with Disabilities Act of 1990

(4) the Age Discrimination in Employment Act of 1967

(5) the Family and Medical Leave Act of 1993

(6) the Employee Polygraph Protection Act of 1988

(7) the Worker Adjustment and Retraining Notification Act

(8) the Rehabilitation Act of 1973

(9) chapter 43 (relating to veterans' employment and re-employment) of title 38, United States Code

(10) chapter 35 (relating to veterans' preference) of title 5, United States Code

(11) the Genetic Information Nondiscrimination Act of 2008

(b) This subpart applies to the covered employees and employing offices as defined in subparagraphs 1.02(m) and (s) of these Rules and any activities within the coverage of sections 102(c) and 201-07 of the Act and referenced above in subparagraph 4.01(a) of these Rules.

§4.02 Requests for Advice and Information.

At any time, an employee or an employing office may seek from the Office informal advice and information on the procedures of the Office and under the Act; and information on the protections, rights and responsibilities under the Act; and procedures available under the Act. The Office will maintain the confidentiality of requests for such advice or information and shall ensure that any employee or agent of the Office who obtains factual information from an employee or employing office regarding a matter arising under the Act shall not be involved in the mediation or hearing regarding the same matter.

§4.03 Confidential Advising Services.

(a) *Appointment or Designation of Confidential Advisors.* The Executive Director shall appoint or designate one or more Confidential Advisors to carry out the duties set forth in section 302(d)(2) of the Act.

(1) *Qualifications.* A Confidential Advisor appointed or designated by the Executive Director must be a lawyer who is admitted to practice before, and is in good standing with, the bar of a State or territory of the United States or the District of Columbia, and who has experience representing clients in cases involving the laws incorporated by section 102 of the Act. A Confidential Advisor may be an employee of the Office. A Confidential Advisor cannot serve as a mediator in any mediation conducted pursuant to section 404 of the Act.

(2) *Restrictions.* A Confidential Advisor may not act as the designated representative for any covered employee in connection with the covered employee's participation in any proceeding, including any proceeding under the Act, any judicial

proceeding, or any proceeding before any committee of Congress. A Confidential Advisor may not offer or provide any of the services in section 302(d)(2) of the Act if the covered employee has designated an attorney representative in connection with the employee's participation in any proceeding under the Act, except that the Confidential Advisor may provide general assistance and information to the attorney representative regarding the Act and the role of the Office, as the Confidential Advisor deems appropriate.

(3) *Continuity of Service.* Once a covered employee has accepted and received any services offered under section 302(d)(2) of the Act from a Confidential Advisor, any other services requested under section 302(d)(2) by the covered employee shall be provided, to the extent practicable, by the same Confidential Advisor.

(b) *Who May Obtain the Services of a Confidential Advisor.* The services provided by a Confidential Advisor are available to any covered employee, including any unpaid staff and any former covered employee, except that a former covered employee may only request such services if the alleged violation occurred during the employment or service of the employee; and a covered employee may only request such services before the end of the 180-day period described in section 402(d) of the Act.

(c) *Services Provided by a Confidential Advisor.* A Confidential Advisor shall offer to provide the following services to covered employees, on a privileged and confidential basis, which may be accepted or declined:

(1) informing, on a privileged and confidential basis, a covered employee who has been subject to a practice that may be a violation of sections 102(c) or 201-07 of the Act about the employee's rights under the Act;

(2) consulting, on a privileged and confidential basis, with a covered employee who has been subject to a practice that may be a violation of sections 102(c) or 201-07 of the Act regarding—

(A) the roles, responsibilities, and authority of the Office; and

(B) the relative merits of securing the private counsel services of the Office of Employee Advocacy (where applicable), securing the services of private counsel outside the Legislative Branch, designating a nonattorney representative, or proceeding without representation for proceedings before the Office;

(3) advising and consulting, on a privileged and confidential basis, with a covered employee who has been subject to a practice that may be a violation of sections 102(c) or 201-07 of the Act regarding any claims the covered employee may have under title IV of the Act, the factual allegations that support each such claim, and the relative merits of the procedural options available to the employee for each such claim;

(4) assisting, on a privileged and confidential basis, a covered employee who

seeks consideration under title IV of an allegation of a violation of sections 102(c) or 201-07 of the Act in understanding the procedures, and the significance of the procedures, described in title IV, including—

(A) assisting or consulting with the covered employee regarding the drafting of a claim form to be filed under section 402(a) of the Act; and

(B) consulting with the covered employee regarding the procedural options available to the covered employee after a claim form is filed, and the relative merits of each option; and

(5) informing, on a privileged and confidential basis, a covered employee who has been subject to a practice that may be a violation of sections 102(c) or 201-07 of the Act about the option of pursuing, in appropriate circumstances, a complaint with the Committee on Ethics of the House of Representatives or the Select Committee on Ethics of the Senate.

(d) *Privilege and Confidentiality*. Although the Confidential Advisor is not the employee's representative, the services provided under subparagraph (c) of this section, and any related communications between the Confidential Advisor and the employee before or after the filing of a claim, shall be strictly confidential and shall be privileged from discovery. All of the records maintained by a Confidential Advisor regarding communications between the employee and the Confidential Advisor are the property of the Confidential Advisor and not the Office, are not records of the Office within the meaning of section 301(m) of the Act, shall be maintained by the Confidential Advisor in a secure and confidential manner, and may be destroyed under appropriate circumstances. Upon request from the Office, the Confidential Advisor may provide the Office with statistical information about the number of contacts from covered employees and the general subject matter of the contacts from covered employees.

§4.04 Claims.

(a) *Who May File.* A covered employee alleging any violation of sections 102(c) or 201-07 of the Act may commence a proceeding by filing a timely claim pursuant to section 402 of the Act.

(b) When to File.

(1) A covered employee may not file a claim under this section alleging a violation of law after the expiration of the 180-day period that begins on the date of the alleged violation.

(2) *Special Rule for Library of Congress Claimants.* A claim filed by a Library claimant shall be deemed timely filed under section 402 of the Act:

(A) if the Library claimant files the claim within the time period specified in subparagraph (1); or

(B) the Library claimant:

(i) initially filed a claim under the Library of Congress's procedures set forth in the applicable direct provision under section 401(d)(1)(B) of the Act;

(ii) met any initial deadline under the Library of Congress's procedures for filing the claim; and

(iii) subsequently elected to file a claim with the Office under section 402 of the Act prior to requesting a hearing under the Library of Congress's procedures.

(c) *Form and Contents.* All claims shall be on the form provided by the Office either on paper or electronically, signed manually or electronically under oath or affirmation by the claimant ~~or the claimant's representative~~, and contain the following information, if known:

(1) the name, mailing and e-mail addresses, and telephone number(s) of the claimant, unless claimant has designated a representative in accordance with § 1.07 herein, in which case the claimant may, but need not, provide any contact information other than claimant's name;

(2) the name of the employing office against which the claim is brought;

(3) the name(s) and title(s) of the individual(s) involved in the conduct that the employee alleges is a violation of the Act;

(4) a description of the conduct being challenged, including the date(s) of the conduct;

(i) No specific format is required.

~~(i)~~(ii) The description must be sufficiently detailed to contain either direct or inferential allegations that address all the material elements of a claim under one or more sections of the Act;

(5) a description of why the claimant believes the challenged conduct is a violation of the Act~~;~~

(i) A claimant may set forth two or more statements alternatively or hypothetically of why the conduct is a violation, either in a single allegation or in separate ones.

(ii) If the claimant makes alternative statements, the description of the alleged violation is sufficient if any one of the statements is sufficient;

~~(4)~~(6) a statement of the specific relief or remedy sought; and

~~(5)~~(7) the name, mailing and e-mail addresses, and telephone number of the representative, if any, who will act on behalf of the claimant.

(d) *Election of Remedies for Library of Congress Employees.* A Library claimant who initially files a claim for an alleged violation as provided in section 402 of the Act may, at any time within 10 days after a Preliminary Hearing Officer submits the report on the preliminary review of the claim pursuant to section 403, elect instead to bring the claim before the Library of Congress under the corresponding direct provision.

§4.05 Right to File a Civil Action.

(a) A covered employee may file a civil action in Federal district court pursuant to section 401(b) of the Act if the covered employee:

(1) has timely filed a claim as provided in section 402 of the Act; and

(2) has not submitted a request for an administrative hearing on the claim pursuant to section 405(a) of the Act.

(b) *Period for Filing a Civil Action.* A civil action pursuant to section 401(b) of the Act must be filed within a 70-day period beginning on the date the claim form was filed, except where: (1) the 70-day period is tolled as a result of the parties engaging in mediation prior to the conclusion of the 70-day period, or (2) the Preliminary Hearing Officer determines that the claimant is not a covered employee or has not stated a claim for which relief may be granted, as provided in Section 4.08(f) of the Rules.

(c) *Effect of Filing a Civil Action.* If a claimant files a civil action concerning a claim during a preliminary review of that claim pursuant to section 403 of the Act, the review terminates immediately upon the filing of the civil action, and the Preliminary Hearing Officer has no further involvement.

(d) *Notification of Filing a Civil Action.* A claimant filing a civil action in Federal district court pursuant to section 401(b) of the Act shall notify the Office within 10 days of the filing.

§4.06 Initial Processing and Transmission of Claim; Notification Requirements.

(a) After receiving a claim form, the Office shall record the pleading, transmit within two (2) business days ~~immediately~~ a copy of the claim form to the head of the employing office and

the designated representative of that office, and provide the parties with all relevant information regarding their rights under the Act. An employee filing an amended claim form pursuant to §4.08(d) ~~§4.04~~ of these Rules shall serve a copy of the amended claim form upon all other parties in the manner provided by §1.04(b). A copy of these Rules also may be provided to the parties upon request. The Office shall include a service list containing the names and addresses of the parties and their designated representatives.

(b) Notification of Availability of Mediation.

(1) Upon receipt of a claim form, the Office shall notify the covered employee who filed the claim form about the mediation process under section 4.07 of these Rules below and the deadlines applicable to mediation.

(2) Upon transmission to the employing office of the claim, the Office shall notify the employing office about the mediation process under the Act and the deadlines applicable to mediation. Upon promulgation of these Procedural Rules, each employing office shall identify for the Office the individual or entity designated to receive service, notices, documents and information from the Office. The Office shall direct the notice regarding the mediation process to the designated individual.

(c) *Special Notification Requirements for Claims Based on Acts by Members of Congress.* When a claim alleges a violation described in subparagraphs (A) and (B) of section 402(b)(2) of the Act that consists of a violation described in section 415(d)(1)(A) by a Member of Congress, the Office shall notify immediately such Member of the claim, the possibility that the Member may be required to reimburse the account described in section 415(a) of the Act for the reimbursable portion of any award or settlement in connection with the claim, and the right of the Member under section 415(d)(8) to intervene in any mediation, hearing, or civil action under the Act as to the claim.

(d) *Special Rule for Architect of the Capitol, Capitol Police and Library of Congress Employees.* The Executive Director, after receiving a claim filed under section 402 of the Act, may recommend that a claimant use, for a specific period of time, the grievance procedures referenced in any Memorandum of Understanding between the Office and the Architect of the Capitol, the Capitol Police, or the Library of Congress. Any pending deadline in the Act relating to a claim for which the claimant uses such grievance procedures shall be stayed during that specific period of time.

§4.07 Mediation.

(a) *Overview.* Mediation is a process in which employees, including unpaid staff for purposes of section 201 of the Act, employing offices, and their representatives, if any, meet with a mediator trained to assist them in resolving disputes. As participants in the mediation, employees, employing offices, and their representatives discuss alternatives to continuing their

dispute, including the possibility of reaching a voluntary, mutually satisfactory resolution. The mediator cannot impose a specific resolution, and all information discussed or disclosed in the course of any mediation shall be strictly confidential, pursuant to section 416 of the Act. Notwithstanding the foregoing, section 416 expressly provides that a covered employee may disclose the "factual allegations underlying the covered employee's claim" and an employing office may disclose "the factual allegations underlying the employing office's defense to the claim[.]"

(b) *Availability of Optional Mediation.* Upon receipt of a claim filed pursuant to section 402 of the Act, the Office shall notify the covered employee and the employing office about the process for mediation and applicable deadlines. If the claim alleges a Member committed an act made unlawful under sections 201(a), 206(a) or 207 of the Act which consists of a violation of section 415(d)(1)(A), the Office shall permit the Member to intervene in the mediation. The request for mediation shall contain the claim number, the requesting party's name, office or personal address, e-mail address, telephone number, and the opposing party's name. Failure to request mediation does not adversely impact future proceedings.

(c) *Timing.* The covered employee or the employing office may file a written request for mediation beginning on the date that the covered employee or employing office, respectively, receives notice from the Office about the mediation process. The time to request mediation under these rules ends on the date on which a Merits Hearing Officer issues a written decision on the claim, or the covered employee files a civil action,

(d) *Notice of Commencement of the Mediation.* The Office shall ~~promptly~~ notify the opposing party or its designated representative of the request for mediation and the deadlines applicable to such mediation within two (2) business days of the Office's receipt of the request. When a claim alleges a violation described in subparagraphs (A) and (B) of section 402(b)(2) of the Act that consists of a violation described in section 415(d)(1)(A) by a Member of Congress, the Office shall notify ~~immediately~~ such Member within two (2) business days of the right to intervene in any mediation concerning the claim.

(e) *Selection of Mediators; Disqualification.* Upon receipt of the second party's agreement to mediate, the Executive Director shall assign one or more mediators from a master list developed and maintained pursuant to section 404 of the Act, to commence the mediation process. Should the mediator consider himself or herself unable to perform in a neutral role in a given situation, he or she shall withdraw from the matter and immediately shall notify the Office of the withdrawal. Any party may ask the Office to disqualify a mediator by filing a written request, including the reasons for such request, with the Executive Director. This request shall be filed as soon as the party has reason to believe there is a basis for disqualification. The Executive Director's decision on this request shall be final and unreviewable.

(f) Duration and Extension.

(1) The mediation period shall be 30 days beginning on the first day after the second party agrees to mediate the matter.

(2) The Executive Director shall extend the mediation period an additional 30 days upon the joint written request of the parties, or of the appointed mediator on behalf of the parties. The request shall be written and filed with the Executive Director no later than the last day of the mediation period.

(g) *Effect of Mediation on Proceedings.*

Upon the parties' agreement to mediate a claim, any deadline relating to the processing of that claim that has not already passed by the first day of the mediation period, shall be stayed during the mediation period, including the deadline for filing a civil action.

(h) Procedures.

(1) *The Mediator's Role.* After assignment of the case, the mediator will contact the parties. The mediator has the responsibility to conduct the mediation, including deciding how many meetings are necessary and who may participate in each meeting. The mediator may accept and may ask the parties to provide written submissions, which shall be submitted within five (5) business days of the mediator's request. Upon request by either party, the mediator may extend the deadline for written submissions up to an additional five (5) business days.

(2) *The Agreement to Mediate.* At the commencement of the mediation, the mediator will ask the participants and/or their representatives to sign an agreement prepared by the Office ("the Agreement to Mediate"). The Agreement to Mediate will define what is to be kept confidential during mediation and set out the conditions under which mediation will occur, including the requirement that the participants adhere to the confidentiality of the process and a notice that a breach of the mediation agreement could result in sanctions later in the proceedings.

(i) *Participation Through Designated Representative.* The parties, including an intervenor Member, may elect to participate in mediation proceedings through a designated representative, provided that the representative has actual authority to agree to a settlement agreement, or has immediate access to someone with actual settlement authority, and provided further that, should the mediator deem it appropriate at any time, the physical presence in mediation of any party may be required. The Office may participate in the mediation process through a representative and/or observer. The mediator may determine, as best serves the interests of mediation, whether the participants may meet jointly or separately with the mediator. At the request of any of the parties, the parties shall be separated during ~~medation~~mediation.

(j) *Informal Resolutions and Settlement Agreements.* At any time during mediation the parties may resolve or settle a dispute in accordance with subparagraph 9.03 of these Rules.

(k) *Conclusion of the Mediation Period and Notice.* If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the Office shall provide the employee, the Member (when applicable), the employing office, and their representatives, with written notice that the mediation period has concluded. The written notice will be e-filed, e-mailed, sent by first-class mail, faxed, or personally delivered.

(l) *Independence of the Mediation Process and the Mediator.* The Office will maintain the independence of the mediation process and the mediator. No individual appointed by the Executive Director to mediate may conduct or aid in a hearing conducted under section 405 of the Act with respect to the same matter or shall be subject to subpoena or any other compulsory process with respect to the same matter.

(m) *Violation of Confidentiality in Mediation.* An alleged violation of the confidentiality provisions may be made by a party in mediation to the mediator during the mediation period and, if not resolved by agreement in mediation, to a Merits Hearing Officer during proceedings brought under section 405 of the Act.

(n) *Exceptions to Confidentiality in Mediation.* It shall not be a violation of confidentiality to provide the information required by sections 301(l) and 416(d) of the Act.

§4.08 Preliminary Review of Claims.

(a) *Appointment of Preliminary Hearing Officer.* Not later than 7 days after transmission to the employing office of a claim or claims, the Executive Director shall appoint a hearing officer to conduct a preliminary review of the claim or claims filed by the claimant. The appointment of the Preliminary Hearing Officer shall be in accordance with the requirements of section 405(c) of the Act.

(b) Disqualifying a Preliminary Hearing Officer.

(1) In the event that a Preliminary Hearing Officer considers himself or herself disqualified, either because of personal bias or of an interest in the case or for some other disqualifying reason, he or she shall withdraw from the case, stating in writing or on the record the reasons for his or her withdrawal, and shall immediately notify the Office of the withdrawal.

(2) Any party may file a motion requesting that a Preliminary Hearing Officer withdraw on the basis of personal bias or of an interest in the case or for some other disqualifying reason. This motion shall specifically set forth the reasons supporting the request and be filed as soon as the party has reason to believe that there is a basis for disqualification.

(3) The Preliminary Hearing Officer shall promptly rule on the withdrawal motion. If the motion is granted, the Executive Director will appoint another Preliminary

Hearing Officer within 3 days. If the motion is denied, the filing party may, within 3 days of receiving the Preliminary Hearing Officer's ruling, file a request that the ruling be reviewed by the Board. Any objection to the Preliminary Hearing Officer's ruling on the withdrawal motion shall not be deemed waived by a party's further participation in the preliminary review process. Such objection will not stay the conduct of the preliminary review process. However, if the Board reverses the denial of the withdrawal motion, any Preliminary Hearing Report issued in the interim shall be deemed vacated automatically and the Executive Director will appoint another Preliminary Hearing Officer within 3 days.

(c) *Assessments Required.* In conducting a preliminary review of a claim or claims under this section, the Preliminary Hearing Officer shall assess each of the following:

(1) whether the claimant is a covered employee authorized to obtain relief relating to the claim(s) under the Act;

(2) whether the office which is the subject of the claim(s) is an employing office under the Act;

(3) whether the individual filing the claim(s) has met the applicable deadlines for filing the claim(s) under the Act;

(4) the identification of factual and legal issues in the claim(s);

(5) the specific relief sought by the claimant;

(6) whether, on the basis of the assessments made under paragraphs (1) through (5), the claimant is a covered employee who, under the standard of Federal Rule of Civil Procedure 12(b)(6), has stated a claim for which, if the allegations contained in the claim are true, relief may be granted under the Act; and

(7) the potential for the settlement of the claim(s) without a formal hearing as provided under section 405 of the Act or a civil action as provided under section 408 of the Act.

(d) In determining whether a covered employee has stated a claim for which relief can be granted under the Act, the Preliminary Hearing Officer shall be guided by judicial and Board decisions under Rule 12(b)(6) of the Federal Rules of Civil Procedure and the laws made applicable by Section 102 of the Act, considering the following principles:

(1) The claim or claims must be construed liberally in the claimant's favor, and the Preliminary Hearing Officer shall grant the claimant the benefit of all inferences that can be derived from the facts alleged;

(2) The claim or claims should contain either direct or inferential allegations respecting material elements necessary to sustain recovery and sufficient factual content

that, if accepted as true, states a claim for relief that is plausible on its face;

(3) A claim or claims is plausible on its face when the pleaded factual content allows the Preliminary Hearing Officer to draw the reasonable inference that the respondent is liable for the misconduct alleged.

(4) Where the legal contentions that the claimant advocates are not warranted by existing law, consideration should be given to whether the legal contentions present a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

~~(d)~~

(e) *Amendments to Claims.* Amendments to the claim(s) may be made once, as of right. A claimant may request to amend within 15 days of the filing of the claim. Absent a request by the claimant, the Preliminary Hearing Officer shall direct a claimant to file an amended claim within 15 days of the filing of the claim if the Preliminary Hearing Officer finds the claim to be deficient. Thereafter, additional amendments to the claim may be permitted in the Preliminary Hearing Officer's discretion, taking the following factors into consideration:

(1) whether the amendments relate to the cause of action set forth in the claim(s); and

(2) whether such amendments will unduly prejudice the rights of the employing office, or of other parties, unduly delay the preliminary review, or otherwise interfere with or impede the proceedings.

(f) *Report on Preliminary Review.*

(1) Except as provided in subparagraph (3~~2~~), not later than 30 days after a claim form is filed, the Preliminary Hearing Officer shall submit to the claimant and the respondent(s) a report on the preliminary review. The report shall include a determination whether the claimant is a covered employee who has stated a claim for which, if the allegations contained in the claim are true, relief may be granted under the Act. Submitting the report concludes the preliminary review.

~~In determining whether a claimant has stated a claim for which relief may be granted under the Act, the Preliminary Hearing Officer shall:~~

~~be guided by judicial and Board decisions under the laws made applicable by section 102 of the Act; and~~

~~consider whether the legal contentions the claimant advocates are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing~~

~~law or for establishing new law.~~

(2) Prior to submission of the report to the parties as provided in subsection (1), if the Preliminary Hearing Officer's initial determination is that claimant is not a covered employee or has not stated a claim for which relief may be granted under the Act, the Preliminary Hearing Officer shall:

(A) provide written notice to the parties of the Preliminary Hearing Officer's preliminary assessment that the claimant is not a covered employee or has failed to state a claim for which relief may granted, including an identification of the claim(s) to which the assessment is applicable and the bases of the Preliminary Hearing Officer's initial assessment;

(B) give the claimant 15 days from the date the initial claim was filed to file an amendment of the claim(s);

(C) if the claimant's initial amendment as of right has been exhausted, discretionary amendments are denied or exhausted, or no amendment is filed, provide the parties with an opportunity to submit written briefs in response to the assessment that the claimant has failed to state a claim for which relief may be granted; and

(D) if upon reviewing the parties' written submissions, the Preliminary Hearing Officer determines that the claimant is not a covered employee or has failed to state any claim(s) for which relief can be granted, the Preliminary Hearing Officer shall complete the Preliminary Review Report, including the details of such determinations.

~~(2)~~(3) *Extension of Deadline.* The Preliminary Hearing Officer may, upon notice to the individual filing the claim(s) and the respondent(s), use an additional period of not to exceed 30 days to conclude the preliminary review.

(g) Effect of Determination of Failure to State a Claim for which Relief may be Granted.

(1) If the Preliminary Hearing Officer's report under subparagraph (e) includes the determination that the claimant is not a covered employee or has not stated a claim for which relief may be granted under the Act:

(A) the claimant (including a Library claimant) may not obtain an administrative hearing as provided under section 405 of the Act as to the claim; and

(B) the Preliminary Hearing Officer shall provide the claimant and the Executive Director with written notice that the claimant may file a civil action as to the claim in accordance with section 408 of the Act and provide the deadline for filing such action.

(2) The claimant must file the civil action not later than 90 days after receiving

the written notice referred to in subparagraph (1)(B).

(h) *Transmission of Report on Preliminary Review of Certain Claims to Congressional Ethics Committees.* When a Preliminary Hearing Officer issues a report on the preliminary review of a claim alleging a violation described in section 415(d)(1)(A) of the Act, the Preliminary Hearing Officer shall transmit the report to—

(1) the Committee on Ethics of the House of Representatives, in the case of such an alleged act by a Member of the House of Representatives (including a Delegate or Resident Commissioner to the Congress); or

(2) the Select Committee on Ethics of the Senate, in the case of such an alleged act by a Senator.

§4.09 Request for Administrative Hearing.

(a) Except as provided in subparagraph (b), a claimant may submit to the Executive Director a written request for an administrative hearing under section 405 of the Act not later than 10 days after the Preliminary Hearing Officer submits the report on the preliminary review of a claim under section 403(c). If the report on the preliminary review indicates that the claimant has stated at least one claim upon which relief may be granted, each of the claimant's alleged claims shall be preserved and claimant's written request for an administrative hearing shall encompass each claim alleged in the claim form.

(b) Subparagraph (a) does not apply to the claim if—

(1) the preliminary review report of the claim under section 403(c) of the Act includes the determination that the individual filing the claim is not a covered employee who has stated a claim for which relief may be granted, as described in section 403(d) of the Act; or

(2) the covered employee files a civil action as to the claim as provided in section 408 of the Act.

(c) Appointment of the Merits Hearing Officer.

(1) Upon the filing of a request for an administrative hearing under subparagraph (a) of this section, the Executive Director shall appoint an independent Merits Hearing Officer to consider the claim(s) and render a decision, who shall have the authority specified in sections 4.10 and 7.01 of these Rules below.

(2) The Preliminary Hearing Officer shall not serve as the Merits Hearing Officer in the same case.

(d) Answer.

(1) Within 10 days after the filing of a request for an administrative hearing under subparagraph (a), the respondent(s) shall file an answer with the Office and serve one copy on the claimant. Filing a motion to dismiss a claim does not stay the time period for filing the answer.

(2) In answering a claim form, the respondent(s) must state in short and plain terms its defenses to each claim asserted against it and admit or deny the allegations asserted against it.

(3) Failure to deny an allegation, other than one relating to the amount of damages, or to raise a defense as to any allegation(s) shall constitute an admission of such allegation(s). Affirmative defenses not raised in an answer that could have reasonably been anticipated based on the facts alleged in the claim form shall be deemed waived.

(4) A respondent's motion for leave to amend an answer to interpose a denial or affirmative defense may be granted by the Merits Hearing Officer ~~will ordinarily be granted~~ unless to do so would unduly prejudice the rights of the other party or unduly delay or otherwise interfere with or impede the proceedings.

§4.10 Summary Judgment and Withdrawal of Claims.

(a) If a claimant fails to proceed with a claim, the Merits Hearing Officer may dismiss the claim with prejudice.

(b) *Summary Judgment.* A Merits Hearing Officer may, after notice and an opportunity for the parties to address the question of summary judgment, issue summary judgment on the claim. A party may move for summary judgment no later than 30 days before the commencement of the hearing, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The party opposing a summary judgment motion shall have 10 days after service of the motion to file an opposition brief. The Merits Hearing Officer may grant an extension of these deadlines for good cause shown. The Merits Hearing Officer may grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.~~A motion before the Merits Hearing Officer asserting that the covered employee has failed to state a claim upon which relief can be granted shall be construed as a motion for summary judgment on the ground that the moving party is entitled to judgment as to that claim as a matter of law.~~

(c) *Appeal.* A final decision by the Merits Hearing Officer made under section 4.10 or 7.16 of these Rules may be subject to appeal before the Board if the aggrieved party files a timely petition for review under section 8.01 of these Rules. A final decision under subparagraphs 4.10(a)–(d) of these Rules that does not resolve all of the issues in the case(s) before the Merits Hearing Officer may not be appealed to the Board in advance of a final decision entered under

section 7.16 of these Rules, except as authorized pursuant to section 7.13.

(d) *Withdrawal of Claim.* At any time, a claimant may withdraw his or her own claim(s) by filing a notice with the Office for transmittal to the Preliminary or Merits Hearing Officer and by serving a copy on the respondent(s). Any such withdrawal must be approved by the relevant Hearing Officer and may be with or without prejudice to refile at that Hearing Officer's discretion.

(e) *Withdrawal from a Case by a Representative.* A representative must provide sufficient notice to the Hearing Officer and the parties of record of his or her withdrawal from a case. Until the party designates another representative in writing, the party will be regarded as appearing pro se.

§4.11 Confidentiality.

(a) Pursuant to section 416 of the Act, except as provided in subsections 416(c), (d) and (e), all proceedings and deliberations of Hearing Officers and the Board, including any related records, shall be confidential. A violation of the confidentiality requirements of the Act and these rules may result in the imposition of procedural or evidentiary sanctions. See also sections 1.08, 1.09 and 7.12 of these Rules.

(b) The fact that a request for an administrative hearing has been filed with the Office by a covered employee shall be kept confidential by the Office, except as allowed by these Rules.

§4.12 Automatic Referral to Congressional Ethics Committees.

Pursuant to section 416(d) of the Act, upon the final disposition of a claim alleging a violation described in section 415(d)(1)(C) committed personally by a Member of the House of Representatives (including a Delegate or Resident Commissioner to the Congress) or a Senator, or by a senior staff of the House of Representatives or Senate, the Executive Director shall refer the claim to—

(a) the Committee on Ethics of the House of Representatives, in the case of a Member or senior staff of the House; or

(b) the Select Committee on Ethics of the Senate, in the case of a Senator or senior staff of the Senate.

Subpart E—General Counsel Complaints

§5.01 Complaints

§5.02 Appointment of the Merits Hearing Officer

§5.03 Dismissal, Summary Judgment, and Withdrawal of Complaint

§5.04 Confidentiality

§5.01 Complaints.

(a) *Who May File.*

The General Counsel may timely file a complaint alleging a violation of sections 210, 215 or 220 of the Act.

(b) *When to File.*

A complaint may be filed by the General Counsel:

(1) after the investigation of a charge filed under section 210 or 220 of the Act, or

(2) after the issuance of a citation or notification under section 215 of the Act.

(c) *Form and Contents.*

A complaint filed by the General Counsel shall be in writing, signed by the General Counsel, or his designee, and shall contain the following information:

(1) the name, mail and e-mail addresses, if available, and telephone number of the employing office, as applicable:

(A) each entity responsible for correction of an alleged violation of section 210(b) of the Act;

(B) each employing office alleged to have violated section 215 of the Act; or

(C) each employing office and/or labor organization alleged to have violated section 220, against which the complaint is brought;

(2) notice of the charge filed alleging a violation of section 210 or 220 of the Act and/or issuance of a citation or notification under section 215;

(3) a description of the acts and conduct that are alleged to be violations of the Act, including all relevant dates and places, and the names and titles of the responsible individuals; and

(4) a statement of the relief or remedy sought.

(d) *Amendments*. Amendments to the complaint may be permitted by the Office or, after assignment, by a Hearing Officer, on the following conditions: that all parties to the proceeding have adequate notice to prepare to meet the new allegations; that the amendments, as appropriate, relate to the charge(s) investigated and/or the citation or notification issued by the General Counsel; and that permitting such amendments will not unduly prejudice the rights of the employing office, the labor organization, or other parties, unduly delay the completion of the hearing, or otherwise interfere with or impede the proceedings.

(e) *Service of Complaint*. Upon receipt of a complaint or an amended complaint, the Office shall serve the respondent, or its designated representative, by hand delivery or first-class mail, e-mail, or facsimile with a copy of the complaint or amended complaint and written notice of the availability of these Rules at www.ocwr.gov. A copy of these Rules may also be provided if requested by either party. The Office shall include a service list containing the names and addresses of the parties and their designated representatives.

(f) *Answer*.

(1) Within 10 days after receipt of a copy of a complaint or an amended complaint, the respondent shall file an answer with the Office and serve one copy on the General Counsel. Filing a motion to dismiss a claim does not stay the time period for filing the answer.

(2) In answering a complaint, a respondent must state in short and plain terms its defenses to each claim asserted against it and admit or deny the allegations asserted against it by an opposing party.

(3) Failure to deny an allegation, other than one relating to the amount of damages, or to raise a claim or defense as to any allegation(s) shall constitute an admission of such allegation(s). Affirmative defenses not raised in an answer that could have reasonably been anticipated based on the facts alleged in the complaint shall be deemed waived.

(4) A respondent's motion for leave to amend an answer to interpose a denial or affirmative defense will ordinarily be granted unless to do so would unduly prejudice the rights of the other party or unduly delay or otherwise interfere with or impede the proceedings.

(g) *Motion to Dismiss*. In addition to an answer, a respondent may file a motion to dismiss, or other responsive pleading with the Office and serve one copy on the complainant. Responses to

any motions shall comply with subparagraph 1.04(c) of these Rules. A motion asserting that the General Counsel has failed to state a claim upon which relief can be granted may, in the Merits Hearing Officer's discretion, be construed as a motion for summary judgment pursuant to subparagraph 5.03(d) of these Rules on the ground that the moving party is entitled to judgment as a matter of law.

§5.02 Appointment of the Merits Hearing Officer.

Upon the filing of a complaint, the Executive Director will appoint an independent Merits Hearing Officer, who shall have the authority specified in subparagraphs 5.03 and 7.01(b) of the Rules below.

§5.03 Dismissal, Summary Judgment and Withdrawal of Complaints.

(a) A Merits Hearing Officer may, after notice and an opportunity to respond, dismiss any claim that the Merits Hearing Officer finds to be frivolous or that fails to state a claim upon which relief may be granted.

(b) A Merits Hearing Officer may, after notice and an opportunity to respond, dismiss a complaint because it fails to comply with the applicable time limits or other requirements under the Act or these Rules.

(c) If the General Counsel fails to proceed with an action, the Merits Hearing Officer may dismiss the complaint with prejudice.

(d) *Summary Judgment.* A Merits Hearing Officer may, after notice and an opportunity for the parties to address the question of summary judgment, issue summary judgment on some or all of the complaint.

(e) *Appeal.* A final decision by the Merits Hearing Officer made under sections 5.03(a)–(d) or 7.16 of these Rules may be subject to appeal before the Board if the aggrieved party files a timely petition for review under section 8.01. A final decision under old subparagraph 5.03(a)–(d) that does not resolve all of the claims or issues in the case(s) before the Merits Hearing Officer may not be appealed to the Board in advance of a final decision entered under section 7.16 of these Rules, except as authorized pursuant to section 7.13.

(f) *Withdrawal of Complaint by the General Counsel.* At any time prior to the opening of the hearing, the General Counsel may withdraw his complaint by filing a notice with the Office for transmittal to the Merits Hearing Officer and by serving a copy on the respondent. After opening of the hearing, any such withdrawal must be approved by the Merits Hearing Officer and may be with or without prejudice to refile at the Merits Hearing Officer's discretion.

(g) *Withdrawal from a Case by a Representative.* A representative must provide sufficient notice to the Merits Hearing Officer and the parties of record of his or her withdrawal from a case. Until the party designates another representative in writing, the party will be regarded as appearing pro se.

§5.04 Confidentiality.

Pursuant to section 416(b) of the Act, except as provided in subsections 416(c) and (f), all proceedings and deliberations of Merits Hearing Officers and the Board, including any related records, shall be confidential. Section 416(b) does not apply to proceedings under section 215 of the Act, but does apply to the deliberations of Merits Hearing Officers and the Board under section 215. A violation of the confidentiality requirements of the Act and these rules may result in the imposition of procedural or evidentiary sanctions. *See also* sections 1.08 and 7.12 of these Rules.

Subpart F—Discovery and Subpoenas

§6.01 Discovery

§6.02 Requests for Subpoenas

§6.03 Service of Subpoena

§6.04 Proof of Service of Subpoena

§6.05 Motion to Quash or Limit Subpoena

§6.06 Enforcement of Subpoena

§6.07 Requirements for Sworn Statements in Support of Subpoena

§6.01 Discovery.

(a) *Description.* Discovery is the process by which a party may obtain from another person, including a party, the information that is needed ~~not privileged and that is reasonably calculated to lead to the discovery of admissible evidence,~~ to assist that party in developing, preparing and presenting its case at the hearing. No discovery, whether oral or written, by any party shall be taken of or from an employee of the Office of Congressional Workplace Rights (including but not limited to a Board member, the Executive Director, the General Counsel, a Confidential Advisor, a mediator, a hearing officer, or unpaid staff), including files, records, or notes produced during the confidential advising, mediation, and hearing phases of a case and maintained by the Office, the Confidential Advisor, the mediator, or the hearing officer.

(1) Parties may obtain discovery regarding any non-privileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

~~(1)~~(2) No discovery, whether oral or written, by any party shall be taken of or from an employee of the Office of Congressional Workplace Rights (including but not limited to a Board member, the Executive Director, the General Counsel, a Confidential Advisor, a mediator, a hearing officer, or unpaid staff), including files, records, or notes produced during the confidential advising, mediation, and hearing phases of a case and maintained by the Office, the Confidential Advisor, the mediator, or the hearing officer.

(b) *Initial Disclosure.* Within 14 days after a request for an administrative hearing has been made under ~~the prehearing conference in cases commenced by the filing of a claim pursuant to~~ section 402(a) of the Act, and except as otherwise stipulated or ordered by the Merits Hearing Officer ~~(the hearing officer appointed by the Executive Director to conduct the administrative hearing)~~, a party must, without awaiting a discovery request, provide to the other parties: (1) the name and, if known, ~~mail~~ the postal and e-mail addresses, and telephone number, of each individual likely to have discoverable information that the disclosing party may use to support its ~~causes of action~~claims or defenses; and (2) a copy or a description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment..

(c) *Discovery Availability.* Pursuant to section 405(e) of the Act, reasonable prehearing discovery may be permitted at the Merits Hearing Officer's discretion. The Merits Hearing Officer may adopt standing orders or make any order setting forth the forms and extent of discovery, including orders limiting the number of depositions and requests for production of documents.

(1) The parties may take discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; physical and mental examinations; and requests for admissions. Nothing in section 415(d) of the Act – dealing with reimbursements by Members of Congress of amounts paid as settlements and awards – may be construed to require the claimant to be deposed by counsel for the intervening Member in a deposition that is separate from any other deposition taken from the claimant in connection with the hearing or civil action.

(2) The responding party must serve its responses and any objections to discovery within 14 days after being served with the request, or no later than 30 days prior to the administrative hearing, whichever comes first. A shorter or longer time may be permitted by the Merits Hearing Officer.

(3) Unless otherwise stipulated or ordered by the Merits Hearing Officer, a party may serve on any other party no more than 25 written interrogatories, *including all discrete subparts*. Leave to serve additional interrogatories may be granted by the Merits Hearing Officer for good cause shown.

(A) Each interrogatory must, to the extent it is not objected to, be answered separately and fully in writing under oath.

(B) If the answer to an interrogatory may be determined by examining, auditing, compiling, abstracting, or summarizing a party's business records (including electronically stored information), and if the burden of deriving or ascertaining the answer will be substantially the same for either party, the responding party may answer by: (1)

specifying the records that must be reviewed, in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could; and (2) giving the interrogating party a reasonable opportunity to examine and audit the records and to make copies, compilations, abstracts, or summaries.

(4) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request. If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(5) A matter is deemed admitted unless, within the time period set forth in section (c)(2) above, the party to whom a request for admission is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney.

(6) Unless otherwise stipulated or ordered by the Merits Hearing Officer, a deposition is limited to 1 day of 7 hours of testimony (excluding breaks and lunch).

~~(1)~~(7) The Merits Hearing Officer may issue any order limiting or expanding discovery, preventing or safeguarding the disclosure of confidential or privileged materials or information as well as any other information deemed not discoverable, or to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

~~(2)~~(8) The parties may take discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; physical and mental examinations; and requests for admissions. Nothing in section 415(d) of the Act – dealing with reimbursements by Members of Congress of amounts paid as settlements and awards – may be construed to require the claimant to be deposed by counsel for the intervening member in a deposition that is separate from any other deposition taken from the claimant in connection with the hearing or civil action.

~~(3)~~(9) The Merits Hearing Officer may adopt standing orders or make any order setting forth the forms and extent of discovery, including orders limiting the number of depositions, interrogatories, and requests for production of documents, and also may limit the length of depositions.

~~(4)~~(10) The Merits Hearing Officer may issue any other order to prevent discovery or disclosure of confidential or privileged materials or information, as well as hearing or trial preparation materials and any other information deemed not discoverable, or to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

~~(c)~~(d) Claims of Privilege.

(1) *Information Withheld.* Whenever a party withholds information otherwise discoverable under these Rules by claiming that it is privileged or confidential or subject to protection as hearing or trial preparation materials, the party shall make the claim of privilege expressly in writing and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing whether the information itself is privileged or protected, will enable other parties to assess the applicability of the privilege or protection. A party must make a claim for privilege no later than the due date to produce the information.

(2) *Information Produced as Inadvertent Disclosure; Sealing All or Part of the Record.* If information produced in discovery is subject to a claim of privilege or of protection as hearing preparation material, the party making the claim of privilege may notify any party that received the information of the claim of privilege and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim of privilege is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the Merits Hearing Officer or the Board under seal for a determination of the claim of privilege. The producing party must preserve the information until the claim of privilege is resolved.

§6.02 Request for Subpoena.

(a) *Authority to Issue Subpoenas.* At the request of a party, the Merits Hearing Officer may issue subpoenas for the attendance and testimony of witnesses and for the production of correspondence, books, papers, documents, or other records. The attendance of witnesses and the production of records may be required from any place within the United States. However, no subpoena shall be issued for the attendance or testimony of an employee or agent of the Office of Congressional Workplace Rights (including but not limited to a Board member, the Executive Director, the General Counsel, a Confidential Advisor, a mediator, a hearing officer, or unpaid staff), or for the production of files, records, or notes produced during the confidential advising process, in mediation, or at the hearing. Employing offices shall make their employees available for discovery and hearing without requiring a subpoena.

(b) *Request.* A request to issue a subpoena requiring the attendance and testimony of witnesses or the production of documents or other evidence under paragraph (a) above shall be submitted to the Merits Hearing Officer at least 15 days before the scheduled hearing date. If the subpoena is sought as part of the discovery process, the request shall be submitted to the Merits Hearing Officer at least 10 days before the date that a witness must attend a deposition or the date for the production of documents. The Merits Hearing Officer may waive the time limits stated above for good cause.

(c) *Forms and Showing.* Requests for subpoenas shall be submitted in writing to the Merits

Hearing Officer and shall specify with particularity the witness, correspondence, books, papers, documents, or other records desired and shall be supported by a showing of general relevance and reasonable scope.

(d) *Rulings.* The Merits Hearing Officer shall promptly rule on subpoena requests.

§6.03 Service of Subpoena.

Subpoenas shall be served in the manner provided under Rule 45(b) of the Federal Rules of Civil Procedure. Service of a subpoena may be made by any person who is over 18 years of age and is not a party to the proceeding.

§6.04 Proof of Service of Subpoena.

When service of a subpoena is effected, the person serving the subpoena shall certify the date and the manner of service. The party on whose behalf the subpoena was issued shall file the server's certification with the Merits Hearing Officer.

§6.05 Motion to Quash or Limit Subpoena.

Any person against whom a subpoena is directed may file a motion to quash or limit the subpoena setting forth the reasons why the subpoena should not be complied with or why it should be limited in scope. This motion shall be filed with the Merits Hearing Officer before the time specified in the subpoena for compliance and not later than 10 days after service of the subpoena. The Merits Hearing Officer should ~~promptly~~ rule on a motion to quash or limit within 7 days and ensure that the person receiving the subpoena is made aware of the ruling.

§6.06 Enforcement of Subpoena.

(a) *Objections and Requests for Enforcement.* If a person has been served with a subpoena pursuant to section 6.03 of the Rules, but fails or refuses to comply with its terms or otherwise objects to it, the party or person objecting or the party seeking compliance may seek a ruling from the Merits Hearing Officer. The request for a ruling shall be submitted in writing to the Merits Hearing Officer. However, it may be made orally on the record at the hearing at the discretion of the Merits Hearing Officer. The party seeking compliance shall present the proof of service and, except when the witness was required to appear before the Merits Hearing Officer, shall submit evidence, by affidavit or declaration, of the failure or refusal to obey the subpoena.

(b) Ruling by the Merits Hearing Officer.

(1) The Merits Hearing Officer shall promptly rule on the request for enforcement and/or the objection(s).

(2) On request of the objecting witness or any party, the Merits Hearing Officer shall -- or on the Hearing Officer's own initiative, the Hearing Officer may -- refer the ruling to the Board for review. Any party shall be given the opportunity to submit a motion to the Board opposing changes to the ruling, and the Board shall consider such motions before issuing a decision regarding the ruling.

(c) *Review by the Board.* The Board may overrule, modify, remand, or affirm the Merits Hearing Officer's ruling and, in its discretion, may direct the General Counsel to apply in the name of the Office for an order from a United States district court to enforce the subpoena.

(d) *Application to an Appropriate Court; Civil Contempt.* If a person fails to comply with a subpoena, the Board may direct the General Counsel to apply, in the name of the Office, to an appropriate United States district court for an order requiring that person to appear before the Merits Hearing Officer to give testimony or produce records. Any failure to obey a lawful order of the district court may be held by such court to be a civil contempt thereof.

§6.07 Requirements for Sworn Statements in Support of Subpoena.

Any time that the Office and/or a Hearing Officer requires an affidavit or sworn statement from a party or a witness, he or she should refer the party or witness to a sample declaration under 28 U.S.C. § 1746, which substantially requires:

(a) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)."

(b) If executed outside the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)."

Subpart G—Hearings

§7.01 The Merits Hearing Officer

§7.02 Sanctions

§7.03 Disqualifying a Merits Hearing Officer

§7.04 Motions and Prehearing Conference

§7.05 Scheduling the Hearing

§7.06 Consolidation and Joinder of Cases

§7.07 Conduct of Hearing; Disqualifying a Representative

§7.08 Transcript

§7.09 Admissibility of Evidence

§7.10 Stipulations

§7.11 Official Notice

§7.12 Confidentiality

§7.13 Immediate Board Review of a Merits Hearing Officer's Ruling

§7.14 Proposed Findings of Fact and Conclusions of Law; Posthearing Briefs

§7.15 Closing the Record

§7.16 Merits Hearing Officer Decisions; Entry in Office Records; Correcting the Record; Motions to Alter, Amend or Vacate the Decision.

§7.01 The Merits Hearing Officer.

This subpart concerns the duties and responsibilities of Merits Hearing Officers, who are appointed by the Executive Director to preside over the administrative hearings under the Act. The duties and responsibilities of Preliminary Hearing Officers are contained in section 5.08 of these Rules.

(a) *Exercise of Authority.* The Merits Hearing Officer may exercise authority as provided in subparagraph (b) of this section upon his or her own initiative or upon a party's motion, as appropriate.

(b) *Authority.* Merits Hearing Officers shall conduct fair and impartial hearings and take all necessary action to avoid undue delay in disposing of all proceedings. They shall have all powers necessary to that end unless otherwise limited by law, including, but not limited to, the authority to:

(1) administer oaths and affirmations;

(2) rule on motions to disqualify designated representatives;

(3) issue subpoenas in accordance with section 6.02 of these Rules;

(4) rule upon offers of proof and receive relevant evidence;

(5) rule upon discovery issues as appropriate under sections 6.01 to 6.06 of these Rules;

(6) hold prehearing conferences for simplifying issues and settlement;

(7) convene a hearing, as appropriate, regulate the course of the hearing, and maintain decorum at and exclude from the hearing any person who disrupts, or threatens to disrupt, that decorum;

(8) exclude from the hearing any person, except any claimant, any party, the attorney or representative of any claimant or party, or any witness while testifying;

(9) rule on all motions, witness and exhibit lists, and proposed findings, including motions for summary judgment;

(10) require the filing of briefs, memoranda of law, and the presentation of oral argument as to any question of fact or law;

(11) order the production of evidence and the appearance of witnesses;

(12) impose sanctions as provided under section 7.02 of these Rules;

(13) file decisions on the issues presented at the hearing;

(14) dismiss any claim that is found to be frivolous or that fails to state a claim upon which relief may be granted;

(15) maintain and enforce the confidentiality of proceedings; and

(16) waive or modify any procedural requirements of subparts F and G of these Rules so long as permitted by the Act.

§7.02 Sanctions.

(a) When necessary to regulate the course of the proceedings (including the hearing), the Merits Hearing Officer may impose an appropriate sanction, which may include, but is not limited to, the sanctions specified in this section, on the parties and/or their representatives.

(b) The Merits Hearing Officer may impose sanctions upon the parties and/or their representatives based on, but not limited to, the circumstances set forth in this section.

(1) *Failure to Comply with an Order.* When a party fails to comply with an order (including an order to submit to a deposition, to produce evidence within the party's control, or to produce witnesses), the Merits Hearing Officer may:

(A) draw an inference in favor of the requesting party on the issue related to the information sought;

(B) stay further proceedings until the order is obeyed;

(C) prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, evidence relating to the information sought;

(D) permit the requesting party to introduce secondary evidence concerning the information sought;

(E) strike, in whole or in part, the claim, briefs, answer, or other submissions of the party failing to comply with the order, as appropriate; or

(F) direct judgment against the non-complying party in whole or in part.

(2) *Failure to Prosecute or Defend.* If a party fails to prosecute or defend a Position in a timely manner, the Merits Hearing Officer may dismiss the action without prejudice ~~prejudice or decide the matter, when appropriate~~.

(3) *Failure to Make Timely Filing.* The Merits Hearing Officer may refuse to consider any request, motion or other action that is not filed in a timely fashion in compliance with this subpart.

(4) *Frivolous Claims, Defenses, and Arguments.* If a party or a representative files a claim that fails to meet the requirements of section 401(f) of the Act, the Merits Hearing Officer may dismiss the claim, in whole or in part, with or without prejudice, or decide the matter for the opposing party. If a party or a representative presents a pleading, written motion, or other paper containing claims, defenses, and other legal contentions for any

improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of resolution of the matter, the Merits Hearing Officer may reject the claims, defenses or legal contentions, in whole or in part. A claim, defense, or legal contention shall not be subject to sanctions if it constitutes a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law.

(5) *Failure to Maintain Confidentiality.* An allegation regarding a violation of the confidentiality provisions may be made to a Merits Hearing Officer in proceedings under section 405 of the Act. If, after notice and hearing, the Merits Hearing Officer determines that a party has violated the confidentiality provisions, the Merits Hearing Officer may:

(A) direct that the matters related to the breach of confidentiality or other designated facts be taken as established for purposes of the action, as the prevailing party contends;

(B) prohibit the party breaching confidentiality from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(C) strike the pleadings in whole or in part;

(D) stay further proceedings until the breach of confidentiality is resolved to the extent possible;

(E) dismiss the action or proceeding in whole or in part; or

(F) render a default judgment against the party breaching confidentiality.

(c) No sanctions may be imposed under this section except for good cause and the particulars of which must be stated in the sanction order.

§7.03 Disqualifying a Merits Hearing Officer.

(a) In the event that a Merits Hearing Officer considers himself or herself disqualified, either because of personal bias or of an interest in the case or for some other disqualifying reason, he or she shall withdraw from the case, stating in writing or on the record the reasons for his or her withdrawal, and shall immediately notify the Office of the withdrawal.

(b) Any party may file a motion requesting that a Merits Hearing Officer withdraw on the basis of personal bias or of an interest in the case or for some other disqualifying

reason. This motion shall specifically set forth the reasons supporting the request and be filed as soon as the party has reason to believe that there is a basis for disqualification.

(c) The Merits Hearing Officer shall promptly rule on the withdrawal motion. If the motion is granted, the Executive Director will appoint another Merits Hearing Officer within 5 days. Any objection to the Merits Hearing Officer's ruling on the withdrawal motion shall not be deemed waived by a party's further participation in the hearing and may be the basis for an appeal to the Board from the Merits Hearing Officer's decision under section 8.01 of these Rules. Such objection will not stay the conduct of the hearing.

§7.04 Motions and Prehearing Conference.

(a) *Motions.* Motions shall be filed with the Merits Hearing Officer and shall be in writing except for oral motions made on the record during the hearing. All written motions and any responses to them shall include a proposed order, when applicable. Except as set forth in Section 1.04(c), o~~O~~nly with the Merits Hearing Officer's advance approval may either party file additional responses to the motion or to the response to the motion. Motions for extension of time will be granted only for good cause shown.

(b) *Scheduling the Prehearing Conference.* Within 7 days after a Merits Hearing Officer is assigned to adjudicate the claim(s), the Merits Hearing Officer shall serve on the parties and their designated representatives written notice setting forth the time, date, and place of the prehearing conference, except that the Executive Director may, for good cause, extend up to an additional 7 days the time for serving notice of the prehearing conference.

(c) *Prehearing Conference Memoranda.* The Merits Hearing Officer may order each party to prepare a prehearing conference memorandum. The Merits Hearing Officer may direct that a memorandum be filed after discovery has concluded. The memorandum may include:

(1) the major factual contentions and legal issues that the party intends to raise at the hearing in short, successive, and numbered paragraphs, along with any proposed stipulations of fact or law;

(2) an estimate of the time necessary for presenting the party's case;

(3) the specific relief, including, when known, a calculation of any monetary relief or damages that is being or will be requested;

(4) the names of potential witnesses for the party's case~~,~~ (except for potential impeachment or rebuttal witnesses~~,~~) and the purpose for which they will be called, ~~and~~ a list of documents that the party is seeking from the opposing party, and~~, if discovery was permitted,~~ the status of any pending request for discovery. (It is not necessary to list each document requested. Instead, the party may refer to the request for discovery.); and

(5) a brief description of any other unresolved issues.

(d) At the prehearing conference, the Merits Hearing Officer may discuss the subjects specified in paragraph (c) above and the manner in which the hearing will be conducted. In addition, the Merits Hearing Officer may explore settlement possibilities and consider how the factual and legal issues might be simplified and any other issues that might expedite resolving the dispute. The Merits Hearing Officer shall issue an order, which recites the actions taken at the conference and the parties' agreements as to any matters considered, and which limits the issues to those not disposed of by the parties' admissions, stipulations, or agreements. Such order, when entered, shall control the course of the proceeding, subject to later modification by the Merits Hearing Officer by his or her own motion or upon proper request of a party for good cause shown.

§7.05 Scheduling the Hearing.

(a) *Date, Time, and Place of Hearing.* The Office shall issue the notice of hearing, which shall fix the date, time, and place of hearing. A hearing must commence no later than 90 days after the claimant's request for administrative hearing, but the Office may grant an extension of up to 30 days.~~Absent a postponement granted by the Office, a hearing must commence no later than 60 days after the filing of the claim(s).~~

(b) *Motions for Postponement or a Continuance.* Motions for postponement or for a continuance by either party shall be made in writing to the Merits Hearing Officer, shall set forth the reasons for the request, and shall state whether or not the opposing party consents to such postponement. A Merits Hearing Officer may grant such a motion upon a showing of good cause. ~~In no event will a hearing commence later than 90 days after the filing of the claim form.~~

§7.06 Consolidation and Joinder of Cases.

(a) Explanation.

(1) Consolidation is when two or more parties have cases that might be treated as one because they contain identical or similar issues or in such other appropriate circumstances.

(2) Joinder is when one party has two or more cases pending and they are united for consideration. For example, joinder might be warranted when a single party has one case pending challenging a 30-day suspension and another case pending challenging a subsequent dismissal.

(b) *Authority.* The Executive Director (before assigning a Merits Hearing Officer to adjudicate a claim),~~;~~ a Merits Hearing Officer (during the hearing),~~;~~ or the Board ~~(during an appeal)~~ may consolidate or join cases on their own initiative or on the motion of a party if to do so would expedite case processing and not adversely affect the parties' interests, taking into account the confidentiality requirements of section 416 of the Act.

§7.07 Conduct of Hearing; Disqualifying a Representative.

(a) Pursuant to section 405(d)(1) of the Act, the Merits Hearing Officer shall conduct the hearing in closed session on the record. Only the Merits Hearing Officer, the parties and their representatives, and witnesses during the time they are testifying, shall be permitted to attend the hearing, except that the Office may not be precluded from observing the hearing. The Merits Hearing Officer, or a person designated by the Merits Hearing Officer or the Executive Director, shall record the proceedings.

(b) The hearing shall be conducted as an administrative proceeding. Witnesses shall testify under oath or affirmation. Except as specified in the Act and in these Rules, the Merits Hearing Officer shall conduct the hearing, to the greatest extent practicable, consistent with the principles and procedures in sections 554 through 557 of title 5 of the United States Code (the Administrative Procedure Act).

(c) No later than the opening of the hearing, or as otherwise ordered by the Merits Hearing Officer, each party shall submit to the Merits Hearing Officer and to the opposing party typed lists of the hearing exhibits and the witnesses expected to be called to testify, excluding impeachment or rebuttal witnesses.

(d) At the commencement of the hearing, or as otherwise ordered by the Merits Hearing Officer, the Merits Hearing Officer may consider any stipulations of facts and law pursuant to section 7.10 of the Rules, take official notice of certain facts pursuant to section 7.11 of the Rules, rule on the parties' objections and hear witness testimony. Each party must present his or her case in a concise manner, limiting the testimony of witnesses and submission of documents to relevant matters.

(e) Any evidentiary objection not timely made before a Merits Hearing Officer shall, absent clear error, be deemed waived on appeal to the Board.

(f) Failure of either party to appear at the hearing, to present witnesses, or to respond to an evidentiary order may result in an adverse finding or ruling by the Merits Hearing Officer. At the Merits Hearing Officer's discretion, the hearing also may be held without the claimant if the claimant's representative is present.

(g) If the Merits Hearing Officer concludes that an employee's representative, a witness, a charging party, a labor organization, an employing office, or an entity alleged to be responsible for correcting a violation has a conflict of interest, the Merits Hearing Officer may, after giving the representative an opportunity to respond, disqualify the representative. In that event, within the time limits for hearing and decision established by the Act, the affected party shall be afforded reasonable time to retain other representation.

§7.08 Transcript.

(a) *Preparation.* The Office shall keep an accurate electronic or stenographic hearing record, which shall be the sole official record of the proceeding. The Office shall be responsible for the cost of transcribing the hearing. Upon request, a copy of the hearing transcript shall be furnished to each party, provided, however, that such party has first agreed to maintain and respect the confidentiality of such transcript in accordance with the applicable rules prescribed by the Office or the Merits Hearing Officer to effectuate section 416(b) of the Act. Additional copies of transcripts shall be made available to a party at the party's expense. The Office may grant exceptions to the payment requirement for good cause shown. A motion for an exception shall be made in writing, accompanied by an affidavit or a declaration setting forth the reasons for the request, and submitted to the Office. Requests for copies of transcripts also shall be directed to the Office. The Office may, by agreement with the person making the request, arrange with the official hearing reporter for required services to be charged to the requester.

(b) *Corrections.* Corrections to the official transcript of the hearing will be permitted. Motions for correction must be submitted within 10 days of service of the transcript upon the parties. Corrections to the official transcript will be permitted only upon the approval of the Merits Hearing Officer. The Merits Hearing Officer may make corrections at any time with notice to the parties.

§7.09 Admissibility of Evidence.

The Merits Hearing Officer shall apply the Federal Rules of Evidence to the greatest extent practicable. These Rules provide, among other things, that the Merits Hearing Officer may exclude evidence if, among other things, it constitutes inadmissible hearsay or its probative value is substantially outweighed by the danger of unfair prejudice, by confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

§7.10 Stipulations.

The parties may stipulate as to any matter of fact. Such a stipulation will satisfy a party's burden of proving the fact alleged.

§7.11 Official Notice.

(a) The Merits Hearing Officer on his or her own motion or on motion of a party, may take official notice of a fact that is not subject to reasonable dispute because it is either:

(1) a matter of common knowledge; or

(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Official notice taken of any fact satisfies a party's burden of proving the fact noticed.

(b) When a decision, or part thereof, rests on the official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

§7.12 Confidentiality.

(a) Pursuant to section 416 of the Act and section 1.08 of these Rules, all proceedings and deliberations of Merits Hearing Officers and the Board, including the hearing transcripts and any related records, shall be confidential, except as specified in sections 416(c), (d), (e), and (f) of the Act and subparagraph 1.08(d) of these Rules. All parties to the proceeding and their representatives, and witnesses who appear at the hearing, will be advised of the importance of confidentiality in this process and of their

obligations, subject to sanctions, to maintain it. This provision shall not apply to proceedings under section 215 of the Act, but shall apply to the Merits Hearing Officers' and the Board's deliberations under that section.

(b) *Violation of Confidentiality.* A Merits Hearing Officer, under section 405 of the Act, may resolve an alleged violation of confidentiality that occurred during a hearing. After providing notice and an opportunity to the parties to be heard, the Merits Hearing Officer, under subparagraph 1.08(f) of these Rules, may find a violation of confidentiality and impose appropriate procedural or evidentiary sanctions, to include the sanctions listed in section 7.02 of these Rules.

§7.13 Immediate Board Review of a Hearing Officer's Ruling.

(a) *Review Strongly Disfavored.* Board review of a Merits Hearing Officer's ruling is strongly disfavored while a proceeding is ongoing (an "interlocutory appeal"). In general, the Board may consider a request for interlocutory appeal only if the Merits Hearing Officer, on his or her own motion or by motion of the parties, determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention.

(b) *Time for Filing.* A party must file a motion for interlocutory appeal of a Merits Hearing Officer's ruling with the Merits Hearing Officer within 5 days after service of the ruling upon the parties. The motion shall include arguments in support of both interlocutory appeal and the requested determination to be made by the Board upon review. Responses, if any, shall be filed with the Hearing Officer within 3 days after service of the motion.

(c) *Standards for Review.* In determining whether to certify and forward a request for interlocutory appeal to the Board, the Merits Hearing Officer shall consider the following:

(1) whether the ruling involves a significant question of law or policy about which there is substantial ground for difference of opinion;

(2) whether an immediate Board review of the Merits Hearing Officer's ruling will materially advance completing the proceeding; and

(3) whether denial of immediate review will cause undue harm to a party or the public.

(d) *Merits Hearing Officer Action.* If all the conditions set forth in paragraph (c) above are met, the Merits Hearing Officer shall certify and forward a request for

interlocutory appeal to the Board for its immediate consideration. Any such submission shall explain the basis on which the Merits Hearing Officer concluded that the standards in paragraph (c) have been met. The Merits Hearing Officer's decision to forward or decline to forward a request for review is not appealable.

(e) *Granting or Denying an Interlocutory Appeal is Within the Board's Sole Discretion.* The Board, in its sole discretion, may grant or deny an interlocutory appeal, upon the Merits Hearing Officer's certification and decision to forward a request for review. The Board's decision to grant or deny an interlocutory appeal is not appealable.

(f) *Stay Pending Interlocutory Appeal.* Unless otherwise directed by the Board, the stay of any proceedings during the pendency of either a request for interlocutory appeal or the appeal itself shall be within the Merits Hearing Officer's discretion, provided that no stay shall serve to toll the time limits set forth in section 405(d) of the Act. If the Merits Hearing Officer does not stay the proceedings, the Board may do so while an interlocutory appeal is pending with it.

(g) *Procedures before the Board.* Upon its decision to grant interlocutory appeal, the Board shall issue an order setting forth the procedures that will be followed in t he conduct of that review.

(h) *Appeal of a Final Decision.* Denial of interlocutory appeal will not affect a party's right to challenge rulings, which are otherwise appealable, as part of an appeal to the Board under section 8.01 of the Rules from the Merits Hearing Officer's decision issued under section 7.16 of these Rules.

§7.14 Proposed Findings of Fact and Conclusions of Law; Posthearing Briefs.

May be Required. The Merits Hearing Officer may require the parties to file proposed findings of fact and conclusions of law and/or posthearing briefs on the factual and the legal issues presented in the case.

§7.15 Closing the Record.

(a) Except as provided in section 7.14 of the Rules, the record shall close when the hearing ends. However, the Hearing Officer may hold the record open as necessary to allow the parties to submit arguments, briefs, documents or additional evidence previously identified for introduction.

(b) Once the record is closed, no additional evidence or argument shall be accepted into the hearing record except upon a showing that new and material evidence has

become available that was not available despite due diligence before the record closed or that the additional evidence or argument is being provided in rebuttal to new evidence or argument that the other party submitted just before the record closed. The Merits Hearing Officer also shall make part of the record an approved correction to the transcript.

§7.16 Merits Hearing Officer Decisions; Entry in Office Records; Corrections to the Record; Motions to Alter, Amend, or Vacate the Decision.

(a) The Merits Hearing Officer shall issue a written decision no later than 90 days after the hearing ends, pursuant to section 405(g) of the Act.

(b) The Merits Hearing Officer's written decision shall:

(1) state the issues raised in the claim(s), form, or complaint;

(2) describe the evidence in the record;

(3) contain findings of fact and conclusions of law, and the reasons or bases therefore, on all the material issues of fact, law, or discretion presented on the record;

(4) determine whether a violation has occurred; and

(5) order such remedies as are appropriate under the Act.

(c) If a final decision concerns a claim alleging a violation or violations described in section 415(d)(1)(C) of the Act, the written decision shall include the following findings:

(1) whether the alleged violation or violations occurred;

(2) whether any violation or violations found to have occurred were committed personally by an individual who, at the time of committing the violation, was a Member of the House of Representatives (including a Delegate or Resident Commissioner to the Congress) or a Senator;

(3) the amount of compensatory damages, if any, awarded pursuant to section 415(d)(1)(B) of the Act; and

(4) the amount, if any, of compensatory damages that is the "reimbursable portion" as defined by section 415(d) of the Act.

(d) Upon issuance, the Merits Hearing Officer's decision and order shall be entered into the Office's records.

(e) The Office shall promptly provide a copy of the Merits Hearing Officer's decision and order to the parties.

(f) If there is no appeal of a Merits Hearing Officer's decision and order, that decision becomes a final decision of the Office, which is subject to enforcement under section 8.03 of these Rules.

(g) *Corrections to the Record.* After a Merits Hearing Officer's decision has been issued, but before an appeal is made to the Board, or absent an appeal, before the decision becomes final, the Merits Hearing Officer may issue an erratum notice to correct simple errors or easily correctible mistakes. The Merits Hearing Officer may do so on the parties' motion or on his or her own motion with or without advance notice.

(h) After a Merits Hearing Officer's decision has been issued, but before an appeal is made to the Board, or absent an appeal, before the decision becomes final, a party to the proceeding before the Merits Hearing Officer may move to alter, amend, or vacate the decision. The moving party must establish that relief from the decision is warranted because: (1) of mistake, inadvertence, surprise, or excusable neglect; (2) there is newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new hearing; (3) there has been fraud (misrepresentation, or misconduct by an opposing party); (4) the decision is void; or (5) the decision has been satisfied, released, or discharged; it is based on an earlier decision that has been reversed or vacated; or applying it prospectively is no longer equitable. The motion shall be filed within 15 days after service of the Merits Hearing Officer's decision. ~~No response shall be filed unless the Merits Hearing Officer so orders.~~ The filing and pendency of a motion under this provision shall not relieve a party of the obligation to file a timely appeal or operate to stay the Merits Hearing Officer's action unless the Merits Hearing Officer so orders.

Subpart H—Proceedings before the Board

§8.01 Appeal to the Board

§8.02 Reconsideration

§8.03 Compliance with Final Decisions, Requests for Enforcement

§8.04 Judicial Review

§8.05 Application for Review of an Executive Director Action

§8.06 Exceptions to Arbitration Awards

§8.07 Expedited Review of Negotiability

§8.08 Procedures of the Board in Impasse Proceedings

§8.01 Appeal to the Board.

(a) No later than 30 days after the entry of the final decision and order of the Merits Hearing Officer in the records of the Office, an aggrieved party may seek review of that decision and order by the Board by filing with the Office a petition for review by the Board. The appeal must be served on all opposing parties or their representatives.

(b) A Report on Preliminary Review pursuant to section 402(c) of the Act is ~~not~~ appealable to the Board.

(c) (1) Unless otherwise ordered by the Board, within 21 days following the filing of a petition for review to the Board, the appellant shall file and serve a supporting brief in accordance with section 1.04 of these Rules. That brief shall identify with particularity those findings or conclusions in the decision and order that are being challenged and shall refer specifically to the portions of the record and the provisions of statutes or rules that are alleged to support each assertion made on appeal.

(2) Unless otherwise ordered by the Board, within 21 days following the service of the appellant's brief, any opposing party may file and serve a responsive brief. Unless otherwise ordered by the Board, within 10 days following the service of the responsive brief(s), the appellant may file and serve a reply brief.

(3) In any case in which the Board has not rendered a determination on the merits, the Executive Director is authorized to: determine any request for extensions of time to file any post-petition for review document or submission with the Board; determine any request for

enlargement of page limitation of any post-petition for review document or submission with the Board; or require proof of service where there are questions of proper service.

(d) Upon the request of any party or upon its own order, the Board, in its discretion, may hold oral argument on an appeal.

(e) Upon appeal, the Board shall issue a written decision setting forth the reasons for its decision. The Board may dismiss the appeal or affirm, reverse, modify, or remand the decision and order of the Merits Hearing Officer in whole or in part. Where there is no remand, the decision of the Board shall be entered in the records of the Office as the final decision of the Board and shall be subject to judicial review.

(f) The Board may remand the matter to a Merits Hearing Officer for further action or proceedings, including the reopening of the record for the taking of additional evidence. The decision by the Board to remand a case is not subject to judicial review under section 407 of the Act. The procedures for a remanded hearing shall be governed by subparts F, G, and H of these Rules. The Merits Hearing Officer shall render a decision or report to the Board, as ordered, at the conclusion of proceedings on the remanded matters. A decision of the Board following completion of the remand shall be entered in the records of the Office as the final decision of the Board and shall be subject to judicial review under section 407 of the Act.

(g) Pursuant to section 406(c) of the Act, in conducting its review of the decision of a Hearing Officer, the Board shall set aside a decision if it determines that the decision was:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

(h) In making determinations under paragraph (g~~f~~), above, the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(i) *Record.* The docket sheet, claim form or complaint and any amendments, preliminary review report, request for hearing, notice of hearing, answer and any amendments, motions, rulings, orders, stipulations, exhibits, documentary evidence, any portions of depositions admitted into evidence, docketed Memoranda for the Record, or correspondence between the Office and the parties, and the transcript of the hearing (together with any electronic recording of the hearing if the original reporting was performed electronically) together with the Merits Hearing Officer's decision and the petition for review, any response thereto, any reply to the response and any other pleadings shall constitute the record in the case.

(j) The Board may invite amicus participation, in appropriate circumstances, in a manner consistent with the requirements of section 416 of the Act.

(k) An appellant may move to withdraw a petition for review at any time before the Board renders a decision. The motion must be in writing and submitted to the Board. The Board, at its discretion, may grant or deny such a motion and take whatever action is required.

§8.02 Reconsideration.

After a final decision or order of the Board has been issued, a party to the proceeding before the Board, who can establish in its moving papers that reconsideration is necessary because the Board has overlooked or misapprehended points of law or fact, may move for reconsideration of such final decision or order. The motion shall be filed within 15 days after service of the Board's decision or order. ~~No response shall be filed unless the Board so orders.~~ The filing and pendency of a motion under this provision shall not relieve a party of the obligation to file a timely appeal or operate to stay the action of the Board unless so ordered by the Board. The decision to grant or deny a motion for reconsideration is within the sole discretion of the Board and is not appealable.

§8.03 Compliance with Final Decisions, Requests for Enforcement.

(a) Unless the Board has, in its discretion, stayed the final decision of the Office during the pendency of an appeal pursuant to section 407 of the Act, and except as provided in sections 210(d)(5) and 215(c)(6) of the Act, a party required to take any action under the terms of a final decision of the Office shall carry out its terms promptly, and shall within 30 days after the decision or order becomes final and goes into effect by its terms, provide the Office and all other parties to the proceedings with a compliance report specifying the manner in which compliance with the provisions of the decision or order has been accomplished. If complete compliance has not been accomplished within 30 days, the party required to take any such action shall submit a compliance report specifying why compliance with any provision of the decision or order has not yet been fully accomplished, the steps being taken to assure full compliance, and the anticipated date by which full compliance will be achieved. A party may also file a petition for attorneys fees and/or damages unless the Board has, in its discretion, stayed the final decision of the Office during the pendency of the appeal pursuant to section 407 of the Act.

(b) The Office may require additional reports as necessary.

(c) If the Office does not receive notice of compliance in accordance with paragraph (a) of this section, the Office shall make inquiries to determine the status of compliance. If the Office cannot determine that full compliance is forthcoming, the Office shall report the failure to

comply to the Board and recommend whether court enforcement of the decision should be sought.

(d) To the extent provided in section 407(a) of the Act and section 8.04 of these Rules, the appropriate party may petition the Board for enforcement of a final decision of the Office or the Board. The petition shall specifically set forth the reasons why the petitioner believes enforcement is necessary.

(e) Upon receipt of a report of noncompliance or a petition for enforcement of a final decision, or as it otherwise determines, the Board may issue a notice to any person or party to show cause why the Board should not seek judicial enforcement of its decision or order.

(f) Within the discretion of the Board, it may direct the General Counsel to petition the court for enforcement under section 407(a)(2) of the Act of a decision under section 406(e) of the Act whenever the Board finds that a party has failed to comply with its decision and order.

§8.04 Judicial Review.

Pursuant to section 407 of the Act,

(a) the United States Court of Appeals for the Federal Circuit shall have jurisdiction over any proceeding commenced by a petition of:

(1) a party aggrieved by a final decision of the Board under section 406(e) of the Act in cases arising under sections 102(c) or 201-207;

(2) a charging individual or respondent before the Board who files a petition under section 210(d)(4) of the Act;

(3) the General Counsel or a respondent before the Board who files a petition under section 215(c)(5) of the Act; or

(4) the General Counsel or a respondent before the Board who files a petition under section 220(c)(3) of the Act.

(b) The United States Court of Appeals for the Federal Circuit shall have jurisdiction over any petition of the General Counsel, filed in the name of the Office and at the direction of the Board, to enforce a final decision under section 405(g) or 406(e) of the Act with respect to a violation of part A, B, C, or D of subchapter II of the Act.

(c) The party filing a petition for review shall serve a copy on the opposing party or parties or their representative(s).

§8.05 Application for Review of an Executive Director's Action.

For additional rules on the procedures pertaining to the Board's review of an Executive Director action in Representation proceedings, refer to parts 2422.30–31 of the Substantive Regulations of the Board, available at www.ocwr.gov.

§8.06 Expedited Review of Negotiability Issues.

For additional rules on the procedures pertaining to the Board's expedited review of negotiability issues, refer to part 2424 of the Substantive Regulations of the Board, available at www.ocwr.gov.

§8.07 Review of Arbitration Awards.

For additional rules on the procedures pertaining to the Board's review of arbitration awards, refer to part 2425 of the Substantive Regulations of the Board, available at www.ocwr.gov.

§8.08 Procedures of the Board in Impasse Proceedings.

For additional rules on the procedures of the Board in impasse proceedings, refer to part 2471 of the Substantive Regulations of the Board, available at www.ocwr.gov.

Subpart I—Other Matters of General Applicability

§9.01 Attorney's Fees and Costs

§9.02 Ex Parte Communications

§9.03 Informal Resolutions and Settlement Agreements

§9.04 Payments Required Pursuant to Decisions, Awards, or Settlements under section 415(a) of the Act

§9.05 Revocation, Amendment or Waiver of Rules

§9.06 Notices

§9.07 Training and Education Programs

§9.01 Attorney's Fees and Costs.

(a) *Request.* No later than 30 days after the entry of a final decision of the Office, the prevailing party may submit to the Merits Hearing Officer who decided the case a motion for the award of reasonable attorney's fees and costs, following the form specified in paragraph (b) below. The Merits Hearing Officer, after giving the respondent an opportunity to reply, shall rule on the motion. Decisions regarding attorney's fees and costs are collateral and do not affect the finality or appealability of a final decision issued by the Office.

(b) *Form of Motion.* In addition to setting forth the legal and factual bases upon which the attorney's fees and/or costs are sought, a motion for an award of attorney's fees and/or costs shall be accompanied by:

(1) accurate and contemporaneous time records;

(2) a copy of the terms of the fee agreement (if any);

(3) the attorney's customary billing rate for similar work with evidence that the rate is consistent with the prevailing community rate for similar services in the community in which the attorney ordinarily practices;

(4) an itemization of costs related to the matter in question; and

(5) evidence of an established attorney-client relationship (if a copy of the fee agreement is not available).

(c) *Arbitration Awards.* In arbitration proceedings, the prevailing party must submit any request for attorney's fees and costs to the arbitrator in accordance with the established

arbitration procedures.

§9.02 Ex Parte Communications.

(a) Definitions.

(1) The term "interested person outside the Office" means any covered employee and agent thereof who is not an employee or agent of the Office, any labor organization and agent thereof, any employing office and agent thereof, and any individual or organization and agent thereof, who is or may reasonably be expected to be involved in a proceeding or a rulemaking, and the General Counsel and any agent thereof when prosecuting a complaint proceeding before the Office pursuant to sections 210, 215, or 220 of the Act. The term also includes any employee of the Office who becomes a party or a witness for a party other than the Office in proceedings as defined in these Rules.

(2) The term "ex parte communication" means an oral or written communication—

(A) that is between an interested person outside the Office and a Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking;

(B) that is related to a proceeding or a rulemaking;

(C) that is not made on the public record;

(D) that is not made in the presence of all parties to a proceeding or a rulemaking; and

(E) that is made without reasonable prior notice to all parties to a proceeding or a rulemaking.

(3) For purposes of this section, the term "proceeding" means a hearing proceeding under section 405 of the Act, an appeal to the Board under section 406 of the Act, a pre-election investigatory hearing under section 220 of the Act, and any other proceeding of the Office established pursuant to regulations issued by the Board under the Act.

(4) The term "period of rulemaking" means the period commencing with the issuance of an advance notice of proposed rulemaking or of a notice of proposed rulemaking, whichever issues first, and concluding with the issuance of a final rule.

(b) Exception to Coverage. The Rules set forth in this section do not apply during periods that the Board designates as periods of negotiated rulemaking in accordance with the procedures

set forth in the Administrative Procedure Act, 5 U.S.C. § 500 *et seq.*

(c) *Prohibited Ex Parte Communications and Exceptions.*

(1) During a proceeding, it is prohibited knowingly to make or cause to be made:

(A) a written ex parte communication if copies thereof are not promptly served by the communicator on all parties to the proceeding in accordance with section 1.04 of these Rules; or

(B) an oral ex parte communication unless all parties have received advance notice thereof by the communicator and have an adequate opportunity to be present.

(2) The Hearing Officer or the Office may initiate attempts to settle a matter informally at any time. The parties may agree to waive the prohibitions against ex parte communications during settlement discussions, and they may agree to any limits on the waiver.

(3) During the period of rulemaking, it is prohibited knowingly to make or cause to be made a written or an oral ex parte communication. During the period of rulemaking, the Office shall treat any written ex parte communication as a comment in response to the advance notice of proposed rulemaking or the notice of proposed rulemaking, whichever is pending, and such communications will therefore be part of the public rulemaking record.

(4) Notwithstanding the prohibitions set forth in subparagraphs (1) and (2) above, the following ex parte communications are not prohibited:

(A) those which relate solely to matters which the Board member or Hearing Officer is authorized by law, Office rules, or order of the Board or Hearing Officer to entertain or dispose of on an ex parte basis;

(B) those which all parties to the proceeding agree, or which the responsible official formally rules, may be made on an ex parte basis;

(C) those which concern only matters of general significance to the field of labor and employment law or administrative practice;

(D) those from the General Counsel to the Office or the Board when the General Counsel is acting on behalf of the Office or the Board under any section of the Act; and

(E) those which could not reasonably be construed to create either unfairness or the appearance of unfairness in a proceeding or rulemaking.

(5) It is prohibited knowingly to solicit or cause to be solicited any prohibited

ex parte communication.

(d) *Reporting of Prohibited Ex Parte Communications.*

(1) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who determines that he or she is being asked to receive a prohibited ex parte communication shall refuse to do so and inform the communicator of this Rule.

(2) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding who knowingly receives a prohibited ex parte communication shall (i) notify the parties to the proceeding that such a communication has been received; and (ii) provide the parties with a copy of the communication and of any response thereto (if written) or with a memorandum stating the substance of the communication and any response thereto (if oral). If a proceeding is then pending before either the Board or a Hearing Officer, and if the Board or Hearing Officer so orders, these materials shall then be placed in the record of the proceeding. Upon order of the Hearing Officer or the Board, the parties may be provided with a full opportunity to respond to the alleged prohibited ex parte communication and to address what action, if any, should be taken in the proceeding as a result of the prohibited communication.

(3) Any Board member involved in a rulemaking who knowingly receives a prohibited ex parte communication shall cause to be published in the Congressional Record a notice that such a communication has been received and a copy of the communication and of any response thereto (if written) or with a memorandum stating the substance of the communication and any response thereto (if oral). Upon order of the Board, these materials shall then be placed in the record of the rulemaking and the Board shall provide interested persons with a full opportunity to respond to the alleged prohibited ex parte communication and to address what action, if any, should be taken in the proceeding as a result of the prohibited communication.

(4) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who knowingly receives a prohibited ex parte communication and who fails to comply with the requirements of subparagraphs (1), (2), or (3) above, is subject to internal censure or discipline through the same procedures that the Board uses to address and resolve ethical issues.

(e) *Penalties and Enforcement.*

(1) When a person is alleged to have made or caused another to make a prohibited ex parte communication, the Board or the Hearing Officer (as appropriate) may issue to the person a notice to show cause, returnable within a stated period not less than seven days from the date thereof, why the Board or the Hearing Officer should not

determine that the interests of law or justice require that the person be sanctioned by, when applicable, dismissal of his or her claim or interest, the striking of his or her answer, or the imposition of some other appropriate sanction, including but not limited to the award of attorneys' fees and costs incurred in responding to a prohibited ex parte communication. Sanctions shall be commensurate with the seriousness and unreasonableness of the offense, accounting for, among other things, the advertency or inadvertency of the prohibited communication.

(2) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who knowingly makes or causes to be made a prohibited ex parte communication is subject to internal censure or discipline through the same procedures that the Board uses to address and resolve ethical issues.

§9.03 Informal Resolutions and Settlement Agreements.

(a) *Informal Resolution.* At any time before a covered employee files a claim form under section 402 of the Act, a covered employee and the employing office, on their own, may agree voluntarily and informally to resolve a dispute. Any informal resolution shall be ineffective to the extent that it purports to:

(1) constitute a waiver of a covered employee's rights under the Act; or

(2) create an obligation that is payable from the account established by section 415(a) of the Act ("Section 415(a) Treasury Account") or enforceable by the Office.

(b) *Formal Settlement Agreement.* The parties may agree formally to settle all or part of a disputed matter in accordance with section 414 of the Act. In that event, the agreement shall be in writing and submitted to the Executive Director for review and approval. The settlement is not effective until it has been approved by the Executive Director. If the Executive Director does not approve the settlement, such disapproval shall be in writing, shall set forth the grounds therefor, and shall render the settlement ineffective.

(c) *General Requirements for Formal Settlement Agreements.* A formal settlement agreement must contain the signatures of all parties or their designated representatives on the agreement document. A formal settlement agreement cannot be approved by the Executive Director until the appropriate revocation periods have expired and the employing office has fully completed and submitted the Office's Section 415(a) Account Requisition Form. A formal settlement agreement cannot be rescinded after the signatures of all parties have been affixed to the agreement, unless by written revocation of the agreement voluntarily signed by all parties, or as otherwise permitted by law. All formal settlement agreements must also:

(1) specify the amount of each payment to be made from the Section 415(a) Treasury Account;

(2) identify the portion of any payment that is subject to the reimbursement provisions of section 415(e) of the Act because it is being used to settle an alleged violation of section 201(a) or 206(a) of the Act;

(3) identify each payment that is back pay and indicate the net amount that will be paid to the employee after tax withholding and authorized deductions; and

(4) certify that, except for funds to correct alleged violations of sections 201(a)(3), 210, or 215 of the Act, only funds from the Section 415(a) Treasury Account will be used for the payment of any amount specified in the settlement agreement.

(d) *Requirements for Formal Settlement Agreements Involving Claims against Members of Congress.* If a formal settlement agreement concerns allegations against a Member of Congress subject to the payment reimbursement provisions of section 415(d) of the Act, the settlement agreement must comply with subparagraphs 9.03(c)(1), (3) and (4) of these Rules, and:

(1) specify the amount, if any, that is the "reimbursable portion" as defined by section 415(d) of the Act; and

(2) contain the signature of any individual (or the representative of any individual) who has exercised his or her right to intervene pursuant to section 414(d)(8) of the Act.

(e) *Violation of a Formal Settlement Agreement.* If a party should allege that a formal settlement agreement has been violated, the issue shall be determined by reference to the formal dispute resolution procedures of the agreement. Parties are encouraged to include in their settlements specific dispute resolution procedures. If the formal settlement agreement does not have a stipulated method for dispute resolution of an alleged violation, the Office may provide assistance in resolving the dispute, including the services of a mediator as determined by the Executive Director. When the settlement agreement does not have a stipulated method for resolving violation allegations, an allegation of a violation must be filed with the Executive Director no later than 60 days after the party to the agreement becomes aware of the alleged violation. Such allegations will be reviewed, investigated or mediated, as appropriate, by the Executive Director or designee.

§9.04 Payments Required Pursuant to Decisions, Awards, or Settlements under Section 415(a) of the Act.

(a) *In General.* Whenever an award or settlement requires the payment of funds pursuant to section 415(a) of the Act, the award or settlement must be submitted to the Executive Director together with a fully completed Section 415(a) Account Requisition Form for processing by the Office.

(b) Requesting Payments.

(1) Only an employing office under section 101 of the Act may submit a payment request from the Section 415(a) Treasury Account.

(2) Employing offices must submit requests for payments from the Section 415(a) Treasury Account on the Office's Section 415(a) Account Requisition Forms.

(c) *Duty to Cooperate.* Each employment office has a duty to cooperate with the Executive Director or his or her designee by promptly responding to any requests for information and to otherwise assist the Executive Director in providing prompt payments from the Section 415(a) Treasury Account. Failure to cooperate may be grounds for disapproval of the settlement agreement.

(d) *Back Pay.* When the award or settlement specifies a payment as back pay, the gross amount of the back pay will be paid to the employing office and the employing office will then promptly issue amounts representing back pay (and interest if authorized) to the employee and retain amounts representing withholding and deductions.

(e) *Attorney's fees.* When the award or settlement specifies a payment as attorney's fees, the attorney's fees are paid directly to the attorney from the Section 415(a) Treasury Account.

(f) *Tax Reporting and Withholding Obligations.* The Office does not report Section 415(a) Treasury Account payments as potential taxable income to the Internal Revenue Service (IRS) and is not responsible for tax withholding or reporting. To the extent that W-2 or 1099 forms need to be issued, it is the responsibility of the employing office submitting the payment request to do so. The employing office should also consult IRS regulations for guidance in reporting the amount of any back pay award as wages on a W-2 Form.

(g) *Method of Payment.* Section 415(a) Treasury Account payments are made by electronic funds transfer. The Office will issue an electronic payment to the payee's account as specified on the appropriate Section 415(a) Treasury Account form.

(h) *Reimbursement of the Section 415(a) Treasury Account.*

(1) *Members of Congress.* Section 415(d) of the Act requires Members of the House of Representatives and the Senate to reimburse the "compensatory damages" portion of a decision, award or settlement for a violation of section 201(a), 206(a), or 207 that the Member is found to have "committed personally." Within 10 days after the Executive Director is made aware that a payment of an award or settlement under this Act has been made from the Section 415(a) Treasury Account in connection with a claim alleging a violation of section 201(a) or 206(a) of the Act by a Member or Senator, the Executive Director will notify the designated Point of Contact for the Office of the Chief Administrative Officer of the House and the Office of the _____ of the Senate. After such notification, ~~R~~reimbursement shall be in accordance with the timetable and procedures established by the applicable congressional committee for the withholding of

amounts from the compensation of an individual who is a Member of the House of Representatives or a Senator.

(2) *Other Employing Offices.* Section 415(e) of the Act requires employing offices (other than an employing office of the House or Senate) to reimburse awards and settlements paid from the Section 415(a) Treasury Account in connection with claims alleging violations of section 201(a) or 206(a) of the Act.

(A) As soon as practicable after the Executive Director is made aware that a payment of an award or settlement under this Act has been made from the Section 415(a) Treasury Account in connection with a claim alleging a violation of section 201(a) or 206(a) of the Act by an employing office (other than an employing office of the House of Representatives or an employing office of the Senate), the Executive Director will notify the head of the employing office that the payment has been made. The notice will include a statement of the payment amount.

(B) Reimbursement must be made within 180 days after receipt of notice from the Executive Director, and is to be transferred to the Section 415(a) Treasury Account out of funds available for the employing office's operating expenses.

(C) The Office will notify employing offices of any outstanding receivables on a quarterly basis. Employing offices have 30 days from the date of the notification of an outstanding receivable to respond to the Office regarding the accuracy of the amounts in the notice.

(D) Receivables outstanding for more than 30 days from the date of the notification will be noted as such on the Office's public website and in the Office's annual report to Congress on awards and settlements requiring payments from the Section 415(a) Treasury Account.

(3) [reserved]

§9.05 Revocation, Amendment or Waiver of Rules.

(a) The Executive Director, subject to the approval of the Board, may revoke or amend these rules by publishing proposed changes in the Congressional Record and providing for a comment period of not less than 30 days. Following the comment period, any changes to the rules are final once they are published in the Congressional Record.

(b) The Board or a Hearing Officer may waive a procedural rule in an individual case for good cause shown if application of the rule is not required by law.

§9.06 Notices.

(a) All employing offices are required to post and keep posted the notice provided by the Office that:

(1) describes the rights, protections, and procedures applicable to covered employees of the employing office under this Act, concerning violations described in 2 U.S.C. § 1362(b); and

(2) includes contact information for the Office.

(b) The notice must be displayed in all premises of the covered employer in conspicuous places where notices to applicants and employees are customarily posted.

§9.07 Training and Education Programs.

(a) Not later than 180 days after the date of the enactment of the Reform Act, June 19, 2019, and not later than 45 days after the beginning of each Congress (beginning with the 117th Congress), each employing office shall submit a report both to the Committee on House Administration of the House of Representatives and the Committee on Rules and Administration of the Senate on the implementation of the training and education program required under section 438(a) of the Act.

(b) *Exception for Offices of Congress.*—This section does not apply to any employing office of the House of Representatives or any employing office of the Senate.