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Via Facsimile and First-Class U.S. Mail
Susan Tsui Grundmann
Executive Director
Office of Congressional Workplace Rights
110 Second Street, S.E.
Room LA-200
Washington, DC 20540

Re: Comments on Notice of Proposed Rulemaking to amend the Procedural Rules of the Office of Congressional Workplace Rights

Dear Ms. Grundmann:

The Office of House Employment Counsel ("OHEC") submits the following comments in response to the Notice of Proposed Rulemaking and Request for Comments from Interested Parties ("NPRM") issued by the Executive Director of the Office of Congressional Workplace Rights ("OCWR") on April 9, 2019.[1] As requested in the NPRM, these comments provide OHEC's views on the changes to the Procedural Rules proposed by the OCWR to implement new provisions of Congressional Accountability Act, as amended by the Congressional Accountability Act Reform Act ("CAA" and "CAARA," respectively).

OHEC's comments are generally applicable to all OCWR proceedings. In several places, however, we highlight unique circumstances that apply to matters involving employing offices of the U.S. House of Representatives ("House"), including the expanded reimbursement requirement applicable to certain CAA claims under House Rules. Accordingly, several of our comments offer feedback that is specific to the House.

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[1] The NPRM was published in the Congressional Record on April 9, 2019. 161 CONG. REC. H3200 (daily ed. April 9, 2019). A slightly different version of the proposed Procedural Rules appears on the OCWR's website. This second version appears to correct a few technical errors that appeared in the version published in the Congressional Record (e.g., the now-defunct Office of Technology Assessment has been removed from Procedural Rule § 1.02(m)).

I. General Comments

A. OCWR should affirm the continuing applicability of existing OCWR precedent on procedural matters.

Because procedural rules cannot anticipate every aspect of every situation, we believe that it would be helpful to affirm that – unless otherwise required by the amended Procedural Rules, the amended CAA, or another legal authority – the interpretation and application of the Procedural Rules will continue to be governed by existing OCWR precedent, which has traditionally looked to the Federal Rules of Civil Procedure for guidance on procedural matters. *See, e.g.*, *U.S. Capitol Police v. FOP/U.S. Capitol Police Labor Comm. Lodge No. 1*, No. 15-LMR-02 (CA), 2016 WL 5943737, at *3 (OCWR Sept. 27, 2016) (relying on the pleading standards of the Federal Rules of Civil Procedure, as well as federal cases applying those standards, to determine whether a motion to dismiss a complaint was properly granted by a hearing officer). Such clarifying language will assist parties and hearing officers in resolving the array of procedural issues that inevitably arise during litigation.

B. The rights and duties of intervenor Members in OCWR proceedings should be more clearly delineated.

Although OHEC does not represent Members in their personal capacity, we are concerned that the rights and duties of intervenor Members in OCWR proceedings have not been clearly delineated in the proposed Procedural Rules. To be sure, the term "party" is defined in proposed Procedural Rule § 1.02(ff)(5) as including an intervenor Member. Elsewhere in the Procedural Rules, however, the term "party" is occasionally qualified as expressly including an intervenor Member, while other times no such qualification is made. *Compare* proposed Procedural Rule § 4.07(i) ("The parties, including an intervenor Member, may elect to participate in mediation proceedings through a designated representative. . . ."), *with* proposed Procedural Rule § 4.10(b) ("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.").

We believe that this lack of consistency is likely to create procedural disputes that will inevitably impede the proceedings. In the summary judgment rule just cited, for instance, it is not clear whether an intervenor Member has the right to move for or oppose a motion for summary judgment and, if so, whether this right is limited in any way (e.g., to matters pertaining to the CAARA's new reimbursement requirement). To avoid confusion over such questions, we believe that the term "party" should be expressly qualified whenever a rule creates a right or duty for an intervenor Member. Alternatively, intervenor Members should be expressly given all the rights and duties of a party unless otherwise stated in the Procedural Rules.

C. OHEC declines to comment on the proposed process for making payments pursuant to section 415 of the CAA.

Proposed Procedural Rule § 9.04 contemplates that employing offices will now become actively involved in the process of making payments required by decisions, awards, or

settlements pursuant to section 415 of the CAA, as amended by the CAARA (e.g., by making tax withholdings from certain payments).[2] In the House, however, finances are administered by the Office of the Chief Administrative Officer ("CAO"), which operates under the oversight of the Committee on House Administration ("CHA"). OHEC plays no role in the administration of House finances, nor do we have a mandate to provide legal advice on appropriations matters. Therefore, OHEC defers to the CAO and CHA regarding any comments on suggested revisions to proposed Procedural Rule § 9.04.

II. Specific Comments

§ 1.02 Definitions.

1.02(d): The term "claim" is defined to mean the factual allegations that a claimant contends constitute "a violation" of the CAA. However, a claimant's factual allegations may allege more than one "violation" or "claim" as those terms have traditionally been used in OCWR and federal practice. *Cf.* section 111(a) of the CAARA, amending section 415(d)(1)(D) of the CAA (recognizing that a single award, decision, or settlement may involve "multiple claims"). Therefore, to avoid confusion, we suggest clarifying this section as follows: "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. *When multiple violations are alleged by a claimant in a single proceeding, each alleged violation may also be referred to as a 'claim.'*" (Proposed alteration emphasized). We believe that this clarification will assist claimants who may not understand the consequences of failing to litigate related violations/claims in the same proceeding under the doctrine of res judicata.

1.02(e): We suggest jettisoning the term "claim form" and using the traditional term "complaint," which has a well-established meaning in OCWR and federal practice. Alternatively, the definition of "claim form" should be amended as follows: "The 'claim form' also may be referred to as 'the documented claim' *or 'the complaint.'*" (Proposed alteration emphasized). The OCWR should also expressly state that the adoption of the term "claim form" is technical in nature and that no substantive change to existing pleading standards is intended.

1.02(aa): OHEC recognizes that the proposed definition of "intern" tracks the language of the CAARA, but we foresee confusion arising because this term has a different meaning under the OCWR's Fair Labor Standards Act Regulations (*see* § H501.102(h)). We suggest harmonizing these definitions to the extent practicable or, alternatively, noting here that "intern" has a different definition for purposes of section 203 of the CAA.

1.02(ff)(5): We suggest three revisions to this section. *First*, the provision of the CAARA that guarantees individual Members the right to intervene in certain proceedings should be expressly referenced to clarify when intervention is appropriate. *See* section 111(a) of the

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[2] This rule also proposes procedures for implementing the CAARA's new reimbursement requirements. Because OHEC does not represent Members in their individual capacity, we decline to comment on the proposed reimbursement procedures.

CAARA, amending section 415(d)(8) of the CAA. *Second*, OHEC notes that Members of the House are currently subject to a reimbursement requirement under House Rules that is more expansive than CAARA's reimbursement requirement. *See* H. Res. 6, § 103(r) (requiring reimbursement for certain alleged violations without limiting this requirement to "harassment" claims only). Accordingly, proposed Procedural Rule § 1.02(ff)(5) should expressly affirm the intervention rights of House Member who are subject to this expanded reimbursement requirement. *Third*, the language proposed in this section appears to contemplate situations in which (i) an "individual" – who apparently may not be a current or former Member – and/or (ii) an "office . . . or organization" may intervene in a confidential OCWR proceeding. OHEC seeks clarification regarding the circumstances when such non-parties may be entitled to intervention of right and/or permissive intervention. Moreover, to the extent there may be a legitimate need to provide for intervention in these cases, one simple solution would be to adopt the standards set forth in Rule 24 of the Federal Rules of Civil Procedure, with appropriate safeguards added to protect the confidential nature of OCWR proceedings and the identity of the parties. *See also* OHEC's specific comments on proposed Procedural Rules §§ 1.07(a), 4.06(c), and 4.07(b) and (d).

§ 1.03 Filing and Computation of Time.

1.03(a)(4): The OCWR should automatically provide an electronic receipt notice to filers who submit documents via email. This notice could easily be provided by permanently enabling Outlook's "Automatic Replies (out of office)" feature on the ocwrefile@ocwr.gov and OSH@ocwr.gov accounts. Taking a simple step like this will give filers certainty that their documents have been successfully transmitted and thus obviate the need to call OCWR each time a document is emailed (a particular concern in litigation because large files must often be attached to filings, many email accounts have file size limitations, and parties may now make filings as late as 11:59 p.m. on the filing due date).

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

1.05(a): The language proposed here is similar to Rule 11 of the Federal Rules of Civil Procedure. We are concerned, however, that it does not account for the limited ability of respondents to investigate allegations due to the compressed timeframe of OCWR proceedings. Indeed, while government defendants have 60 days to file an answer in federal court, proposed Procedural Rule § 4.09(d) gives respondents just 10 days to answer after a request for an administrative hearing has been filed. To account for these differences between OCWR and federal practice, we believe that this rule should be amended as follows: ". . . that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry *within the time available* . . . ." (Proposed alteration emphasized). *See also* OHEC's specific comment on proposed Procedural Rules §§ 4.09(d) and 7.02.

§ 1.07 Designation of Representative.

1.07(a): OHEC should be identified as the designated representative for all House employing offices unless an alternative designation is filed with the OCWR. *Cf.* 2 U.S.C.

§ 1408(d). We also believe that the OCWR should establish a mechanism for Members and Committees to designate a representative even when a CAA claim is not pending. This step is needed because the Procedural Rules do not identity a specific process for notifying Members who may be entitled to intervene in an OCWR proceeding under section 402(b)(2) of the CAA, as amended by section 102(a) of the CAARA. In the absence of a designated representative, we anticipate the OCWR will face a number of practical problems when attempting to provide such intervention notifications (e.g., the use of U.S. mail, hand delivery, and/or email may compromise confidentiality and inadvertently expose the identity of a claimant because many Members routinely have non-managerial staff review their House mail, deliveries, and/or email accounts).

One solution would be to encourage Members to inform the OCWR of their designated representative at the beginning of each Congress (as well as shortly after they are sworn in). Many Members, however, may choose not to engage a representative until after they become aware that a CAA case is pending. Therefore, this rule could also be revised to provide that – in the absence of an alternate designation from a Member – CHA has the discretion to designate OHEC as the representative of Members of the House for the sole purpose of accepting intervention notifications.[3] Revising this rule in this manner would provide Members and other stakeholders greater flexibility as they adjust to the new requirements of the CAARA. *See also* OHEC's specific comment on proposed Procedural Rules §§ 1.02(ff), 4.06(c), and 4.07(b) and (d).

§ 1.08 Confidentiality.

1.08(d): The first sentence should be amended to reflect that confidentiality applies throughout the proceeding. In addition, this section should clarify that additional exceptions to the CAA's confidentiality requirements may apply when required by law and in other unique circumstances. Therefore, we recommend revising this section as follows:

> Nothing in these Rules prohibits a party or its representative from disclosing information obtained in mediation, *discovery*, hearings, *or any related proceeding* when reasonably necessary to investigate claims, ensure compliance with the Act, or prepare its prosecution or defense. *Such information may also be disclosed by a party or representative in certain other limited circumstances, including when required by law, compelled by legal process, or requested in conjunction with a criminal or security clearance investigation by an entity of relevant jurisdiction.*" (Proposed alteration emphasized).

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[3] To be clear, we do not believe that OHEC may assume this duty without authorization from CHA. For this reason, we recommend that our proposed change to this rule be made using permissive language rather than mandatory language.

§ 4.03 Confidential Advising Services.

4.03(a): Subsection (1) should provide that Confidential Advisors, in addition to being barred from serving as mediators, may not serve as a hearing officer in any OCWR proceeding. Subsection (2) should provide that the restriction on Confidential Advisors acting as a covered employee's designated representative also applies to any lawyer with whom the Confidential Advisor is associated in a firm. *See, e.g.*, D.C. Rule of Professional Conduct 1.10.

4.03(c): The OCWR should explain what oversight, if any, it will exercise over Confidential Advisors, particularly in cases where there are allegations of improper conduct.

4.03(d): Although this section states that Confidential Advisors are not an employee's legal representative, the reality is that Confidential Advisors will provide legal services to claimants. Therefore, this section should clarify that Confidential Advisors are subject to the same rules of professional conduct that apply in the context of an attorney-client relationship, including all such rules that pertain to the attorney-client privilege.

On a related note, OHEC is concerned that this section expressly permits Confidential Advisors to destroy records without any concrete limitations. This is problematic for several reasons. For example, if a claimant provides documents to a Confidential Advisor that belong to a respondent and/or were obtained without authorization, the Confidential Advisor may have a legal obligation to return those documents to their owner. Similarly, although communications between a claimant and a Confidential Advisor may generally be privileged, a claimant can waive this privilege in certain circumstances, in which case records that reflect those communications would no longer be privileged from discovery. For these reasons, we believe that Confidential Advisors should be required to maintain all potentially discoverable records at least until a final disposition of the claim occurs.

§ 4.04 Claims.

4.04(c): The form and contents of the claim form should expressly be made subject to the pleading standards of the Federal Rules of Civil Procedure as interpreted by the Board and federal courts (particularly the pertinent provisions of Rules 8 and 12). *See, e.g.*, *Williams v. Office of the Architect of the Capitol*, Nos. 14-AC-11 (CV, RP), 14-AC-48 (CV, RP), 15-AC-21 (CV, RP), 2017 WL 5635714, at *7 (OCWR Nov. 17, 2017) (applying these pleading standards, and expressly relying on, *inter alia*, the holdings of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)); *U.S. Capitol Police*, 2016 WL 5943737, at *3 (applying the same pleading standards). That Congress intended to preserve the existing pleadings standards is reflected in the language used in the pertinent CAARA provision, which is substantively identical to Rule 12(b)(6) of the Federal Rules of Civil Procedure. *Compare* section 103(a) of the CAARA, amending section 403(b)(6) of the CAA (providing that the Preliminary Hearing Officer's review shall assess whether the claimant "has stated a claim for which, if the allegations contained in the claims are true, relief may be granted"), *with* Fed. R. Civ. P. 12(b)(6) (providing that a court should dismiss a claim for "failure to state a claim upon which relief can be granted").

Moreover, as a practical matter, creating clear pleading standards will assist claimants in drafting their claim forms, ensure that respondents are put on sufficient notice of the allegations against them, and give Preliminary Hearing Officers a chance to conduct a meaningful review of claims as required by section 103(a) of the CAARA. For all these reasons, sections 4.04(c)(4)-(6) of this rule should also specifically require claimants to describe the "factual bases" of the conduct being alleged, the "factual bases" of why the claimant believes this conduct constitutes an actionable CAA violation, and the "factual bases" of why the requested remedy or relief is warranted.

Draft claim form: After the NPRM was issued, the OCWR provided OHEC with a draft of its proposed claim form. In addition to addressing any relevant points made above, OHEC recommends that the following revisions be made to the draft claim form:

- In section A (p. 3), the claimant should be required to identify the "Names & Titles of *the Individuals* Involved in the Alleged Conduct." (Proposed alteration emphasized). This change will make it clear that the claimant should identity all individuals involved in the alleged conduct, not just "officials." In addition, because the claim form is a pleading to which a respondent must answer, the question in this section asking claimants how they learned about the OCWR should be stricken.

- In sections B and D (pp. 3 and 4), the claimant should be given detailed instructions, consistent with the appropriate pleading standards, regarding how to draft the statement of the conduct being alleged and why the claimant believes that the challenged conduct is a violation of the CAA. These instructions should specifically require the claimant to identify the factual bases of their allegations, and the claimant should be required to submit the responses in a separate document with numbered paragraphs. The claimant should also be instructed that, if more than one violation/claim is asserted, each such violation/claim must be separately identified and described. *See also* OHEC's specific comments regarding proposed Procedural Rule §§ 1.02(d) and (e) above.

- Section C (p. 4) should be revised so that the claim form can serve as a useful guide to the OCWR, the parties, and hearing officers in determining whether a reimbursable violation has been alleged. This will ensure that Members are able to intervene at the earliest possible juncture of the proceeding, which, in turn, will assist the parties and their representatives in litigating the matter efficiently.

  To that end, we suggest that, for each protected characteristic listed under the subsection addressing violations of section 201 of the CAA, the claimant should be asked the following: (i) whether the alleged violation includes an allegation of harassment; and (ii) whether the alleged violation was committed personally by an individual who, at the time of the alleged violation, was a Member of Congress

(including a Delegate or Resident Commissioner to the Congress).[4] The same questions should be asked under the subsection addressing section 206 violations. The subsection addressing section 207 violations should also be revised to ask whether the retaliation was personally committed by a Member (thus making it a potentially reimbursable violation).

Because the facts required to answer these questions may not always be known during the early stage of a proceeding, the claim form should permit the claimant to answer these questions with a "yes," "no," or "unknown."

§ 4.05 Right to File a Civil Action.

4.05(a): Because filing the claim form is a jurisdictional prerequisite to filing a civil action in federal court, subsection (1) should be revised as follows: ". . . has timely filed a claim, *by properly completing the seven items on the claim form*, as provided in section 402 of the Act." (Proposed alteration emphasized).

4.05(b): To avoid confusion, this section should clarify that the period for filing a civil action may be modified pursuant to section 401(b)(4) of the CAA, as amended by section 101(a) of the CAARA.

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

4.06(c): This section should provide that Members of the House or their designated representatives will receive intervention notifications in cases where the expanded reimbursement requirement applicable under House Rules has been triggered. *See also* OHEC's comments on proposed Procedural Rule §§ 1.02(ff), 1.07(a), and 4.07(b) and (d).

§ 4.07 Mediation.

4.07(a): The first sentence should be modified as follows: "Mediation is a process by which *covered* employees . . . ." (Proposed alteration emphasized).

4.07(b) and (d): These sections should be revised to ensure that Members subject to the expanded reimbursement requirement under House Rules receive mediation notices. *See also* OHEC's comments on proposed Procedural Rules §§ 1.02(ff), 1.07(a), and 4.06(c).

4.07(c): The comma that appears at the end of the second sentence should be replaced with a period.

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[4] The phrasing of these questions should be consistent with the expanded reimbursement requirement applicable under House Rules. See also OHEC's specific comments regarding Proposed Procedural Rules §§ 1.02(ff), 1.07(a), 4.06(c), and 4.07(b) and (d).

4.07(m): To ensure that any alleged confidentiality violation is addressed in mediation, this section should be revised as follows: "An alleged violation of the confidentiality provisions *shall* be made by a party in mediation to the mediator during the mediation period . . . ." (Proposed alteration emphasized).

4.07(n): This section should clarify that additional exceptions to the confidentiality of mediation may apply, including when the alleged CAA violation is based on an informal resolution of a dispute previously reached by the parties at mediation pursuant to Procedural Rule § 9.02(a). For example, if a personnel action is agreed to during the mediation process, but later challenged by either party as violating the CAA, the parties should be able to disclose the underlying mediation discussion(s) that resulted in the personnel action.

§ 4.08 Preliminary Review of Claims.

4.08(a): The qualifications of a Preliminary Hearing Officer should be specified, and the parties should be promptly notified when a Preliminary Hearing Officer is appointed.

4.08(c): To ensure that the preliminary review is meaningful as envisioned by the CAARA and that all parties have an opportunity to contribute to this process, respondents and intervenor Members should be permitted, in their discretion, to submit a motion, brief, or position statement that addresses the matters described in this section. This document should be due no earlier than 15 days after a claim form is received by the respondent and/or an intervention notification is received by a Member, and any such document submitted by a party should be subject to the CAA's confidentiality requirements. In addition, this section should be revised to indicate the appropriate pleading standards applicable to claim forms as follows: "In making these assessments, the Preliminary Hearing Officer shall be guided by Board precedent and the pleading standards of the Federal Rules of Civil Procedure." *See also* OHEC's general comment at I.A and specific comment on proposed Procedural Rule § 4.04(c).

4.08(f): In enacting the CAARA, Congress did not show any intent to abrogate the CAA's election-of-proceeding rule to permit the bifurcation of violations/claims arising from the same dispute in multiple fora. Therefore, this section should clarify that, when a "claim" as defined by the Procedural Rules involves multiple violations/claims, some of which survive the preliminary review and some of which do not, the claimant may elect to proceed as follows: (i) request an OCWR hearing on any violations/claims that have survived the preliminary review and abandon those claims that have not; or (ii) file a civil action in federal court. This section should further clarify that the claimant's election of proceedings is a binary choice. In other words, if a CAA "claim" involves multiple violations/claims, these violations/claims must be litigated either before the OCWR or in federal court (but not in both). *See, e.g.*, section 101(a) of the CAARA, amending section 401(b)(1) of the CAA (providing that "[o]nly a covered employee . . . who has *not submitted a request for a hearing on the claim* . . . may . . . file a civil action in a District Court of the United States with respect to the violation alleged in the claim") (emphasis added); section 103(a) of the CAARA, amending section 403(d) of the CAA (providing that, if the preliminary review results in a determination "that the individual filing the claim is not a covered employee or has not stated a claim for which relief may be granted," then

the individual "may not obtain a formal hearing with respect to the claim as provided under section 405").[5]

For the same reasons, this section must instruct claimants that their decision to proceed on a "claim" through the OCWR process automatically waives their ability to file a civil action with respect to any violations/claims that the Preliminary Hearing Officer has determined to be without merit. Making this point explicit will prevent the undue prejudice that respondents will face if they are required to defend multiple legal actions arising from the same dispute (not to mention the myriad res judicata and collateral estoppel issues this will inevitably create for courts and hearing officers). Claimants must also be forewarned that choosing to proceed with the OCWR process in these circumstances will result in a waiver of their ability to file a civil action on any violations/claims that have been dismissed by a Preliminary Hearing Officer. *See also* OHEC's specific comments on proposed Procedural Rule §§ 1.02(d) and (e).

Finally, subsection (1)(B) should be modified to ensure that "respondent(s) and intervenor Members" also receive the written notice of the claimant's right to file a civil action.

§ 4.09 Request for Administrative Hearing.

4.09(b)(1): Consistent with section 103(a) of the CAARA, amending section 403(d) of the CAA, this section should be revised as follows: ". . . . includes the determination that the individual filing the claim is not a covered employee *or* has *not* stated a claim. . . ." (Proposed alteration emphasized).

4.09(d): Consistent with the current rule, subsection (1) should be amended to give respondents 15 days to file an answer to the claim form, and this deadline should be calculated from the date that the respondent receives notice of the request for an administrative hearing. The filing of a motion to dismiss should also stay the time period for filing the answer. These changes will ensure that respondents have adequate time to investigate the allegations, prepare their pleadings, and not be burdened by responding to alleged violations/claims that are frivolous in nature and subject to dismissal. *See also* OHEC's specific comments on proposed Procedural Rules §§ 1.05, 5.01(f), and 7.02.

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[5] To the extent the CAARA is arguably ambiguous on any of these procedural points, OHEC notes that Congress has expressly delegated authority to promulgate procedural rules to the OCWR, whose interpretation of the CAA is subject to deference. *See* 2 U.S.C. § 1383. *Cf. King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (affirming general rule that, when an agency-administered statute is ambiguous, the "statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps," especially when, as here, Congress has expressly delegated such rulemaking authority to the agency) (citations and quotations omitted). Proceeding with an interpretation that creates the potential for multiple legal actions pending at the same time in multiple fora and that arise out of the same facts is an inefficient use of judicial and administrative resources.

In subsection (2), the following sentence should be added: "A respondent that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial." *Cf.* Fed. R. Civ. P. 8(b)(5). Subsection (2) should further clarify that, if an allegation pertains to a violation/claim that the Preliminary Hearing Officer has dismissed and is not otherwise relevant to the remaining violations/claims, the respondent is not required to admit or deny the allegation.

§ 4.10 Summary Judgment and Withdrawal of Claims.

4.10(a): This sentence should be modified as follows: "If a claimant fails to proceed with a claim, *including a failure to participate in discovery*, the Merits Hearing Officer may dismiss the claim with prejudice." (Proposed alteration emphasized).

4.10(b): This section implies that a motion to dismiss cannot be granted unless the parties first engage in discovery.[6] In many cases, however, a motion to dismiss will dispose of all or portions of a claim, thus narrowing the scope of discovery and any subsequent hearing that may be required. To ensure that this tool of judicial economy continues to be available, this section should include the same rules for dismissing claims and granting summary judgment that apply in actions initiated by the General Counsel. *See* proposed Procedural Rule § 5.03(a)-(d). Alternatively, this section should be revised to clarify that a Merits Hearing Officer may dismiss all or portions of a claim, without first requiring discovery on the claim, if the claim is frivolous, fails to state a claim upon which relief may be granted, or fails to comply the applicable time limits or other requirements under the CAA or the Procedural Rules.

4.10(d): The following clarifying language should be added to the end of the second sentence: ". . . provided that any refiled claim complies with the applicable time limits and other requirements under the Act and these Rules."

§ 4.11 Confidentiality.

This section should be revised to address the concerns discussed in OHEC's specific comment on proposed Procedural Rule § 1.08(d).

§ 5.01 Complaints.

5.01(f): Consistent with OHEC's specific comment on proposed Procedural Rule § 4.09(d), this section should be amended to give respondents 15 days to file the answer, and the respondent's ability to answer that it lacks knowledge or information sufficient to form a belief about the truth of particular allegations should be affirmed.

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[6] This concern may be relieved in part if the provisions of the Procedural Rules governing the preliminary review period are revised to give respondents a meaningful opportunity to participate in the process. See OHEC's specific comment on proposed Procedural Rule § 4.08(c).

§ 6.01 Discovery.

6.01(a): The language regarding the availability and scope of discovery should be revised to reflect the current standards under Rule 26(b) of the Federal Rules of Civil Procedure, which provides, in pertinent part: "Parties may obtain discovery regarding any nonprivileged 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." (Emphasis added).

6.01(c): The Merits Hearing Officer should be given discretion to stay discovery pending the resolution of any pending dispositive motion. This section should also be revised to clarify that discovery shall not be permitted on any claim or portion of a claim that is frivolous, that fails to state a claim upon which relief may be granted, or that fails to comply with the time limits and other requirements applicable under the CAA and the Procedural Rules. *See also* OHEC's specific comment on proposed Procedural Rule § 4.10(b).

Additionally, under subsection (1), the phrase "deposition taken from the claimant" should be changed to "deposition taken of the claimant." Under subsection (2), the following guidance should be added: "In general, each party, including an intervenor Member, shall be permitted to issue up to 20 interrogatories (including subparts) and 20 requests for production to the other party, and to notice and take depositions of opposing parties (including any relevant witnesses under the control of such party). Absent extraordinary circumstances, a party shall be provided at least 21 days to respond to interrogatories or document requests, and parties shall give at least 14 days advance notice of depositions." The following should also be added to subsection (3): "In determining whether to quash any discovery, the Merits Hearing Officer shall be guided by the scope of discovery permitted under section 6.01(a) of these Rules."

6.01(c)(3): We propose adding a new subsection affirming the following limitation on discovery: "Nothing in these Rules shall be interpreted to require a respondent or Member to reveal or produce any information protected from disclosure by the Speech or Debate Clause of the United States Constitution."

§ 7.01 The Merits Hearing Officer.

This section should specify the qualifications of a Merits Hearing Officer. *See also* OHEC's specific comment on proposed Procedural Rule § 4.08(a).

§ 7.02 Sanctions.

This section should be revised to address the concerns discussed in OHEC's specific comment on proposed Procedural Rule § 1.05.

§ 7.05 Scheduling the Hearing.

Due to the compressed timeframe of OCWR proceedings – and consistent with existing OCWR practice – this section should expressly affirm that a Merits Hearing Officer has authority to open a hearing and stay proceedings pending the resolution of dispositive motions and other pretrial matters. The Merits Hearing Officer should also be permitted to open and stay proceedings for a reasonable amount of time when jointly requested by the parties. These changes will ensure that the hearing remains focused on material factual matters that are subject to genuine dispute, rather than violations/claims that can be readily resolved as a matter of law.

To implement these changes, we propose adding a new section (c) to this rule that provides as follows: "If a motion for summary judgment is filed, the Merits Hearing Officer shall formally open the hearing for purposes of setting a briefing schedule on the motion. The Merit Hearing Officer shall not require the parties to present their cases and evidence at hearing until after the summary judgment motion is fully briefed and the Merit Hearing Officer has issued a written decision on the motion, which decision shall set forth the factual and legal bases for the Merit Hearing Officer's decision. The Merits Hearing Officer also has discretion to formally open a hearing and stay proceedings for the purpose of resolving any other pending pretrial matter or when jointly requested by the parties."

§ 7.07 Conduct of Hearing; Disqualifying a Representative.

7.07(f): We do not understand why a claimant may be excused from attending a hearing if his or her representative appears, but the respondent apparently cannot. We also believe that additional allowances should be made for intervenor Members, whose presence throughout the duration of a hearing may not be necessary and, in some cases, may actually impede the progress of the hearing due to the Member's need to fulfill his or her constitutional duties. Accordingly, this section should be revised as follows: "At the Merits Hearing Officer's discretion, the hearing also may be held without a *party* if *the party's* representative is present. *Unless called to testify as a witness, an intervenor Member shall be permitted, but not required, to attend the hearing either in person or through the presence of a representative.*" (Proposed alteration emphasized).

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

7.16(c): This section should be revised to reflect the expanded reimbursement requirement applicable to Members under House Rules. *See* OHEC's specific comment on proposed Procedural Rule § 1.02(ff)(5). To implement this change, we suggest adding the following after the first reference to section 415 of the CAA: ". . . or that is subject to reimbursement under any applicable House Rule." Then, after each subsequent reference to section 415 of the CAA, the following language may be added: "or applicable House Rule."

§ 9.03 Informal Resolutions and Settlement Agreements.

9.03(c): The reference to section *415(e)* of the CAA appears to be in error because reimbursable violations/claims are defined in section *415(d)* of the CAA, as amended by section 111 of the CAARA. In addition, although this rule correctly states that certain section 201 and 206 claims are reimbursable under the CAARA, it does not mention that certain section 207 claims are also subject to the new reimbursement requirement. Accordingly, this rule should be revised to address these issues, as well as to reflect the expanded reimbursement requirement applicable to Members under House Rules. *See* OHEC's specific comment on proposed Procedural Rule § 1.02(ff)(5).

9.03(d): This rule should be revised to reflect the expanded reimbursement requirement applicable to Members under House Rules. *See* OHEC's specific comment on proposed Procedural Rule § 1.02(ff)(5). To implement this change, the following should be added after the statutory reference in subsection (1): ". . . or any applicable House Rule." The following should also be added after the statutory reference in subsection (2): "or these Rules."

Thank you for your consideration of these comments to the NPRM.

Sincerely,

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