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ONE HUNDRED SIXTEENTH CONGRESS

U.S. House of Representatives

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May 10, 2019

Susan Tsui Grundmann, Executive Director
Office of Congressional Workplace Rights
110 2nd St. SE, Room LA-200
Washington, D.C. 20540-1000

Re: Comments Regarding Proposed Procedural Rules and CAA Reform Act Implementation

Dear Ms. Grundmann:

The Committee on Ethics ("Committee") submits the following comments to the Executive Director of the Office of Congressional Workplace Rights ("OCWR") in response to the Proposed Rules published in the Congressional Record on April 9, 2019 (the "Proposed Rules").[1]

The Committee commends OCWR for working to promptly implement changes mandated by the recent reforms to the Congressional Accountability Act ("CAA," or the "Act"). As the Committee stated in the 115th Congress when calling for passage of the CAA Reform Act, the Committee takes allegations of sexual harassment, discrimination and other violations of workplace rights extremely seriously. As amended by the Reform Act, the CAA seeks to ensure that the Committee receives information regarding allegations of harassment and reprisal by current Members and senior staff. The changes to the CAA reflect Congress's recognition that the Committee plays an essential role in holding Members and staff accountable for violations of workplace rights.

Many of the procedural regulations proposed by OCWR further the goals of accountability and transparency that are at the heart of the amended CAA. However, some of the Proposed Rules may detract from those goals. To the extent any of the Proposed Rules would prevent or inhibit the Committee from obtaining the information it needs to investigate alleged violations of workplace rights and other misconduct by current House Members and staff, the Committee urges OCWR to revise such rules.

The Committee also recognizes that there are certain gaps created by the Act that are best addressed by clarifying regulations from OCWR.[2] With new procedures inevitably comes new potential for bad actors to find unintended loopholes or otherwise abuse the process. OCWR is well positioned to prevent such abuse by adopting procedural regulations that ensure the goals of

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[1] 165 CONG. REC. H3200-3214 (daily ed. Apr. 9, 2019).

[2] *See Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 709 (D.C. Cir. 2009) (noting that ambiguities in the Act "could be filled by [OCWR's] rules of procedure.").

the CAA Reform Act are served where the Act creates gaps or ambiguities that could otherwise be exploited.

The Committee urges OCWR to consider the following comments on specific provisions of the Proposed Rules:

I. Proposed Rules 1.08, 4.11 & 7.12 (Confidentiality)

Proposed Rules 1.08, 4.11 and 7.12 relate to confidentiality requirements under the Act. Under the Act, the mediation proceedings are "strictly confidential," and other OCWR proceedings are generally "confidential." There are however, several specified exceptions to those confidentiality requirements. Furthermore, under Section 503, the Act specifies that the House and Senate Ethics committees "retain full power, in accordance with the authority provided to them by the Senate and the House, with respect to the discipline of Members, officers, and employees for violating rules of the Senate and the House on nondiscrimination in employment."[3] OCWR should add language to the Proposed Rules, consistent with Section 503 of the Act, to note that:

> *Nothing in these Rules should be construed to prohibit OCWR from providing any information to the House or Senate Ethics Committees pursuant to a duly authorized subpoena or otherwise requested in accordance with the authority provided to them by the Senate and the House, with respect to the discipline of Members, officers, and employees for violating rules of the Senate and the House on nondiscrimination in employment.*

This provision would help clarify that OCWR is not restricted from cooperating with the Committee's investigations.[4] Such a rule would also be consistent with court rulings clarifying

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[3] 2 U.S.C. § 1433.

[4] The Committee has consistently asserted that, to effectuate its constitutional and statutory authority, it is essential that OCWR provide all records in its possession relating to misconduct by any current Member, officer, or employee of the House, when requested by the Committee. *See* Letter from Committee on Ethics to Susan Grundmann (Dec. 1, 2017), *available at* https://ethics.house.gov/sites/ethics.house.gov/files/20171201%20COE%20to%20OOC.pdf. You have previously indicated, both in writing and in oral testimony before the Committee on House Administration, that your office interpreted the CAA to prohibit it from providing any information to the Committee except in a limited set of circumstances. However, in a December 11, 2017, letter to the Committee, you clarified your previous response to state that it remained "unclear" in your view "whether, and if so, under what conditions [OCWR] can disclose records from confidential records when the allegations were litigated and found to be meritless." *See* Letter from Susan Grundmann to Committee on Ethics (Dec. 11, 2017). Whether allegations of misconduct are "meritless" in the eyes of the Committee, however, has little to do with whether the allegations were successfully litigated under the CAA. The Committee's mandate is broader and more fundamental, and as the Committee has asserted previously, it believes that any interpretation of the CAA's confidentiality provisions that restricts the Committee's access to the information it needs to fulfill that mandate is overly narrow. By adopting the Committee's proposed language in its procedural rules, OCWR can remedy the "lack of clarity" that has previously prevented it from fully cooperating with the Committee.

that the confidentiality provisions of the Act are not a shield against lawfully compelled disclosure.[5]

Proposed Rule 1.08 also contains language, at part (c), purporting to prohibit any *participant* in OCWR proceedings from disclosing written or oral communications that occur during the OCWR proceedings. "Participant" is defined at part (b) to include any individual or entity that takes part in the proceedings, including witnesses. The only exceptions explicitly identified are when disclosure is "reasonably necessary to investigate claims, ensure compliance with the Act, or prepare its prosecution or defense." Part (d) notes that these Rules do not prohibit OCWR from providing information to the Senate or the House as required by the Act, but is silent on the ability of the participants to provide information to the Ethics committees. Section 402(a)(3)(B) of the Act, as amended, makes clear that filing a claim with OCWR should not be construed "to limit the ability of a covered [House] employee to refer information regarding an alleged violation of part A of title II to the Committee on Ethics . . . ."[6] The Reform Act reflects a clear intent that the Ethics committees further investigate certain claims that are the subject of OCWR proceedings, *see* Section 416(d), and that notwithstanding any provision of the Act, the Ethics committees retain their authority to investigate allegations relating to the rules of the Senate and House on nondiscrimination in employment, *see* Section 503.[7] In order to accomplish that mandate, the Ethics committees must be able to question relevant parties and witnesses. Nor can participants be prohibited from reporting misconduct that occurs during the proceedings to the Ethics committees. OCWR proceedings cannot be a black box where the Code of Official Conduct does not apply. Accordingly, the Committee requests the following language be added to the end of Proposed Rule 1.08(d): "*, nor do they preclude participants from providing information to the Senate Select Committee on Ethics or House Committee on Ethics.*"

OCWR should also add a provision to Proposed Rule 1.08 mirroring the language of Section 416(f) of the Act, providing that "*nothing in this section may be construed to prohibit a covered employee from disclosing the factual allegations underlying the covered employee's claim, or to prohibit an employing office from disclosing the factual allegations underlying the employing office's defense to the claim.*"

II. Proposed Rule 4.03 (Confidential Advising Services)

Proposed Rule 4.03(c)(5) tracks the language of Section 302(d)(2)(B)(v) of the Act, and states that the Confidential Advisor designated to assist a claimant will help inform a covered employee who has been subject to a practice that may be a violation of federal employment laws about the "option of pursuing, in appropriate circumstances, a complaint with the" Ethics committees. The word "complaint," however, has a specific meaning in the context of investigations by the Committee, which is narrower than the meaning intended by the Act.[8] The Committee may consider any information respecting matters within its jurisdiction, regardless of whether such information is offered through the formal complaint process. The Committee's

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[5] *Cienfuegos v. Office of the Architect of the Capitol*, 34 F.Supp.3d 1 (D.D.C. 2014) (confidentiality requirements of the CAA do not give rise to an evidentiary privilege).

[6] Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397 (2018).

[7] *Id.*

[8] *See* Rules of the Committee on Ethics 2(b), 15, *available at* https://ethics.house.gov/about/committee-rules.

jurisdiction is also not limited to violations of the federal employment laws, and the Committee believes that Confidential Advisors can play an important role in helping claimants understand that matters that may not constitute a violation of the laws may nonetheless be a violation of the Rules of the House. Accordingly, OCWR should adopt the following alternative language for Proposed Rule 4.03(c)(5):

> *Informing, on a privileged and confidential basis, a covered employee about the option for providing information to the Committee on Ethics of the House of Representatives or the Select Committee on Ethics of the Senate.*

The Committee looks forward to working with OCWR's Confidential Advisors, once they are appointed, to provide them with the information they need to properly inform covered employees about the Committee and its processes.

III. Proposed Rule 4.04 (Claims)

Proposed Rule 4.04(c), regarding the form and contents of claims under the CAA, requires claimants to provide certain information. Part (3) requires inclusion of the names and titles of all individuals involved in the conduct alleged to be a violation. The Committee applauds inclusion of this as required information on the intake form, as it should help streamline the automatic referral process under the amended CAA. The Committee expects that, for any form where a claimant has listed the personal name of a Member or senior staffer, the Executive Director will be able to then swiftly categorize the claim as one alleging a violation "committed personally" by an individual described in Section 415(d) of the Act. To further assist the Executive Director in efficiently identifying which claims meet the criteria described in Section 415(d) of the Act, the Committee recommends adding a requirement, as part (8) of Proposed Rule 4.04(c):

> *(8) whether the challenged conduct is alleged to include (i) harassment that is unlawful under section 201(a) or 206(a); or (ii) intimidation, reprisal, or discrimination that is unlawful under section 207 and is taken against a covered employee because of a claim alleging a violation described in clause (i).*

For any form that provides an affirmative response to proposed part (8), the Executive Director would then be able to identify that claim as one potentially triggering the Act's referral requirements. However, the Executive Director would still be permitted, in her discretion, to identify a claim as triggering the automatic referral requirement even where the claimant did not affirmatively characterize the challenged conduct in the manner described in Section 415(d) of the Act.

IV. Proposed Rules 4.07 (Mediation) & 9.03 (Informal Resolutions and Settlement Agreements)

Proposed Rule 4.07(j) begins with a subtitle, "Informal Resolutions and Settlement Agreements," and provides that, at any time during mediation, the parties may resolve or settle a dispute in accordance with Proposed Rule 9.03. Proposed Rule 9.03(a) begins with the subtitle "Informal Resolution," and provides that, "[a]t 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" (emphasis added). The section further provides that such an informal resolution may not create an obligation that is payable from the Section 415(a) Treasury Account. Proposed Rule 9.03(b) relates to formal settlements, which must be approved by the Executive Director.

Mediation occurs after a claim form is filed, therefore the informal resolution option is not available to the parties during mediation. To avoid confusion, the Committee proposes striking the language "*Informal Resolutions and*" from the subtitle of Proposed Rule 4.07(j). This is consistent with Sections 414 and 415(a) of the Act, which require settlements of claims under the Act to be paid from the Section 415(a) Treasury Account and approved by the Executive Director.

The Committee also notes that, pursuant to regulations of the Committee on House Administration, House funds "may not be used to pay a settlement or award in connection with conduct prohibited under the Congressional Accountability Act of 1995."[9] This restriction applies even if a claim form is not submitted to OCWR.

Furthermore, under House Resolution 6 of the 116th Congress, in the case of a settlement in connection with a discrimination or reprisal claim under the CAA alleging a violation committed personally by a Member, the settlement agreement must include terms and conditions requiring the Member to reimburse the Treasury the full amount of the settlement unless the Member is already required to do so under the CAA.[10] In order to avoid situations where parties enter into settlement agreements that are then voided by the Committee on House Administration pursuant to House Resolution 6, the Committee recommends OCWR amend part (d) of Proposed Rule 9.03 (which is subtitled "Requirements for Formal Settlement Agreements Involving Claims Against Members of Congress") to include the following language mirroring House Resolution 6:

> *In the case of a formal settlement agreement in connection with a claim alleging a violation described in Section 103(r)(2) of House Resolution 6 of the 116th Congress committed personally by a Member of the U.S. House of Representatives, if the Member is not required under section 415(d) of the Act to reimburse the Treasury for the amount of the settlement, the agreement must specify that the Member is required to reimburse the Treasury for the amount of the settlement.*

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[9] *See Members' Congressional Handbook* (2019), *available at* https://cha.house.gov/handbooks/members-congressional-handbook; *Committees' Congressional Handbook* (2019), *available at* https://cha.house.gov/handbooks/committee-handbook.

[10] H. Res. 6, 116th Cong. § 103(r) (2019).

V. Proposed Rules 4.12 (Automatic Referral to Congressional Ethics Committees) and 1.02 (Definitions)

Proposed Rule 4.12 implements the CAA's requirement that certain matters be automatically referred to the Ethics committees, stating that the Executive Director shall refer a "claim" alleging certain violations to the Ethics committees upon the final disposition of the claim. The Proposed Rule uses virtually the same language as the Act. However, Proposed Rule 1.02(d) defines a "claim" as "the allegations of fact that the claimant contends constitute a violation," whereas the Act does not define the word claim, nor does it further specify what it means to "refer the claim" to the Ethics committees. As written, the Rules could create the impression that a "claim" is severable from other allegations raised in a filing with OCWR. It would be unworkable to require OCWR to distinguish which allegations of fact make up a referable "claim" under Section 416(e), and which do not. OCWR should refer all allegations of fact raised on a single claim form and in subsequent proceedings following the claim form's filing. In order to avoid confusion, Committee staff encourages OCWR to amend Proposed Rule 4.12 to use a term other than "claim" (such as "matter") to describe what must be referred.

Proposed Rule 4.12 does not specify a time frame for the referral required under Section 416(e) of the Act. OCWR should add language to Proposed Rule 4.12 providing that "*such referral shall be made on the next business day following a final disposition.*" Because some final dispositions may occur in a civil action before a federal court, OCWR should also promulgate a procedural rule requiring parties to provide OCWR with immediate notice of a final disposition described in Proposed Rules 1.02(u)(4) and (5).

Section 416(e) of the CAA requires that, when making an automatic referral to the Ethics committees, OCWR shall provide the committees "with access to the records of any preliminary reviews, hearings, or decisions of the hearing officers and the Board under this Act, and any information relating to any award or settlement paid, in response to such claim." To effectuate that requirement, the Committee proposes adding the following to Proposed Rule 4.12:

> *For any claim referred to the Committee on Ethics of the House of Representatives or Select Committee on Ethics of the Senate, the Executive Director shall provide the Committee with a copy of all records of any preliminary reviews, hearings, or decisions of the hearing officers and the Board, and any information relating to an award or settlement paid in response to such claim. Such records and information shall be provided to the Committee within one week of the referral of any claim under Section 416(e) of the Act.*

VI. Reporting Requirements under the Reform Act

In addition to the required reporting to the Ethics committees, the CAA Reform Act includes certain annual reporting requirements for OCWR to the House and Senate. The Proposed Rules do not appear to address these annual reporting requirements.

Section 201(a) of the Reform Act amended the CAA to create an annual reporting requirement for settlements paid out of the Section 415(a) Treasury Account.[11] Pursuant to the Reform Act, the Committee on House Administration and the Committee on Rules and Administration of the Senate are charged with issuing rules establishing the content, form and other requirements for the reporting of *future* awards and settlements information required under that provision. Section 201(b) of the Reform Act required OCWR to submit to Congress a report on all payments made with public funds for *previous* "awards and settlements in connection with violations of" the discrimination, harassment and reprisal provisions of the CAA. Unlike part (a) of that Section, the Reform Act does not charge the House or Senate with issuing any implementing regulations with respect to this reporting requirement.

On January 20, 2019, your office made the required report of previous awards and settlements to Congress and the public. That report disclosed six payments, though it did not disclose the nature of the allegations or the employing offices.[12] The report also appears to include only those rare instances where a matter under the CAA was resolved by a specific finding of a violation. As your office has previously noted, settlement documents "typically release all potential claims under the CAA regardless of whether . . . there was any evidence to support the claim," and so settlements of CAA claims do not include any explicit acknowledgement a violation has occurred.[13] As a result, even the settlements from the designated Treasury account previously disclosed by your office are not included in the report,[14] and Congress still has received no information about settlements paid with other government funds. The Committee believes your January 20, 2019 report reflects an overly narrow implementation of Section 201(b) of the Reform Act; consistent with the principles of the Reform Act, OCWR should disclose all awards and settlements that were paid *in connection with* claims arising under the Act, not just those awards and settlements that were paid explicitly *for* admitted violations.

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[11] Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397 (2018).

[12] Office of Congressional Workplace Rights, Report on Amounts Previously Paid with Public Funds in Connection with Violations of Section 201(a) or 207 of the Congressional Accountability Act, *available at* https://www.ocwr.gov/sites/default/files/Report%20on%20amounts%20paid%20in%20connection%20with%20violations%20FINAL.pdf. *See also* CAA Reform Act, Sec. 201(b)(2) (reporting requirement may not be construed to "require or permit" the OCWR to report the account of any specific office of the House or Senate as the source of funds used for an award or settlement).

[13] Letter from Ms. Grundmann to Senator Kaine re: "Request for Information," (Dec. 18, 2017). *See also* Written Testimony of Gloria Lett before the Committee on House Administration (Dec. 7, 2017) (". . . most employing offices expressly deny liability and they insist that language to this effect be included as a term of the parties' settlement agreement.").

[14] *See,* U.S. House Comm. on House Admin., Updated Data on Harassment in the Workplace (Dec. 1, 2017), *available at* https://republicans-cha.house.gov/press-release/updated-data-harassment-congressional-workplace; U.S. House Comm. on House Admin., Additional Statistics on Harassment in the Congressional Workplace (Dec. 19, 2017), *available at* https://republicans-cha.house.gov/press-release/additional-statistics-harassment-congressional-workplace; U.S. Senate Comm. on Rules and Admin., Senate Rules and Appropriations Committees Release OOC Harassment Settlement Data (Dec. 21, 2017), *available at* https://www.rules.senate.gov/news/majority-news/senate-rules-and-appropriations-committees-release-ooc-harassment-settlement-data.

We take this opportunity to once again reiterate our longstanding request that your office promptly provide the Committee with all records in its possession related to any claims of sexual harassment, discrimination, retaliation, or any other employment practice prohibited by the CAA involving alleged conduct by any current Member, officer, or employee of the House of Representatives. The information we are again requesting is essential for the Committee to effectuate its constitutional and statutory authority. The House Rules authorize the Committee to investigate any alleged violation by a Member, officer, or employee of the House "of the Code of Official Conduct or of a law, rule, regulation, or other standard of conduct applicable to the conduct of such Member, Delegate, Resident Commissioner, officer, or employee in the performance of the duties or the discharge of the responsibilities of such individual."[15] Even prior to passage of the recent reform legislation, the CAA recognized this jurisdiction and authority. The law states that the House and Senate Ethics Committees "retain full power, in accordance with the authority provided to them by the Senate and the House, with respect to the discipline of Members, officers, and employees for violating rules of the Senate and the House on nondiscrimination in employment."[16] The CAA also expressly provides that the OCWR may provide the House and Senate Ethics Committees with access to records of its hearings and decisions.[17] The CAA Reform Act reaffirmed the intent of Congress that the Ethics committees have jurisdiction and a mandate to act by maintaining these provisions, while also requiring OCWR to refer certain matters to the Ethics committees for such action as they may deem appropriate.[18]

The Committee looks forward to working with OCWR to accomplish the goals of the CAA Reform Act, bringing greater accountability and transparency to the dispute resolution process while promoting fair, welcoming and professional work environments for all who serve in the halls of Congress.

Sincerely,

Theodore E. Deutch
Chairman

Kenny Marchant
Ranking Member

[15] House Rule XI, clause 3(a)(2).
[16] 2 U.S.C. § 1433.
[17] 2 U.S.C. § 1416(e).
[18] Congressional Accountability Act of 1995 Reform Act, Pub. L. No. 115-397 (2018).