JULIE E. ADAMS
SECRETARY

United States Senate
OFFICE OF THE
SENATE CHIEF COUNSEL FOR EMPLOYMENT
SUITE SH–103
WASHINGTON, DC 20510–7130
(202) 224–5424

CLAUDIA A. KOSTEL
SENATE CHIEF COUNSEL FOR EMPLOYMEN

ERICA A. WATKINS
DEPUTY CHIEF COUNSEL FOR EMPLOYMENT

ANN S. ROBINSON
CHRISTOPHER CALSYN
SENATE SENIOR COUNSEL FOR EMPLOYMENT

NEIL MANZULLO
ANDREA GOPLERUD
SENATE COUNSEL FOR EMPLOYMENT

FAX: (202) 228–2557
TDD/TTY: (202) 224–1240

May 10, 2019

BY E-MAIL (Alexander.Ruvinsky@ocwr.gov)
AND U.S. MAIL

Susan Grundmann, Esq.
Executive Director
Office of Congressional Workplace Rights
Room LA 200
John Adams Building
110 Second Street, S.E.
Washington, D.C. 20540-1999

Re: Comments to the Noticed of Proposed Rulemaking Regarding Updates to the Office of Congressional Workplace Rights' Rules of Procedure

Ms. Grundmann:

The Office of the Senate Chief Counsel for Employment ("SCCE") submits the following comments to the Office of Congressional Workplace Rights ("OCWR") in response to the Notice of Proposed Rulemaking ("NPRM") to implement proposed amendments to the Rules of Procedure, which was published in the Congressional Record on April 9, 2019. *See* 165 Cong. Rec. S2334-48 (daily ed. Apr. 9, 2019) (Notice of Proposed Rulemaking, Office of Congressional Workplace Rights) ("Proposed Rules").[1]

In December 2018, Congress passed, and the President signed into law, sweeping changes to the Congressional Accountability Act of 1995 ("CAA"). The changes contained within that new law, the Congressional Accountability Act of 1995 Reform Act ("CAARA"), Pub. L. No. 115-397, fundamentally alter many aspects of the CAA, including the process for pursuing claims of alleged violations of the CAA.[2]

The SCCE appreciates the OCWR's work in developing the Proposed Rules promptly, but sees significant areas for improvement in approach, scope of coverage, and degree of precision.[3]

---

[1] The comments in this memorandum and its exhibits are based on the NPRM as published in the Congressional Record, except for comments to Proposed Rule §§ 8.01 and 9.03(b), which are based on the version published on the OCWR's website.

[2] Unless indicated otherwise, all citations to the CAA herein are to the CAA as amended by the CAARA.

[3] For example, the Proposed Rules fail to address significant new subject matter areas, such as Member intervention, and fail to use defined terms consistently throughout.

In the spirit of ensuring that the Proposed Rules are faithful to the changes wrought by the CAARA[4] and are understandable and beneficial for all affected stakeholders, the SCCE recommends several modifications to the Proposed Rules, as discussed generally in this letter and as illustrated and discussed specifically in the attached exhibits.[5]

I. The Proposed Rules Require Modification to Eliminate the Potential for Bifurcated Proceedings on a Claim – a Result at Odds with the CAARA and Congressional Intent.

Prior to enactment of the CAARA, some of the loudest criticism of the CAA pertained to its dispute resolution process, which was regarded by critics as unnecessarily complicated and time-consuming for aggrieved congressional employees. Congress addressed this issue in the CAARA in several ways, including by eliminating the CAA's mandatory counseling and mediation processes and by permitting covered employees to file a lawsuit in federal district court immediately after filing a claim with the OCWR.

Contrary to the goals of simplicity and expediency, however, the Proposed Rules create the possibility that a covered employee, who wishes to adjudicate her claim quickly through the section 405 hearing process, could be improperly forced to pursue part of her claim separately in federal district court if an OCWR-designated preliminary hearing officer determines that portions of her claim are not well-pleaded. This potential for bifurcated proceedings on a claim is the result of the OCWR unnecessarily treating each CAA violation alleged in an employee's claim as a separate "claim" (within the meaning of CAA section 402(a)), rather than treating the employee's claim as a whole during the preliminary review as the CAARA amendments intended.[6] Because of this erroneous treatment, the preliminary hearing officer is required (per CAA section 403(c)) to issue a report directing the covered employee who has poorly pleaded certain CAA violations that those alleged violations can only be adjudicated in federal district court.[7] The covered employee would be permitted to request a section 405 hearing only for the well-pleaded CAA violations. During an informational meeting held by the OCWR on April 24, 2019, to discuss the Proposed Rules, OCWR representatives confirmed that forced bifurcation of proceedings was a potential result of the preliminary review under the Proposed Rules.

Bifurcation of proceedings is a terrible result both for covered employees and for employing offices. Employees and employing offices would be saddled with duplicative and wasteful litigation due to proceedings before a district court judge and before a hearing officer

---

[4] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("An administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress.").

[5] The Exhibits: (A) a version of the Proposed Rules with line-by-line changes suggested (which include many edits beyond the major recommendations discussed in this letter), and (B) a document reflecting proposed revisions to the OCWR's new Claim Form, which the OCWR distributed during its April 24, 2019 public meeting.

[6] *See* CAA § 403(b)(6) (2 U.S.C. § 1402a(b)(6)) (requiring a hearing officer to assess whether a covered employee "has stated a claim for which, *if the allegations contained in the claim* are true, relief may be granted under this title") (emphasis added).

[7] *See* CAA § 405(a)(2)(A) (2 U.S.C. § 1405(a)(2)(A)) (preventing a covered employee from requesting a hearing under section 405 if the preliminary review has found that the covered employee has not "stated a claim for which relief may be granted"). The preliminary hearing officer's decision is not subject to appeal.

regarding essentially the same workplace dispute. Multiple discovery proceedings would lead to multiple sets of interrogatories, multiple sets of document requests, and multiple depositions of a claimant and other witnesses. Bifurcation of proceedings also would generate legal disputes over the preclusive effect of a judgment on part of a claim issued by a Merits Hearing Officer over a federal court lawsuit regarding other parts of the same claim.

Moreover, the CAA specifically prohibits bifurcated proceedings. The CAA, both before and after the CAARA, mandates that once a covered employee initiates the CAA process, the employee gets one choice for where and how to adjudicate her alleged CAA violations – either through a section 405 hearing or in federal district court. *Compare* pre-CAARA CAA §§ 401(3), 404 (requiring employee to make single election of proceeding, file a complaint either with the Office of Compliance or in federal court, but not both) *with* post-CAARA CAA §§ 401(b)(1), 405(a)(2)(B) (as between filing suit in federal district court or requesting a hearing through the OCWR, once the employee has chosen one, she cannot choose the other).

Fortunately, this potential bifurcation problem is entirely avoidable. The SCCE recommends that Proposed Rule § 4.08 be modified to direct the preliminary hearing officer to treat a covered employee's claim as a whole during the preliminary review; see proposed revisions at Exhibit A. The SCCE also recommends that the Proposed Rules be revised throughout to make more precise use of certain terms, which are contributing to the confusion. Specifically, (1) the word "claim" should refer to a covered employee's collection of factual and legal allegations (as described in a claim form filed with the OCWR) for which the covered employee seeks legal relief under Title IV of the CAA and should not be used in its plural form unless the employee has actually filed more than one claim; (2) the term "alleged violation" should refer to each CAA violation that is alleged within a claim; and (3) the term "claim form" should only refer to the document through which the claim is articulated and that gets filed with and processed by the OCWR.[8]

The following example illustrates how the procedural rules – revised as SCCE recommends – would impact the preliminary review process of a claim containing a poorly-pleaded alleged CAA violation. A covered employee files a *claim* with the OCWR alleging that the employee's rights under sections 201 and 203 of the CAA were violated based on the facts alleged in the claim. That claim sets forth two *alleged violations* of the CAA (section 201 and section 203). A preliminary hearing officer is assigned to review the claim. If the preliminary hearing officer concludes that at least one of the two alleged CAA violations meets the pleading threshold set forth in section 403(b)(6) of the CAA, then the covered employee may request a hearing on the claim pursuant to section 405(a).[9] If, however, neither alleged CAA violation within the claim satisfies the pleading threshold set forth in section 403(b)(6) of the CAA, then the covered

[8] See, e.g., SCCE recommended edits to Proposed Rule §§ 1.02(d), (e), (z); 4.03(c)(4)(A); 4.04(c); 4.05(b); 4.06(a), (b); 4.08; 4.09(c); 4.10(c), (d); 7.01(b)(14); 9.03(d). This list is not exhaustive. Please refer to Exhibit A for all proposed revisions.

[9] When the employee requests a hearing, the *claim form* becomes the employee's initial pleading for the section 405 hearing.

employee is precluded from requesting a section 405 hearing on the claim and must proceed with the claim in federal court, if at all. No bifurcation of proceedings. No duplication of litigation burdens for employing offices or employees. No conflict with the CAA's election of proceedings requirement.

II. The Proposed Rules Lack Sufficient Guidance Regarding Intervention by Members

Under the CAARA, Members may be responsible for reimbursing the United States Treasury under certain circumstances. *See* CAA § 415(d) (2 U.S.C. § 1415(d)). Because of this reimbursement obligation, the CAARA requires specific notifications to Members of certain rights that they may have and allows Members to intervene in certain proceedings. *See* CAA § 415(d)(8) (2 U.S.C. § 1415(d)(8)). The Proposed Rules, however, contain little or no procedures for how these notifications and interventions would work. Accordingly, the SCCE recommends that the OCWR include a specific section within the rules dealing with intervention; a proposed revision is set forth as § 4.13 (new) in Exhibit A.

In addition to creating a specific section to deal with intervention, the OCWR should also make a number of modifications to existing rules, including:

- *Proposed Rule § 1.02(ff)(5)*: this Rule should list the specific sections of the CAA that allow entities to intervene and become a party to a CAA proceeding.
- *Proposed Rule § 4.06(c)*: the CAARA requires that a Member be notified when a claim is filed that may create a reimbursement obligation, but the rules do not provide procedures for this notification. The Proposed Rules should be expanded to specify that the OCWR will notify the Member by of the claim by providing the Member with a copy of the claim form. Without knowledge of the allegations of the claim, the Member may be unable to decide whether or what point in the administrative process to exercise the right of intervention.
- *Proposed Rule §§ 4.07 and 4.09*: under certain circumstances, a Member has a right to intervene in a mediation and administrative hearing, CAA § 415(d)(8) (2 U.S.C. § 1415(d)(8)), but the Proposed Rules do not contain any provision specifying that a Member would be notified that a mediation or hearing will occur. Notification processes must be included in the Proposed Rules.
- *Proposed Rule § 7.16(e)*: although a Member has a reimbursement obligation under certain circumstances, regardless of whether or not the Member has intervened, the Proposed Rules only specify that a copy of the written decision be delivered to the parties to the case. A Member who has not intervened is not a party. *See* Prop. R. § 1.02(ff)(5). A Member needs to be given a copy of this decision when that decision creates a reimbursement obligation for the Member. Without this notification, the Member may not know that a reimbursement obligation exists.

III. The Proposed Rules Require a Well-Defined Process for Optional Mediation

The Proposed Rules do not clearly define the process for a claimant or respondent to make, or agree to, a request for mediation. At a minimum, the procedural rules must address:

- *Request for mediation*: who may make a request for mediation, to whom this request is made, on what form the request is made, and when the request can be made.
- *Notice of request*: who is notified that a request for mediation has been made.
- *Acceptance of request*: who may accept a request for mediation, and how that party may accept the request for mediation.
- *Commencement*: when mediation commences, and who is notified of the commencement of mediation.
- *Duration and extension*: how long mediation lasts, and who may extend mediation. As drafted, Proposed Rule § 4.07(f)(2) states that "parties" can request an extension of mediation. A Member who has intervened is a "party," but only an employing office and an employee may request an extension of mediation. *See* CAA § 404(c) (2 U.S.C. § 1403(c)).
- *Who is present during mediation*: the Proposed Rules state that a mediator can require the physical presence of any party at mediation. *See* Prop. R. § 4.07(i). With the passage of the CAARA, however, mediation is optional, and no authority supports giving the mediator the power to physically order the presence of an individual. Furthermore, as drafted, this power to compel the presence of an individual extends to all parties, which would include a Member who has intervened in a hearing, regardless of whether the Member intervened in the mediation. The mediator does not have this power under the statute.
- *Clarification re stayed deadlines*: under the CAARA, all deadlines are stayed during a mediation. *See* CAA § 404(c) (2 U.S.C. § 1403(c)) ("Any 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."). Because of this provision, the parties may have new deadlines applicable to various parts of CAA proceedings following mediation. If new deadlines do apply, then the Executive Director or, as appropriate, a Hearing Officer, should notify the parties of any new deadlines.

The SCCE recommends revisions to Proposed Rule § 4.07 as shown in Exhibit A to provide for these procedures.

IV. The Proposed Rules Regarding the Drafting and Filing of an Answer to a Claim Do Not Adequately Account for the CAARA's Changes to the Dispute Resolution Process

Proposed Rule § 4.09(d), dealing with the answer to a claim, needs to be changed in several ways to allow parties to adequately respond to the allegations within a claim.

First, Proposed Rule § 4.09(d)(1) states that a respondent must file an answer within a certain time after a claimant requests a section 405 hearing. *See* Prop. R. § 4.09(d)(1) ("Within 10 days after the filing of a request for an administrative hearing . . . the respondents shall file an answer."). The Proposed Rules, however, are silent as to whether or how a respondent will be notified that a request for an administrative hearing has been filed. The claimant must request the hearing from the Executive Director. *See* Prop. R. § 4.09(a). The respondent may not know for several days whether such a hearing has been requested. For instance, if a claimant files a hearing request on a Friday, the respondent may not know about this request until Monday or later. Given the tight deadline the Proposed Rules provide for filing an answer (more on that below), Proposed Rule § 4.09(d)(1) is prejudicial to respondents. The Proposed Rules should therefore be modified to, first, require the Executive Director to notify a respondent when a request for an administrative hearing has been made and to, second, only run the time for filing an answer from when that notification is made.

Second, the OCWR has inexplicably reduced the amount of time a respondent has to file an answer in a section 405 hearing from 15 to 10 days. See Proposed Rule § 4.09(d)(1). This is a significant reduction in time, which adversely impacts respondents and potential intervenors. Indeed, given the increase in the amount of time the CAARA provided to parties to prepare for a section 405 hearing (previously 60 days, but now 90 days (*see* CAARA § 103(d)), the reduction in time to file an answer makes absolutely no sense. The procedural rules should maintain the 15-day time period.

Third, Proposed Rule § 4.09(d)(3) requires a respondent to either admit or deny every allegation, but respondents frequently lack information to admit or deny an allegation, especially at an early stage of a case. The SCCE recommends that Proposed Rule § 4.09(d)(3) include language recognizing that a respondent may assert it lacks knowledge or information sufficient to form a belief about the truth of an allegation. Such language would be consistent with both the current Federal Rules of Civil Procedure[10] as well as common practice during the past 25 years of section 405 proceedings.

The SCCE's proposed revisions to Proposed Rule § 4.09 are included in Exhibit A.

V. The Proposed Rules Should be Revised to Implement a Pre-Hearing Process That Will Facilitate the Most Efficient Use of The Parties' Time in Preparation For a Hearing

Proposed Rule § 7.04 essentially imports the OCWR's existing process whereby the parties to a section 405 hearing engage in a prehearing conference with the newly-assigned hearing officer to discuss matters that – as dictated by the rules – are primarily relevant to an imminent hearing and not necessarily meaningful at the pre-discovery phase. In practice, the parties and assigned hearing officers often have not followed this process because it is unhelpful to the early stages of litigation and is largely a waste of the parties' time.

[10] *See* Fed. R. Civ. P. 8(b)(5) ("A party 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.").

Based on its 25 years of experience litigating CAA cases, the SCCE strongly recommends that the Proposed Rules be modified to provide a meaningful process for, initially, establishing a framework for prehearing discovery, and subsequently, preparing for a hearing, if any. Such a process would require two conferences. First, the hearing officer would conduct an initial conference soon after the claimant requests a section 405 hearing. During this conference the hearing officer would assert early control over the proceedings, establish an orderly process for discovery, and set a schedule for dispositive motions. Second, after discovery has closed, the hearing officer would conduct a true "prehearing" conference shortly before the hearing must commence to discuss the matters currently covered by the OCWR's prehearing conference rule.

The SCCE's proposed revisions to Proposed Rule § 7.04 are included in Exhibit A.

VI. Replace the Outdated Federal Discovery Standard with the Current Federal Standard

The Proposed Rules retain a discovery standard from an outdated version of the Federal Rules of Civil Procedure. In 2015, Rule 26's description of the scope of discovery was reorganized to more clearly explain that scope and to remove the phrase "reasonably calculated to lead to the discovery of admissible evidence," which the Advisory Committee had found "continued to create problems." *See* Fed. R. Civ. P. 26, advisory committee's note (2015). The Proposed Rules, however, contain this language. *See* Prop. R. § 6.01(a) (allowing discovery of nonprivileged information "that is reasonably calculated to lead to the discovery of admissible evidence").

Because hearing officers frequently rely on case law interpreting the Federal Rules of Civil Procedure when resolving discovery disputes, the Proposed Rules should be updated to track the new language, so that hearing officers are able to rely on current case law. *See* Fed. R. Civ. P. 26(b)(1) ("*Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: 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 discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within the scope of discovery need not be admissible in evidence to be discoverable.").

VII. Proposed Rule § 9.03(a) Does Not Accurately Reflect the Limits of the OCWR's Statutory Authority Over Settlements and Must be Revised

Although possibly an inadvertent result of careless drafting, the OCWR has expanded the scope of coverage of existing Rule § 9.03(a)[11] to place limits on informal resolutions between an employing office and a covered employee *before* that covered employee files a claim with the OCWR. Prop. R. § 9.03(a). In other words, Proposed Rule 9.03(a) purports to control the actions of an employing office and its employee *before* the employee ever initiates proceedings under the CAA. The CAA does not convey this authority to the OCWR. Rather, the OCWR has authority

[11] In its current form, Procedural Rule § 9.03(a) covers informal resolutions between an employer and "a covered employee who has filed a formal request for counseling" but who has not yet filed a complaint.

to control only those resolutions specified in CAA § 414 (2 USC § 1414) ("Any settlement entered into by the parties to a process described in section 1331, 1341, 1351, or 1401 of this title shall be in writing and not become effective unless it is approved by the Executive Director.") and informal resolutions that would implicate the requirements of CAA § 414. Accordingly, Proposed Rule § 9.03(a) should be revised as shown in Exhibit A, which parallels the current rule § 9.03(a), to cover informal resolutions by employees who have initiated CAA proceedings (by filing a claim under section 402) but who have not yet requested a hearing under section 405.

VIII. Other Needed Revisions

In addition to the major areas that need improvement discussed above, the OCWR should also make a number of revisions to other areas of the rules. Those are discussed below.

Proposed Rule § 1.02(m), Unpaid Staff

Proposed Rule § 1.02(m)(13) confusingly includes "unpaid staff" in place of an employing office. Under Proposed Rule § 1.02(m), the term "covered employee" is defined to mean "any employee of" a variety of employing offices contained in a list, such as the Senate. Prop. R. § 1.02(m)(2). However, this list for some reason includes "unpaid staff," which results in a rule that states that "covered employee" means "any employee of . . . unpaid staff." Prop. R. § 1.02(m)(13). This subsection should be removed because "unpaid staff" are not an employing office. Rather, unpaid staff should be included within the definition of "employee." Prop. R. § 1.02(l).

Proposed Rule § 1.03(a)(4), Transmission of Documents via Electronic Mail

The Proposed Rules place the onus on the party filing a document electronically to confirm that OCWR has received this document. It is unclear how a party would receive this confirmation (e.g., is it sufficient if a party calls the OCWR, confirms verbally with an employee there that the document was received, and then writes a non-privileged memo to file noting this confirmation?). Instead of requiring the filing party to confirm this receipt, the OCWR should set up a system to automatically provide a confirmation.

Proposed Rule § 1.07(c), Revocation of Designation

Currently, the rule that deals with how a designed representative may withdraw from representing a party is included within the proposed rule dealing with the withdrawal of claims. *See* Prop. R. § 4.10(e). These subject matters are completely different. Instead, the rule dealing with withdrawal of a designated representative should be included within the same rule that deals with revocation of a designation of representative. *See* Prop. R. § 1.07(c).

Proposed Rule § 1.08(b), Confidentiality

Many individuals who do not become parties within the meaning of the Proposed Rules may use the services of a Confidential Advisor, but the confidentiality rules dealing with Confidential Advisors currently just apply to parties, witnesses, and designated representatives.

See Prop. R. § 1.08(b). For instance, a covered employee may contact a Confidential Advisor and discuss the filing of a claim and alleged violations, but not proceed with the filing of a claim. This employee would not be considered a "party" within the meaning of the rules. *See* Prop. R. § 1.02(ff)(1) (only including covered employees who are part of "a proceeding" within the definition of a party). It is consistent with the CAARA, however, that the employee and the Confidential Advisor be protected and covered by the confidentiality provisions of the rules. To the extent that the OCWR has decided to include this process within the scope of Proposed Rule § 1.08, the process and its participants should be fully protected, regardless of whether or not an employee has initiated a CAA proceeding.

Proposed Rule § 4.03(a)(1), Confidential Advisor Qualifications

Currently, nothing within the Proposed Rules prevents the Confidential Advisor from serving as a Hearing Officer. A Confidential Advisor acts as, essentially, an employee advocate and may provide privileged and confidential advice to an employee. A Hearing Officer, on the other hand, must act as a neutral arbiter. The difference between these roles presents an inherent conflict, and the Propose Rules should specify that one individual cannot occupy both roles.

Proposed Rule § 4.08(d), Preliminary Hearing Officers and Amendments to Claims

The Proposed Rule § 4.08(d) purports to give Preliminary Hearing Officers authority to allow amendments to claims. Neither the CAARA nor the CAA, however, provides such authority to these individuals. The CAARA is quite specific about the actions that hearing officers can take during the preliminary review. *See* CAA § 403(a) (2 U.S.C. § 1402a(a)). A Preliminary Hearing Officer who engages in actions beyond that authority would be acting *ultra vires*.

Proposed Rule § 4.10, Summary Judgment Standard

For the past 25 years, Hearing Officers deciding summary judgment motions during section 405 proceedings have applied the summary judgment standard from Federal Rule of Civil Procedure 56. The Proposed Rules, however, do not include the language of this standard. Because Merits Hearing Officers in post-CAARA section 405 proceedings will likely continue to apply the federal summary judgment standard, the SCCE recommends that the OCWR revise Proposed Rule § 4.10(b) to include language that tracks this standard.

Proposed Rule § 4.11(b), Conversion of Motions to Dismiss

Confusingly, the Proposed Rules contain two different standards for motions to dismiss filed during an administrative hearing. Under Proposed Rule § 4.11(b), the Merits Hearing Officer "shall" construe a motion that a claimant has failed to state a claim upon which relief can be granted as a motion for summary judgment. But under Proposed Rule § 5.01(g), a Merits Hearing Officer "may" at their "discretion" so construe a motion to dismiss. No textual basis within the CAARA supports this difference. The OCWR should update the language of Proposed Rule § 4.11(b) to make it permissive, rather than mandatory, since there are numerous instances where a motion to dismiss need not be converted into a summary judgment motion (e.g., if a claimant has alleged disparate treatment, but failed to allege that they suffered any adverse action).

Proposed Rule § 4.12, Referral to Ethics Committees

Under the CAARA, once a claim has been referred to an Ethics Committee, then the Executive Director is required to provide that Committee access to certain records. *See* CAA § 416(e)(2) (2 U.S.C. § 1416(e)(2)). Although Proposed Rule § 4.12 include language describing this referral, it does not include any language about providing this statutorily-mandated access to records. The SCCE recommends that Proposed Rule § 4.12 be revised to include this requirement.

Proposed Rule § 7.05, Scheduling the Hearing

Proposed Rule § 7.05 misstates the statutory deadlines for the commencement of a hearing. As amended by the CAARA, the CAA requires that a section 405 hearing must commence no later than 90 days after a claimant files a request for an administrative hearing, and this time limit may be extended by 30 days. *See* 2 CAA § 405(d)(2) (2 U.S.C. § 1405(d)(2)). Subparagraphs (a) and (b) of Proposed Rule § 7.05 must be revised to reflect the correct deadlines.

Numerous References to the Genetic Information Nondiscrimination Act of 2008

In many places, the Proposed Rules refer to "part A of Title II" of the CAA and state that this portion of the CAA "includes section 102(c)." *See, e.g.*, Prop. R. § 1.02(d) ("[P]art A of title II of the Act, which includes section 102(c) and 201-207 of the Act."). Under the CAA, however, section 102(c), which applies the Genetic Information Nondiscrimination Act of 2008 to Congress, is not included in part A of Title II. Instead, that section falls within Title I of the CAA. *See* 2 U.S.C. § 1302(c). These references should be updated throughout the Proposed Rules.

IX. The Claim Form is in Need of Significant Improvement

During the public discussion of the Proposed Rules on April 24, 2019, the OCWR distributed its newly-created "Claim Form" to be used by a covered employee when filing a claim with the OCWR to initiate CAA proceedings pursuant to CAA section 402(a). The SCCE strongly recommends that the Claim Form be modified as shown in that document at Exhibit B hereto for the reasons set forth in the comments appearing in that document. Most significantly, however, the Claim Form suffers from the following deficits:

- Directs the claimant to make a succinct, rather than detailed, statement of the claim. Less information can negatively impact both the claimant, whose claim must survive preliminary review to reach a hearing, as well as the respondent employing office which must be able to prepare a defense to the claim.
- Fails to require the claimant to specifically allege whether a Member of Congress personally committed acts of prohibited harassment or related retaliation against the claimant. This information is necessary for determining potential reimbursement liability and potential intervenor status.
- Fails to include place to indicate whether section 201 or 206 discrimination is, more specifically, harassment. This information is necessary for determining potential reimbursement liability and potential intervenor status.

Please feel free to contact me for further discussion about any of the SCCE's recommended revisions to the OCWR's Proposed Rules or the Claim Form.

Sincerely,

Claudia A. Kostel
Senate Chief Counsel for Employment

CAK/kj
Enclosures

Subpart A—[AMENDED]

[Table of contents omitted]

1. Revise section 1.01 to read as follows:

§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~~ requesting an administrative hearing with the OCWR and filing a civil action in a United States district court under ~~part A of~~ title ~~II~~ IV 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.

Commented [A1]: These procedures are covered in Title IV, not Title II. *See* CAA § 401(b) (2 U.S.C. § 1401(b)).

2. Revise section 1.02 to read as follows:

§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 and law that the claimant contends constitute one or more ~~a~~ violations of part A of title II of the Act.

Commented [A2]: A claim can contain several alleged violations of the Act. This is roughly parallel to a complaint in federal court that contains several "counts" each alleging a separate legal violation.

which includes sections ~~102(c) and~~ 201-207 of the Act. and/or section 102(c) of the Act.

(e) *Claim Form.*— The term "claim form" means the document ~~written pleading~~ an individual uses to (1) describe the facts that form the basis of the claim and the alleged violation(s) of the Act, and (2) identify the employing office alleged to have committed the violation(s) or in which the alleged violation(s) occurred, and files ~~to initiate proceedings~~ with the Office of Congressional Workplace Rights pursuant to section 402(a) of the Act to initiate proceedings for that claim. When a claimant requests a hearing pursuant to section 405(a) of the Act, the claim form becomes the claimant's initial written pleading setting forth the claim to be adjudicated. ~~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~~ covered employee who files a claim ~~form~~ with the Office of Congressional Workplace Rights pursuant to section 402(a) of the Act.

(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 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 382 of the Act,~~ a lawyer appointed or designated by the Executive Director to offer to provide to covered employees ~~certain~~ the services described in section 302(d)(2)(B) of the Act, on a privileged and confidential basis and subject to the limitations described in sections 302(d)(4) and (d)(5) of the Act, 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.

(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

Commented [A3]: CAA § 102(c) is not contained in Part A of Title II.

Commented [A4]: CAA § 402(a)(2). (2 USC § 1402(a)(2))

Commented [A5]: See OCWR Proposed Procedural Rule § 4.09

Commented [A6]: CAA § 302(d) (2 USC § 1382(d)).

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 and, for purposes of the applications of sections 201(a) and (b) of the Act only, any unpaid staff, as defined below in subparagraph 1.02(r).

Commented [A7]: *See* CAA § 201(d)(1) (2 U.S.C. § 1311). "Unpaid staff" deleted from Rule 1.02(m) below.

(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 Office of Technology Assessment;~~

(1~~1~~0) the John C. Stennis Center for Public Service Training and Development;

(11~~2~~) the China Review Commission, the Congressional Executive China Commission, and the Helsinki Commission; or

(12~~3~~) 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~~.

Commented [A8]: A person cannot be "any employee of . . . unpaid staff." Unpaid staff removed and added to definition of "Employee" in Rule 1.02(l) above.

(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 (132) 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 (132) 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. Sections 201(a) and (b) of the Act apply with respect to unpaid staff, in the same manner and to the same extent that those sections section 201(a) and (b) of the Act applyies to a covered employee; and

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

Commented [A9]: Conforming edit due to elimination of (m)(13).

Commented [A10]: Conforming edit due to elimination of (m)(13).

Commented [A11]: For clarity.

Commented [A12]: Edited to use the defined term. See OCWR Proposed Procedural Rule § 1.02(r)(1)

(u) *Final Disposition.*—The term "final disposition~~"~~ of a claim" as it pertains to automatic referrals to Congressional Ethics Committees as specified in ~~under~~ section 416(d) of the Act and described in section 4.12 of these Rules 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~~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 and does not require further proceedings by the district court, Board or Hearing Officer below.

Commented [A13]: For example, a remand for application of the proper legal standard by the Hearing Officer.

(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 described in section 405(c)(2) of the Act who is 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~~ a Hearing Officer appointed by the Executive Director pursuant to section 405(c)(1) of the Act to preside over a~~n administrative~~ hearing conducted on matters within the Office's jurisdiction under section 405 of the Act.

Commented [A14]: Hearing is a defined term. See OCWR Proposed Procedural Rule § 1.02(w).

(z) *Hearing Officer, Preliminary.*—The term "Preliminary Hearing Officer" means ~~an individual~~ a Hearing Officer appointed by the Executive Director pursuant to section 403(a) of the Act to make a preliminary review of ~~the~~ a 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 sections 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) A~~n~~ covered employee or employing office in a proceeding to address an alleged violation of section 102(c) or ~~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) a~~n~~ covered employee, an 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~~ an employing office ~~or employing activity~~, or as appropriate, the General Counsel in a proceeding under part D of title II of the Act; or

Commented [A15]: CAA §§ 401(a), 402(a) (2 USC §§1401(a), 1402(a)).

Commented [A16]: CAA § 215(c)(1) (2 USC §1341(c)(1)).

Commented [A17]: No such party exists under the CAA.

(5) any individual, employing office, or Member of Congress~~, or organization that~~ who has intervened in a proceeding pursuant to sections 210(d)(3), 407(b)(2), or 415(d)(8) of the Act, respectively.

Commented [A18]: These are the only provisions of the CAA that expressly recognize intervenors as parties.

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 Executive Director to the House and Senate Ethics Committees under section 416(d) of the Act, means any individual who, at the time a violation occurred, ~~is~~was an employee~~d in~~of 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.*).

Commented [A19]: For clarity. *See* CAA § 416(d)(1) (2 USC § 1416(d)(1)).

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

3. Amend section 1.03 by:

(a) Revising paragraph (a)(1);

(b) Revising the first four sentences of paragraph (a)(3); and

(c) Revising the first five sentences of paragraph (a)(4).

The revisions read as follows:

§1.03 Filing and Computation of Time.

(a) * * *

(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) * * *

(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. * * *

(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 Office will automatically send a filing confirmation upon receipt by either of the above email addresses of a document transmitted electronically. * * *

* * * * *

Commented [A20]: Could OCWR establish an auto-reply feature for receipt of electronically filed documents?

4. Amend section 1.04 by:

(a) Revising paragraph (a);

(b) Revising the first sentence of paragraph (b); and

(c) Revising paragraphs (c) through (d).

The revisions read as follows:

§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 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.

(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. * * *

(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. 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. 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.

5. Amend section 1.05 by revising paragraph (a). The revisions read as follows:

§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) The pleading, motion, or other filing ~~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;

Commented [A21]: For clarity. *See* CAA § 401(f) (2 USC § 1401(f)).

(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.

* * * * *

6. Amend section 1.06 by:

(a) Revising paragraph (a);

(b) Revising the first sentence of paragraph (b);

(c) Revising paragraphs (c) through (d); and

(d) Removing paragraph (f).

The revisions read as follows:

§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. * * *

(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.

* * * * *

(f) [Removed]

7. Amend section 1.07 by republishing the first two sentences of paragraph (c) and revising the third sentence of paragraph (c). The revisions read as follows:

§1.07 Designation of Representative; Revocation of Designation.

* * * * *

(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~~Hearing Officer, or Board, additional time may be provided to allow the party to designate a new representative as consistent with the Act. In the case of proceedings under section 405 of the Act, a designated representative must provide sufficient notice to the Hearing Officer and the parties of record of his or her withdrawal from a case; ~~.~~ Uuntil the party designates another representative in writing, the party will be regarded as appearing pro se.

Commented [A22]: Language moved from OCWR Proposed Rule §4.10(e).

8. Amend section 1.08 by:

(a) Revising paragraphs (a) through (e); and

(b) Republishing paragraph (f).

The revisions read as follows:

§1.08 Confidentiality.

(a) *Policy.* Except as provided in sections 302(d) and 416(c), (d), and (e) of the Act, the Office and all of its agents, officers, designees and employees, shall maintain confidentiality in the confidential advising process, mediation, and the proceedings and deliberations of ~~hearing officers~~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 a covered employee or an unpaid staff member who utilizes the services of a confidential advisor under section 302(d) of the Act or an individual or entity who takes part as ~~either~~ a party, a witness, or a designated representative in ~~confidential advising under section 302(d) of the Act,~~ mediation under section 404 of the Act, the claim and hearing process under section 405 of the Act, 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~~these Rules.

Commented [A23]: An individual who takes part in confidential advising is not necessarily a party (as defined in OCWR Proposed Rule 1.02(ff) above) or a witness. Confidential advisors do not provide services to "entities" or designated representatives. See CAA §§ 302(d)(4), 302(d)(5)(B) (2 USC 1382(d)(4), 1382(d)(5)(B)).

(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.

(d) *Exceptions.* Nothing in ~~these rules~~these Rules prohibits a party or its representative from disclosing information obtained in mediation under section 404 of the Act or other proceedings made confidential by section 416 of the Act ~~hearings~~ when such disclosure is reasonably necessary to investigate claims, ensure compliance with the Act, or prepare its prosecution, ~~or~~ defense, or appeal. However, the party or representative making the disclosure shall take all reasonably appropriate steps to ensure that persons to whom the information is disclosed maintains the confidentiality of such information. ~~These~~ This rule~~s~~ 1.08 does not preclude a mediator from consulting with the Office, except that when the ~~covered employee~~ claimant in mediation is a~~n~~ covered 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~~ This rule~~s~~ 1.08 does 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 made confidential by section 416 of the Act includes the information discussed or disclosed by participants to the

Commented [A24]: For clarity.

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. ~~.~~ ~~H~~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/or the claim and hearing process 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.

Commented [A25]: For clarity. Not all participants will engage in both mediation and hearing.

Commented [A26]: Borrowing language used in subsection (b) of this Rule.

Subpart B—[AMENDED]

[Table of contents omitted]

Amend subpart B by:

(1) Removing sections 2.01 through 2.07; and

(2) Reserving subpart B for rules concerning "Compliance, Investigation, and Enforcement under Section 210 of the Act (ADA Public Services)—Inspections and Complaints"

Subpart C—[REDESIGNATED AND AMENDED]

[Table of contents omitted]

1. Amend subpart C by:

(a) Redesignating subpart D as subpart C, and amending the references as indicated in the table below:

Old Section	*New Section*
4.01	*3.01*
4.02	*3.02*
4.03	*3.03*
4.04	*3.04*
4.05	*3.05*
4.06	*3.06*
4.07	*3.07*
4.08	*3.08*
4.09	*3.09*
4.10	*3.10*
4.11	*3.11*
4.12	*3.12*
4.13	*3.13*
4.14	*3.14*
4.15	*3.15*
4.20	*3.20*
4.21	*3.21*
4.22	*3.22*
4.23	*3.23*
4.24	*3.24*
4.25	*3.25*
4.26	*3.26*
4.27	*3.27*
4.28	*3.28*

4.29	*3.29*
4.30	*3.30*
4.31	*3.31*

(b) In subpart C, when referencing sections 4.01 through 4.15 or 4.20 through 4.31, writing the corresponding new section number as indicated in the table above.

2. Amend redesignated section 3.07 by revising the last sentence of paragraph (g)(1) as follows:

* * * * *

§3.07 Conduct of Inspections.

* * * * *

(g) *Trade Secrets.*

(1) * * * 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.

4. Amend redesignated section 3.14 by revising the second sentence of paragraph (b) as follows:

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

* * * * *

(b) * * * The complaint shall be submitted to a Merits Hearing Officer for decision pursuant to subsections (b) through (h) of section 405 of the Act, subject to review by the Board pursuant to section 406. * * *

3. Amend redesignated section 3.22 by revising the second sentence as follows:

§3.22 Effect of Variances.

* * * 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.

4. Amend redesignated section 3.25 by:

(a) Revising the second sentence of paragraph (a); and

(b) Revising the second sentence of paragraph (c)(1).

The revisions read as follows:

§3.25 Applications for Temporary Variances and Other Relief.

(a) *Application for Variance.* * * * 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. * * *

* * * * *

(c) *Interim Order.*

(1) *Application.* * * * The Merits Hearing Officer to whom the Board has referred the application may rule ex parte upon the application.

* * * * *

5. Amend redesignated section 3.26 by:

(a) Revising the second sentence of paragraph (a); and

(b) Revising the second sentence of paragraph (c)(1).

The revisions read as follows:

§3.26 Applications for Permanent Variances and Other Relief.

(a) *Application for Variance.* * * * 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.

* * * * *

(c) *Interim Order.*

(1) *Application.* * * * The Merits Hearing Officer to whom the Board has referred the application may rule ex parte upon the application.

* * * * *

6. Amend redesignated section 3.28 by revising paragraph (a)(1) as follows:

§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.

* * * * *

7. Amend redesignated section 3.29 by revising it as follows:

§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.

8. Amend redesignated section 3.30 by

(1) Revising the second sentence of paragraph (a)(1);

(2) Revising paragraph (b)(3);

(3) Revising paragraph (c); and

(4) Revising paragraph (d).

The revisions read as follows:

§3.30 Consent Findings and Rules or Orders.

(a) *General.* * * * 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:

* * * * *

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

* * * * *

(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.

9. Amend redesignated section 3.31 by revising paragraph (a) as follows:

§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.

* * * * *

Subpart D—[AMENDED]

Add a new subpart D as follows:

Subpart D—Claims Procedures Applicable to Consideration of Alleged Violations of Sections 102(c) and 201-207 of the Congressional Accountability Act of 1995, as amended by the CAA Reform Act of 2018.

[Table of Contents omitted]

§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 201-206 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, and

(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 201-207 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.

§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 and cannot serve as a Hearing Officer.

Commented [A27]: Inherent conflict for a Confidential Advisor to serve as a Hearing Officer.

(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 former covered employee's employment or service ~~of the~~ as a covered 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.

Commented [A28]: For clarity.

(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 201-207 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 201-207 of the Act regarding—

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

(B) the relative merits of securing private counsel, 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 201-207 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 201-207 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~~ and completion of the claim form to be filed under section 402(a) of the Act; and

Commented [A29]: For clarity.

(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 201-207 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 covered employee's representative, the services provided under subparagraph (c) of this section, and any related communications between the Confidential Advisor and the covered 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~~ of such privileged and confidential communications between the covered 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.

Commented [A30]: For clarity.

§4.04 Claims.

(a) *Who May File.* A covered employee alleging any violation of sections 102(c) or 201-207 of the Act may commence a proceeding by filing a timely claim pursuant to section 402 of the Act and these Rules.

(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 set forth in writing on the claim 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:

Commented [A31]: For clarity.

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

(2) the name of the employing office alleged to have committed the violation or in which the violation is alleged to have occurred ~~against which the claim is brought~~;

Commented [A32]: As specified in CAA § 402(a)(2) (2 USC § 1402(a)(2)).

(3) the name(s) and title(s) of the individual(s) involved in the conduct that the ~~employee~~ claimant alleges ~~is a~~ violat~~es~~~~ion~~ one or more provisions of section 102(c) or part A of title II of the Act;

(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 violates one or more provisions of section 102(c) or part A of title II of the Act~~is a violation of the Act~~;

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

(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 a~~n administrative~~ hearing ~~on~~ regarding 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 pursuant to section 402 of the Act. Notwithstanding the foregoing, if a claimant receives a written notice from the Preliminary Hearing Officer following preliminary review of the claim pursuant to section 403(d) of the Act, that the claimant has the right to file a civil action with respect to the claim in accordance with section 408 of the Act, the claimant may file the civil action not later than 90 days after receiving such written notice.

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

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

Commented [A33]: For clarity. As specified in CAA § 402(a)(1) (2 USC § 1402(a)(1)). Claims are limited to alleged violations of these provisions.

Commented [A34]: For clarity. As specified in CAA § 402(a)(1) (2 USC § 1402(a)(1)). Claims are limited to alleged violations of these provisions.

Commented [A35]: "Hearing" is a defined term. See OCWR Proposed Procedural Rule § 1.02(w).

Commented [A36]: To clarify the two different filing periods for civil actions. CAA § 401(b)(4) (2 USC § 1401(b)(4)).

Commented [A37]: For clarity.

filing. The Office shall immediately notify the employing office that the preliminary review has terminated pursuant to section 401(b)(2) of the Act.

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

(a) After receiving a claim filed pursuant to section 402 of the Act~~form~~, the Office shall record the ~~pleading~~claim form, transmit immediately a copy of the claim form to the head of the employing office identified on the claim form (or authorized designee of the head of the employing office) and the designated representative of that employing 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 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.

Commented [A38]: For clarity and to make use of defined terms.

Commented [A39]: The CAA does not provide for the amendment of a claim.

(b) *Notification of Availability of Mediation.*

(1) Upon receipt of a claim ~~form~~filed pursuant to section 402(a) of the Act, the Office shall notify the ~~covered employee~~ claimant ~~who filed the claim form~~ about the availability of mediation ~~process~~ under the Act, the mediation process set forth in section 4.07 of these Rules, ~~below~~ and the deadlines applicable to mediation.

Commented [A40]: For clarity

(2) Upon transmission to the employing office identified in a claim form of a copy of the claim form, the Office shall notify the employing office about the availability of mediation ~~process~~ under the Act, the mediation process set forth in section 4.07 of these Rules, and the deadlines applicable to mediation.

Commented [A41]: For clarity

(c) *Special Notification Requirements for Claims Based on Allegations of Acts Committed Personally 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:

(1) 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~~ regarding the claim; and

(2) provide the Member with a copy of the claim form containing the allegations against such Member.

A Member who has a right to intervene under section 415(d)(8) and wishes to intervene in any mediation or hearing, shall follow the procedures set forth in section 4.13.

Commented [A42]: Cross-reference to [new] intervention procedures for mediations and hearings.

(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 the claimant (a covered employee~~s~~, including unpaid staff for purposes of section 201 of the Act), the respondent (the employing office~~s~~ identified in the claim), a Member of Congress who has exercised the right to intervene pursuant to section 415(d)(8) of the Act, if any, and their representatives, if any, meet with a mediator trained to assist them in resolving disputes. As participants in the mediation, ~~employees~~the claimant, ~~employing offices~~respondent, intervenor Member, if any, and their representatives, if any, 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 and these Rules. 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~~b) ~~*Timing*~~*Request for Mediation*. The ~~covered employee~~ claimant or the respondent ~~employing office~~ may file a written request for mediation beginning on the date that the ~~covered employee~~ claimant or ~~employing office~~respondent, respectively, receives notice from the Office about the mediation process. The request for mediation shall be filed with the Executive Director on such form as the Office requires and 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 of a party to request mediation does not adversely impact future proceedings.

Commented [A43]: See CAA §§ 201(d), 404(a), 415(d)(8) (2 USC §§ 1311(d), 1403(a), 1415(d)(8)).

Commented [A44]: For clarity.

Commented [A45]: Already covered in Rule 4.06(b).

(c) *Timing of Request for Mediation.* The time to request mediation of a claim under section 404 of the Act and ~~these rules~~these Rules ends on the date on which a Merits Hearing Officer issues a written decision on the claim, or the ~~covered employee~~ claimant files a civil action~~,~~ on the claim.

(d) *Notice of ~~Commencement of the~~Request for Mediation.* The Office shall promptly notify the opposing party (claimant or respondent) or its designated representative of the request for mediation and the deadlines applicable to such mediation. Failure of a party to accept a request for mediation does not adversely impact future proceedings. When a request for mediation is accepted regarding a claim that 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~~ the mediation concerning the claim.

(e) *Selection of Mediators; Withdrawal or Disqualification.* Upon receipt of ~~the second party's~~ agreement by the opposing party (claimant or respondent) 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~~ opposing party agrees to mediate the ~~matter~~claim.

(2) The Executive Director shall extend the mediation period an additional 30 days upon the joint written request of the ~~parties~~claimant and respondent, or of the appointed mediator on behalf of the ~~parties~~claimant and respondent. 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 Deadlines in Proceedings.*

Upon ~~the parties'~~ agreement by the claimant and respondent 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.

(h) *Procedures.*

(1) *The Mediator's Role.* After assignment of the ~~case~~claim to a mediator, the mediator will contact the parties. The mediator has the responsibility to conduct the mediation,

Commented [A46]: For clarity.

Commented [A47]: CAA section 404(a)(3) (2 USC 1403(a)(3)).

Commented [A48]: Procedure for requesting intervention in mediation.

Commented [A49]: For clarity.

Commented [A50]: Per section 404(c) of the Act (2 USC § 1403(c)), only the covered employee and the employing office are permitted to agree to extend mediation. No other parties are specified.

Commented [A51]: For clarity

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.

(2) *The Agreement to Mediate.* At the commencement of the first mediation session, the mediator will ask the ~~participants~~ parties 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~~ must be kept confidential during and after mediation and set out the conditions under which mediation will occur, including the requirement that the ~~participants~~ parties adhere to the confidentiality of the process and a notice that a breach of the ~~mediation a~~Agreement to Mediate or the confidentiality provision of section 416(a) of the Act could result in sanctions in subsequent ~~later in the~~ proceedings on the claim that is the subject of the mediation.

(i) 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 mediation.

(j) *Informal Resolutions and Settlement Agreements.* At any time during mediation the parties may resolve or settle a dispute in accordance with section~~ubparagraph~~ 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~~claimant, respondent, the intervening Member (when applicable), ~~and the employing office,~~ and their representatives, with written notice that the mediation period has concluded and, if applicable, the new deadlines applicable to the claim. 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 a claim may conduct or aid in a hearing conducted under section 405 of the Act with respect to the same ~~matter~~ claim or shall be subject to subpoena or any other compulsory process with respect to the same ~~matter~~claim.

(m) *Violation of Confidentiality in Mediation.* An allegation~~ed~~ of violation of the confidentiality provisions in these Rules applicable to mediation, the Agreement to Mediate, or section 416(a) of the Act may be made by a party in mediation to the mediator during the mediation period and, if not resolved by agreement of the parties in mediation, to a Merits Hearing Officer during proceedings brought under section 405 of the Act.

Commented [A52]: Only parties (including an intervenor Member) and their representatives can participate.

Commented [A53]: For clarity

Commented [A54]: For clarity: use defined terms and include all pertinent information.

Commented [A55]: With passage of the CAARA, mediation is no longer mandatory under the CAA; accordingly, a basis no longer exists to require any party's participation in mediation.

Commented [A56]: For clarity: use defined terms

Commented [A57]: For clarity: use defined terms

Commented [A58]: For clarity: use defined terms and include all pertinent information.

(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~~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) *Disqualification/Withdrawal of~~ying~~ a Preliminary Hearing Officer.*

(1) In the event that a ~~Preliminary~~ Hearing Officer considers himself or herself disqualified from being the Preliminary Hearing Officer for a claim, either because of personal bias or ~~of~~ an interest in the ~~case~~ claim or for some other disqualifying reason, he or she shall withdraw from the appointment~~ease~~, 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 as the Preliminary Hearing Officer for a claim on the basis of the Hearing Officer's personal bias or ~~of an~~ interest in the ~~case~~ claim or for some other disqualifying reason. The~~is~~ 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. 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~~ A withdrawal motion will not stay the conduct of the preliminary review process.

(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)~~ claimant 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;

Commented [A59]: Defined term.

Commented [A60]: For clarity: proper use of defined terms.

Commented [A61]: For clarity: proper use of defined terms

Commented [A62]: For clarity: Use defined terms

(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.

~~(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:~~

~~(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.~~

Commented [A63]: CAARA does not provide the PHO with authority to permit amendments during preliminary review. See CAA § 403 (2 USC § 1402a). The CAARA specifically delineates the PHO's role.

(~~c~~d) *Report on Preliminary Review*.

(1) Except as provided in subparagraph (~~2~~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. 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. The Preliminary Hearing Officer's determination is not subject to appeal.

(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) shall deem the entire claim to state a claim for which relief can be granted if, in the opinion of the Preliminary Hearing Officer, at least one alleged violation of the Act contained in the claim would survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6)~~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~~.

Commented [A64]: Because this is a preliminary review and not a review on the merits (as with a Merits Hearing Officer or federal judge), the entire claim would survive the preliminary review if at least one alleged violation is legally viable. *See* CAA § 403 (2 USC § 1402a). ("states *a claim* for which relief can be granted.")

Commented [A65]: CAARA does not provide the PHO with authority to engage in such an inquiry during preliminary review. See CAA § 403 (2 USC § 1402a). The CAARA specifically delineates the PHO's role.

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

(~~f~~e) *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~~d) 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, then the Preliminary Hearing Officer shall include the following notices in the report, as applicable:

Commented [A66]: Conforming amendment due to removal of subparagraph (d) from this rule (see comment above).

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

(B) ~~the Preliminary Hearing Officer shall provide~~ to 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.

(2) The claimant must file the civil action not later than 90 days after the Preliminary Hearing Officer submits the report containing the ~~receiving the~~ written notice referred to in subparagraph (1)(B).

(~~g~~f) *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 a ~~Administrative~~ Hearing on a Claim.

(a) Except as provided in subparagraph (b), a claimant may submit to the Executive Director a written request for a~~n administrative~~ hearing on a claim 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~~ that claim ~~under~~ pursuant to section 403(c) of the Act. Upon the filing of a request for a hearing on a claim, the Executive Director shall notify immediately the respondent employing office's designated representative that the request was filed, and if the claim alleges a violation described in section 415(d)(1)(A) of the Act, the Executive Director also shall notify immediately the Member of Congress alleged to have personally committed the violation that a request for a hearing on the claim was filed and that the Member has a right to intervene in the hearing.

(b) A claimant shall not be permitted to request a hearing on a claim under section 405 of the Act ~~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~~ claimant is not a covered employee ~~who~~ or has not stated a claim for which relief may be granted, as described in section 403(d) of the Act; or

Commented [A67]: For clarity.

Commented [A68]: To be consistent with OCWR Proposed Rule § 4.09(A).

Commented [A69]: "Hearing" is a defined term under these Rules.

Commented [A70]: "Hearing" is a defined term under these Rules.

Commented [A71]: For clarity

Commented [A72]: For clarity

Commented [A73]: Correction per CAA § 403(d) (2 USC § 1402a(d)).

(2) the ~~covered employee~~ claimant has filed~~files~~ a civil action as to the claim as provided in section 408 of the Act;~~.~~ or

(3) the claimant has filed the request for hearing on the claim more than 10 days after the Preliminary Hearing Officer submits the report on the preliminary review of the claim.

(c) *Appointment of the Merits Hearing Officer.*

(1) Upon the timely 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) A Hearing Officer shall not serve as ~~T~~the Preliminary Hearing Officer ~~shall not serve as~~ and the Merits Hearing Officer ~~in the same case~~for the same claim.

(d) *Answer.* Upon the filing of a request for a hearing under subparagraph (a) of this section, the Executive Director shall notify immediately the respondent and any Member who has a right to intervene in the hearing pursuant to section 415(d)(8) of the Act that the hearing request was filed and the date on which the claimant filed the request for a hearing. The Executive Director shall also immediately notify any Member who has a right to intervene in the hearing pursuant to section 415(d)(8) of the Act of the right to intervene.

(1) Within ~~10~~ 15 days after the Executive Director notifies the respondent ~~filing of a~~ of the claimant's 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~~other parties. 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~~ alleged violation of the Act asserted against it and, to the extent the respondent possesses sufficient knowledge or information to do so, must admit or deny the factual allegations asserted against it.

(3) Failure to deny an allegation of fact or to assert a lack of knowledge or information sufficient to admit or deny an allegation of fact, other than ~~one~~ a fact relating to the amount of damages, or to raise a defense as to any ~~allegation(s)~~ alleged violation of the Act 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 will ordinarily be granted by the Merits Hearing Officer unless to do so would unduly prejudice the rights of ~~the~~ another party or unduly delay or otherwise interfere with or impede the proceedings.

Commented [A74]: Per CAA section 405(a)(1) (2 USC 1405(a)(1)).

Commented [A75]: Per CAA section 405(a)(1) (2 USC 1405(a)(1)).

Commented [A76]: Use the defined term.

Commented [A77]: For clarity

Commented [A78]: To provide for notification to the respondent and any intervenor Member that the claimant has requested a hearing.

Commented [A79]: Provides breathing room in the event of delayed notification to the respondent. Also, the respondent must have time to ensure that its answer to the allegations in the claim meets the pleading verification standard of CAA § 401(f) (2 USC § 1401(f)) and these Rules.

Commented [A80]: Use the defined term.

Commented [A81]: To account for possible intervenor Member.

Commented [A82]: Similar to responding to counts in a complaint in federal court.

Commented [A83]: Consistent with the pleading verification standard of CAA § 401(f) (2 USC § 1401(f)) and these Rules, a respondent must have an option other than admit/deny if the respondent does not possess sufficient knowledge or information to do admit/deny.

§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 party may move for summary judgment identifying each alleged violation of the Act or defense, or the part of each alleged violation of the Act or defense, on which summary judgment is sought. The Merits Hearing Officer ~~may~~shall grant summary judgment to the movant, after notice and an opportunity for the parties to address the motion, if the movant shows that here is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law regarding the alleged violations or defenses that are the subject of the motion~~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.~~

(c) *Appeal.* A ~~final~~ decision issued by the Merits Hearing Officer ~~made under~~ pursuant to sections 4.10(a), 4.10(b) or 7.16(a) 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~~b) of these Rules that does not resolve all of the ~~issues in the case(s)~~ violations alleged in the claim before the Merits Hearing Officer may not be appealed to the Board in advance of a ~~final~~ decision entered ~~under~~ pursuant to section 7.16(d) of these Rules, except as authorized pursuant to section 7.13 of these Rules.

(d) *Withdrawal of Claim.* At any time, a claimant may withdraw his or her own claim~~(s)~~ by filing a notice of withdrawal with the Office for transmittal to the Preliminary or Merits Hearing Officer and by -serving a copy on the other parties ~~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 ~~sub~~sections 416(c), (d) and (e), all information discussed or disclosed in the course of any mediation under section 404 and all proceedings and deliberations of Hearing Officers and the Board, including any related records, under sections 405 and 406 of the Act shall be confidential. A violation of the confidentiality requirements of the Act and ~~these rules~~these Rules may result in the imposition of procedural or evidentiary sanctions. See also sections 1.08, 1.09, 4.07 and 7.12 of these Rules.

Commented [A84]: Incorporates the summary judgment standard from Fed. R. Civ. P. 56.

Commented [A85]: This does not make sense because summary judgment involves findings of fact, which motions to dismiss do not. Also this part of the rule does not account for partial motions to dismiss which would not result in complete dismissal of a claim. Finally, if a claim will be permitted to move forward with non-viable counts/violations – as determined by PHO (see comment above regarding PHO review and bifurcation) – then the respondent should have an opportunity to seek removal of those counts through the MHO.

Commented [A86]: For clarity. Per OCWR Proposed Rule §7.16(f) the MHO's decision is not "final" until the appeal period has expired.

Commented [A87]: Language moved to Rule § 1.07(c).

(b) The fact that a claimant has filed 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.

Commented [A88]: Use the defined term.

§4.12 Automatic Referral to Congressional Ethics Committees.

(a) 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~~1) the Committee on Ethics of the House of Representatives, in the case of a Member or senior staff of the House; or

(~~b~~2) the Select Committee on Ethics of the Senate, in the case of a Senator or senior staff of the Senate.

(b) Following referral of a claim pursuant to subsection (a), the Executive Director shall provide the Committee with access to the records of any preliminary reviews, hearings, or decisions regarding the claim by the Hearing Officers and/or the Board under the Act, and any information relating to an award or settlement paid in connection with the claim.

Commented [A89]: Per CAA § 416(d)(2) (2 USC § 1416(d)(2)).

§ 4.13 Intervention by a Member.

Commented [A90]: The Propose Rules required processes for notification of and intervention by a Member of Congress pursuant to CAA §§ 402(b)(2), 415(d)(8) (2 USC §§ 1402(b)(2), 1415(d)(8)).

The following procedures apply to claims that contain an alleged violation described in section 415(d)(1)(A) by a Member of Congress:

(a) After the Office notifies a Member of Congress of the commencement of mediation under section 404 of the Act and of the Member's right to intervene, the Member may intervene in the mediation by informing the Executive Director that the Member wishes to intervene. Upon being so informed, the Executive Director shall immediately notify the mediator and the parties to the mediation that the Member has intervened, and the Member shall have the rights of a party to that mediation, except as otherwise provided by the Act. The Office shall also provide the Member with a copy of the preliminary review report, if any, on the claim that is the subject of the mediation.

(b) After the Office notifies a Member of Congress of a claimant's request for a hearing under section 405 of the Act and of the Member's right to intervene, the Member may intervene in the hearing by informing the Executive Director that the Member wishes to intervene. Upon being so informed, the Executive Director shall inform the Merits Hearing Officer and the other parties to the hearing that the Member has intervened, and the Member shall have all the rights and duties of a party to that hearing, except as otherwise provided by these Rules. The Office

shall also provide the Member with access to all documents already filed during or prior to the hearing, including the claim form, the preliminary review report, and the answer.

Subpart E—[AMENDED]

[Table of contents omitted]

Revise subpart E to read as follows:

Subpart E—General Counsel Complaints

[Table of contents omitted]

§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.

Commented [A91]: Improper use of the defined term.

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

Commented [A92]: Improper use of the defined term.

(3) Failure to deny a~~n~~ factual allegation, other than one relating to the amount of damages, or to raise a ~~claim or~~ defense as to any ~~allegation(s)~~ alleged legal violation 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~~ complaint or portion of a complaint 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 issued by the Merits Hearing Officer ~~made under~~ pursuant to 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 of the Merits Hearing Officer ~~under old subparagraph 5.03(a)–(d)~~ that does not resolve all of the claims or issues in the ~~case(s)~~complaint before the Merits Hearing Officer may not be appealed to the Board in advance of a ~~final~~ decision on the complaint entered ~~under~~ pursuant to section 7.16(d) of these Rules, except as authorized pursuant to section 7.13 of these Rules.

(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 ~~sub~~sections 416(c) and (f), all proceedings and deliberations of Merits Hearing Officers and the Board, including any related

Commented [A93]: Improper use of the defined term.

Commented [A94]: For clarity. Per OCWR Proposed Rule §7.16(f) the MHO's decision is not "final" until the appeal period has expired.

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~~these Rules may result in the imposition of procedural or evidentiary sanctions. *See also* sections 1.08 and 7.12 of these Rules.

Commented [A95]: Use the defined term.

Subpart F—[AMENDED]

[Table of Contents Omitted]

Revise subpart F to read as follows:

§6.01 Discovery.

(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 relevant to any party's cause of action 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 the scope of discovery need not be admissible in evidence in order to be discoverable.~~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~~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~~Hearing Officer.

Commented [A96]: Replace old federal court discovery standard with the current federal court discovery standard. Fed. R. Civ. Pro. 26(b)(1).

(b) *Initial Disclosure.* Within 14 days after the ~~prehearing~~ initial 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~~ causes of action or defenses.

Commented [A97]: See [new] initial conference proposed at section 7.04, below.

Commented [A98]: "Merits Hearing Officer" is a defined term.

(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 ~~m~~Member in a deposition that is separate from any other deposition taken from the claimant in connection with the hearing ~~or civil action~~.

Commented [A99]: These Rules do not govern civil actions.

(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.

(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~~Hearing Officer, or unpaid staff), or for the production of files, records, or notes ~~produced~~ created by such employee of the Office 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.~~

Commented [A100]: This is overbroad. Employing offices cannot compel non-managerial employees to testify and not all employees possess discoverable information. OCWR lacks authority to issue a blanket requirement that employing offices make all of their employees submit to discovery and/or hearing.

(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.

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.

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.

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 and ensure that the person receiving the subpoena is made aware of the ruling.

§6.06 Enforcement.

(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.

(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.

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—[AMENDED]

[Table of Contents Omitted]

Revise subpart G to read as follows:

§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, complaint, or portion thereof 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 possession, custody or 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, the Merits Hearing Officer may dismiss the action with 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 timely filed ~~in a timely fashion~~ or in compliance with this subpart.

(4) *Frivolous Claims, Defenses, and Arguments.* If a ~~party~~ claimant or ~~a~~ the claimant's designated 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~~. If a party or ~~a~~ the party's designated representative presents a pleading, discovery request or response, ~~written~~ motion, or other paper containing claims, defenses, ~~and~~ or 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 pleading, discovery request or response, motion or other paper ~~claims, defenses or legal contentions,~~ in whole or in part. A pleading, discovery request or response, motion, or other paper containing claims, defenses, or other legal contentions, shall not be subject to sanctions if it is supported by or 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 contained in the Act, these Rules or an order of the Merits Hearing Officer 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

Commented [A101]: Claimants are the only parties that can file claims.

Commented [A102]: For clarity.

Commented [A103]: For clarity

(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 Disqualification or Withdrawal of~~ying~~ 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, Initial Conference, and Prehearing Conference.

(a) *Motions.* Unless otherwise provided in these Rules, ~~M~~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.

(b) *Scheduling the ~~Prehearing~~ Initial Conference.* Within 7 days after a claim is assigned to 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~~ initial 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~~ initial conference. As required by section

Commented [A104]: Examples of exceptions: Motions to intervene by Member pursuant to section 415(d)(8). (See OCWR Proposed Rule § 4.13, above); Motions for postponement of hearing pursuant to OCWR Proposed Rule § 7.05(b), below.

Commented [A105]: Proposed Initial conference would address discovery issues. Subsequent prehearing conference would address post-discovery/hearing issues.

6.01(b) of these Rules, initial disclosures shall be due within 14 days of the initial conference.

(c) *Initial Conference Memoranda*. The Merits Hearing Officer may order each party to prepare an initial conference memorandum. The memorandum may include:

(1) a proposed discovery plan, including the number of depositions, interrogatories, requests for production, requests for admissions, and other discovery devices that the party anticipates requesting;

(2) a proposed schedule for the filing of any dispositive motions;

(3) a proposed date for the prehearing conference; and

(4) a proposed schedule for the hearing.

(d) *The Prehearing Conference*. Within 7 days after the initial conference, 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, which shall not take place until the period provided for discovery, if any, has ended.

~~(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.

(c~~d~~) At the prehearing conference, the Merits Hearing Officer may discuss the subjects specified in paragraph (c~~d~~) 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

Commented [A106]: Conforming edit due to addition of new subsection (c).

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~~hearing, 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. Absent a postponement granted by the Office, a hearing on a claim pursuant to section 405 of the Act must commence no later than ~~60~~ 90 days after the Executive Director receives the claimant's request for a hearing under section 405 of the Act~~filing of the claim(s)~~.

(b) *Motions for Postponement of Commencement of a Hearing ~~or a Continuance~~.* Motions for postponement ~~or for a continuance~~ of the commencement of a hearing by either party shall be made in writing to the ~~Merits Hearing~~ Officer~~r~~, shall set forth the reasons for the request, and shall state whether ~~or not the~~ any opposing party consents to or opposes ~~such~~ the requested postponement. Upon mutual agreement of the parties or for good cause, the Office shall extend the time for commencing a hearing for not more than an additional 30 days ~~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.~~

(c) *Continuance of Hearing after Commencement.* A party seeking a continuance of a hearing may do so by oral or written motion to the Merits Hearing Officer. Such motion shall include the reasons for the requested continuance and shall state whether any opposing party consents to or opposes the requested continuance. The Merits Hearing Officer may grant such a motion upon mutual agreement of the parties or for good cause shown.

§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

Commented [A107]: Corrected per CAA § 405(d)(2) (2 USC § 1405(d)(2)).

Commented [A108]: CAA § 405(d)(2) (2 USC § 1405(d)(2)). See also subsection (a) of this Rule.

Commented [A109]: Corrected per CAA § 405(d)(2) (2 USC § 1405(d)(2)).

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 electronically and/or stenographically.

Commented [A110]: See OCWR Proposed Rule §7.08(a).

(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~~ commencement of the hearing, or as otherwise ordered by the Merits Hearing Officer, each party shall submit to the Merits Hearing Officer and to ~~the~~ each opposing party typed lists of the party's hearing exhibits and the witnesses the party expect~~sed to be~~ to call~~ed~~ to testify or for whom the party intends to submit deposition testimony~~,~~. A party may exclude from the lists any documents or witnesses ~~excluding~~ intended solely for impeachment or rebuttal ~~witnesses~~.

Commented [A111]: To account for possible intervenor Members.

Commented [A112]: For clarity

(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 evidence, 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 the representative of 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.

Commented [A113]: For clarity. This section only applies to representatives (not witnesses, etc.).

§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. The~~se~~ Federal Rules of Evidence 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

Commented [A114]: For clarity. All other uses of the phrase "these Rules" means the OCWR procedural rules.

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~~ section 405 proceedings ~~is~~ are 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~~ a party, certifies and forwards a request for interlocutory appeal to the Board ~~determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention~~.

Commented [A115]: As written, this phrase conflicts with subsections (c) and (d) below. Proposed edit corrects that conflict.

(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~~.

Commented [A116]: Inappropriate consideration given that the proceedings are confidential by statute.

(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 the 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 Merits 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.

Commented [A117]: Use the defined term.

(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~~ another party submitted just before the record closed. The Merits Hearing Officer also shall make part of the record an approved correction to the transcript.

Commented [A118]: To account for possible intervenor Members.

§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~~ the Merits Hearing Officer's written 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 written 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 written decision ~~and order~~ to the parties. In the case of a decision that finds that an amount of damages is reimbursable, as described in subparagraph (c)(4) of this section, the Office shall promptly provide a copy of the Merits Hearing Officer's written decision to the Member responsible for that reimbursement, regardless of whether the Member has intervened in the action.

(f) If there is no appeal of a Merits Hearing Officer's written 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

Commented [A119]: Confusing because decision is not "final" until appeal period has expired. See subsections (g) and (h) below ("before a decision becomes final"). *See also* comment at OCWR Proposed Rule §8.01(a).

Commented [A120]: For clarity. *See also* CAA § 405(g) (2 USC §1405(g)).

Commented [A121]: For clarity. As described above, the order is part of the written decision. *See also* CAA § 405(g) (2 USC §1405(g) (referring to decision)).

Commented [A122]: Member needs to be notified if reimbursement has been ordered.

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; (6) the decision ~~it~~ is based on an earlier legal decision that has been reversed or vacated or on a provision of law that has been amended, repealed, or ruled unconstitutional; or (7) applying ~~it~~ the decision prospectively is no longer equitable. The motion shall be filed within 15 days after ~~service~~ issuance 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.

Commented [A123]: For clarity.

Subpart H—[AMENDED]

[Table of Contents Omitted]

Amend section 8.01 by:

(a) Revising the second sentence of paragraph (a);

(b) Adding a new paragraph (b) and redesignating paragraphs (b) through (j) as paragraphs (c) through (k), respectively;

(c) Revising redesignated paragraph (c)(2); and

(d) Revising redesignated paragraphs (i) through (k).

The revisions read as follows:

§8.01 Appeal to the Board.

(a) No later than 30 days after the entry of ~~the final~~ a decision ~~and order~~ of the Merits Hearing Officer in the records of the Office pursuant to section 7.16(d) of these Rules, 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.

Commented [A124]: For clarity. Per OCWR Proposed Rule §7.16(f) the MHO's decision is not "final" until the appeal period has expired.

(b) A ~~Report on P~~preliminary ~~R~~review report issued 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

Commented [A125]: For consistent terminology. Also see CAA § 406(a) (2 USC § 1406(a)-(c) (referring to hearing officer's "decision")).

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.

* * * * *

(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.

Commented [A126]: For consistent terminology. Also see CAA § 406(a) (2 USC § 1406(a)-(c) (referring to hearing officer's "decision")

* * * * *

(g) Pursuant to section 406(c) of the Act, in conducting its review of the decision of a Merits Hearing Officer, the Board shall set aside a decision if it determines that the decision was:

Commented [A127]: Use the defined term.

(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 (~~f~~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.

Commented [A128]: Typographical 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.

* * * * *

Subpart I—[AMENDED]

[Table of Contents Omitted]

1. Amend section 9.01 by:

(a) Revising paragraph (a); and

(b) Adding a new paragraph (c).

The revisions read as follows:

§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.

* * * * *

(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.

2. Amend section 9.02 by revising paragraph (b) as follows:

§9.02 Ex Parte Communications.

* * * * *

(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.*

* * * * *

3. Revise section 9.03 as follows:

§9.03 Informal Resolutions and Settlement Agreements.

(a) *Informal Resolution*. At any time before a covered employee, who has filed ~~files~~ a claim ~~form~~ under section 402 of the Act, requests a hearing under section 405 of the Act, ~~a~~ the 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:

Commented [A129]: Corrected per CAA §§ 401(a)(1), 402(a) (2 USC §§ 1401(a)(1), 1402(a)).

(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~~ claim or complaint 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.

Commented [A130]: OCWR's jurisdiction/authority over settlements extends only to settlements specified in CAA § 414. See CAA § 414 (2 USC § 1414) ("Any settlement entered into by the parties to a process described in section 1331, 1341, 1351, or 1401 of this title shall be in writing and not become effective unless it is approved by the Executive Director.")

(c) *General Requirements for Formal Settlement Agreements.* Except as provided in subparagraph 9.03(d) of these Rules, ~~A~~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 resolves a claim that contains ~~concerns~~ allegations against a Member of Congress described in section 402(b)(2) of the Act~~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~~415(d)(8) of the Act.

Commented [A131]: Typographical error.

(e) * * * * *

3. Revise section 9.04 as follows:

§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~~ employing 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.

Commented [A132]: Use the defined term.

(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.

Commented [A133]: The SCCE incorporates by reference the comments submitted by the Senate Disbursing Office in response to the Proposed Rules.

(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.~~

Commented [A134]: The SCCE incorporates by reference the comments submitted by the Senate Disbursing Office in response to the Proposed Rules.

(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~~ certain violations 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.

Commented [A135]: CAA § 415(d)(1)(C) (2 USC § 1415(d)(1)(C)).

(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 and the employing office's designated representative 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]

4. Amend section 9.05 by revising paragraph (b) as follows:

§9.05 Revocation, Amendment or Waiver of Rules.

* * * * *

(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.

5. Add a new section 9.06 as follows:

§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~~covered ~~-~~employees are customarily posted.

Commented [A136]: *See* CAA § 226(a) (2 USC § 1362(a)).
.

6. Add a new section 9.07 as follows:

§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.

Claim Form

Instructions

All claims alleging ~~a~~ violation~~(s)~~ of the Congressional Accountability Act of 1995 (CAA), as amended by the Congressional Accountability Act of 1995 Reform Act of 2018, are initiated by completing this Claim Form with the Office of Congressional Workplace Rights (OCWR). Using this form will help the OCWR provide you with prompt service.

You have the right to a Confidential Advisor:

IMPORTANT: If you have questions or concerns about how to complete this Claim Form, the CAA process, or the specific employment laws applicable to your workplace and you do not have a designated representative assisting you, you may benefit from consultation with an OCWR Confidential Advisor. ~~You have the right to consult, a~~**A**t no cost to you, an OCWR Confidential Advisor ~~to~~ can help you in filling out this Claim Form. The OCWR Confidential Advisor also can inform you about your rights and responsibilities under the CAA and the OCWR's procedures, discuss your concerns, and get information from you regarding the alleged violation(s). *(Although the OCWR Confidential Advisor is not your representative, he/she can communicate with you on a privileged and confidential basis.)*

Filing and Submission:

This form must be filed with the OCWR no later than 180 days after the date of the alleged violation(s). The OCWR will not accept a claim filed after the applicable deadline. Filling this form initiates formal proceedings on your claim~~(s)~~ alleging that the CAA has been violated. **PLEASE BE ADVISED THAT IMMEDIATELY AFTER YOU SUBMIT YOUR CLAIM FORM, WE MUST PROVIDE A COPY TO YOUR EMPLOYING OFFICE.**

~~Drafting the claims as described below will assist the OCWR in reviewing the claims more expeditiously and thoroughly.~~ All claims MUST be either e-filed (link to e-filing system), emailed (OOCEFile@ocwr.gov), faxed (202-426-1913), or hand-delivered to: John Adams Building, 110 Second Street, SE, Room LA-200, Washington, DC 20540-1999.

For additional information regarding filing a claim, please refer to the OCWR website at www.ocwr.gov. If you have additional questions, please contact the OCWR at (202) 724-9250.

If you have a disability and need assistance with completing this form, please contact the OCWR.

Commented [SCCE1]: This sentence suggests that the form is optional. Use of form is mandatory under the OCWR procedural rules.

Commented [SCCE2]: 2 USC § 1382(d)(5).

Commented [SCCE3]: Why is this so tiny? This may be an important consideration for potential claimants.

Commented [SCCE4]: This is important enough to state explicitly.

Commented [SCCE5]: Why is this in ALLCAPS and bold? Comes across as intimidation.

Commented [SCCE6]: This sentence is not particularly helpful and does not seem to belong in the filing section. See proposed instructional language under the "Claim Requirements" section.

Claim Requirements:

It is important that you complete this Claim Form thoroughly, providing all required information and including as much detail as possible about the facts and circumstances that you believe resulted in a violation of your rights under the CAA.

A claim filed with the OCWR must contain the following:

- **Section A)**
  - Your contact information, including full name, job title, home address, home phone number, cell phone number, work phone number, and at least one personal email address; and
  - ~~Employing office's contact information, including n~~Name of the ~~agency~~employing office that committed the alleged violation(s) of your CAA rights or in which the alleged violations occurred, as well as the employing office's address and phone number ~~city, and state~~.
- **Section B)**
  - Your specific allegations, including what happened, who was involved, and all relevant date(s) of the incident(s).
- **Section C)**
  - ~~Identify t~~The specific section(s) of the CAA that you believe ~~your~~ the employing office violated in its actions or conduct toward you.
- **Section D)**
  - Your explanation of why the challenged conduct constitutes a violation of the specified sections of the CAA.
- **Section E)**
  - A brief statement of the remedy(ies)/outcome(s) you are seeking by filing this claim;
  - The signature of the preparer and the date this form was prepared; and
  - The signed oath or affirmation included at the end of this form.

Commented [SCCE7]: All of the indenting is making the form longer than it needs to be. Suggest reformatting to reduce page length.

Commented [SCCE8]: Might not be the claimant's employing office that engaged in the violation(s).

Confidentiality:

Pursuant to section 416 of the CAA, all proceedings and deliberations of the OCWR Hearing Officers and the OCWR Board of Directors, including any related records, are confidential. Further, except as provided in sections 302(d) and 416(c)-(e) of the CAA, the OCWR shall maintain confidentiality in the confidential advising process, mediation, and the proceedings and deliberations of the OCWR Hearing Officers and the OCWR Board of Directors in accordance with sections 302(d)(2)(B) and 416(a)-(b) of the CAA. However, section 416(f) of the CAA provides that in the course of any proceeding under this title, a covered employee is not prohibited from disclosing the factual allegations underlying the covered employee's claim, and an employing office is not prohibited from disclosing the factual allegations underlying the employing office's defense to the claim.

~~For additional information regarding filing a claim, please refer to the OCWR website at www.ocwr.gov. If you have additional questions, please contact the OCWR at (202) 724-9250.~~

~~***If you have a disability and need assistance with completing this form, please contact the OCWR.***~~

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

Section A)

Name: Job Title:

Dates of Employment with an Employing Office (if applicable):

Mailing Address:

Home Phone: Cell Phone:

Work Phone: Email Address 1:

Email Address 2:

Employing Office Involved in the Alleged CAA Violation:

Employing Office's Address:

Employing Office's Phone Number:

Date(s) of Alleged CAA Violation(s):

Names & Titles of ~~Officials~~ Individuals Involved in the Alleged ~~Conduct~~CAA Violation(s):

Do you contend that a Member of Congress personally committed an act or acts of harassment against you in violation of sections 201 or 206 (see Section C below)?

yes no Name of Member:

Do you contend that a Member of Congress personally committed an act or acts of retaliation against you because you made a claim of harassment in violation of sections 201 or 206 (see Section C below)?

yes no Name of Member:

~~Employing Office's Address:~~

Commented [SCCE9]: Unsuccessful applicants for employment would not be able to complete this.

~~Employing Office's Phone Number:~~

~~How did you learn about the OCWR?~~

Section B) The employing office identified in Section A, above, violated the CAA by engaging in the following conduct: *(Using numbered paragraphs, ~~P~~please set forth a clear and ~~concise~~ detailed ~~statement~~ description of the conduct being challenged, including the dates of the conduct and the names and titles of the individuals involved. Use additional pages if necessary.)*

Commented [SCCE10]: This is not appropriate here. Suggest moving to first page or delete.

Commented [SCCE11]: Would provide more space than this.

Section C) By engaging in ~~this~~ the conduct described in Section B, above, the employing office violated the following section(s) of the CAA. *(Check the circle(s) below and specify.)*

For more information regarding any of these laws, please visit our website at www.ocwr.gov.

o **Section 201 – Discrimination~~/Harassment Claims~~**
- o Race:_____ ○ Color:_____
- ~~o~~ Sex:_____ ○ Religion:_____
- o ~~Is this an allegation of sexual harassment? (Circle one.) Yes or No~~
- o National Origin:_____ ○ Age (40 or over):_____
- o Disability:_____ ○ Genetic Information:_____

o **Section 201 – Harassment**
- o Race: ○ Color:
- o Sex: ○ Religion:
- o National Origin: ○ Age (40 or over):
- o Disability: ○ Genetic Information:

o **Section 202 – Family & Medical Leave**
- o FMLA Leave Violation ○ FMLA Retaliation

o **Section 203 – Fair Labor Standards**
- o Minimum Wage ○ Overtime Pay ○ Equal Pay ○ Child Labor ○ Lactation

o **Section 204 – Employee Polygraph Protection**

o **Section 205 – Worker Adjustment & Retraining Notification**

o **Section 206 – Uniformed Services Employment & Reemployment Rights – Discrimination**
- o Army ○ Marines ○ Navy ○ Air Force
- o Reserves ○ National Guard ○ Other:_____

o **Section 206 – Uniformed Services Employment & Reemployment Rights – Harassment**
- o Army ○ Marines ○ Navy ○ Air Force
- o Reserves ○ National Guard ○ Other:

o **Section 206(A) – Veterans Employment Opportunities**
- o Army ○ Marines ○ Navy ○ Air Force
- o Reserves ○ National Guard ○ Other:_____

o **Section 207 – Reprisal**
- o Because you opposed a practice made unlawful by the CAA. Identify the unlawful practice:
- o Because you initiated proceedings, made a charge, or testified, assisted, or participated in any manner in a hearing or other proceeding under the CAA. Identify the proceeding and your role in that proceeding:

Formatted: Font: 9 pt

Formatted: List Paragraph, Indent: Left: 0.25", Bulleted + Level: 2 + Aligned at: 0.75" + Indent at: 1"

Formatted: Indent: Left: 0.25", No bullets or numbering

Commented [SCCE12]: Need to know harassment information for CAA § 415(d)(1)

Commented [SCCE13]: Suggest: "Denial or Interference" rather than "Violation"

Commented [SCCE14]: Need to know harassment information for CAA § 415(d)(1)

Commented [SCCE15]: Needs more space

Commented [SCCE16]: Needs more space

Section D) For each ~~section~~ selection in Section C, above, please explain in numbered paragraphs why you believe that the ~~challenged~~ conduct you described in Section B constitutes one or more ~~a~~ violations of the CAA. *(Use additional pages if necessary.)*

Commented [SCCE17]: Would provide more space than this.

Section E) I request the following remedy(ies)/outcome(s) for this/these alleged violation(s):

_____
_____
_____
_____
_____
_____
_____
_____
_____

The Claim Form was completed and prepared by:

_____
Signature of Preparer **Date**

Oath or Affirmation for Assertion(s) Made by Claimant:

I swear or affirm to the best of my knowledge, information, and belief, as formed after an inquiry which is reasonable under the circumstances, that each of the following is correct:

- ~~No pleading, written motion, or other paper is~~ My claim as described in this Claim Form is not presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of resolution of the matter; and
- The ~~claims, defenses,~~ factual allegations and ~~other~~ legal contentions ~~herein~~ set forth above are warranted by existing law or by a non-frivolous argument for extending, modifying, or reversing existing law or for establishing new law; and
- The factual contentions set forth above have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further review or discovery.~~; and~~
- ~~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.~~

Commented [SCCE18]: Oath/Affirmation should be specific to this filing.

Commented [SCCE19]: This applies to answers/defenses and not to the Claim.

_____
Claimant's Signature **Date**

_____
Designated Representative's Signature* **Date**

**You are not required to have a representative to file a Claim with OCWR; however, if you have a representative, that representative~~Representatives~~ must be designated by ~~the claimant~~ you on a separate Notice of Designation of Representative form provided by the OCWR.*

Commented [SCCE20]: Provide electronic link to the form?