Office of Compliance

Section 102(b) Report

advancing safety, health, and workplace rights in the legislative branch

December 2008

2008 Section 102(b) Report

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This is the seventh biennial report submitted to Congress by the Board of Directors of the Office of Compliance of the U.S. Congress, pursuant to the requirements of section 102(b) of the Congressional Accountability Act (2 U.S.C. 1302 (b)). Section 102(b)(2) of the Act states:

Beginning on December 31, 1996, and every 2 years thereafter, the Board shall report on (A) whether or to what degree [provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees; and (B) access to public services and accommodations] ... are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch. The presiding officers of the House of Representatives and the Senate shall cause each such report to be printed in the Congressional Record and each such report shall be referred to the committees of the House of Representatives and the Senate with jurisdiction.*

*Bracketed portion from Section 102(b)(1).

Introduction

The first law passed by the 104th Congress, the Congressional Accountability Act of 1995 (CAA) brings the legislative branch under the ambit of twelve workplace rights, occupational safety and health and fair labor standards statutes. Prior to this time, Congress had exempted itself from the reach of these laws, affording employees no statutory remedy for their violation. In an effort to bring "accountability" to the Congress and its instrumentalities, the CAA establishes a dispute resolution process and judicial remedies; mandates an education program for employing authorities and employees of the legislative branch; requires safety, health, and disability access inspections of all facilities at least once per Congress; and authorizes a 5-member Board of Directors to promulgate regulations and make recommendations to Congress regarding employment law and access to public services and accommodations.

The CAA should be dynamic. The Act intended that there be an ongoing, vigilant review of federal law to ensure that legislative branch employees – some 30,000 strong – have coverage under the labor, employment, health, and safety laws similar to federal executive branch and private sector employees.

Since 1996, the Board of Directors, consistent with its statutory charge, has duly submitted biennial Reports to Congress recommending limited amendments to the CAA. An Interim Report in 2001 made similar suggestions regarding Section 508 of the Rehabilitation Act of 1973. The Board has also, where appropriate, promulgated implementing regulations to federal law, and urged their passage through selected Section 102(b) Reports.

In its *2006 Section 102(b) Report*, the Board explicitly prioritized its recommendations to the Congress, focusing primarily on the needs of veterans and on safety and health compliance authority. The Board continues that approach in 2008, with emphasis on similar themes. As in the *2006 102(b) Report*, however, the Board herein includes in the appendices the important recommendations made in prior reports: amendments to the Rehabilitation Act and to Titles II and III of the Civil Rights Act; whistle blower protections; prohibitions against discrimination on the bases of jury duty, bankruptcy, and garnishment; notice posting; and employee protection provisions of environmental statutes. The Board incorporates these by reference and continues to urge that these prior recommendations be implemented.

The CAA must remain current with the employment needs of the legislative branch. The overwhelming bipartisan support for the CAA's passage in 1995 is testimony to the importance of - and support for - the principles the CAA embodies, both in Congress and in the electorate as a whole. While recognizing the enormous importance of many of the other issues faced today by Congress, the Board is hopeful that issuance of this *2008 Section 102(b) Report* will result in legislative action to implement these recommendations.

Executive Summary

In this 2008 Report, the Board focuses on two areas of vital and immediate concern to the covered community and to our nation – veterans' rights and safety and health – and urges prompt legislative action in the 111th Congress.

Veterans: Congress has enacted laws to ensure that soldiers with civilian employment will not be penalized for time spent away from their employers while serving in the military. Through the enactment of these laws, Congress ensured that military service would not prevent individuals from remaining professionally competitive with their civilian counterparts. The Veterans' Employment Opportunities Act (VEOA) and the Uniformed Services Employment and Reemployment Rights Act (USERRA) currently provide protections for military personnel entering and returning to federal and other civilian workforces.

Under VEOA, Congress has enacted protections for these citizen-soldiers, so that in certain circumstances, they receive a preference for selection to federal employment. Regulations for these laws have been implemented in the executive branch. In March 2008, the Board of Directors adopted substantive regulations seeking to apply veterans' preference to federal employment in the legislative branch as provided by VEOA. The Board encourages Congress to approve these regulations. Until they are approved, the legislative branch covered community has no protection or rights under VEOA.

Under USERRA, Congress sought to encourage non-career military service by eliminating or minimizing the disadvantages to civilian careers and employment that can result from such service by providing for reemployment and by prohibiting discrimination against such persons on the basis of their military service. The Board of Directors adopted regulations to implement USERRA in December, 2008 and urges their prompt approval by the 111th Congress.

Safety and health: The Office of Compliance Office of the General Counsel (OGC) is responsible for ensuring the safety and health of legislative branch employees through the enforcement of the provisions of the Occupational Safety and Health Act (OSHA). This responsibility includes inspection of the covered community, which the Office of the General Counsel performs in collaboration with employing offices. While enormous progress has been achieved in improving health and safety conditions in the legislative branch, there remain circumstances where progress would be significantly enhanced if the OGC is provided specific, narrowly-tailored tools to better carry out its mission: subpoena power for health and safety investigations; enforcement authority for anti-retaliation rights for employees reporting health and safety violations; the requirement that legislative branch employers maintain and submit injury and illness records; and the requirement that employing offices establish and maintain comprehensive occupational safety and health programs.

In this Report, the Board also recognizes certain legislative action in the 110th Congress where employment rights of legislative branch employees were enhanced or ensured. Recommendations from prior Reports, itemized in the appendices, remain critically important, and the Board remains optimistic that Congress will address those, as well.

The 111th Congress opens with both great optimism and enormous challenge. With our nation in combat and our economy in recession, there could be no better time to ensure that the rights and the safety and health of the legislative branch covered community are protected. The Board of Directors of the Office of Compliance respectfully requests your action on its recommendations dedicated to those ends.

Recommendations

I. Veterans' Rights

Veterans' Employment Opportunities Act

Recommendation: The Board of Directors requests prompt approval of its adopted regulations permitting enforcement of VEOA rights by legislative branch covered employees.

Since the end of the Civil War, the United States Government has granted veterans a certain degree of preference in federal employment in recognition of their duty to country, sacrifice, and exceptional capabilities and skills. Initially, these preferences were provided through a series of statutes and Executive Orders. In 1944, however, Congress passed the first law that granted our service men and women preference in federal employment: the Veterans' Preference Act of 1944.[1] The Veterans' Preference Act provided that veterans who are disabled or who served in military campaigns during specified time periods are "preference eligible" veterans and would be entitled to preference over non-veterans (and over non-preference-eligible veterans) in decisions involving selections and retention in reductions-in-force.

In 1998, Congress passed the Veterans Employment Opportunities Act (VEOA)[2], which "strengthen[s] and broadens"[3] the rights and remedies available to military veterans who are entitled to preferences in federal employment. In particular, Congress clearly stated in the law itself that certain "rights and protections" of veterans' preference law provisions for certain executive branch employees, "shall apply" to certain "covered employees" in the legislative branch.[4] However, without implementing regulations passed by Congress, the VEOA provisions in the Congressional Accountability Act are inapplicable to legislative branch employees. Currently, those veterans – thousands currently returning from the Middle East and other combat zones -- who might seek legislative branch employment or fill covered positions have no benefit appropriate to their service to our country.

As mandated by the Congressional Accountability Act, the Board of Directors of the Office of Compliance has adopted substantive regulations implementing certain employment rights and protections for veterans under the VEOA. The Board, with stakeholder input, has endeavored to adopt regulations both sensitive and responsive to the particular workings and procedures of the covered community. On March 21, 2008, these regulations were sent to Congress for approval.

The Board-adopted VEOA regulations seek both to apply veterans' preference to federal employment in the legislative branch as provided by VEOA and to provide transparency in the application of veterans' preference in covered appointment and retention decisions. CAA procedures for bringing claims under VEOA are now provided. See, www.compliance.gov for full text of the regulations.

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1 Act of June 27, 1944, ch. 287, 58 Stat. 387, amended and codified in various provisions of Title 5 of the United States Code.
2 Pub. L. 105-339, 112 Stat. 3186 (October 31, 1998).
3 Sen. Rept. 105-340, 105 Cong., 2d Sess. at 19 (Sept. 21, 1998).
4 Pub. L. 105-339 § 4(c)(1) and (5), 112 Stat. 3186 (October 21, 1998), 2 U.S.C.§ 1316(a)

The regulations cover certain qualified, preference-eligible employees[5] of the legislative branch, and require veterans' preference in certain appointments and reductions-in-force (RIF). In general, employees who are appointed by Members of Congress, Committees, Subcommittees or Joint Committees are not covered by these regulations. However, employees of Congressional instrumentalities are.

The regulations do not apply to those Employing Offices whose employees are not covered by the VEOA. As noted above, this generally excludes Members' offices as well as Committees of the House and Senate. The regulations are drafted to afford Employing Offices flexibility in determining how veterans' preference will be implemented in their own workplaces, while requiring that those policies remain true to the principles of the VEOA. Thus, Veterans' preference in hiring is an "affirmative factor" that must be considered only if the applicant is otherwise qualified for the position. Unless the Employing Office has duly adopted a numerical rating system, veterans' preference will be part of a subjective evaluation of applicants. However, as long as there are qualified preference eligible applicants for custodian, elevator operator, guard, or messenger positions, competition for appointment to these jobs is restricted to those individuals.

As is required by the VEOA, veterans' preference trumps other retention criteria in reductions-in-force. Thus, qualified veterans are given preference over all other employees in their "competitive area" who are impacted by a RIF. The RIF regulations do not apply to personnel actions based on performance or conduct, and do not apply to temporary employees.

Finally, the VEOA regulations require Employing Offices to adopt written veterans' preference policies; provide notice of the policies and reasons for non-selection of preference eligible applicants; and keep sufficient personnel records relating to the application of those policies.

With veterans returning to a distressed economy, the promise of veterans' preference laws, including VEOA, is ever more compelling but remains out-of-reach for employees of the legislative branch without Congressional approval of the adopted regulations. The Board of Directors urges Congress to make meaningful this promise by affording those veterans the benefits contemplated by VEOA.

Uniformed Services Employment and Re-employment Rights Act

Recommendation: The Board of Directors requests prompt approval of its adopted regulations implementing USERRA rights and protections specific to the legislative branch.

The Uniformed Services Employment and Re-employment Rights Act (USERRA) was enacted in 1994 to encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from such service. USERRA seeks to ensure that entry and re-entry into the civilian workforce are not hindered by participation in non-career military service and

5 A preference eligible employee is an individual who is covered under the CAA and served on active duty in the armed forces during specified circumstances, and who has been honorably discharged or released; served on active duty and incurred a service-connected disability; or has a particular familial relationship with a certain type of veteran who is, generally, entitled to veteran's preference. VEOA covers those preference-eligible employees of the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the new Office of Congressional Accessibility Services (which replaces the Capitol Guide Service), and the Office of Compliance.

accomplishes this purpose by providing rights in two kinds of cases: discrimination based on such military service, and denial of an employment benefit as a result of such military service. The Department of Labor submitted implementing regulations for the executive branch in 2005.

USERRA was made applicable to eligible employees of the legislative branch under the CAA. The Board of Directors of the Office of Compliance proposed implementing regulations in May 2008. Subsequent to receipt of comments, and sensitive to stakeholder input particular to legislative branch concerns, the Board of Directors adopted regulations on December 3, 2008 and intends to send them for approval by the 111th Congress at the beginning of its new session. See, www.compliance.gov for full text of the regulations.

The regulations cover employees and applicants for employment who are serving or have served in the uniformed services and work in the legislative branch.[6] They provide re-employment rights and protection from discrimination and retaliation. Generally, with sufficient notice, an "eligible employee" with five or less years of service has the right to be reemployed by an employing office if that employee left that job to perform service in the uniformed service. An employing office may not deny an "eligible employee" initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of the employee's status in the uniformed service.

Further, the regulations address health and pension plan benefits. Upon returning to employment with the employing office, eligible employees are entitled to health benefit coverage, generally without any waiting periods or exclusions except for service connected illnesses or injuries. In addition, upon reemployment, an eligible employee is treated as not having a break in service with the employing office for purposes of participation, vesting and accrual of benefits in a pension plan.

Under USERRA, as enforced by the CAA, an employing office may not retaliate against an "eligible employee" for asserting, or assisting in the enforcement of, a right under USERRA, including testifying or making a statement in connection with a proceeding under USERRA. While not specifically protected by USERRA, a "covered employee" is protected under the anti-retaliation provisions of the CAA for assisting in the enforcement of USERRA rights, including testifying or making a statement in connection with a proceeding under USERRA, even if that covered employee has no service connection.

An "eligible employee" may file a USERRA complaint, subsequent to CAA-mandated counseling and mediation, either with the OOC or in a civil action in district court. Similarly, after the required period of counseling and mediation, a "covered employee" may bring an action for retaliation under the retaliation sections of the CAA. Although USERRA has no statute of limitations, the CAA requires that a request for counseling be brought to the OOC within 180 days after the alleged violation.

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6 For purposes of USERRA, an employee or applicant for employment with the House of Representatives, Senate, Office of Congressional Accessibility Services, Capitol Police, Congressional Budget Office, Office of the Architect of the Capitol, Office of the Attending Physician, Government Accountability Office, Library of Congress, Office of Compliance is a "covered employee" under the CAA. A "covered employee" who is a past or present member of the uniformed service; has applied for membership in the uniformed service; or is obligated to serve in the uniformed service is an "eligible employee" protected by USERRA, as applied by the CAA.

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There is a need for both VEOA and USERRA regulations in the legislative branch, sensitive to its particular procedures and practices. Congress has seen fit to provide service men and women certain protections in federal civilian employment. The Board of Directors urges speedy passage of both sets of regulations to make meaningful to the covered community the rights afforded by VEOA and USERRA.

II. Safety and Health Compliance Tools

In enacting the occupational safety and health provisions of the Congressional Accountability Act (2 U.S.C. 1341), Congress did not fully incorporate significant provisions of the Occupational Safety and Health Act of 1970. As a result, in the event an employing office refuses to voluntarily provide documents during an inspection or investigation, the OOC does not have the authority to subpoena employing office records, nor can the OOC require employing offices to collect and provide illness, injury and other safety and health related information. In addition, the OOC does not have the authority granted to the Secretary of Labor to protect against retaliation employees who cooperate in OOC investigations. Lacking such authorities, this Office's ability to effectively and efficiently investigate and enforce occupational safety and health standards, determine the extent and causes of employee injuries and illnesses, and assure covered employees the same level of protection from retaliation afforded their counterparts in the private sector is substantially diminished.

In prior Section 102(b) Reports, the Board of Directors of the Office of Compliance requested that Congress amend the CAA to provide the foregoing authorities to enable the OOC's General Counsel to effectively and efficiently exercise the occupational safety and health mandate under that Act. In enacting the OSH Act, Congress declared it to be its purpose "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources...." 29 U.S.C. 651. Because of the importance of the foregoing authorities to the fulfillment of Congress' purpose in enacting the OSH Act, the Board again renews its request.

Accordingly, as discussed below, the Board recommends that Congress amend the CAA, (1) to provide investigatory subpoena authority and record keeping and other requirements of Sections 8(b) and 8(c) of the OSH Act (29 U.S.C. 657(b) and (c)) and (2) to authorize the General Counsel to initiate an action to protect employees who report workplace hazards to the Office of Compliance or otherwise cooperate with health and safety inspections and investigations as provided by Section 11(c) of the OSH Act (29 U.S.C. 660(c)). The Board recommends that these amendments apply only to employing offices that are instrumentalities of Congress. The Board finds that the need for such measures has not been demonstrated with respect to the personal offices of Members of the House of Representatives or Senators or House, Senate or joint committees.

Investigatory Subpoena Power and Record Keeping

Recommendation 1: The Board of Directors of the Office of Compliance recommends amending the Congressional Accountability Act to afford its General Counsel investigatory subpoena power under Section 8(b) of the Occupational Safety and Health Act in aid of health and safety investigations with

respect to the employing offices listed in 2 U.S.C. 1341(a)(2)(C) of the CAA, except the personal offices of Members of the House of Representatives or of Senators or House, Senate or joint committees.
Recommendation 2: The Board of Directors of the Office of Compliance recommends amending the Congressional Accountability Act to adopt the recordkeeping, notice posting and related requirements of Section 8(c) of the Occupational Safety and Health Act with respect to the employing offices listed in Recommendation 1.

1. Investigatory Subpoena Authority

Under the CAA, Congress mandated that the General Counsel of the Office of Compliance conduct periodic occupational safety and health inspections in covered employing offices within the legislative branch and to investigate alleged safety and health violations upon request of covered employees and employing offices. To implement this mandate, Congress granted the General Counsel some, but not all, of the authorities that are provided the Secretary of Labor under Section 8 of the Occupational Safety and Health Act of 1970.

One of the most significant authorities of the Secretary of Labor is the ability to compel the attendance and testimony of witnesses and the production of evidence under oath in the course of conducting inspections and investigations. 29 U.S.C. §657(b). In enacting the OSH Act, the Congress observed that this investigatory subpoena power "is customary and necessary for the proper administration and regulation of an occupational safety and health statute."[7] Investigatory subpoena authority is common to other federal agencies that have investigative functions similar to that of the Secretary of Labor under the OSH Act.[8] Absent such authority, a recalcitrant employer under investigation could easily delay or even disable a regulatory agency from conducting an adequate investigation.[9] Unlike OSHA and other state and federal entities, subpoena authority in aid of investigations was not included in the Congressional Accountability Act. This omission considerably limits the General Counsel's ability to promptly and effectively investigate safety and health hazards within the legislative branch.[10]

In many, if not most, instances, safety and health inspections and investigations of employment areas must rely on witnesses and the examination of records that are solely within the possession and control of the employing office. Where an employing office refuses to provide pertinent information, the General Counsel will be forced to limit or even abort an inspection or investigation. We understand that in some instances, the absence of investigatory subpoena authority has significantly contributed to protracted delays in investigations.

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7 Report No. 91-1291 of the House Committee on Education and Labor, 91st Congress, *2d Session, p. 22,* to accompany H.R 16785 (OSH Act) (Section 8(b) "grants the Secretary of Labor a subpoena power of books, records and witnesses – a power which is customary and necessary for the proper administration and regulation of an occupational safety and health statute."); Report No. 91-1291 of the Senate Committee on Labor and Public Welfare, 91st Congress, *2d Session, p.12,* to accompany S. 2193 (OSH Act) ("a power which is customary and necessary for the proper administration and enforcement of a statute of this nature.").

8 See, for example, *Report to Congress on the Use of Administrative Subpoena Authorities by Executive Branch Agencies and Entities*, U.S. Department of Justice, pp. 6-7 and Appendix A: ("Without sufficient investigatory powers, including some authority to issue administrative subpoena requests, federal governmental entities would be unable to fulfill their statutorily imposed responsibility to implement regulatory or fiscal policies. Congress has granted some form of administrative subpoena authority to most federal agencies, with many agencies holding several such authorities. [] The Supreme Court has construed administrative subpoena authority broadly and has consistently allowed expansion of the scope of administrative investigative authorities, including subpoena authorities, in recognition of the principle that overbearing limitation of these authorities would leave administrative entities unable to execute their respective statutory responsibilities.").

9 See, for example, *Federal Efforts to Eradicate Employment Discrimination in State and Local Governments: An Assessment of the U.S. Department of Justice's Employment Litigation Section*, U.S. Commission on Civil Rights (September 2001) ("A major obstacle to the investigative process is [the Employment Litigation Section] ELS's lack of subpoena power and its resulting reliance on voluntary compliance from employers under investigation. Without this authority, ELS cannot force employers to provide documents, access to personnel, or other evidence necessary to complete an investigation. *** '[I]nvestigations get strung along by employers very often' and the collection of information alone can take months. *** Thus, without having subpoena power, ELS runs the risk of needlessly expending resources on efforts to compel employers to produce the information necessary for an investigation.")

10 Research disclosed nothing in the legislative history to explain why §8(b) of the OSH Act was not incorporated in the CAA.

See *Biennial Report on Occupational Safety and Health Inspections* during the 109th Congress, pp. 5-6 (April 2008). Inordinate delay or provision of only partial information can easily result in faulty witness recollection, the loss of evidence, and untimely completion of inspections.

When cooperation in an investigation is not forthcoming, the only means currently available to the General Counsel to gain access to necessary documents or testimony is to issue a citation, followed by a complaint, and a request to the hearing officer to issue subpoenas or conduct discovery. This option is both costly and time-consuming. The inherent delays of litigation may have the unfortunate effect of prolonging employee and public exposure to unabated hazards, with potential risk of illness or injury. Investigatory subpoena power would deter the raising of unwarranted objections to providing documents or other evidence necessary for an investigation. At the same time, this authority would provide a neutral forum for the timely resolution of legitimate disputes over the production of evidence.[11] Hence, it would enhance the General Counsel's ability to promptly obtain information necessary to ascertain whether further investigation was required, immediate enforcement action was warranted, or to otherwise conclude that no factual basis existed for finding a violation.

2. Adoption of OSHA's record keeping requirements

The Board of Directors recommends that covered legislative branch employers be required to keep and provide records to the General Counsel consistent with the requirements of the Occupational Safety and Health Act. Section 8(c) of the OSHA, 29 U.S.C. 657(c), requires employers to make, keep and preserve, and provide to the Secretary of Labor, records required by the Secretary as necessary and appropriate for the enforcement of the Act or for developing information regarding the causes and prevention of occupational accidents and illnesses; records on work-related deaths, injuries and illnesses; and records of employee exposure to toxic materials and harmful physical agents. None of these record keeping provisions was adopted by the CAA.[12]

In enacting the OSH Act, Congress recognized that "[f]ull and accurate information is a fundamental precondition for meaningful administration of an occupational safety and health program." Congress observed that a record keeping requirement should be included in that legislation since "the Federal government and most of the states have inadequate information on the incidence, nature, or causes of occupational injuries, illnesses, and deaths."[13] With respect to legislative branch workplaces, however, inaccessibility to full and accurate safety and health information continues to impede the OOC's ability to effectively administer the CAA because the record keeping requirements of Section 8(c) of the OSH Act were not incorporated in the CAA.

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11 Typically, administrative investigatory subpoenas are subject to third party review in order to determine whether "the inquiry is within the authority of the agency, the demand is not too indefinite and the information is reasonably relevant." *United States v. Morton Salt,* 338 U.S. 632, 651 (1950). Such review allows both parties to be heard at an early stage of the investigation. Any dispute over the agency's right to obtain information can then be promptly resolved. This procedure would deter an employing office from unilaterally withholding relevant documents and other evidence and unduly prolonging an investigation.

12 Occupational accident and illness record keeping and reporting requirements are applied to "each Federal Agency" by virtue of Section 19 of the OSH Act (29 U.S.C. §668). Section 19 was not incorporated in the CAA. Accordingly, the Secretary of Labor's record keeping regulations under Section 19 apply only to executive branch agencies, except that "By agreement between the Secretary of Labor and the head of an agency of the Legislative and Judicial Branches of the Government, these regulations may be applicable to such agencies." 29 CFR 1960.2(b) and 1960.66 et seq. The Department of Labor has advised that it has no such agreements with any legislative branch employing offices.

13 Senate Report No. 91-1282 (October 6, 1970) respecting the record keeping and records provisions of now Section 8(c) of the OSH Act. See also, Report No. 91-1291 of the House Committee on Education and Labor, 91st Congress, *2d Session,* p. 30, to accompany H.R 16785 (OSH Act)("Adequate information is the precondition for responsive administration of practically all sections of this bill.").

Without access to such information, the General Counsel is unable to effectively enforce several critical safety and health standards within the legislative branch. Substantive occupational safety and health regulations concerning asbestos in the workplace (29 C.F.R. 1910.1001), providing employees with safety information regarding hazardous chemicals in their workspaces (29 C.F.R. 1910.1200), emergency response procedures for release of hazardous chemicals (29 C.F.R. 1910.120), and several others rely on accurate record keeping to ensure that employees are not exposed to hazardous materials or conditions. However, because the CAA does not contain Section 8(c)'s record keeping requirements, employing offices may contend that they are not required to maintain or submit such records to OOC for review. We are concerned that absent these requirements, the Congress's objective to ensure that all legislative branch employees are provided with places of work that meet the occupational safety and health standards that protect their private sector counterparts will not be fulfilled.

Without the benefit of Section 8(c) authority, the General Counsel cannot access records needed to develop information regarding the causes and prevention of occupational injuries and illnesses. Section 8(c)(1). As the Department of Labor recognized, "analysis of the data is a widely recognized method for discovering workplace safety and health problems and tracking progress in solving these problems." See, "Frequently asked questions for OSHA's Injury and Illness Recordkeeping Rule for Federal Agencies," www.osha.gov/dep/fap/recordkeeping faqs.html.

In February 2004, the General Accountability Office issued its report, *Office of Compliance, Status of Management Control Efforts to Improve Effectiveness*, GAO-04-400. In its report, the GAO made a number of recommendations to improve the OOC's effectiveness, one of which was to increase "its capacity to use occupational safety and health data to facilitate risk-based decision making" to ensure that OOC's activities contribute to "a safer and healthier workplace." (pp. 4, 14). The inability to acquire relevant and targeted employing office accident and injury data (OSH Act Section 8(c)(2)) hinders the General Counsel's effort to tailor the biennial inspections, focusing its limited resources on work areas that have the highest incidence of illness or injury.

Enforce Anti-Retaliation Rights for Employees Reporting Health and Safety Violations

Recommendation: The Board of Directors of the Office of Compliance recommends amending the Congressional Accountability Act to permit its General Counsel to enforce anti-retaliation rights for covered employees of employing offices listed in Recommendation 1 who report health and safety hazards or who otherwise participate or cooperate in occupational safety and health investigations.

Over the thirteen years of the Congressional Accountability Act's existence, legislative branch employees have provided invaluable insight into the existence of hazardous or unhealthful conditions. The information received from employees has proven essential in advising the General Counsel of the possible existence of serious hazards that may affect the safety and health of employees and members of the public. All too often, the hazards these employees have brought to the General Counsel's attention might not otherwise have been detected during the mandated periodic inspections of legislative branch facilities. Because of the strong institutional interest in ensuring that this information continues to flow freely, it is critical that the Congressional Accountability Act effectively protects employees from reprisal when they exercise their rights to report occupational hazards within the workplace or otherwise cooperate with the Office of Compliance on matters relating to occupational safety and health. Investigation and prosecution by the General Counsel would more

effectively vindicate those rights, deter acts taken in reprisal, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the Act and its processes.

At present, the CAA offers covered employees only limited protection against retaliation for asserting their occupational health and safety rights under the CAA. In a number of instances, employees have expressed to the General Counsel's health and safety inspectors their unwillingness to file a request for inspection or otherwise become involved in an inspection for fear of possible retaliation by their employers. Section 207 of the CAA prohibits any action by a covered employing office to "intimidate, take reprisal against, or otherwise discriminate against, any covered employee because the covered employee has opposed any practice made unlawful by [the CAA]... or initiated proceedings...or participated in... [a] proceeding..." 2 U.S.C. Sec 1317. Under this provision, the employee has the obligation to bring the retaliation claim. With that comes the obligation to shoulder the financial and logistical burden of litigating a charge of reprisal without the support of the General Counsel's investigative process and enforcement procedures. Under Section 11 (c) of the OSH Act, the Secretary of Labor has authority to investigate and bring an action with respect to an unlawful discharge or other discrimination against an employee because of the employee's exercise of his rights on behalf of himself or others under that Act. 29 U.S.C. 660(c)(2). In contrast, under the CAA, the General Counsel does not have authority to bring a claim on behalf of an employee who alleges retaliation because he or she cooperated in one of the General Counsel's investigations. Employees have reported to the General Counsel's safety inspectors instances of harassment and other acts of retaliation because they reported hazards. But with few exceptions, they have not initiated Section 207 retaliation claims under the CAA. Some employees have expressed to the OGC great concern about their exposure in coming forward to bring a claim of retaliation; others have indicated their unwillingness to proceed without support of agency investigation and prosecution.

In such event, the General Counsel's inability to prosecute meritorious retaliation claims can have the effect of undermining employee confidence in the efficacy of the CAA. Not only is the employee affected, but others may be deterred from reporting a hazard. Employee reluctance to report uncorrected hazardous conditions within the workplace both undermines the core objective of the CAA - to foster a safe and healthful work environment - and deprives the Office of information critical to its mission. Accordingly, the Board recommends that the Congress enhance the protections of Section 207 by granting authority under the CAA to investigate and prosecute allegations of intimidation or reprisal for employees asscerting their OSH rights under the CAA.

III. Legislative Activity in the 110th Congress

The Board of Directors recognizes legislation passed by the 110th Congress where, by its terms, the legislative branch is covered and the Congressional Accountability Act applied.

Genetic Information Nondiscrimination Act of 2008, Pub. L. No. 110-233: This new legislation, effective November, 2008, prohibits, *inter alia*, discrimination in employment on the basis of genetic information and is intended to provide a uniform national standard to protect against discrimination and/or the potential for discrimination and allow individuals to take advantage of genetic testing, new technologies and therapies, and research findings. Employees covered under the Congressional Accountability Act are expressly covered by the Genetic Information Nondiscrimination Act, and their remedies and enforcement mechanisms are similar to those provided by the CAA. Sec. 207(c)(1-4).

ADA Amendments Act of 2008, Pub. L. 110-325: This statute, effective January 1, 2009, intends to restore the intent and protections of the Americans with Disabilities Act of 1990, one of the initial statutes covered by the CAA. Its terms will cover legislative branch employees, and CAA remedies pertain.

The Board applauds enhanced compliance with section 102(b)(3) of the CAA during the 110th Congress. Section 102(b)(3) requires that every House and Senate committee report accompanying a bill or joint resolution that affects terms and conditions of employment or access to public services or accommodations must "describe the manner in which the provisions of the bill or joint resolution apply to the legislative branch" or "in the case of a provision not applicable to the legislative branch, include a statement of the reasons the provision does not apply." The Board encourages continuing such efforts in the 111th Congress.

Conclusion

With the advent of the 111th Congress, coming at a time of economic and global challenge, the Board of Directors believes that the timing of this series of recommendations could not be more favorable. Both the regulations implementing VEOA and USERRA and the proposed CAA amendments regarding health and safety are of profound significance to the covered community. We urge the leadership of both houses of Congress to move swiftly on the proposals included in this *2008 Section 102(b) Report*.

A fair workplace requires fair treatment for its applicants and employees who serve in the military. The legislative branch attracts and employs many men and women who have collateral military responsibility. Congress has enacted laws which ensure that these individuals receive the same treatment as their civilian counterparts. Those service men and women who make application for federal employment in the legislative branch and those individuals returning from active duty must be assured, through appropriate regulation, that their service in the military will not hinder them from serving in their country's legislative branch of government.

The Office of the General Counsel, in collaboration with instrumentalities in the covered community, has had much success in reducing and/or eliminating health and safety hazards. However, continuing progress is impeded by failure to grant the General Counsel enforcement authority similar to executive branch counterparts and to mandate certain reporting requirements and programs in the legislative branch. With this Section 102(b) Report, the Board has recommended limited, narrowly tailored approaches to the problems of investigatory subpoenas; enforcement of employee anti-retaliation rights; illness and injury reporting; and safety and health programs.

This Board, its executive appointees, and the staff of the Office of Compliance are prepared to work with the leadership, its oversight committees, other interested Members, and instrumentalities in Congress and the legislative branch both to garner Congressional approval for these regulations and to make these recommendations part of the Congressional Accountability Act during the 111th Congress.

Respectfully submitted,

Susan S. Robfogel, Chair

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Appendix A: Employment and Civil Rights which still do not apply to Congress or Other Legislative Branch Instrumentalities

Recommendation: The Board of Directors of the Office of Compliance recommends that Congress make applicable to the legislative branch covered community all employment and civil rights protections still not so applicable, as more fully described below.

The statutes below, with the exception of Section 508 of the Rehabilitation Act and the Whistleblower Protection Act, were all first identified by the Board in 1996 as not included among the laws which were applied to Congress through the Congressional Accountability Act of 1995. The absence of section 508 of the Rehabilitation Act was first identified in our 2001 Interim Report to Congress and the urgency of affording legislative branch employees whistleblower protection was emphasized in our *2006 Section 102(b) Report*. We here repeat the recommendations – made in our Reports of 1996, 1998, 2000, 2002, 2004, and 2006, as well as those of the Interim 2001 Report – that these statutes should also be applied to Congress and the legislative branch through the Act.

The 1998 amendments to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d)

In November 2001, the Board submitted an Interim Section 102(b) Report to Congress regarding the 1998 amendments to the Rehabilitation Act of 1973 in which the Board urged Congress to make those amendments applicable to itself and the legislative branch. The purpose of the 1998 amendments is to:

> *require each Federal agency to procure, maintain, and use electronic and information technology that allows individuals with disabilities the same access to technology as individuals without disabilities. [Senate Report on S. 1579, March 1998]*

As of this time, some seven years later, software and other equipment which is "508 compliant" is readily available and in use by some employing offices. The Board encourages consistent use of these technologies so that individuals with impairments may have the same opportunities to access materials as others.

The Board reiterates its recommendation that Congress and the legislative branch, including the Government Accountability Office, Government Printing Office, and Library of Congress, be required to comply with the mandates of section 508.

Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a to 2000a-6, 2000b to 2000b-3)

These titles prohibit discrimination or segregation on the basis of race, color, religion, or national origin regarding the goods, services, facilities, privileges, advantages, and accommodations of "any place of public accommodation" as defined in the Act. Although the CAA incorporated the protections of titles II and III of the ADA, which prohibit discrimination on the basis of disability with respect to access to public services and accommodations[14], it does not extend protection against discrimination based upon race, color, religion, or

14 Access to public accommodations, in this sense, includes an individual's "full enjoyment" of goods and services, and is not limited to the physical access of the place of accommodation. See *National Federation of the Blind v. Target Corp.*, 2006 WL 2578282 (N.D. Cal. Sept. 6, 2006).

national origin with respect to access to public services and accommodations. For the reasons set forth in the 1996, 1998 and 2000 Section 102(b) Reports, the Board has determined that the rights and protections afforded by titles II and III of the Civil Rights Act of 1964 against discrimination with respect to places of public accommodation should be applied to employing offices within the legislative branch.

Whistle Blower Protection Act Application to the CAA

Over the years, the Office of Compliance has received numerous inquiries from legislative branch employees about their legal rights following their having reported allegations of employer wrongdoing or mismanagement. Unfortunately, these employees are not currently protected from employment retaliation by any law. The retaliation provisions of the CAA limit protection to employees who, in general, exercise their rights under the statute. Whistle blower protections are intended specifically to prevent employers from taking retaliatory employment action against an employee who discloses information which he or she believes evidences a violation of law, gross mismanagement, or substantial and specific danger to public health or safety. When Congress first enacted the Whistleblower Protection Act (WPA) in 1989, it stated that the intent of the legislation was to:

> strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by — (1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing ... that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration[15].

The operative statutory protections of the WPA are embodied in its definition of "prohibited personnel practices":

§ 2302. Prohibited personnel practices
(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority — ...
(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of —
(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences — (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or
(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences — (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

15 5 U.S.C. § 1201 nt.

In both the 109th and 110th Congresses, legislation was introduced[16] that would have amended the Congressional Accountability Act to give legislative branch employees some of the whistle blower protection rights that are available to executive branch employees. In its *2006 Section 102(b) Report*, the Board of Directors simultaneously encouraged passage of that legislation and noted some of its limitations by comparison to executive branch employee whistle blower protection.[17] In this *2008 Section 102(b) Report*, the Board again urges Congress to grant legislative employees the same or similar whistleblower protections that are afforded to executive branch employees.

Prohibition against discrimination on the basis of jury duty (28 U.S.C. § 1875)

Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative branch employment. For the reasons set forth in the 1996, 1998, 2000 and 2006 Section 102(b) Reports, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Prohibition against discrimination on the basis of bankruptcy (11 U.S.C.§ 525)

Section 525(a) provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person who is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. For the reasons stated in the 1996, 1998, 2000 and 2006 Section 102(b) Reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Prohibition against discharge from employment by reason of garnishment (15 U.S.C. § 1674(a))

Section 1674(a) prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the legislative branch. For the reasons set forth in the 1996, 1998, 2000 and 2006 Section 102(b) Reports, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

16 S.3676, 109th Cong. (2006); S. 508, 110th Cong. (2007).
17 See *2006 Section 102(b) Report* at 3-7.

Appendix B: Regulatory Enforcement Provisions for Laws Which Are Already Applicable to the Legislative Branch under the Act

Recommendation: The Board of Directors of the Office of Compliance recommends that Congress grant comprehensive enforcement authority for laws already applicable to the legislative branch, as more fully described below.

Notice-posting requirements of the private sector CAA laws

As mentioned in its 1998, 2000, 2002, 2004 and 2006 Reports, experience in the administration of the Act leads the Board to recommend that all currently inapplicable notice-posting provisions be made applicable under the CAA. For the reasons set forth in most of its prior reports, in addition to the narrow recommendation made above (pages 9-11), the Board recommends that the Office be granted the authority to require that records be kept and notices posted in the same manner as required by the agencies that enforce the provisions of law made applicable by the CAA in the private sector.

Other enforcement authorities exercised by the agencies that implement the CAA laws for the private sector

To further the goal of parity, the Board also recommends that Congress grant the Office the remaining enforcement authorities that executive branch agencies utilize to administer and enforce the provisions of law made applicable by the CAA in the private sector. Implementing agencies in the executive branch have investigatory and prosecutorial authorities with respect to all of the private sector CAA laws, except the WARN Act. Based on the experience and expertise of the Office, granting these same enforcement authorities would make the CAA more comprehensive and effective. By taking these steps to live under full agency enforcement authority, the Congress will strengthen the bond that the CAA created between the legislator and the legislated.

Appendix C: Employee Protection Provisions of Environmental Statutes

Recommendation: The Board of Directors of the Office of Compliance recommends that Congress adopt legislation clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the legislative branch.

Since its 1996 Report, the Board has addressed the inclusion of employee protection provisions of a number of statutory schemes: the Toxic Substances Control Act, Clean Water Act, Safe Drinking Water Act, Energy Reorganization Act, Solid Waste Disposal Act/Resources Conservation Recovery Act, Clean Air Act, and Comprehensive Environmental Response, Compensation and Liability Act. In its 1996 Section 102(b) Report, the Board stated:

> *It is unclear to what extent, if any, these provisions apply to entities in the Legislative Branch. Furthermore, even if applicable or partly applicable, it is unclear whether and to what extent the Legislative Branch has the type of employees and employing offices that would be subject to these provisions.*
> *Consequently, the Board reserves judgment on whether or not these provisions should be made applicable to the Legislative Branch at this time.*

Further, in the 1998 Report the Board concluded that, while it remained unclear whether some or all of the environmental statutes apply to the legislative branch, "[t]he Board recommends that Congress should adopt legislation clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the Legislative Branch."

In the 2002, 2004 and 2006 Reports, the Board explicitly analyzed these protections and recommended that the employee protection provisions of these acts be placed within the CAA and applied to all covered employees, including employees of the Government Accountability Office, Government Printing Office, and Library of Congress. The Board reiterates those recommendations herein, including its recommendation to eliminate the separation of powers conflict inherent in enforcing these statutes, and urges Congress to include such amendments to the Act.

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