# Congress of the United States

## House of Representatives

COMMITTEE ON HOUSE ADMINISTRATION
1309 LONGWORTH HOUSE OFFICE BUILDING
(202) 225-8281
Washington, DC 20515-6157
www.house.gov/cha



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**Via Facsimile and First Class Mail**

William W. Thompson II
Executive Director
Office of Compliance
Room LA 200
John Adams Building
110 Second Street, S.E.
Washington, D.C. 20540-1999

Dear Mr. Thompson:

The Committee on House Administration ("Committee") is pleased to submit the following comments and suggestions regarding the revised proposed amendments to the Procedural Rules of the Office of Compliance. Although some of the proposed amendments constitute valuable and relevant changes to the Procedural Rules, we nevertheless urge the Board to reconsider some of the language and requirements of the proposed amendments in accordance with the suggestions below.

**Introduction**

On September 4, 2003, the Board of Directors of the Office of Compliance ("the Board") submitted for publication in the Congressional Record, a Notice of Proposed Rulemaking for Proposed Amendments to the Office of Compliance's Procedural Rules ("Proposed Amendments").[1] After receiving a number of comments from interested parties, including this Committee, the Board submitted a Second Notice of Proposed Rule Making revising the initial Proposed Amendments ("Revised Amendments").[2] The

[1] 149 CONG. REC. H7944-04 (daily ed. Sept. 4, 2003).

[2] The Second Notice was originally published in the Congressional Record on February 24, 2004, after being received by the House only. The Second Notice was republished in the Congressional Record by both the House and Senate on February 26, 2004. 150 CONG. REC. H693-01 (daily ed. February 26, 2004); 150 CONG. REC. S1671-02 (daily ed. February 26, 2004).

Revised Amendments include alterations to the initial set of proposed amendments, as well as brief discussions of the Board's reasoning for all of its proposed amendments.

## Comments to Proposed Procedural Rules

### § 2.03(a) – Initiating a Proceeding; Formal Request for Counseling.

The language of this Proposed Amendment requires an employee wishing to initiate the administrative process under the Congressional Accountability Act ("CAA") to file a *written* request for counseling with the Office of Compliance ("the Office").

As stated in our initial comments, we agree with the requirement that requests for counseling be in writing so as to prevent confusion over the timing and content of such requests. In the event that a party pursues an action before a Hearing Officer or in federal court, however, the confidentiality of the written request for counseling should be automatically waived and the Office should provide the written request for counseling to the employing office upon written request. The written request for counseling is necessary for the employing office to determine if the Hearing Officer or federal court has jurisdiction over a complaint.

Contrary to the Board's assertion in the "Discussion" section for this proposed amendment, the Committee's position on this rule should not be interpreted as advocating a waiver of the confidentiality of the counseling process. Indeed, the counseling *process* remains confidential; it is simply the document *initiating* the counseling process that is relevant to the determination of jurisdictional and statutory prerequisites necessary for pursuing a claim under the CAA. Such a document should be turned over to the employing office in the event that the covered employee either files a complaint with the Office so as to initiate an administrative hearing, or files a complaint in federal court.

### § 4.16 - Comments on Occupational Safety and Health Reports.

This Proposed Amendment creates an entirely new procedural rule regarding the submission and review of the comments of responsible parties to reports issued by the Office of the General Counsel of the Office of Compliance ("General Counsel"). Although the time tables set forth in the proposed rule have been changed to reflect a more realistic expectation for receiving comments from affected parties, several issues of concern remain.

One such issue involves how the General Counsel intends to respond to comments which may demonstrate a need to conduct further investigation of the initial Request for Inspection. In other words, the strict deadlines of the proposed amendment do not take into account the fact that there may be situations in which the General Counsel's most prudent course of action in response to comments from affected parties may entail reopening the investigation. Any such extension of an investigation would, most likely, mean that the original deadline for publication of a report would need to be altered in

favor of a thorough investigation, complete with the General Counsel's re-issuance of a revised report for review and comment. Again, the Board's apparent aversion to the General Counsel missing the self-imposed deadline should not outweigh the goal of compiling an accurate report based on the most immediate information available. Yet, the strict deadlines of the proposed amendment do not allow for such contingencies.

More important is the issue of security of Capitol Hill facilities. As stated in our original comments, the proposed amendment fails to mention or account for how the General Counsel and/or the Board would proceed if there is a conflict between the Office and the U.S. Capitol Police with regard to security sensitive information being disclosed in one of the General Counsel's reports. We hope that the Board is not attempting to assume "final and non-appealable" decision-making authority on matters which may touch upon local and national security. Yet, even under the revised language of the proposed rule, there is no accommodation for the special circumstances which arise when security sensitive information is necessarily included in a safety and health investigation. We therefore urge the Board to address the issue of how security sensitive information can be managed in light of the General Counsel's obligations under the CAA *as well as* the U.S. Capitol Police's mission to protect the safety and security of the Capitol Hill campus.

**§ 5.03(e) - Appeal.**

As stated in our earlier submission, this current rule should be amended to incorporate the new section 5.03(d) (the language, as written, only covers appeals of final decisions made under sections "5.03 (a) - (c)"). To the extent a Hearing Officer grants summary judgment on some, but not all, of the claims in a complaint, this section would apply to such a decision.

**§ 7.02(a) - Sanctions.**

This section allows a Hearing Officer to impose sanctions against a party's representative as "necessary to regulate the course of the hearing." Although this language is an improvement over the language originally proposed, the dearth of information concerning the sanctions contemplated by the rule leaves the question open as to whether allowing a Hearing Officer to impose sanctions is a substantive, rather than procedural, rule.[3] Moreover, there is no reference to or discussion of an appeals process for the party against whom sanctions are imposed. Therefore, we reiterate our suggestion that the rule be amended to include a list of sanctions and establish a process for

[3] For the sake of brevity, we incorporate by reference the discussion of substantive regulations versus procedural rules found in the Introduction section of our October 6, 2003, Comments to Proposed Amendments.

appealing any such sanctions.[4]

**§ 8.01(3) - Appeal to the Board.**

This Proposed Amendment allows the Board to authorize the Executive Director to rule on requests for extensions of time for filing documents with the Board.

Although we are glad that the Board has adopted the suggestion that any such delegation of authority to the Executive Director be in writing,[5] we are still troubled by the fact that the Board has not discussed how the CAA allows for such a delegation of authority.

In addition, as mentioned in our original comments, § 8.01(b)(2) is *not* indicated as being subject to proposed revision in the Office of Compliance's Notice of Proposed Rulemaking. Yet the language of the rule as represented in both the original Notice of Proposed Rulemaking and in the Second Notice of Proposed Rule Making *is significantly different* from the current Procedural Rule § 8.01(b)(2). The Board should indicate whether this is a typographical error or if this section of Rule § 8.01(b)(2) is part of the proposed amendments. Again, for the purpose of these comments, we assume that the error is typographical and that the Board is *not* proposing that Rule § 8.01(b)(2) be amended. If, however, the Board *is* suggesting an amendment to § 8.01(b)(2), the Board must reissue the language of this rule for public comment.

**§ 9.01(a) - Filing, Service and Size Limitations of Motions, Briefs, Responses and other Documents.**

This Proposed Amendment clarifies how a party should submit documents to the Office or to the Board. In addition, the Proposed Amendment allows the "Officer [*sic*], Hearing Officer or Board" to request a party to submit election versions of documents.

The reference to "The Officer" remains in the last sentence of this section. As mentioned in our earlier submission, we assume that this is a typographical error and that the term is supposed to be "the Office," as defined in Procedural Rule § 1.02(k). If not, we ask that the Board clarify who is referenced by "The Officer."

**§ 9.03 - Attorney's Fees and Costs.**

This Proposed Amendment requires all motions for attorney's fees to be submitted to the Hearing Officer.

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[4] As stated in our original comments, it is unclear from the language of the Proposed Amendment whether current Office of Compliance Procedural Rule § 8.01 would address this scenario. If so, such coverage should be clearly established in the rule.

[5] We suggest that such written delegation of authority be distributed to interested parties.

As stated in our original comments, while we support the proposed change that all motions for attorney's fees and costs be submitted to the Hearing Officer, we remain concerned that the proposed rule does not indicate whether an award of attorney's fees and costs is appealable and, if so, to whom. We urge the Board to adopt a method for appeal of an award of attorney's fees and costs in accordance with the provisions of § 8.01.

**§ 9.05(c) – Requirements for a Formal Settlement Agreement.**

This Proposed Amendment creates a variety of new procedural rules regarding signed settlement agreements. The proposed language requires any decision of the Executive Director to reject a settlement agreement to be in writing. In addition, the new rule states that signed settlement agreements cannot be rescinded unless by written revocation signed by all parties, or "as otherwise permitted by law."

Although the language has been altered to substitute the word "permitted" for "required," the problem still remains that the proposed rule regarding revocation of a settlement agreement does not address the situation for which this rule was apparently intended. It is applicable contract law, and not language of a procedural rule, which will dictate whether a settlement agreement can be rescinded and under what circumstances.

Moreover, as stated in our original comments, we propose modifying the rule to permit formal settlement agreements to contain the "signature of all parties *or their designated representatives*." Such language is particularly necessary in light of the fact that the "party" of the employing office is not a specific individual. Accordingly, individuals signing on behalf of employing offices are necessarily "designated representatives." The Proposed Amendment should be changed to reflect this fact.

**§ 9.05(d) – Violation of a Formal Settlement Agreement.**

This Proposed Amendment establishes a dispute resolution process for alleged violations of executed settlement agreements in the event that the settlement agreement itself does not contain "formal dispute resolution procedures."

We reiterate our belief the Office of Compliance lacks the statutory authority to settle disputes regarding settlement agreements. Specifically, Section 414 of the CAA[6] only gives the Office of Compliance authority to *approve* settlement agreements. We disagree with the Board's assessment that any "plenary" authority found in Section 414 of the CAA for the Executive Director to approve settlement agreements extends the authority of the Office of Compliance to hear contract claims. Moreover, the proposed language has a significant effect on private interests, and, therefore, affects the substantive rights of the parties. Accordingly, as discussed in our earlier comments, such a proposal is inappropriate for promulgation under Section 303 of the CAA.

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[6] 2 U.S.C. §1414.

Furthermore, the Board fails to address our observation that any dispute regarding settlement agreements reached after district court litigation should be resolved by the district court and we are suspect of any attempt by the Board to remove jurisdiction of a matter from a federal court.

**§ 9.07 - Payment of Decisions, Awards, or Settlements under section 415(a) of the Act.**

This Proposed Amendment provides that whenever a settlement is reached or a decision or award is granted at any juncture during the administrative process, the "decision, award or settlement shall be submitted to the Executive Director" to be processed and paid. We reiterate our position that no payment should be authorized from the settlement fund until a *final* decision or award has been made *and* the appeals process has been exhausted. The proposed language does not contemplate the effect of a party's request for a stay and, instead, intimates that the payment of awards is automatic. This is disturbing in light of the significant risk that funds disbursed to a complainant prior to exhaustion of appeals would not be recoverable to the U.S. Treasury if an award is reduced or vacated on appeal. We are concerned about the waste of taxpayer dollars – a waste which is preventable through the stay of an award pending the exhaustion of appeals. Accordingly, we disagree with the Board's assertion that a provision for automatic stays of judgment pending exhaustion of appeals requires an amendment to the CAA.

Sincerely,

Bob Ney
Chairman

John Larson
Ranking Member