Green, Susan

From: Tuck, Emily [Emily.Tuck@mail.house.gov]
Sent: Thursday, September 08, 2011 10:29 AM
To: Green, Susan
Cc: Space, Melissa; Black, Carol; Hite, Jason
Subject: FW: 111th Congress OSH Report -- Update

Susan – I received the report a few weeks ago. I reviewed it and did not have any comments concerning the CAO. I thought a response was only needed if there were comments; sorry for not contacting you. Please forward all further documents to my attention, to 102 Ford HOB.

Thanks,
Emily

Emily Tuck, Esq.
HR Policy and Practice Advisor
Office of the CAO
U.S. House of Representatives
202-225-0668
Emily.Tuck@mail.house.gov

From: Space, Melissa
Sent: Thursday, September 08, 2011 10:23 AM
To: Tuck, Emily
Subject: FW: 111th Congress OSH Report -- Update

FYI

From: Black, Carol
Sent: Thursday, September 08, 2011 10:22 AM
To: Green, Susan
Subject: RE: 111th Congress OSH Report -- Update

I gave it to Kyle Smith who handled safety for our office. His job was eliminated last month and I'm trying to track down his files. I'll let you know if I can find it before you go to the trouble to re-send it.

From: Green, Susan [mailto:Susan.Green@compliance.gov]
Sent: Thursday, September 08, 2011 10:13 AM
To: Black, Carol
Subject: RE: 111th Congress OSH Report -- Update
Importance: High

Carol –
Our records show that, on July 20th, we hand-delivered to you a cover letter and a CD with the text of the Report and Appendix Bs. As you don't have the document, would you let me know to whom I should send it for review? The Capitol Police have advised us that the Report and Appendices do not contain security-sensitive information, so we can now email the materials. Please advise right away so we can move the process along.

Thanks,
Susan
Susan M. Green
Deputy General Counsel
Office of Compliance
110 Second Street SE
Room LA-200
Washington DC 20540
(202) 724-9231
susan.green@compliance.gov
www.compliance.gov

From: Black, Carol [mailto:Carol.Black@mail.house.gov]
Sent: Wednesday, September 07, 2011 12:19 PM
To: Green, Susan
Subject: RE: 111th Congress OSH Report -- Update

Susan—I have checked my files and I didn't' receive the draft report.

From: Green, Susan [mailto:Susan.Green@compliance.gov]
Sent: Tuesday, July 19, 2011 8:52 AM
To: Adams, Sue; 'cbowman@aoc.gov'; 'kmulshin@aoc.gov'; Pugh, Elizabeth; Parker, Celine; Cherry, Felice; Browne, Robert; Lett, Gloria; Rogers, Ann; 'jean_manning@scce.senate.gov'; 'Jones, Janet (SCCE)'; 'patrick_mcmurray@scce.senate.gov'; 'jean_mccomish@saa.senate.gov'; 'AndrewsM@gao.gov'; 'carpineta@gao.gov'; 'frederick.herrera@uscp.gov'; 'rick.rogers@uscp.gov'; Black, Carol; Kyle Smith - (CAO-IO)
Cc: Eveleth, Peter; Schluter, Kathy; Perry, Faith; Wigfall, Terry
Subject: 111th Congress OSH Report -- Update

I'm writing to advise that the draft 111th Congress OSH report and its jurisdiction-specific appendices (Appendix Bs) will be delivered to you by close of business tomorrow, July 20th. Please provide comments by Monday, August 15th.
If you'd like to offer information about employing office safety and health accomplishments please do so by Monday, August 22nd.
Thank you in advance for your assistance.
Susan

Susan M. Green
Deputy General Counsel
Office of Compliance
110 Second Street SE
Room LA-200
Washington DC 20540
(202) 724-9231
susan.green@compliance.gov
www.compliance.gov

APPENDIX C

LIBRARY OF CONGRESS

Office of the General Counsel

August 22, 2011

Susan M. Green
Deputy General Counsel
Office of Compliance
Room LA 200 Adams Building
110 Second Street, SE
Washington, DC 20540-1999

Dear Ms. Green:

Thank you for the opportunity for the Library of Congress to provide comments on the 111th Congress Report on Occupational Safety and Health and Appendix B. The Library has no comment on the report or its appendix (see enclosure). However, please continue to send correspondence including requests for information relating to the Library of Congress to the Office of the General Counsel. We will distribute all correspondence to the appropriate Library managers and provide a consolidated Library-wide response. We look forward to continued cooperation between our agencies in fostering the protection of the health and safety of the Library's employees and patrons.

Sincerely,

Elizabeth A. Pugh
General Counsel

Enclosure:
Letter from Robert Browne, Safety Services Officer

LIBRARY OF CONGRESS

THE LIBRARY OF CONGRESS
101 INDEPENDENCE AVENUE, S.E.
Washington, D.C. 20540-9460

SAFETY SERVICES OFFICE

July 27, 2011

VIA HAND DELIVERY

Ms. Susan M. Green, Esq.
Deputy General Counsel
Office of Compliance
110 Second Street, Room LA 200
Washington, DC 20540-1999

Dear Ms. Green:

Thank you for your letter of July 20, 2011 and the opportunity to comment on your draft of the 111th Congressional Report on Occupational Safety and Health and Appendix B.

We do not have any recommendations for changes to the document but would like to thank your for your kind words regarding the Safety and Health Program at the Library. It is our privilege to work with the Office of Compliance to advance safety and health at the Library of Congress for our employees, patrons and visitors and to protect the vast collections of knowledge that we maintain.

Sincerely,

Robert S. Browne
Safety Services Officer

Green, Susan

From: Mills, Wesley [wmills@aoc.gov]
Sent: Wednesday, August 03, 2011 4:10 PM
To: Green, Susan; Young, David
Subject: OOC report on the 111th Congress

Thank you for the opportunity to review the draft of the 111th Congress Report on Occupational Safety and Health. The Office of Attending Physician has no comments on the report

Wesley Mills
Environmental / Occupational Health Manager
Office of Attending Physician
United States Capitol
B-344 Rayburn House Office Building
Washington, DC 20515
office 202-225-7993
cell 202-225-0218
fax 202-226-8718

NANCY ERICKSON
SECRETARY

APPENDIX C

United States Senate

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

SENATE CHIEF

CLAUDIA A. KOSTEL
DEPUTY CHIEF COUNSEL FOR EMPLOYMENT

TOBY R. HYMAN
ERICA A. WATKINS
C. PATRICK McMURRAY
SENATE SENIOR COUNSEL FOR EMPLOYMENT

MARK S. HAYES
ANN S. ROBINSON
SENATE COUNSEL FOR EMPLOYMENT

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

August 29, 2011

BY FACSIMILE

Mr. Peter A. Eveleth
General Counsel
Office of Compliance
Room LA-200 Adams Building
110 Second Street, SE
Washington, DC 20540-1999

Re: Comments to the OOC's Draft Report on the 111th Congress Biennial Safety and Health Inspections

Dear Mr. Eveleth:

The Office of Senate Chief Counsel for Employment ("SCCE") submits the following comments on the Office of Compliance ("OOC") Draft Report on the 111th Congress Biennial Safety and Health Inspections (the "Biennial Report"). We request that you consider our comments when finalizing the Biennial Report and that you include this letter as an appendix to the final Biennial Report, subject to security review by the U.S. Capitol Police.

No Citations For Senate Offices

We are pleased that the Biennial Report recognizes the Senate's safety record: no outstanding citations exist for Senate offices and no citations were issued during the 111th Congress. We appreciate your acknowledgement that this safety record is the result of the commendable accomplishments of the staff of each Senate office working with the SCCE in cooperation with the Office of the Senate Sergeant at Arms ("Senate SAA"), and the Office of the Architect of the Capitol ("AOC") in providing a safe work environment for all Senate employees.

Corrections, Additions And Clarifications To The Biennial Report

The SCCE recommends the following corrections, additions and clarifications to the Biennial Report to ensure that Congress receives complete and accurate information regarding current health and safety conditions in the congressional workplace.

A. The Biennial Report

- On page 10, the third paragraph states that "[a] number of the fire door latches [in the Capitol Visitor Center] had been covered with tape to prevent them from working in an emergency." This statement is misleading as it suggests that the latches were covered with tape for the purpose of rendering the fire doors inoperable in an emergency. To avoid misinterpretation, we request that the sentence be changed to read: "A number of fire door latches had been covered with tape, which we believe could have prevented the fire doors from working effectively in an emergency."
- On pages 12-13, under "Risk-Based Biennial Inspections," please clarify that the CAA does not require employing offices to conduct self-inspections as a substitute for the OOC Office of General Counsel's ("OGC") obligation under 2 U.S.C. § 1341(e)(1) to conduct inspections.

B. Appendix B (The Senate Facilities)

- The reference to the Senate SAA on page 1 should be deleted because no staff of the Senate SAA participated in the pre-inspections of member or committee offices conducted by the SCCE.
- The reference to the "Senate Daycare" on page 1 should be changed to the "Senate Child Care Center."
- The references to "DC Village" on pages 1 and 2 should be deleted as that is not a Senate facility and no Senate employees work there.
- The Biennial Report should omit any mention of a "general finding" based on the alleged lack of an annunciator system at the Congressional Acceptance Site facility. (*See* App. B at 2.) In fact, that facility has an annunciator system that the OOC inspector overlooked during the inspection.
- The second full paragraph on page 2 should clarify that the AOC is responsible for signage in the Dirksen Senate Office Building and for installing handrails in the Russell Senate Office Building ("RSOB").
- The last sentence of the second full paragraph on page 2 should refer to "Picture 1," not "Picture 2."
- Figures 2 and 4 in Appendix B should define the term "Other."
- In Figure 2, the second heading ("Underground . . . ") appears to be incomplete.
- Figure 3, depicting the distribution of hazard findings by Risk Assessment Code ("RAC"), should be modified to reflect that the RAC-1 and RAC-2 hazard findings are not the responsibility of any Senate office, but, rather, fall under the jurisdiction of other non-Senate congressional offices.
- In Figure 4, the reference to "Senate SSA" should be changed to "Senate SAA."

C. Appendix B (The U.S. Capitol Building)

- Figure 3 should define the term "Other."

D. Appendix B (The Capitol Visitor Center)

- The first sentence in the final paragraph on page 1 reads: "Picture 2 displays a fire door with tape covering the latching mechanism so that the door will not latch in a fire emergency." As noted above, this statement suggests that the latching mechanism was covered with tape for the purpose of rendering the fire door inoperable in an emergency, which is not the case. To avoid misinterpretation, the sentence should read: "Picture 2 displays a fire door with tape covering the latching mechanism, which the OGC believes could have prevented the fire door from working effectively in an emergency."
- The last sentence on page 1 should refer to "Picture 3," not "Picture 6."

The OGC Should Not Attach The Blue Ribbon Panel Report To Its Biennial Report

The SCCE objects to the OGC's plan to attach to its Biennial Report a copy of the Final Report of the Blue Ribbon Panel, Russell Senate Office Building, Office of Compliance Citation 19-1 100% Report ("Blue Ribbon Panel Report"). Inclusion of the Blue Ribbon Panel Report with the Biennial Report is inappropriate and unnecessary, as explained below.

The Blue Ribbon Panel Report was generated by an independent panel convened by the Senate Committee on Rules and Administration ("Senate Rules Committee") and the AOC, and contains a significant amount of information that is confidential or security sensitive, including but not limited to, technical data about the RSOB's heating, ventilation and air-conditioning systems, fire alarm and detection systems, means of egress and floor plans. Accordingly, the OGC's publication of the Blue Ribbon Panel Report would compromise rather than enhance the safety of congressional employees.

The OOC has previously acknowledged that it has no authority to make the Blue Ribbon Panel Report public. On September 30, 2010, the OOC Executive Director, Tamara Chrisler, testified before the House Transportation Subcommittee on Economic Development, Public Buildings and Emergency Management. In response to Del. Eleanor Holmes-Norton's inquiry whether the OOC will publish the Blue Ribbon Panel Report, Ms. Chrisler acknowledged: "The report is not ours to make public."

Finally, the OGC's publication of the Blue Ribbon Panel Report is unnecessary because the relevant stakeholders already have access to the Blue Ribbon Panel Report. Indeed, as acknowledged in the draft Biennial Report, the Blue Ribbon Panel presented its findings and recommendations to the relevant members of the congressional community at a briefing on April 6, 2010. *See* Draft Biennial Report at page 4, n. 6.

For all these reasons, the OGC should not publish the Blue Ribbon Panel Report with the final Biennial Report. Further, and for the same reasons, the SCCE requests that the OGC remove from its final Biennial Report the detailed summary of the Blue Ribbon Panel Report set forth at pages 4-6 of the draft Biennial Report.

The Biennial Report Inaccurately Portrays The Current Level Of Fire Safety At The Russell Senate Office Building

The SCCE recommends a number of changes to the Biennial Report to ensure that any information regarding the current level of fire safety in the RSOB is complete and accurate.

The draft Biennial Report correctly notes that the OOC issued Citation 19-1 regarding certain fire and life safety findings in the RSOB. The Biennial Report also correctly notes that the Senate Rules Committee, together with the AOC, has taken the lead in devising a plan to address those findings while preserving a historic building. To that end, in April 2009, the Senate Rules Committee and the AOC convened a Blue Ribbon Panel to study, evaluate and offer solutions to the findings addressed in Citation 19-1. As noted in the Biennial Report, the AOC and the Senate SAA have carried out recommendations of the Blue Ribbon Panel to ensure fire safety in the RSOB, including (1) installation of sprinklers and smoke barriers in the RSOB attic; (2) implementation of plans to relocate workshops from the basement of the RSOB to a new facility; and (3) development of an annual fire inspection program. The Biennial Report neglects to mention, however, that certain additional measures have been taken to improve fire safety in the RSOB, including the addition of an exit for mobility-impaired individuals and installation of annunciator alarm systems throughout the RSOB attic. The SCCE requests that the Biennial Report acknowledge these additional safety measures.

The SCCE further requests that the OGC remove from its Biennial Report any reference to a statement allegedly made by Ed Plaugher during the Blue Ribbon Panel briefing on April 6, 2010. Neither Mr. Plaugher nor anyone else made that statement. Furthermore, the Biennial Report mischaracterizes the current level of fire safety in the RSOB.

Conclusion

We appreciate the opportunity to provide commentary and suggestions for the Biennial Report. Please let us know if you have any questions regarding the comments or concerns expressed in this letter. The Senate employing offices look forward to working with you to continue to promote a safe and healthy workplace.

Sincerely,

Jean M. Manning

Jean M. Manning

NANCY ERICKSON
SECRETARY

United States Senate

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February 27, 2012

BY FACSIMILE

Mr. Peter A. Eveleth, Esq.
General Counsel
Office of Compliance
Room LA-200 Adams Building
110 Second Street, SE
Washington, DC 20540-1999

Re: Comments to the OOC's Revised Draft Report on the 111th Congress Biennial Safety and Health Inspections

Dear Mr. Eveleth:

The Office of Senate Chief Counsel for Employment ("SCCE") submits the following comments on the Office of Compliance ("OOC") Revised Draft Report on the 111th Congress Biennial Safety and Health Inspections (the "Biennial Report"), dated January 27, 2012. We request that you consider our comments when finalizing the Biennial Report.

No Citations For Senate Offices

We are pleased that the Biennial Report recognizes the Senate's safety record: no outstanding citations exist for Senate offices and no citations were issued during the 111th Congress. We appreciate your acknowledgement that this safety record is the result of the commendable accomplishments of the staff of each Senate office working with the SCCE in cooperation with the Office of the Senate Sergeant at Arms ("Senate SAA"), and the Office of the Architect of the Capitol ("AOC") in providing a safe work environment for all Senate employees.

Corrections, Additions And Clarifications To The Biennial Report

The SCCE recommends the following corrections, additions and clarifications to the Biennial Report to ensure that Congress receives complete and accurate information regarding current health and safety conditions in the Congressional workplace.

Statement From The General Counsel

The Biennial Report begins with a 5-page "Statement from the General Counsel," which purports to explain the new "risk-based" inspection program being implemented by the OOC's Office of General Counsel ("OGC") in the 112th Congress.[1] The SCCE recommends the following corrections, additions and clarifications to this section of the Biennial Report:

- On page 2, footnote 7, please remove all references to the findings of the Blue Ribbon Panel regarding fire safety in Congressional facilities. The SCCE's objection is explained in greater detail on pages 4-5 of this letter and on page 3 of the SCCE's comment letter dated August 29, 2011.
- On page 3, footnote 8, please clarify that the Legislative Branch Appropriations Conference Committee Report does not direct the OGC to implement a "risk-based approach" in a unilateral manner. Rather, the Report states that the Conference Committee "expec[s]t the OOCGC to amend its regulations to establish criteria that use a comprehensive risk-based approach, including the cost of remedial actions as well as building renovations planned for the future, in working with agencies to address needed corrections." *Conference Report on H.R. 2918, Legislative Branch Appropriations Act, 2010*, 111th Cong., 155 Cong. Rec. H9932-33 (daily ed. Sept. 24, 2009) (emphasis added). In fact, the OGC did not amend its regulations in implementing its "risk-based approach" but instead simply issued a list of talking points to employing offices on February 15, 2011, without any formal input from stakeholders. http://www.compliance.gov/wp-content/uploads/2011/10/112th-Congressional-Biennial-Inspections-Risk-Based-Approach-Talking-Points.pdf The Biennial Report also should clarify that the focus of the Conference Committee's Report regarding the "risk-based approach" was that legislative employing offices be held to the same safety and health standards as other employers. *Id.* at H9932 ("The conferees are concerned that the Congressional Accountability Act of 1995 may apply a higher enforcement standard for certain health and safety standards than those applied to the Executive Branch and private sector.") (emphasis added).
- On page 3, footnote 9, please clarify that the standards issued by the Occupational Safety and Health Administration – an Executive branch agency – are not binding on Congressional employing offices because those standards were not promulgated pursuant to the CAA. *See* 2 U.S.C. § 1341(d)(1) (requiring OOC Board to issue substantive regulations implementing OSH Act pursuant to 2 U.S.C. § 1384); *id.* § 1384(d)(3) (requiring Congressional approval of all such substantive regulations prior to their effective date).

[1] It is not clear whether the "Statement from the General Counsel" is intended to be part of the OGC's biennial report required by 2 U.S.C. § 1341(e)(2), or merely an introductory statement. For the sake of completeness, SCCE is providing comments on the "Statement of General Counsel" as if it were part of the statutorily required biennial report.

A. The Biennial Report

- Please cite to authority for the statements on page 9, footnote 23.
- On pages 9-10, please clarify that the Occupational Safety and Health Administration, in its advisory role, has taken the position that unpredictable terrorist attacks are not "recognized hazards" as contemplated by the general duty clause of the OSH Act. 29 U.S.C. § 654(a)(1), as incorporated in 2 U.S.C. § 1341(a). *See* OSHA interpretation letters dated November 24, 2003, and May 24, 2004.
- On page 26, under "Risk-Based Biennial Inspections," please clarify that the CAA does not require employing offices to conduct self-inspections as a substitute for the OGC's obligation under 2 U.S.C. § 1341(e)(1) to conduct inspections. While the introductory "Statement from the General Counsel" acknowledges in passing – in a footnote – that "self-inspections and audits are not mandated by the CAA" (page 4, n. 13), the OOC's report should highlight this point because employing office self-inspections appear to be central to the OOC's risk-based inspection program.
- On page 11, for security reasons, please remove the floor plan for the Russell Building.
- On pages 8-19, for the reasons explained on pages 4-5 of this letter, please remove all references to the findings of the Blue Ribbon Panel.

B. Appendix B (The Senate Facilities)[2]

- The reference to the Senate SAA on page 1 should be deleted because no staff of the Senate SAA participated in the pre-inspections of member or committee offices conducted by the SCCE.
- The reference to the "Senate Daycare" on page 1 should be changed to the "Senate Child Care Center."
- The references to "DC Village" on pages 1 and 2 should be deleted as that is not a Senate facility and no Senate employees work there.
- The Biennial Report should omit any mention of a "general finding" based on the alleged lack of an annunciator system at the Congressional Acceptance Site facility. (*See* App. B at 2.) In fact, that facility has an annunciator system that the OOC inspector overlooked during the inspection.
- The second full paragraph on page 2 should clarify that the AOC is responsible for signage in the Dirksen Senate Office Building and for installing handrails in the Russell Senate Office Building ("RSOB").
- The last sentence of the second full paragraph on page 2 should refer to "Picture 1," not "Picture 2."
- Figures 2 and 4 in Appendix B should define the term "Other."
- In Figure 2, the second heading ("Underground . . . ") appears to be incomplete.
- Figure 3, depicting the distribution of hazard findings by Risk Assessment Code

[2] Because the OOC did not provide a revised draft of Appendix B along with its January 27, 2012, Biennial Report, we reiterate the corrections, additions and clarifications included in the SCCE's August 29, 2011, comment letter for "The Senate Facilities," "The U.S. Capitol Building," and "The Capitol Visitor Center."

("RAC"), should be modified to reflect that the RAC-1 and RAC-2 hazard findings are not the responsibility of any Senate office, but rather fall under the jurisdiction of other non-Senate congressional offices.
- In Figure 4, the reference to "Senate SSA" should be changed to "Senate SAA."

C. Appendix B (The U.S. Capitol Building)

- Figure 3 should define the term "Other."

D. Appendix B (The Capitol Visitor Center)

- The first sentence in the final paragraph on page 1 reads: "Picture 2 displays a fire door with tape covering the latching mechanism so that the door will not latch in a fire emergency." This statement suggests that the latching mechanism was covered with tape for the purpose of rendering the fire door inoperable in an emergency, which is not the case. To avoid misinterpretation, the sentence should read: "Picture 2 displays a fire door with tape covering the latching mechanism, which the OGC believes could have prevented the fire door from working effectively in an emergency."
- The last sentence on page 1 should refer to "Picture 3," not "Picture 6."

The Biennial Report Should Not Include References To The Blue Ribbon Panel Report

The SCCE objects to the OGC's reproduction of specific details contained in the Blue Ribbon Panel Report. In our last comment letter to OGC, dated August 29, 2011, SCCE objected to the attachment of the Blue Ribbon Report to OGC's initial draft report. We appreciate your removal of the Blue Ribbon Panel Report as an exhibit on your initial draft report; however, to reproduce the specific details of the Blue Ribbon Panel Report within the Biennial Report is also inappropriate and unnecessary for the reasons explained below and in our August 29, 2011, comment letter.

The Blue Ribbon Panel Report was generated by an independent panel convened by the Senate Committee on Rules and Administration ("Senate Rules Committee") and the AOC, and contains a significant amount of information that is confidential or security sensitive, including maps and protected zones in the RSOB, technical data about the RSOB's heating, ventilation and air-conditioning systems, fire alarm and detection systems, means of egress and floor plans. Accordingly, the OGC's reproduction of the same specific charts and details contained in the Blue Ribbon Panel Report would still compromise rather than enhance the safety of congressional employees.

The OOC has previously acknowledged that it has no authority to make the Blue Ribbon Panel Report public. On September 30, 2010, the OOC Executive Director, Tamara Chrisler, testified before the House Transportation Subcommittee on Economic Development, Public Buildings and Emergency Management. In response to Del. Eleanor Holmes-Norton's inquiry whether the OOC will publish the Blue Ribbon Panel Report, Ms. Chrisler acknowledged: "The

report is not ours to make public." Therefore, the details of this report should not be made public by OOC. The SCCE objects to the extensive reproduction of charts and data from the Blue Ribbon Panel Report without the permission of the appropriate Senate stakeholders.

Finally, the OGC's reproduction and duplication of the Blue Ribbon Panel Report is unnecessary because the relevant stakeholders already have access to the Blue Ribbon Panel Report.

For all these reasons, the OGC should not reproduce the specific details, maps or charts from the Blue Ribbon Panel Report in the final Biennial Report.

The Biennial Report Inaccurately Portrays The Current Level Of Fire Safety At The Russell Senate Office Building

The SCCE recommends a number of changes to the Biennial Report to ensure that any information regarding the current level of fire safety in the RSOB is complete and accurate.

The Biennial Report correctly notes that the Senate Rules Committee, together with the AOC, has taken the lead in addressing findings while preserving a historic building. To that end, in April 2009, the Senate Rules Committee and the AOC convened a Blue Ribbon Panel to study, evaluate and offer solutions to safety findings. As noted in the revised Biennial Report, the AOC and the Senate SAA have carried out recommendations of the Blue Ribbon Panel to ensure fire safety in the RSOB, including (1) installation of sprinklers and smoke barriers in the RSOB attic; (2) implementation of plans to relocate workshops from the basement of the RSOB to a new facility; and (3) development of an annual fire inspection program.

The revised Biennial Report should highlight certain additional measures that have been taken to improve fire safety in the RSOB, including the addition of an exit for mobility-impaired individuals and installation of annunciator alarm systems throughout the RSOB attic. The SCCE requested that the OGC report these additional safety measures in our comment letter dated August 29, 2011, and we respectfully renew our request that you include this information in the body of the Biennial Report rather than in a footnote. *See* page 17 n.52.

Conclusion

We appreciate the opportunity to provide commentary and suggestions for the Biennial Report. Please let us know if you have any questions regarding the comments or concerns expressed in this letter. The Senate employing offices look forward to working with you to continue to promote a safe and healthy workplace.

Sincerely,

Patrick McMurray
Senate Senior Counsel for Employment

APPENDIX D

Office of Compliance

June 2, 2009

The Honorable Lisa Murkowski
Ranking Member, Senate Appropriations Subcommittee
on the Legislative Branch
United States Senate
709 Hart Senate Office Building
Washington, DC 20510

Dear Senator Murkowski:

I am writing in response to the Questions for the Record for the Office of Compliance that you provided to me in connection with the Hearing on the Fiscal Year 2010 Budget Requests for the Office of the Architect of the Capitol and the Office of Compliance which was conducted before the Senate Appropriations Subcommittee on the Legislative Branch on Thursday, May 7, 2009 at 2:30 p.m.

Biennial Inspections. The Office of Compliance conducts biennial inspections of the Capitol complex. I understand that there are over 9,000 findings in the draft report for the 110th Congress biennial inspection. What are the most serious deficiencies which have been identified? To what extent have these deficiencies been identified in prior inspections? Does it make sense to continue to conduct full-scale biennial inspections, now that the OOC has conducted major campus-wide inspections for the past 3 Congresses? What is the cost of conducting a biennial inspection?

Answer:

- Most Serious Deficiencies Identified. During the 110th Congress Biennial Inspection, the OOC inspection team identified 19 extremely serious safety violations – those classified as Risk Assessment Code (RAC) 1 hazards – the most dangerous category. Those deficiencies included unenclosed stairwells, penetrations in fire barriers, unrated or under-rated fire doors, and other obstructions exposing evacuating employees and visitors to toxic smoke and gasses; deficient emergency notification systems; and failure to provide effective fall

protection. Nearly 2,000 other findings were classified as RAC 2 violations. These findings involved (1) damaged or deteriorating transite boards[1] (exposing employees and visitors to asbestos fibers); (2) missing, damaged or defective covers, outlets, switches, electrical cords, electrical panels, and plugs (causing risk of electrical shock and fire); (3) lack of effective emergency lighting; and (4) defective or missing machine guards.

- Extent that Deficiencies were Identified Previously. Approximately 90% of the RAC 1 hazards identified during the 110th Congress inspection were attributable to previously identified hazards that remained unabated. Between 1,200 and 1,600 of the RAC 2 hazards are related to previously identified hazards, which occur when an employing office abated an identified hazard, but did not address its cause. For example, in response to a hazard finding, the employing office may have encapsulated asbestos from broken transite boards without removing the transite boards themselves. As employees continue to roll heavy carts over these boards, additional cracks develop and more of the asbestos becomes friable (causing further exposure to employees). While the previously identified hazard may have been abated, the cause of the exposure remains unaddressed and exposure to the hazardous substance continues. Other "new" hazards may be similar to previously identified hazards. For example, a GFCI outlet added to a circuit to abate a previously identified hazard may be found to be nonfunctional during a subsequent inspection.

- The Need for Major Campus-Wide Inspections. There is still a need to conduct biennial inspections, but the OOC intends to limit the scope and scale of these inspections in future Congresses.

  Comprehensive campus-wide inspections have only occurred during the past two Congresses. The Office of Compliance has just begun its third full-scale, wall-to-wall inspection of the Capitol complex. With the completion of this third inspection, there will exist three independent sets of data that will enable the OOC to conduct a trend analysis of safety and health conditions in the legislative branch. Such an analysis will allow the OOC to determine where progress is being made, what requires closer attention, etc. Further, in jurisdictions where adequate OSH Act mandated safety programs and procedures are in place to protect workers, the risk of serious illness or injuries and, consequently, the necessity for frequent inspections may be substantially reduced as well. Such a risk-based approach will result in more targeted deployment of inspector resources, whether in the nature of the more focused inspections to ascertain the root causes of repeat hazards or the provision of technical and educational assistance to employing offices. Future inspections can be more effectively concentrated on areas presenting the greatest

[1] A building material used in flooring composed of cement and asbestos that becomes friable when broken.

potential risk of illness, death or injury. Some areas may not have to be inspected during each inspection cycle, if previously identified hazards have been abated and the likelihood of recurrence is low. Other high hazard areas may necessitate more frequent inspections to assure abatement has been promptly accomplished. This is particularly important where the continued existence of a hazard may contribute to the creation or exacerbation of a fire hazard in a facility that lacks protected evacuation routes or sufficient egress capacity in the event of a fire. If the data support it, the OOC may not need to inspect every administrative space and office on campus, but rather random sampling may be sufficient to ascertain whether or not new hazards are being created or old hazards repeated. This will permit the OOC to devote more resources to reviewing employing office safety and health programs, focusing inspections on high risk work areas and procedures, developing new educational materials, and providing more in-depth technical assistance. In making these determinations, it is important that employing offices make, keep and preserve, and provide to the OOC, data which will be needed to develop information regarding the causes and prevention of occupational injuries and illnesses, an OSH Act requirement, 29 USC 657(c), applicable to the private sector and executive branch agencies, but not required under the Congressional Accountability Act.

The OOC currently lacks sufficient financial resources and necessary statutory authority to fully track and verify abatement information provided by employing offices and then target its inspections accordingly. In its FY 2010 Budget Request, the OOC has requested funding for a Compliance Officer who would be able to assist in the development and implementation of such a system. See, OOC, *Budget Justification Request for the Committee On Appropriations*, p. 13 (FY 2010). The OOC's recent Section 102(b) Report to Congress (December 2008) proposes several legislative changes that would assist in the development of a targeted inspection system. These changes involve adoption of OSHA's record keeping and reporting requirements. See OOC, *Section 102(b) Report,* p. 10 (December 2008).

The OOC has informed employing offices that future inspections will include a review of the written safety and health programs required by the OSH Act. Due to the number of hazard findings identified in each of the last two Congresses, the OOC believes that many of these hazards could be prevented if needed safety programs were operational in the legislative branch. The inspection team has observed many hazards attributable to the lack of effective OSHA-mandated safety and health programs. Similar hazards recur because employees lack a clear understanding of what the OSHA regulations require of them. We hope that employing offices will cooperate by furnishing information regarding their written safety and health programs. However, as noted, if the CAA were amended as

proposed in our *Section 102(b) Report*, the OOC would have access to injury and illness records that we could use to determine whether existing programs are effective in reducing injury, illness, and accident rates as well as a substantially savings in worker compensation and other associated costs.[2]

During the 111th Congress Biennial Inspection, the inspection team is finding fewer hazards as well as increased educational efforts by the employing offices. However, without data from the employing offices showing that they have adequately discovered and abated OSH hazards, the OOC must continue to do what is necessary to ensure a safe and healthy workplace for covered employees. In addition, as noted earlier, the employing offices do not provide the OOC – or perhaps may not make, keep or preserve - injury and illness records that would help us identify the most hazardous areas for more regular inspections and/or offers of technical assistance. Without this information, the OOC must rely upon its biennial and requestor-initiated inspections to provide information regarding workplace safety and building conditions in its biennial report to Congress. Without biennial inspections and the biennial report, Congress would not have the information required to exercise its oversight and appropriation functions.

Finally, the biennial inspection schedule is a relatively inexpensive safety measure. Together with the safety measures implemented by the Architect of the Capitol in recent years, the biennial inspection allows continued and safer occupancy of buildings that have very serious fire and safety deficiencies. Due to the large costs involved in making building modifications that will provide protected egress in the event of a fire or other emergency condition, the OOC has worked closely with the AOC and other covered entities to implement some interim prevention and protection measures to reduce the level of risk to employees and visitors in these buildings with open unprotected stairwells and deficient egress capacity. Improving fire prevention is such a recognized interim measure. The biennial inspection schedule is an integral part of such interim protection because it permits periodic training of a continually changing workforce about emergency procedures and fire prevention measures being implemented in each building. Further, by removing hazards that contribute to the creation or spread of a fire, such as improper wiring, accumulation of paper and other fuel sources, penetration of fire walls, inadequate or damaged fire doors, and blockage of sprinklers, fire prevention is enhanced.

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[2] During FY 2008, the OOC commenced a study of injury rates and associated costs in employing offices in the legislative branch based upon limited injury rate data available from the Office of Worker Compensation Programs. The Library of Congress, the first office reviewed, implemented safety programs that appeared to contribute to lowering the number of new injuries occurring over the last 7 years. From the preliminary information available to this office, it appears that the LOC achieved significant cost avoidance – in excess of $11 million – during this period that otherwise would have been incurred but for that agency's efforts to reduce lost time injuries. See *Office of Compliance, FY 2008 Annual Report* (March 2009), pp. 13-14.

Cost of Conducting a Biennial Inspection. Most of the funds expended by the Office of the General Counsel are related to the biennial inspection process. The cost of conducting a biennial inspection is difficult to calculate with precision, given the multiple and overlapping elements of the process. We estimate that during fiscal year 2009, the OOC will spend roughly $1.4 million on the biennial inspection process.

Two FTE's - one inspector and one management analyst - and three contractors are engaged in the inspection process. This process includes (1) inspection preparation, such as reviewing past inspection notes, hazard findings, condition assessments and abatement records; (2) scheduling and coordinating inspections with employing offices; (3) travel time; (4) physically inspecting over 17 million square feet of legislative branch facilities; (5) post-inspection data entry of inspection findings; (6) reviewing data for quality control; (7) preparing *Hazard Findings Reports;* (8) communicating with employing offices and the AOC about findings and proposed abatement dates; (9) reviewing and resolving disputes over any findings contested by employing offices; and (10) reviewing proposed abatement measures and abatement dates.

In addition, an Administrative Assistant (FTE) and a contract clerical assistant are engaged nearly full time in inspection-related responsibilities. Three FTE attorneys also spend significant time on inspection-related work. Attorneys and inspectors provide technical assistance to employing offices concerning abatement measures, and the development and implementation of OSH-mandated safety programs and procedures. The attorney and inspection staff prepare statutorily-required reports to Congress regarding the biennial inspections. Inspectors, attorneys, and support staff contribute to the preparation of these reports, including reviewing employing office comments on the draft reports in advance of publication. At least 70% of the General Counsel and Deputy General Counsel's efforts are related to OSH matters.

The OOC spends funds on equipment used in the inspection, such as electrical testers, industrial hygiene equipment, door pressure gauges and slope meters. Maintaining the FMA database also requires the expenditure of funds.

The value added from these inspections has been proven by the reduction in the number of identified hazards in the last five years. The number of hazards dropped by roughly 30% between the 109th and 110th Congresses. Moreover, in the 111th Congress, the OOC is already observing a 75% reduction of hazards in Member offices compared to the 109th Congress. Because hazards tend to remain unabated absent oversight, we believe it

unlikely that such reductions would have been achieved without our biennial inspections. Finally, as noted earlier, the biennial inspection schedule is a relatively inexpensive interim measure that substantially contributes to lowering the risk to occupants of facilities having serious fire and safety deficiencies.

Citations. As you know, AOC puts the highest priority on funding for projects that have received a citation from the Office of Compliance. Are projects with citations necessarily those posing the highest risk to health and safety throughout Capitol facilities?

Answer: Yes. The General Counsel issues a citation when there is a hazard posing a potentially high risk to health and safety. Citations are issued infrequently, 67 in the 13-year history of this Office, particularly given the large number of hazard findings issued during our biennial inspections. Moreover, only a single complaint has been filed – that challenging the AOC's failure to abate longstanding, life-threatening safety and health hazards in the Capitol Power Plant utility tunnels. In contrast, during that period, the OGC has notified the employing offices of many thousands of hazards following the inspection of each facility – 13,140 in the 109th Congress biennial inspection and 9,336 in the 110th Congress inspection – all without issuance of a citation.

Both OSHA and the OOC's General Counsel are required to issue citations for every serious hazard identified by inspections. Unlike OSHA, which immediately issues a citation and imposes monetary penalties for every serious hazard identified by its inspections, the General Counsel only issues citations when less formal, non-adversarial means have failed to abate a hazard. The General Counsel notifies the employing offices of hazards requiring abatement rather than routinely issuing citations. Given the vast number of hazards discovered during inspections, the General Counsel has determined that this procedure achieves more expeditious and voluntary abatement of hazards. The decision to issue a formal citation or to follow a more informal process lies within the statutory discretion of the General Counsel.

- ***I understand your office has been attempting to do more outreach to the AOC and work in a more cooperative manner. How does OOC decide whether to work with the AOC or issue a citation?***

  Answer: The OOC goes to great lengths to "get it right." It offers multiple opportunities for the AOC and other employing offices to provide information, opinions, suggestions, and criticisms. As indicated above, citations are not regularly issued. In fact, only one citation has been issued since December 2006. The OOC is continually exploring with the AOC and other offices creative ways to work more cooperatively. The OGC offers

employing offices the opportunity to contest any hazard finding found during a biennial Inspection. Every cover letter sent with the OOC's *Hazard Summary Report* includes information regarding how to contest the finding. If there is a dispute over a finding, for whatever reason, an employing office can appeal to the General Counsel for review. The General Counsel responds in writing to the employing office and informs them that the hazard has been marked as abated, removed from the list of identified hazards, or remains open because the General Counsel has determined that there is sufficient justification for the finding.

The General Counsel also affords the employing office an opportunity to set forth its position on the merits of a hazard finding, in writing or face-to-face, if he is considering whether to issue a citation. Even after the citation is issued, the employing office is given the opportunity to present additional information to the General Counsel. A typical citation contains the following language:

> **"Informal" Conference** – At the request of the affected employing office, employee, or representative of employees, the General Counsel may hold an informal conference for the purpose of discussing any issues raised by an inspection, citation, or notice, including the abatement date. If you decide to request an informal conference, please mail or fax the request to the General Counsel within 10 working days of your receipt of this Citation. See Office of Compliance Rules of Procedure, §4.15.
>
> During such an informal conference, you may present any evidence or views which you believe would support an adjustment to the citation. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far."

As indicated above, the General Counsel will only issue a citation when the identified hazard is particularly serious or creates an imminent risk to legislative branch employees or the public; when the hazard constitutes a 'repeat' or similar or related violation of the type found in past inspections or when a broad, systematic remedy may be required; when an employing office fails to take appropriate and timely steps to correct a hazard; or when he determines it is otherwise necessary to effectuate the purposes of the occupational safety and health laws.

- ***Can OOC do more to work with AOC in a flexible manner – without jeopardizing serious health and safety considerations – to ensure we fund those projects that are truly aimed at the highest risks?***

Answer: Yes. The Office of Compliance does work with the AOC, as well as other offices, in a flexible manner to ensure that its abatement efforts are focused on the highest risks, i.e., the fire and life safety hazards that the Office identified in the U.S. Capitol, Senate and House Office Buildings, and Library of Congress buildings. The OOC identified these hazards in 2000 and 2001; they are the subject of open Citations 16-19 and 29-30. The AOC historically has determined what to include in its budget request. It is the AOC that has set funding priorities among citation abatement projects. The OOC traditionally has not been involved in the AOC's process of setting priorities among those projects.

At the request of staff from this Subcommittee and their counterparts in the House, the OOC and AOC recently have begun an effort to assess the relative risks posed by these open citations, with the goal of informing the process of setting funding priorities. We are working closely with the AOC to identify projects where temporary adjustments can minimize life safety risks until permanent structural corrections can be made. For example, our offices began by pinpointing interim measures for the House Page School in the attic of the Thomas Jefferson Building, which can be evacuated only via a spiral staircase. The interim measures are designed to ensure that students and faculty have evacuation routes that reduce the risk of injury until an enclosed exit stairway is constructed.

We will continue to work with the AOC to identify other infrastructure hazards whose risks can be reduced by interim abatement measures. We are hopeful that the AOC-OOC risk analysis will be complete by September 1, 2009. Thereafter, the AOC and the OOC look forward to presenting that analysis to the Senate and House Appropriations Subcommittees, as well as to our respective oversight Committees. Our goal is to provide this and other Committees with the information necessary to ensure that funding is directed toward the highest risks.

Our analysis will include an examination of AOC's fire prevention programs, which include the installation of sprinklers in legislative branch facilities. Fire prevention is particularly important in historic structures, where repair or replacement is difficult if not impossible. These programs reduce but cannot eliminate the risk that a fire may occur, and if occurring, may be contained in scope. Accordingly, to protect lives, it is

essential permanently to correct hazards such as inadequate exit capacity, stairways not protected from fire and smoke infiltration and the like.

Effective interim measures may not be feasible in every facility. Even the best fire prevention programs cannot guarantee safe evacuation from a structurally deficient building. Significant, permanent alterations to existing facilities will be required in order to ensure that Capitol Complex occupants may escape a fire safely. No credible risk analysis can overlook these facts. We look forward to continued cooperation with the AOC and other stakeholders to develop an analysis that accounts for these and all other relevant concerns.

- ***Under current law, can OOC take into consideration the importance of undertaking projects in a coordinated, risk-based manner?***

Answer: As noted above, despite the time limitations imposed by the CAA, and understanding the importance of undertaking projects in a coordinated, risk-based manner, the OOC has worked with the AOC to implement interim measures to reduce the degree of risk to occupants of buildings with known safety and fire hazards requiring expensive alterations that will take more than one Congress to complete. Ordinarily, a citation sets forth the date by which abatement must be completed by the office responsible for correcting the hazard. In setting that date, the General Counsel takes into account whether full or partial abatement is achievable within that time frame. The employing office may challenge the time set by the citation by submitting a request for modification of abatement, and if the request is not granted, an enforcement proceeding may resolve that issue. The GAO addressed this question in a Briefing for Congressional Staff, *AOC's Process for Prioritizing Capital Projects* (September 2008) as follows:

> While it is clear that AOC is statutorily required to correct violations of health and safety standards, it is not clear as to when the statutory compliance requirement begins if new appropriated funds are needed because of the statutory enforcement framework regarding the OOC process for citations, complaints, and orders. While 2 U.S.C. §1341(c)(6) sets a deadline using 'the end of the fiscal year following the fiscal year in which the citation is issued or the order requiring correction becomes final and not subject to further review,' the OOC GC sets a time limit for corrective action consistent with OOC's regulations in its citations, complaints, and orders, which could be longer than the statutory timeframe. For example, to resolve the complaint for hazards in the Capitol Power Plant utility tunnels issued by OOC GC, the OOC GC and

AOC entered into a settlement agreement that set a five year time limit for corrective action by May 2012, which a hearing officer ordered the AOC to comply with, whereas a literal interpretation of the statutory timeframe would require corrective action by October 1, 2008. For budgetary decisions, it is unclear whether AOC has to correct the violations: 1) using the date of the citation or order, or 2) the date stipulated by the OOC in citation or order. Using either time limit though, AOC must take steps to obtain sufficient funding to correct the violations, such as including amounts in its budget request; however, Congress is not required to appropriate funds to cover the corrective actions.

- ***Are there statutory changes needed to ensure we aren't holding the Leg Branch to a higher (or different) standard than GSA or private sector buildings? Please be specific.***

Answer: The OSHAct imposes a "General Duty" upon all employers (including executive branch departments and private employers) "to furnish a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to employees" and requires employers to comply with regulations issued by the Secretary of Labor (OSHA Regulations). The Congressional Accountability Act (CAA) imposes this "General Duty Clause" upon each employing office and each covered employee. However, the CAA does not apply to the legislative branch the many specific mandates that the OSHAct imposes in the executive branch.

While the general duty imposed upon all employers (private sector, executive branch and legislative branch) is the same – compliance with Section 5 of the OSHAct by furnishing a place of employment free from hazards – the specific mandates imposed upon the executive branch are quite extensive due to the provisions of OSHAct § 19 and 29 CFR § 1960. The following table illustrates the differences between the OSH requirements for the executive branch (as mandated by 29 CFR § 1960) and the requirements for the legislative branch.

To comply with Section 5 of the OSH Act (as mandated by 29 CFR § 1960), executive branch agencies are required to:	**To comply with Section 5 of the OSH Act, legislative branch employing offices are required to:**
• Submit to inspection by agency safety and health inspectors at least annually.	• Submit to inspection by the OOC at least biennially.
• Designate an "Agency Safety and Health Official" (holding the rank of Assistant Secretary or equivalent) who will carry out	

provisions of the 29 CFR §1960, Executive Order 12196, and Section 19 of the OSH Act. A principal role for this official is to provide "adequate budgets and staffs to implement the occupational safety and health program at all levels."	
• Establish safety and health officials at each appropriate level with sufficient authority and responsibility to plan for and assure funds for necessary safety and health staff, materials, sampling, testing, analyses, travel, training and equipment required to identify, analyze and evaluate unsafe or unhealthful working conditions and operations.	
• Ensure that performance evaluations of management and supervisory officials measure their effectiveness in meeting the requirements of the occupational safety and health program.	
• Make available the agency's occupational safety and health plan to employees and employee representatives upon their request.	
• Post a conspicuous notice informing employees of the Act, Executive Order and agency occupational safety and health program, and relevant information about safety and health committees.	
• Adopt emergency temporary or permanent supplementary standards appropriate for application to working conditions of agency employees for which there exist no appropriate OSHA standards.	
• Provide safety and health inspectors with safety and health hazard reports, injury and illness records, previous inspection reports, and reports of unsafe and unhealthful working conditions.	
• Post notices of unsafe or unhealthful working conditions that are identified by the agency's internal safety and health inspectors. These posters must remain until after the hazard has been abated.	

• Investigate working conditions, which employees have reported as unsafe or unhealthful, within 24 hours to 20 working days, depending on the potential seriousness of the conditions. These investigations must be made available to the employee within 15 or 30 working days.	
• Investigate each accident that results in a fatality or in the hospitalization of three or more employees.	
• Establish procedures to follow up, to the extent necessary, to verify that hazardous conditions have been abated.	
• Prepare an abatement plan that includes a proposed timetable for abatement, an explanation of any delays in the abatement, and a summary of interim steps to abate the hazard.	
• Keep established committees and/or employee representatives informed of the progress on abatement plans.	
• Either establish safety and health committees or be subject to unannounced inspections by OSHA. These committees, which have equal representation by management and non-management employees, monitor the performance of agency-wide safety and health programs.	
• Participate in the Safety, Health, and Return-to Employment (SHARE) Initiative which requires: (1) the establishment of goals and plans for reduction of injuries and illness; and (2) reporting on progress made toward meeting the established goals. The goals for 2004-2009 were to: (1) reduce by 3% the total number of employee injuries per year; (2) reduce by 3% the annual lost time due to worker injuries, and (3) reduce by 1% the total number of annual lost production days due to worker injuries. (Established by Presidential Memoranda on 1/9/2004 & 9/29/2006).	

The legislative branch is also required to comply with fewer mandates than the private sector. Unlike private sector employers, the employing offices covered by the CAA are not required to comply with OSHA § 8(c) [29 U.S.C. § 657(c)]. That provision requires employers to maintain and provide to the Secretary of Labor records regarding employee injuries and illnesses.

The OOC's recent Section 102(b) Report to Congress (December 2008) proposes to apply OSHA's recordkeeping and reporting requirements to the employing offices covered by the CAA. See OOC, *Section 102(b) Report,* p. 10 (December 2008). Under the current statutory scheme, employing offices are not required to make, keep, preserve, or provide to the OOC records deemed necessary for enforcement of OSH Act Section 5, including records on work-related deaths, injuries and illnesses, and records of employee exposure to toxic materials and harmful physical agents. Similarly, under the current scheme, the OOC is unable to consider any inspection findings of safety professionals in the employing offices because employing offices do not share their inspection findings with the OOC. In addition, neither the AOC nor any other covered employing office provides the OOC with injury and illness records that are necessary for strategically determining what areas should be inspected more regularly or provided more technical assistance. This information is not required to be compiled or disclosed under the CAA, and without it, the OOC depends on its biennial inspections to provide information regarding building conditions and workplace safety to Congress.

Risk-based approach to safety work. How do you prioritize your safety-related inspections work? Are you able to give priority to facilities that may be lacking certain safety features, such are fire sprinklers, or having a greater number of occupants and visitors exposed to safety issues? If not, are legislative changes needed?

Answer: As noted above, the OOC has just begun its third comprehensive, wall-to-wall inspection of the Capitol complex. This inspection will provide a third set of data which will be used to develop a more focused risk-based inspection schedule. As also noted above, under the current statutory scheme, employing offices are not required to make, keep, and preserve, or provide to the OOC, records deemed necessary for enforcement of OSHAct Section 5, including records on work-related deaths, injuries and illnesses, and records of employee exposure to toxic materials and harmful physical agents. Requiring the employing offices to maintain and disclose such records would greatly assist the OOC in strategically planning what areas should be inspected more regularly or provided more technical assistance. This is a legislative change the OOC has previously suggested in its *Section 102(b) Report,* p. 10 (December 2008).

Under the CAA, the OOC is also required to inspect and investigate places of employment in response to a written request from an employing office or a covered employee. CAA § 215(c)(1), 2 U.S.C. § 1341(c)(1). Requestor-initiated inspections are therefore also given priority regardless of whether the building has sprinklers or low occupancy rates.

Finally, in buildings with known fire and safety hazards, the OOC and the employing offices have implemented interim prevention and protection measures to provide relatively safe occupancy. These interim safety measures often include frequent inspections and training. Buildings that lack sprinkler coverage in whole or in part, and/or have higher occupancy rates, are given a higher priority when determining the frequency of these types of inspections.

Thank you for the opportunity to provide written responses to these important issues.

Respectfully submitted,

Tamara E. Chrisler

Tamara E. Chrisler
Executive Director

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

Office of Compliance

May 29, 2009

The Honorable Ben Nelson
Chairman, Senate Appropriations Subcommittee
on the Legislative Branch
United States Senate
720 Hart Senate Office Building
Washington, DC 20510

Dear Senator Nelson:

I am writing in response to the Questions for the Record for the Office of Compliance that you provided to me in connection with the Hearing on the Fiscal Year 2010 Budget Requests for the Office of the Architect of the Capitol and the Office of Compliance which was conducted before the Senate Appropriations Subcommittee on the Legislative Branch on Thursday, May 7, 2009 at 2:30 p.m.

Question No. 1: I understand that your organization conducts "biennial inspections" of the Legislative Branch facilities. Do these "biennial inspections" occur in the rest of the Federal Government?

Answer: No. The executive branch has annual inspections. See 29 CFR §1960.25(c).

When Congress enacted the Congressional Accountability Act ("CAA"), the result was to enforce the Occupational Safety and Health Act (OSHAct) in a manner similar to what is being done in the private sector[1]. The OSHAct imposes a "General Duty" upon all employers (including executive branch departments) "to furnish a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to employees" and requires employers to comply with regulations issued by the Secretary of Labor (OSHA Regulations). The Congressional Accountability Act (CAA) imposes this "General Duty Clause" upon each employing office and each covered employee. However, the CAA does not apply to the legislative branch the many specific mandates that the OSHAct imposes in the executive branch.

While the general duty imposed upon all employers (private sector, executive branch and legislative branch) is the same – compliance with Section 5 of the OSHAct by furnishing a place

[1] Please see the answer to Question No. 9.

of employment free from hazards – the specific mandates imposed upon the executive branch are quite extensive due to the provisions of OSHAct § 19 and 29 CFR § 1960. The following table illustrates the differences between the OSH requirements for the executive branch (as mandated by 29 CFR § 1960) and the requirements for the legislative branch.

To comply with Section 5 of the OSHAct (as mandated by 29 CFR § 1960), executive branch departments are required to:	**To comply with Section 5 of the OSHAct, legislative offices are required to:**
• Submit to inspection by agency safety and health inspectors at least annually.	• Submit to inspection by the OOC at least biennially.
• Designate an "Agency Safety and Health Official" (holding the rank of Assistant Secretary or equivalent) who will carry out provisions of 29 CFR §1960, Executive Order 12196, and Section 19 of the OSHAct. A principal role for this official is to provide "adequate budgets and staffs to implement the occupational safety and health program at all levels."	
• Establish safety and health officials at each appropriate level with sufficient authority and responsibility to plan for and assure funds for necessary safety and health staff, materials, sampling, testing, analyses, travel, training and equipment required to identify, analyze and evaluate unsafe or unhealthful working conditions and operations.	
• Ensure that performance evaluations of management and supervisory officials measure their effectiveness in meeting the requirements of the occupational safety and health program.	
• Make available the agency's occupational safety and health plan to employees and employee representatives upon their request.	
• Post a conspicuous notice informing employees of the Act, Executive Order and agency occupational safety and health program, and relevant information about safety and health committees.	
• Adopt emergency temporary or permanent supplementary standards appropriate for application to working conditions of agency employees for which there exist no appropriate OSHA standards.	

• Provide safety and health inspectors with safety and health hazard reports, injury and illness records, previous inspection reports, and reports of unsafe and unhealthful working conditions.	
• Post notices of unsafe or unhealthful working conditions that are identified by the agency's internal safety and health inspectors. These posters must remain until after the hazard has been abated.	
• Investigate working conditions, which employees have reported unsafe or unhealthful, within 24 hours to 20 working days, depending on the potential seriousness of the conditions. These investigations must be made available to the employee within 15 or 30 working days depending on the condition's severity.	
• Investigate each accident that results in a fatality or in the hospitalization of three or more employees.	
• Establish procedures to follow up, to the extent necessary, to verify that hazardous conditions have been abated.	
• Prepare an abatement plan that includes a proposed timetable for abatement, an explanation of any delays in the abatement, and a summary of interim steps to abate the hazard.	
• Regularly inform established committees and/or employee representatives of the progress on abatement plans.	
• Either establish safety and health committees or be subject to unannounced inspections by OSHA. These committees, which have equal representation by management and non-management employees, monitor the performance of agency-wide safety and health programs.	
• Participate in the Safety, Health, and Return-to Employment (SHARE) Initiative which requires: (1) the establishment of goals and plans for reduction of injuries and illness; and (2) reporting on progress made toward meeting the established goals. The goals for	

2004-2009 were to: (1) reduce by 3% the total number of employee injuries per year; (2) reduce by 3% the annual lost time due to worker injuries, and (3) reduce by 1% the total number of annual lost production days due to worker injuries. (Established by Presidential Memoranda on 1/9/2004 & 9/29/2006).	

In addition, many executive agencies apply more stringent definitions and other national standards for safety, health and fire prevention, which have not been implemented by OSHA. For example, the Department of Defense instruction on hearing conservation defines a more protective (lower) level of hazardous noise than the OSHA standard. In some cases for which no OSHA standard is appropriate, the executive branch has adopted emergency temporary or permanent supplementary standards. By contrast, the OOC does not apply any standards more stringent than those adopted by OSHA.

The CAA also requires the OOC to perform inspections in response to a written request by an employee, just as OSHA inspectors respond to written requests by executive branch employees. At executive branch workplaces that have not established a safety and health committee, OSHA is also authorized to make unannounced inspections. In contrast, the OOC does not conduct unannounced inspections of any type. Although the OOC's procedural rules permit the use of unannounced inspections, the OOC's General Counsel, exercising his authority under OOC Procedural Rule §§ 4.06(3) and (4), has determined that giving advance notice of inspections is "necessary to assure the presence of the representatives of the employing office and employees needed to aid in the inspection" and will "enhance the probability of an effective and thorough inspection." For these reasons, the OOC does not make unannounced biennial inspections. Most employing offices are not only notified of the inspection well in advance, but are provided with reminder notices shortly before the actual inspection.

Question No. 2: If not, doesn't this hold the Legislative Branch to a higher standard than the rest of the government? I do not think that was the intent of the Congressional Accountability Act and I certainly don't personally think it is appropriate.

Answer: The legislative branch is not held to a higher standard as the rest of the government. As explained above, the general duty imposed upon all employers (including the executive and legislative branches) is the same – compliance with Section 5 of the OSHAct by furnishing a place of employment free from hazards. However, the specific mandates imposed upon the executive branch are far more extensive than those imposed on the legislative branch due to the provisions of OSHAct §19 and 29 CFR §1960, as illustrated in the table provided above.

Question No. 3: Does your organization work closely with the Architect of the Capitol – taking into account the Architect's Capital Improvement Plan and Capitol Complex Master Plan when conducting its biennial inspections to ensure that redundancies in work are avoided?

Answer: Yes. OOC and AOC work collaboratively to conduct the biennial inspections. The biennial inspection schedule is an integral part of the interim protection methods implemented to reduce the risk to occupants of buildings having serious safety deficiencies. The OOC is very conscious of budgetary concerns and works closely with the AOC concerning plans that involve safety improvements. As features of the Master Plan have received approval and funding, the OOC and the AOC have worked closely together to avoid redundancies in work and to maintain cost effectiveness. Due to the costs of the improvements recommended by AOC in its plan to abate hazards originally discovered in 2000, the OOC is working closely with the AOC to implement interim fire prevention and fire protection methods to lower risks in those buildings with serious safety deficiencies.

The OOC also works with the AOC to conduct biennial inspections so as to cause minimal disruption of building operations. The OOC has daily contact with AOC staff and conducts regularly-scheduled meetings with the AOC to coordinate efforts. Prior to any inspection, a pre-inspection conference is held to determine how the inspection can be conducted in the most efficient and effective manner. Prior to the physical inspection of an employment site, the OOC will review any office records regarding self-inspections and other safety initiatives to avoid redundancies and to focus the inspection efficiently on areas of concern.

OOC Communications with Building Superintendents. The OOC and the AOC have also been working on improving communication with the Superintendents' Offices regarding the hazards that have been identified during inspections. OOC and AOC representatives are working cooperatively to develop a regular agenda and to otherwise share information with the Superintendents' Offices that will better prepare them for the OSH Biennial Reports and future inspections. The additional information to be shared includes: OOC inspection priorities and changes in priorities, most common hazards, most serious hazards, inspection trends, and OOC inspector observations of existing conditions. This joint effort will benefit both the AOC and the OOC because information will be relayed to decision makers on a weekly or biweekly basis so that common hazards can be addressed, and employees in areas yet to be inspected can be informed of what the inspectors are expecting to find. This regular communication enhances overall education and protects covered employees more effectively.

Contested Findings. In addition, the OOC provides a procedure for the AOC and other employing offices to contest Biennial Inspection findings. Every cover letter sent with the OOC's *Hazard Summary Report* includes the following language:

> *"As to any identified hazards your office or agency wishes to contest, please clearly identify those findings in your responses by writing* ***CONTESTED*** *in the response area in line with the Finding ID and explain the rationale and related standards for the contest. If you object to any of the findings, please be as specific as possible in identifying the basis of your contest, e.g. the level of the RAC assessment, if you think the finding is not a hazard, if you dispute the location of the finding, or contest responsibility for correcting the hazard, etc."*

This procedure ensures that any dispute over a finding, no matter what the reason, will be presented to the General Counsel for review. The General Counsel responds in writing to any contested finding filed by an employing office.

Cannon Building Project. The Cannon building project does not entail redundant or wasted work; the OOC has not required the installation of expensive stairwell enclosures only to be torn out during future remodeling. First, the OOC citation issued in 2000 does not mandate a specific abatement solution; instead the OOC's role is to evaluate whether the abatement measures proposed by the AOC will adequately abate the hazard pursuant to the OSHAct and fire protection standards. Second, the OOC has assisted AOC in an efficient implementation of the AOC's current plan for the Cannon Building. Stairwells 3-7 are already enclosed or in the process of being enclosed and will remain so in the new design. The alternate life-safety measures (creation of separate life-safety zones) to account for the unclosed rotunda stairways (1 & 2), if funded, will not be installed until 2012, after the design for the renovation has been completed. The renovation design plans are likely to incorporate these measures. If not, any necessary modifications to the fire safety measures can be made prior to any construction. If there are any delays in construction, the OOC has agreed to work with the AOC to identify and implement interim fire prevention and protection methods.

Question No. 4: Does your office consider whether work that is required by a citation may be addressed in phases so that the impacts of the work on occupants and budgets may be minimized?

Answer: Yes. When the OOC issues a citation, it only identifies hazards; it does not mandate particular ways in which the AOC is required to abate the hazard. The covered offices are given maximum flexibility to develop, consider and implement various corrective measures. For example, the citations regarding unenclosed stairwells contain the following abatement instructions: "evaluate alternatives to reduce the danger posed by open stairwells and develop plan to reduce danger, taking into account costs, benefits, and historic preservation." The OOC provides technical guidance and assistance to the covered offices regarding various solutions that are being considered. As the technical expertise of the Office has expanded, more assistance has been provided. Although the CAA requires that violations be corrected "as soon as possible" and no later than "the end of the fiscal year following the fiscal year in which the citation is issued" [2 U.S.C. § 1341(c)(6)], the OOC works with the employing offices to implement interim safety measures when abating a citation will require expensive alterations and take more than one Congress to complete. See, GAO's Briefing for Congressional Staff, *AOC's Process for Prioritizing Capital Projects* (September 2008).

An example of such interim safety measures is the installation and enclosure of stairwells. Most of the AOC's current proposals regarding the installation and enclosure of stairwells in various buildings arose out of OOC inspections conducted in 2000. Improving fire prevention is a recognized interim measure that can allow occupancy of buildings with deficient fire protection. A biennial inspection is a comparatively inexpensive, interim measure. In buildings with inadequate fire protection, it is essential that the inspection focuses on the following: eliminating electrical hazards posed by extension cords and overloaded or inadequately protected circuits; minimizing egress hazards associated with open fire doors and obstructions in exit pathways; examining the functioning of all alarms, detectors and fire suppression systems; insuring adequate training regarding evacuation procedures and plans; and reducing the danger posed by a building's total fuel load by encouraging prudent paper storage methods. Due to relatively high employee turnover rates in legislative offices, biennial

inspections are needed to keep the new staff well informed about fire prevention methods. Such fire prevention methods go a long way towards reducing the probability of fires altogether, as well as the severity of a fire should it occur.

In other cases of addressing the abatement of hazards, the OOC has acted as a facilitator by bringing together interested stakeholders so that all viewpoints can be considered and a cost-effective solution can be found. An example of this type of cooperative decision making involved the House Page School, located in the attic of the Thomas Jefferson Building. The Page School lacks safe emergency egress – a serious safety hazard. The OOC, together with the AOC, brought together representatives, of all of the interested parties including the Clerk of the House, the Capitol Police, House Employment Counsel, the Library of Congress and the Committee on House Administration. Working cooperatively with the AOC and the OOC, these parties were able to devise a cost-effective, interim solution that addresses some of the most significant safety hazards and allows the Page School to continue operating at this location in relative safety until a permanent fix can be accomplished.

Question No. 5: Do the historical buildings in our complex, such as the Capitol, the Jefferson Building, and the Russell Building have different requirements for fire and life safety than say a building being built today?

Answer: Yes. The *Code for Fire Protection in Historic Structures* (NFPA 2001) implements a performance-based approach to fire safety in historic buildings where rigid adherence to a modern code might adversely affect historic integrity. This performance-based approach, however, still recognizes that historic buildings must provide reasonably equivalent fire and life safety protection for their occupants. Older buildings that were not built in accordance with modern building codes are more challenging to inspect and require more oversight when known hazards remain unabated. Fire departments often perform inspections on older buildings more frequently than biennially since the risk of fire in buildings with old electrical and gas systems is greater and the methods of egress are not as safe as in newer buildings. NFPA *Fire Protection Handbook*, pp. 7-216 – 7-219 (2003). The use of frequent inspections is a common interim "fire prevention" method that allows occupation and use of a building that would otherwise be unsafe because known hazards remain unabated.

Other interim measures in buildings with inadequate egress focus on providing more time for occupants to evacuate a building. Increasing fire suppression and fire detection systems (e.g., sprinklers and smoke detectors) can help offset the threat posed by inadequate egress. Ultimately, however, all buildings need to provide safe egress to keep occupants out of danger. The answer to the question below offers a more detailed explanation as to why this is so.

Question No. 6: Why would we need to add egress stairwells to the Jefferson Building - which would cost more than $12 million and cause major disruptions to both staff and visitors – when 98 percent of the building is equipped with sprinklers, 100% of the building is equipped with smoke detectors, and it is fully staffed with Capitol Police in the event that a fire did occur?

Answer: After five fires[2] in Capitol Hill buildings during 1998 and 1999, the OOC began a comprehensive review of fire and life safety systems in all legislative buildings. The OOC inspection of the Jefferson Building in 2000 revealed serious life-threatening hazards pertaining to unenclosed stairwells and unprotected exit pathways that would expose school children, staff, and visitors to smoke and toxic gasses in the event of a fire. While developing a plan to abate the identified hazards, the AOC hired outside consultants, including Gage-Babcock & Associates, to evaluate egress from the building. The resulting studies led the AOC to conclude that adequate egress could best be achieved by adding additional stairwells rather than merely enclosing existing exit stairwells and pathways. The AOC's plan for the Jefferson Building is acceptable to the OOC because, not only does it address the problems posed by unenclosed stairwells and exposed exit pathways, but it greatly improves egress throughout the building.

In assessing alternatives, the OOC and the AOC have been particularly concerned about the inadequate egress for the House Page School located in the building's attic. The proposed new stairwell for the House Page School is the least expensive of those being proposed for the building.

The Need for Safe Egress. While sprinklers, smoke detectors, and trained staff can provide more time for occupants to evacuate a building, buildings with these features still must provide safe egress to keep occupants out of danger. As noted in the NFPA *Fire Protection Handbook*, p. 4-65(2003): "Under no condition can manual or automatic fire suppression be accepted as a substitute for the provision and maintenance of a proper means of egress." Improving egress for fire safety also improves egress during other types of emergencies (including attacks on the Capitol). The Capitol Hill campus is known to be a prime target for an attack. National Commission on Terrorist Attacks on the United States, *The 9/11 Commission Report* (New York: W.W. Norton, 2004). Ensuring the safety of the nation's leaders during a time of national emergency is a paramount national security concern. *Id.* Buildings need to have better egress when evacuation takes longer due to congestion, confusion, and slower walking speeds because they contain public assemblies, strollers and wheelchairs, young visitors unfamiliar with the layout, and occupants over the age of 65. NFPA *Fire Protection Handbook*, pp. 4-58 – 4-59, 13-64 (2003).

Sprinklers. Sprinkler systems do not prevent fires but help control fires after they occur. NFPA, *Fire Protection Handbook*, p. 13-56 (2003). Fires often start in utility closets, electrical cabinets and other locations that do not contain sprinklers. NFPA, *Fire Protection Handbook*, p. 13-52 (2003). Sprinklers do not control fires that start in locations outside of the water distribution pattern due to obstructions (such as under desks and tables). NFPA, *Fire Protection Handbook*, p. 10-201 (2003). Fire risk in a building is determined by the "fire load" or "fuel

[2] In March 1998, a fire in the O'Neill Building (no longer in existence) sent sixteen Capitol Police officers to the hospital for treatment. In April 1998, seven Capitol Police officers were overcome by smoke while attempting to put out a fire in Longworth. In May 1998, a grease fire in the Longworth food court sent three kitchen workers to the hospital for treatment. In July 1998, Ford and Hart were both evacuated because of smoke. An April 1999 electrical fire in the Library of Congress' Madison Building seriously injured one employee, and required evacuation of the entire building.

load," which measures the amount of combustible material in the building. NFPA, *Fire Protection Handbook*, p. 2-42 (2003). Buildings that contain tons of paper and wooden furnishings have larger fire loads than many industrial buildings. NFPA, *Fire Protection Handbook*, p. 6-347 (2003); Robert J. Fischer and Gion Green, *Introduction to Security*, p. 216 (7th ed. 2004). Combustible materials, like paper, store heat and act like ovens during fires even if there is no ignition. Robert J. Fischer and Gion Green, *Introduction to Security*, p. 216 (7th ed. 2004). Sufficient heat can be generated by un-ignited combustible material to destroy everything inside a building. Robert J. Fischer and Gion Green, Introduction to Security, p. 216 (7th ed. 2004).

Smoke Detectors. While smoke detectors can alert occupants to the presence of smoke, these devices do not eliminate the dangers posed by smoke, heat, toxic gas, explosion and panic. Smoke, heat, toxic gas, explosion and panic are more frequent killers during fires than flames. NFPA, *Fire Protection Handbook*, p. 2-42 (2003). "Best estimates are that two-thirds of all fatal injuries in fires are due to smoke inhalation, possibly in combination with other fire effects, with more than half of such deaths attributable to smoke inhalation alone." John R. Hall, "Burns, Toxic Gases and Other Fire-Like Hazards in Non-Fire Situations," p. 2 (NFPA 2004). During a fire, un-ignited combustible materials generate smoke. *Fire Protection Handbook*, p. 8-23 (2003). Smoke can reduce visibility to zero within two minutes of a fire's ignition. A test subject was unable to find a stairway located less than two feet away. Robert J. Fischer and Gion Green, Introduction to Security, p. 218 (7th ed. 2004). The danger of unenclosed stairways is that, without floor-to-floor separations, smoke and fire can easily spread from the floor of origin to other areas of the building, thereby increasing the risk of disability and death due to obscured visibility, asphyxiation, and panic. NFPA, *Fire Protection Handbook*, p. 12-99 (2003). By providing isolation from smoke, fumes, and flames, enclosed stairways also provide safe egress that minimizes the risk of panic. The risk of panic is greater in buildings such as the Jefferson Building which contain frequent assemblies and many visitors unfamiliar with its layout and evacuation plans. NFPA, *Fire Protection Handbook*, p. 13-36 (2003).

Capitol Police. Trained personnel, such as members of the Capitol Police, can provide valuable assistance to occupants during a time of fire or other emergency. Panic can easily erupt in facilities such as the Jefferson Building, which receive frequent visitors who are unfamiliar with the building's layout and evacuation procedures. Trained personnel can help instill calm by providing direction and assistance as needed. Providing trained personnel, however, is not a substitute for providing a safe method of egress.

Fire safety is still a serious problem that must be continually addressed on the Capitol Hill campus. There have been at least 48 fires in Capitol Hill buildings since 1985. A list of these fires has been included in the accompanying Appendix A. There have been 22 fires since 2000.

Question No. 7: How would you compare the OOC system of occupational safety and health inspections to the inspections done by OSHA in executive branch agencies?

Answer: The table comparing the two systems in the answer to Question No. 1 should be responsive to this question. In addition, I would like to add that OOC inspections are very similar to "wall to wall" OSHA inspections. The inspection procedure used by the OOC is

actually more "agency friendly" than OSHA's procedure because, unlike OSHA inspections which are almost always unannounced, OOC biennial inspections are only performed after notice of the inspection is provided to the employing offices. This practice provides the employing offices with an opportunity to inspect and correct any known hazards prior to an inspection . . . and many do.

Question No. 8: How much do you rely on the Occupational Health and Safety Administration or other executive branch agencies to do your work? If you rely on a decision or opinion of OSHA or some other Executive branch office, is this allowed under the Congressional Accountability Act? Does OSHA itself conduct inspections in Congressional facilities?

Answer: The OOC attempts to apply OSHA regulations as they are interpreted across the federal government and the private sector. OSHA also publishes directives and issues decisions interpreting its standards which provide useful guidance to the OOC's General Counsel in exercising his statutory authority under the CAA. OOC's hearing officers are also guided by judicial decisions interpreting OSHA as mandated by the CAA. 2 U.S.C. § 1404(h). Currently, a detailee from the Department of Labor provides technical assistance and assists in supervising the inspectors; however, he reports directly to the General Counsel and is under his direct supervision. The other inspectors are either CAA employees or contractors. The CAA permits the Department of Labor to detail, upon request, personnel to the OOC as may be necessary to advise and assist the OOC in carrying out its OSHA-related duties under the CAA. 2 U.S.C. § 1341(e)(4).

As indicated in the OOC's FY 2010 Budget Request, the detailee from the Department of Labor (OSHA) is scheduled to retire during the current fiscal year and OSHA has indicated that it cannot furnish a comparable or similar replacement detailee. See, OOC, *Budget Justification Request for the Committee On Appropriations*, p. 13 (FY 2010). The FY 2010 budget proposal has requested funding to replace this vital employee.

Congress did not adopt the substantive occupational safety and health regulations that were proposed by the OOC in 1996. The CAA requires that any regulations issued by the OOC be the same as substantive regulations promulgated by the Secretary of Labor except to the extent that a modification of such regulations would be more effective for the implementation of the rights and protections under CAA § 215. See 2 U.S.C. § 1341(d)(2). With respect to any OOC proceeding, if no regulations are issued, the CAA requires the OOC to apply "the most relevant substantive executive agency regulation promulgated to implement the statutory provision at issue in the proceeding." See 2 U.S.C. § 1411. These provisions suggest that the OOC can properly consider decisions and opinions from OSHA when interpreting the safety and health provisions of the CAA.

The OOC is also in the process of developing regulations that will be consistent with the current OSHA regulations and will include the same requirements now followed by OGC during its biennial inspections.

OSHA will inspect Congressional facilities only with respect to a private contractor performing services on the campus. To the best of the OOC's knowledge, OSHA has conducted

inspections only in response to complaints regarding private contractors performing services on the campus.

Question No. 9: How do you see your responsibilities and role vis-à-vis safety professionals in the employing offices? Do you give their own OSH inspections any credit or deference when deciding what needs inspection?

Answer: The OOC's evaluation function includes examining the performance of safety initiatives and safety professionals in the employing offices. As noted in the Answer to Question 1, the OOC's ability to conduct this evaluation function has been somewhat hampered by the failure to incorporate the provisions of 29 U.S.C. § 657(c) (relating to maintenance, preservation and availability of safety records) into the CAA[3]. The OOC's recent Section 102(b) Report to Congress (December 2008) proposes several legislative changes that would correct this problem proposes several legislative changes that would correct this problem by applying OSHA's recordkeeping and reporting requirements to the employing offices covered by the CAA. See OOC, *Section 102(b) Report,* p. 10 (December 2008). Under the current statutory scheme, unlike the executive branch or private employers, employing offices are not required to make, keep, and preserve, or provide to the OOC records deemed necessary for enforcement of OSHAct Section 5, including records on work-related deaths, injuries and illnesses, and records of employee exposure to toxic materials and harmful physical agents. Similarly, under the current scheme, the OOC is unable to consider any inspection findings of safety professionals in the employing offices because employing offices do not share their inspection findings with the OOC. OOC inspectors are observing a decrease in the number of identified hazards, as well as increased educational efforts from the employing offices, but without inspection data from the employing offices signifying that they have adequately examined and removed OSH hazards from the workplace, the OOC must continue to do what is necessary to ensure a safe and healthy workplace for covered employees. In addition, neither the AOC nor any other covered employing office provides the OOC with injury and illness records that are necessary for strategically determining what areas should be inspected more regularly or provided more technical assistance. This information is not required as part of the CAA, and without it, the OOC depends on its biennial inspections to provide information regarding safety and health conditions to Congress.

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[3] Under the CAA, the OOC's General Counsel is granted the same authority as the Secretary of Labor in subsections (a), (d), (e) and (f) of OSHAct § 8 (29 U.S.C. § 657) and all of the authority contained in OSHAct §§ 9 & 10. Unlike the OSHAct, 29 U.S.C. § 657(c), the CAA does not require legislative offices to keep and provide records to the OOC necessary to develop information regarding the cause and prevention of accidents and illness; records on work-related deaths, injuries and illnesses; and records of any large exposure to toxic materials. Furthermore, unlike the OSHAct, 29 § 657(b), the CAA does not give the OOC investigatory subpoena power that Congress found in enacting the OSHAct to be "customary and necessary for the proper administration and regulation of an occupational, safety and health statute." Report No. 91-1291 of the House Committee on Education and Labor, 91st Congress, 2nd Session, p. 22; Report No. 91-1291 of the Senate Committee on Labor and Public Welfare, 91st Congress, 2nd Session, p. 12, to accompany S.2193 (OSHAct) ("a power which is customary and necessary to the proper administration and enforcement of a statute of this nature.").

Even with these limitations, the OOC works cooperatively with safety professionals in the employing offices to improve conditions in those offices and also facilitates compliance by providing technical assistance and educational opportunities to these individuals. Some employing offices have decided to rely exclusively upon OOC inspections rather than having their own safety professionals conduct comprehensive inspections. In other cases, when necessary and practical, the OOC has also brought safety professionals together with other stakeholders to coordinate and develop solutions to safety concerns that are acceptable to all concerned.

The OOC is in the process of conducting its next full-scale inspection of covered facilities. The 111th Congress Inspection is crucial to developing a strategy for future inspections because it provides the OOC with three independent data sets to form the beginnings of a trend analysis. The OOC had a picture from the data garnered from the 109th Congress Inspection, and utilized the 110th Congress Inspection data to begin looking for trends. However, with the information from the 111th Congress, the OOC will be able to implement a more thorough trend analysis and focus future inspections more effectively upon the areas with greatest risk. This means that some areas may not be included in certain inspection cycles if previously identified hazards have been abated and the likelihood of recurrence is low. In other words, provided the data supports it, the trend analysis would allow OOC to sample areas randomly to determine that hazards are not being created rather than actually inspecting every administrative space and office on campus. By doing so, the OOC will be able to devote more resources to reviewing employing office safety and health programs, to focusing inspections on high risk work areas and procedures, to developing new educational materials, and to providing more detailed technical assistance.

Question No. 10: By what criteria does your office decide to issue a citation or a complaint? Do you or your deputies review each of these citations before they are issued?

Answer: Criteria and Process Used to Issue a Citation. If the safety and health specialist and attorney assigned to evaluate a certain finding believe that a citation should be issued, they prepare a report and make recommendations to the General Counsel. In formulating their recommendations, they often consult outside specialists at OSHA, GSA, NIOSH or other entities with expertise in the subject matter. The General Counsel reviews each and every report submitted and makes an independent determination as to whether a citation should issue. A citation is only issued if the hazard is particularly serious or creates an imminent risk to legislative branch employees or the public; when the hazard constitutes a 'repeat' or similar or related violation of the type found in past inspections or which a broad, systematic remedy may be required; when an employing office fails to take appropriate and timely steps to correct a hazard; or when it is otherwise necessary to effectuate the purposes of the occupational safety and health laws.

Communication of Process to Employing Offices. The processes followed by the General Counsel's office with respect to the issuance of citations are well documented. This information has been previously communicated both in writing and in face-to-face conversations with employing offices. For example, *Biennial Report on Occupational Safety and Health Inspections for the 108th Congress*, pp. 7-11 (October 2005); *Biennial Report on Occupational Safety and*

Health Inspections for the 108th Congress, pp. 4-5 (April 2008). See also, letter to Terrell G. Dorn, P.E. from Peter Ames Eveleth, April 21, 2008, describing our citation processes (previously provided to the Committee, most recently on February 3, 2009). The General Counsel issues citations only infrequently, 67 in the 13-year history of this Office. Moreover, only a single complaint has been filed – that challenging the AOC's failure to abate long-standing, life-threatening safety and health hazards in the Capitol Power Plant utility tunnels. In contrast, during that period, many thousands of hazards have been identified in the hazard findings reports issued to the employing offices by the OGC following the inspection of each facility without issuance of a citation – 13,140 in the 109th Congress biennial inspection and 9,336 in the 110th Congress inspection. The responsible employing office's obligation to abate any hazard identified by the General Counsel applies whether or not a citation has been issued.

No Routine Issuance of Citations. Both OSHA and the OOC's General Counsel are required to issue citations for every serious hazard identified by inspections. Unlike OSHA, which immediately issues a citation and imposes monetary penalties for every serious hazard identified by its inspections, the General Counsel only issues citations when less formal, non-adversarial means have failed to abate a hazard. The General Counsel notifies the employing offices of hazards requiring abatement rather than routinely issuing citations. Given the vast number of hazards discovered during inspections, the General Counsel has determined that this procedure achieves more expeditious and voluntary abatement of hazards. The decision to issue a formal citation or to follow a more informal process lies within the statutory discretion of the General Counsel.

Only One Complaint Has Ever Been Issued. As indicated previously, only one complaint has been issued in the history of the OOC. This was issued due to the AOC's failure to abate long-standing, life-threatening safety and health hazards in the Capitol Power Plant utility tunnels. A complaint will only be issued when little or no effort has been made to abate similar long-standing, life-threatening safety and health hazards.

Question No. 11: Does the risk assessment code that you give to an OSH matter, such as those highlighting possibly deficient egress points in a building, include a consideration of the cost and difficulty of corrections and possible disruptions to a building's occupants? How might a risk-based analysis of safety citations affect your work?

Answer: The risk assessment code (RAC), developed and applied by OOC inspectors working cooperatively with the AOC, is in fact a risk-based analysis of safety hazards based upon the degree of harm and probability of occurrence. The employing or correcting office determines how to abate the hazard and takes into account cost, disruption of operations, and historical consistencies. The role of the OOC is to determine whether the abatement options proposed by the offices are adequate and timely.

As noted earlier, the OOC's primary function is to provide an objective evaluation of the hazards found in legislative branch buildings and to provide technical assistance to employing offices when solutions are being considered. The employing offices customarily consider the cost and difficulty of corrections and possible disruptions to a building's occupants when evaluating and proposing different abatement options.

The risk assessment codes (RACs), which the OOC began to use in coordination with the Architect of the Capitol's Director of Safety, Fire and Environmental Programs, are a version of the RACs used by the Department of Defense. These codes do not include costs or disruptions in operations. They have been established to reflect the relative risk, viewed as a combination of the likelihood of an exposure to a hazard and the severity of the resulting injury or illness.

The Department of Defense Instruction, DOD Safety and Occupational Health Program, DODI 6055.1, August 19, 1998, uses the RAC in conjunction with a Cost Effectiveness Index (CEI) to determine an Abatement Priority Number (APN). The CEI is the cost of correction divided by an effectiveness index, which has been derived from an analysis of DOD accident experience. In the Department of Defense, the APN is used to establish the priority of the funding for abatement projects. That accounts for the risk, the cost and the effectiveness of the proposed abatement plan.

To the best of the OOC's knowledge, none of the employing offices covered by the CAA uses the APN system to prioritize based upon cost effectiveness. In its FY 2010 budget request, the OOC has requested funding for a Compliance Officer who would be able to help the employing offices establish cost-effective abatement measures. See, OOC, *Budget Justification Request for the Committee On Appropriations*, p. 13 (FY 2010). In addition, the OOC's recent Section 102(b) Report to Congress (December 2008) proposes several legislative changes that might assist in determining relative abatement priorities. These changes involve adoption of OSHA's record keeping and reporting requirements regarding accident experience. See OOC, *Section 102(b) Report,* p. 10 (December 2008). Effective abatement priorities cannot be determined without information about accident experience.

Question No. 12: Do you give priority to facilities that may be lacking certain safety features, such as fire sprinklers, or having a greater number of occupants exposed to safety issues?

Answer: Yes. The OOC, in conjunction with the AOC, prioritizes the safety hazards in and among facilities by taking into consideration the existence of safety features such as automatic fire suppression systems and building occupancy rates. For instance, in deciding whether a building's egress deficiencies would merit the issuance of a citation, the OOC's General Counsel would consider the number of occupants in the building when determining whether the hazard was so serious as to require a citation.

Question No. 13: Does your office consider whether corrections that a citation lists may be spaced over time so that the impacts of the corrections on occupants and budgets may be minimized?

Answer: Yes. The Office of Compliance already works with the AOC in a flexible manner to ensure that its abatement efforts are focused on the highest risks, i.e., the fire and life safety hazards that the Office identified in the U.S. Capitol, Senate and House Office Buildings, and Library of Congress Buildings. The OOC identified these hazards in 2000 and 2001; they are the subject of open Citations 16-19 and 29-30.

We recognize that abating these citations presents many challenges. The projects are designed to correct critical safety and health hazards that confront Members, employees and visitors. The buildings affected are historic structures with powerful symbolic importance that must simultaneously accommodate ongoing legislative work, supporting services, and visitor access. And, of course, securing adequate funding given many competing demands is always a knotty problem. These factors complicate the OOC's already-difficult task of evaluating the effectiveness of hazard abatement proposals offered by the AOC.

The AOC's task is more challenging still. While, in this context, the OOC is charged "only" with enforcing the safety and health protections of the Congressional Accountability Act, the AOC also must consider other priorities: building maintenance, historic preservation, initiatives such as "Green the Capitol," and many more.

In light of these many important and sometimes-conflicting missions, our Office has commenced a comprehensive risk analysis. We are working closely with the AOC to identify projects where temporary adjustments can minimize life safety risks until permanent structural corrections can be made. Together, our offices have begun by pinpointing interim measures for the House Page School in the Thomas Jefferson Building. Those measures are designed to ensure that students and faculty have evacuation routes that minimize the risk of injury until an enclosed exit stairway is constructed. We will continue to work with the AOC to identify other infrastructure hazards whose risks can be reduced by interim abatement measures.

We are also examining AOC's fire prevention programs, which include the installation of sprinklers in legislative branch facilities. Fire prevention is particularly important in historic structures, where repair or replacement is difficult if not impossible. These programs reduce but cannot eliminate the risk that a fire may occur. Accordingly, to protect lives, it is essential permanently to correct hazards such as inadequate exit capacity, stairways not protected from fire and smoke infiltration and the like.

Effective interim measures may not be feasible in every facility. Even the best fire prevention programs cannot guarantee safe evacuation from a structurally-deficient building. Significant, permanent alterations to existing facilities will be required in order to ensure that Capitol Complex occupants may escape a fire safely. No credible risk analysis can overlook these facts. We look forward to continued cooperation with the AOC and other stakeholders to develop an analysis that accounts for these and all other relevant concerns.

We are hopeful that the AOC-OOC risk analysis will be complete by September 1, 2009. Thereafter, the AOC and the OOC look forward to presenting that analysis to the Senate and House Appropriations Subcommittees, as well as to our oversight Committees. Our goal is to provide this and other Committees with the information necessary to ensure that funding is directed toward the highest risks.

Question No. 14: Your Board adopted OSH standards in January 1997. Are these the standards that your office applies when you decide to issue a notice of deficiency or a citation? What is the difference between notices of deficiency and citations? Do you hear or review the employing office's responses contesting the merits of these findings? If not you, who, may review these

responses? If the response describes a matter that boils down to a difference of opinion or judgment, what deference do you give to the thoughts of the employing office representatives? Is there a way for an employing office to appeal to a higher authority such as a neutral expert or the OOC Board?

Answer: The OOC goes to great lengths to "get it right." It provides multiple opportunities for employing offices to provide information, opinions, suggestions, and criticisms.

Deficiency Notices. Congress did not adopt the OSH regulations proposed by the OOC Board. The OOC does not issue so-called "notices of deficiency." If an imminent danger is discovered during an inspection the OOC issues a "Notice of Serious Deficiency." The Notice of Serious Deficiency requires the responsible office to abate the hazard within 24 hours; the AOC routinely complies with such a Notice and abates the hazard accordingly. If the hazard does not present so immediate a threat, the OOC instead includes it in the list of hazard "findings" that are included in the final inspection report forwarded to the employing office. This procedure allows employing offices to develop a plan voluntarily to abate the hazard. The vast majority of hazards are abated using this procedure.

Consideration of Employing Offices' Responses. As noted earlier, the OGC initially allows employing offices to contest any hazard finding found during a Biennial Inspection. Every cover letter sent with the OOC's *Hazard Summary Report* includes information regarding how to contest the finding. If there is a dispute over a finding, for whatever reason, an employing office can appeal to the General Counsel for review. The General Counsel will respond in writing to the employing office and inform them that the hazard has been marked as abated, removed from the list of identified hazards, or remains open because the General Counsel has determined that there is sufficient justification for the finding.

The General Counsel will also afford the employing office an opportunity to set forth its position on the merits of a hazard finding, in writing or face-to-face, if he is considering whether to issue a citation. Even after the citation is issued, the employing office is given the opportunity to present additional information to the General Counsel. The General Counsel gives significant consideration to the information presented by employing offices. A typical citation contains the following language:

> ***"Informal Conference** – At the request of the affected employing office, employee, or representative of employees, the General Counsel may hold an informal conference for the purpose of discussing any issues raised by an inspection, citation, or notice, including the abatement date. If you decide to request an informal conference, please mail or fax the request to the General Counsel within 10 working days of your receipt of this Citation. See Office of Compliance Rules of Procedure, §4.15.*
>
> *During such an informal conference, you may present any evidence or views which you believe would support an adjustment to the citation. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far."*

Citations. Under the CAA, the OOC's General Counsel has the authority to issue a citation to any employing office responsible for correcting an OSH violation. 2 U.S.C. section 1341(c)(2). The "history factor," that is, whether the hazard constitutes a "repeat" or similar/related violation of a type found in past inspections, is one of several factors taken into account in deciding whether to issue a citation. Other factors that the General Counsel considers include whether the identified hazard is particularly serious, or creates an imminent risk to legislative branch employees or the public; whether a broad, systemic remedy may be required; whether an employing office fails to cooperate in an investigation or to take appropriate and timely steps to correct a hazard; or whether the General Counsel determines it is otherwise necessary to effectuate the purposes of the occupational safety and health laws. These criteria were published in the General Counsel's Biennial Report on Occupational Safety and Health Inspections for both the 108th Congress (issued October 2005, pp. 10-11) and 109th Congress (issued April 2008, pp. 4-6).

Appeal Procedure. While the CAA does not contain an appeal procedure allowing review of the General Counsel's discretionary decision to issue a citation or a complaint [2 U.S.C. §§ 1341(b)(2) & (3)], nevertheless, as indicated previously, employing offices are provided with multiple opportunities, both before and after a citation is issued, to respond by presenting information and evidence to the General Counsel for consideration. In addition to these informal procedures, the CAA provides a formal procedure in the event that a citation is elevated to a complaint. An independent hearing officer has the authority to decide whether a complaint issued by the General Counsel has any merit. See 2 U.S.C. § 1341(c)(3) and 2 U.S.C. § 1405(g). The hearing officer's decision can be appealed to the OOC Board. 2 U.S.C. § 1406.

Variance Requests. An employing office can also request from the Board an order granting a variance from a standard being applied. See 2 U.S.C. § 1341(c)(4). The Board's final decision is subject to judicial review if a party is aggrieved by the decision. 2 U.S.C. § 1341(c)(5).

Question No. 15: If a citation ends up in the issuance of a complaint, do you have access to OSHA experts to serve as hearing officers to judge whether the citation must be obeyed?

Answer: Yes. In the only complaint that has been issued in the history of the OOC, an OSHA expert was contracted to hear the case, but the case was resolved through a comprehensive settlement agreement reached by the parties. I am in the process of developing a master list of experts in technical matters relating to occupational safety and health matters to serve as hearing officers.

Thank you for the opportunity to provide written responses to these significantly important issues.

Respectfully Submitted,

Tamara E. Chrisler

Tamara E. Chrisler
Executive Director

APPENDIX E

Office of Compliance Memorandum

TO: Peter Ames Eveleth
General Counsel

FROM: John D. Uelmen
Supervisory Attorney

RE: Response to Blue Ribbon Panel – Analysis of Legal History and Authority of the Office of Compliance - Final Report

DATE: January 28, 2011

On August 23, 2010, the Blue Ribbon Panel (Panel) issued its Final Report concerning unprotected stairwells and other fire and life safety hazards in the Russell Senate Office Building (RSOB). The Panel's substantive fire and life safety hazard findings and recommendations for corrective action, in major part, are well founded. See Attachment A.[1] The Final Report also contains a legal analysis of Citation 19-1, which was issued by the OOC on March 1, 2000 against the AOC on the basis that the RSOB hazards violate 29 C.F.R. §1910.36, an OSHA safety standard. The Panel's legal analysis is largely supportive of the OOC's actions in this matter, recognizing that the OOC clearly has the authority to issue citations for alleged violations of the Congressional Accountability Act of 1995 (CAA),[2] that OOC's issuance of a citation for these types of hazards and classification of the citation as "serious" are consistent with OSHA's practices regarding similar historic buildings,[3] and that these hazards can "reasonably viewed as a violation of Section 5 of OSHA."[4] However, the Final Report errs in two significant respects in its legal analysis of the validity of, and the AOC's authority to enforce, Citation19-1.[5] That analysis is the subject of this memorandum.

First, while the Panel concluded that the AOC has a legal obligation to correct the hazardous conditions in the Russell Building based on the General Duty Clause of Section 5 of the Occupational Safety and Health Act of 1970 (OSHAct), which it found was applicable to the legislative branch,[6] it nevertheless concluded that under the CAA, the OSHA safety and health

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[1] See Attachment A, Memorandum from Charles Tetreault and Thomas H. Seymour, P.E. to Peter Ames Eveleth, General Counsel, OOC, "Response to the Blue Ribbon Panel Report: Abatement of Fire and Life Safety Hazards in the Russell Senate Office Building," January 28,2011.
[2] Final Report at 116, 123.
[3] Final Report at 117, 130-131.
[4] Final Report at 132.
[5] Final Report at 3-5, 115-133.
[6] Final Report at 3, 125-126, n.12.

standards, such as §1910.36, do not apply because they were not approved by Congress.[7] In support, the Panel's conclusion draws substantially on a Memorandum prepared by the law firm of Baker Botts, LLP. (Memorandum).[8] The Panel stated,

> A key concern of the AOC regarding Citation 19-1 is the applicability of regulation 29 C.F.R. §1910.36 that served as a basis of Citation 19-1. Congress set forth a procedure in the CAA for adopting regulations for the legislative branch requiring Congressional approval of the regulations applicable to Congress, but never approved the regulation that was the basis for Citation 19-1. Consequently, the Panel finds that the AOC is not subject to those regulations.[9]

This conclusion is principally based on a misconception that, because the CAA requires that the OOC Board of Directors and Congress approve substantive regulations to implement the OSH provisions of the Act,[10] Congress could not have intended that the OSHA standards would apply to legislative branch employing offices without prior Congressional approval, notwithstanding the explicit Congressional directive that these offices comply with those standards.[11] Since, as discussed below at 3-6, OSHA safety and health "standards" under §215(a)(1) of the CAA are not "regulations" requiring approval by Congress under CAA §304, the Panel's conclusion is erroneous.

Second, the Panel misperceives how compliance determinations are made by the General Counsel in the legislative branch under the CAA and how such determinations are made by the Secretary of Labor in the executive branch and in the private sector under the OSHAct. As a result, it incorrectly finds that in executive branch agencies, the head of the agency has the authority to make compliance determinations and correct compliance issues whereas, unique to the legislative branch, there are two authorities having jurisdiction, the OOC and the AOC, to make such determinations. As the Panel opined,

> In other federal agencies, the Authority Having Jurisdiction (AHJ), head of the agency, makes facility compliance determinations such as those in Citation 19-1 and has the authority to correct compliance issues. The legislative branch is unique because this responsibility is split between the AOC and the OOC, the enforcement authority. While the AOC answers to Congress, Congress does not answer to the OOC. OOC lacks a full

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[7] In 1997, a former Board of Directors of the OOC adopted OSH regulations that included all of the Secretary of Labor's OSHAct standards relative to legislative branch operations. No action was taken by Congress with respect to those proposed regulations. Accordingly, they were not issued by the Board. Final Report at 125. Thus, the Board, like the Panel, failed to recognize that is was unnecessary to adopt substantive regulations mandating compliance with the standards when in fact the CAA itself requires compliance with the standards without the issuance of regulations. The current Board has concluded that its statutory authority to issue substantive regulations does not require it to re-enact standards that are already expressly applicable and implemented under the CAA.

[8] See Baker Botts L.L.P. Memorandum, "Blue Ribbon Panel – Analysis of Legal History and Authority of the Office of Compliance – Final Report," Final Report, at 115-133 (August 23, 2010). This memorandum is substantially the same as the one dated April 6, 2010 that was attached to the Panel's 100% Report.

[9] Final Report at 3.

[10] See CAA, §215(d)(1)and (2).

[11] See CAA, §215(a)(1).

> range of administrative remedies and as a consequence of the legislative branch's dispersion of authority and responsibility, Citation 19-1 has gone unresolved for over a decade.[12]

Based upon this faulty premise, the Panel determined that "[t]his information will be utilized in a subsequent phase of this project to develop recommendations on a structure to adjudicate proposed design options for RSOB, as well as other buildings in the Capitol complex."[13]

As shown below at 13-17, the Panel failed to recognize that the CAA reflects Congress's intention that the OOC General Counsel be vested with the same authorities granted to the Secretary of Labor when enforcing OSHAct safety standards in the private sector, unlike in the executive branch where the Secretary has a limited oversight role. Like the Secretary vis-à-vis the private sector, the OOC General Counsel has exclusive enforcement authority; there is simply no overlapping or duplicative AOC-OOC AHJ authority structure in the legislative branch.[14]

I. CITATION 19-1 PROPERLY CITED THE ARCHITECT OF THE CAPITOL FOR VIOLATING OSHA STANDARDS.

CONTRARY TO WHAT THE PANEL SUGGESTED, BY MANDATING COMPLIANCE WITH SECTION 5 OF THE OSHACT, THE CAA REQUIRES COMPLIANCE WITH THE OSHA STANDARDS.

Section 215(a)(1) of the CAA provides that each legislative branch employing office and each covered employee "shall comply with the provisions of section 5 of the Occupational Safety Act of 1970." CAA §215(a)(1).[15] Section 5 of the OSHAct ("Section 5")[16] imposes two duties upon each employer: (1) the duty to "furnish each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious harm to his employees; and (2) the duty to "comply with occupational safety and health standards promulgated under this chapter." OSHAct § 5(a)(1)(2).[17] Consequently, "[a]ny standard ... properly imposed under the Act has the force of law because the Act imposes upon every employer the duty to 'comply with occupational safety and health standards promulgated under' the OSHAct."[18] As the court recognized in *Usery v. Marquette Cement Mfg. Co.*, 568

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[12] Final Report at 3.
[13] Final Report at 5.
[14] Final Report at 5.
[15] Final Report at 126.
[16] 29 U.S.C. §654.
[17] *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 122 S.Ct. 738. 742 (2002); *Industrial Union Dept. v. American Petroleum Inst.*, 448 U.S. 607, 691-692, 100 S.Ct. 2844, 2889 (1980); *Whirlpool Corp. v. Marshall*, 445 U.S. 1, 12-13, 100 S.Ct. 883, 891 (1980); *Atlas Roofing Co. v. Occupational Safety and Health Review Comm'n*, 430 U.S. 422, 445, 97 S.Ct. 1261, 1264, n.2 (1977).
[18] *Asbestos Information Association v. Occupational Safety and Health Administration*, 727 F.2d 415, 417 (5th Cir. 1984).

F2d 902, 905 at n.5, "[t]he specific standards 'are intended to be the primary method of achieving the policies of the Act.' *Brennan v. OSHRC and Underhill Construction Corp.*, 513 F2d 1032, 1038 (2nd Cir. 1975) (citations omitted). The standards presumably give the employer superior notice of the alleged violation and should be used instead of the general duty clause whenever possible."(citations omitted).

The Memorandum reads out of the CAA the requirement that legislative branch employing offices must comply with the OSHA standards contained in Section 5(a)(2): Congress "could not have meant for this language to be applied literally" because doing so would be "absurd" and "illogical."[19] However, it is not necessary to disregard clear statutory language to find the rational and logical legislative scheme adopted by Congress when enacting the CAA. Rather, a correct reading of the Act, that gives full meaning to all of the words used, properly respects the statutory scheme that Congress created. In so doing, it honors "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant."[20]

The apparent cause of the Memorandum's faulty analysis is its failure to perceive the distinction between the "occupational safety and health standards" and regulations enacted to detect and prosecute violations of the standards. The OOC pointed out this distinction in its July 8, 2010 response to the Panel's 100% Report. The OSHAct grants the Secretary of Labor the power to "by rule promulgate, modify or revoke any health and safety standard" as long as the Secretary follows the specific procedures and criteria set forth in the statute.[21] An "occupational safety and health standard" is defined as "a standard which requires conditions, or the adoption or use of one or more practices, means, methods, operations, or processes, reasonably necessary or appropriate to provide safe or healthful employment and places of employment."[22]

The OSHAct also grants the Secretary the power to prescribe "such rules and regulations as he may deem necessary to carry out [his] responsibilities" and the power to "prescribe regulations" that require employers to maintain accurate records regarding deaths and injuries and exposures to toxic and harmful materials.[23] The OSHAct further distinguishes between "standards" and "regulations" by allowing for review of a "standard" in the courts of appeal.[24] On the other hand, "regulations" are reviewable by a district court under the Administrative Procedure Act ("APA").[25] The courts of appeal have recognized and further refined the

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[19] Final Report at 126, 127.
[20] *TRW Inc. v. Andrews*, 534 U.S. 19, 30, 122 S.Ct. 441. 449 (2001) (quoting *Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) (internal quotation marks omitted)); see *United States v. Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 99 L.Ed. 615 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'"); *Schindler Elevator Corp v. United States*, 563 U.S. __, __(2011) (slip op. at 5) ("to determine the meaning of one word . . . we must consider the provision's 'entire text,' read as an integrated whole.").
[21] OSHAct §6(a), (b), 29 U.S.C. §655(a),(b). See, *e.g., Industrial Union Dept.*, 448 U.S. at 653-659 (invalidating benzene standard because statutory criteria had not been met).
[22] 29 U.S.C. 652(8).
[23] OSHAct §§8(g)(2), 8(c)(2) & 8(c)(3).
[24] OSHAct §6(f); 29 U.S.C. 655(f).
[25] See 5 U.S.C. §703.

distinction between "regulations" and "occupational safety and health standards" by finding that "if the basic function of the rule is to 'address[] . . . a specific and already identified hazard, [and it is not] a purely administrative effort designed to uncover violations of the Act,' then the rule is a standard . . . . If, on the other hand, the rule is 'merely a general enforcement or detection procedure,' then it is a regulation . . . . In other words, a standard, unlike a regulation, is 'aim[ed] toward correction rather than mere inquiry into possible standards." [26]

The CAA likewise distinguishes its treatment of standards and regulations. CAA §215(a)(1) mandates that OSHA *standards* apply to the legislative branch without further action being required of Congress; in contrast, substantive *regulations* promulgated by the OOC pursuant to CAA §304 require Congressional approval before they become effective. By conflating the two terms, the Memorandum reasons that Congress could not have intended to make the OSHA standards applicable to legislative branch offices because such an interpretation, albeit the "literal" language of the statute, conflicts with CAA requirements respecting adoption of regulations.[27] Yet, Section 5 makes no reference to employer compliance with the Secretary's "regulations" and the rulemaking authority granted to the Board under §304 of the CAA is limited to "regulations" and makes no mention of "standards."[28]

The Memorandum states that it would be "illogical" for Congress to have included a process for enacting regulations in Section 215(d) of the CAA if the Secretary's regulations already applied by virtue of the language in § 215(a)(1).[29] That would only be true if standards and regulations were synonymous. The Memorandum also mistakenly asserts that a literal interpretation of the statute would subject Congress to two regulatory (and potentially conflicting) schemes.[30] Again, since OSH regulations do not encompass OSH standards, there can be no redundancy or conflict between them.

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[26] *Chamber of Commerce v. United States Dep't of Labor*, 174 F.3d 206, 209 (D.C.Cir.1999) (quoting *Workplace Health & Safety Council v. Reich*, 56 F.3d 1465, 1467 (D.C.Cir.1995). Also see, *e.g.*, *Louisiana Chemical Ass'n v. Bingham*, 657 F.2d 777 (5th Cir. 1981) and *United Steelworkers v. Auchter*, 763 F.2d 728 (3rd Cir. 1985).

[27] Final Report at 125-127.

[28] CAA §§215(d)(1)and (2) provide as follows:"**(d) Regulations to implement section (1) In general** The Board shall, pursuant to section [304] of this title, issue regulations to implement this section. **(2) Agency regulations** The regulations issued under paragraph (1) shall be the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions in subsection (a) in this section except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections under this section." This underscores that "regulations" serve the purpose of implementing protections but are not the protections themselves; those protections are embodied in the OSHA safety and health standards.

[29] Final Report at 127. ("If Congress had intended for the OSHA regulations to apply automatically through OSHA Section 5(a)(2), then it would be illogical to require the OOC to promulgate a new regulation already in effect.")

[30] Final Report at 126. ("It is not so clear, however, that Congress intended to subject itself to the follow-up language in Section 5(a)(2) of OSHA [] that would require Congress to have intended for CAA Section 215(a) to subject Congress to two regulatory schemes: OSHA's by default and the OOC's regulations if Congress approved them pursuant to the procedures established in the CAA Section 304, 2 U.S.C. §304, 2 U.S.C. §1384. ... Section 215(a) should not be read as subjecting Congress and its subsidiary agencies to two parallel regulatory schemes.").

The Memorandum also erroneously characterizes as a "rejection" of the regulations[31] Congress's failure to respond or otherwise take any action respecting the regulations proposed by the previous OOC Board of Directors in 1997.[32] All of these arguments require that inferences be drawn from Congress' failure to act upon the proposed regulations. The Supreme Court has on numerous occasions noted that it is "reluctant to draw inferences from Congress' failure to act."[33]

FURTHER CONTENTIONS CONTAINED IN THE PANEL'S LEGAL ANALYSIS ALSO LACK MERIT.

Additional arguments contained in the Memorandum are also based on strained interpretations of the CAA. For example, the Memorandum states that "Congress could not have meant for [the language requiring compliance with Section 5] to be applied literally because OSHA itself states that it does not apply to the legislative branch."[34] While undoubtedly true prior to the enactment of the CAA, the CAA specifically defines the term "employer" under Section 5 of the OSHAct as meaning an "employing office" in the legislative branch.[35] Unquestionably, the very purpose of the CAA was to assure that employees in the legislative branch were given the same protections afforded employees in the private sector and the executive branch.

The Memorandum further asserts that requiring employing offices to comply with the Secretary's standards would conflict with 29 C.F.R. §1910.5(b), which limits the application of the standards when other federal or state agencies have exercised their authority.[36] The interpretative rule at §1910.5(b) merely restates the provisions contained in §4(b)(1) of the OSHAct, which provides that "[n]othing in this chapter shall apply to working conditions of employees with respect to which other Federal agencies, and State agencies acting under section 2021 of title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." Section 4(b)(1) of the OSHAct is not incorporated in the CAA; consequently, the provisions contained in §1910.05(b) do not apply. Moreover, "Federal

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[31] Final Report at 126.
[32] See n. 4, *supra.*
[33] *Brecht v. Abrahamson,* 507 U.S. 619, 632-33, 113 S.Ct. 1710, 1719, 123 L.Ed.2d 353 (1993) (quoting *Schneidewind v. ANR Pipeline Co.;* 485 U.S. 293, 306, 108 S.Ct. 1145, 1154, 99 L.Ed.2d 316 (1988) (citing *Am. Trucking Ass'ns., Inc. v. Atchison, T. & S.F.R. Co.,* 387 U.S. 397, 416-18, 87 S.Ct. 1608, 1618-19, 18 L.Ed.2d 847 (1967)). Generally, "Congressional silence 'lacks persuasive significance.'" *Brown v. Gardner,* 513 U.S. 115, 121, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994) (quoting *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187, 114 S.Ct. 1439, 1453, 128 L.Ed.2d 119 (1994) which in turn quoted *Pension Benefit Guaranty Corporation v. LTV Corp.,* 496 U.S. 633, 650, 110 S.Ct. 2668, 2678, 110 L.Ed.2d 579 (1990). As noted by Justice Harlan (writing for the court) in *Zuber v. Allen,* 396 U.S. 168, 185-186, n. 21, 90 S.Ct. 314, 324, n. 21, 24 L.Ed.2d 345 (1969): "The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible.... Congressional inaction frequently betokens unawareness, preoccupation, or paralysis."
[34] Final Report at 126.
[35] 2 U.S.C. § 1341(a)(2)(A).
[36] Final Report at 127.

agencies" in this provision refers to executive, not legislative, agencies.[37] Finally, as held by the Supreme Court in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 122 S.Ct. 738, 742, 151 L.Ed.2d 659 (2002): "Congress' use of the word 'exercise' [in OSHAct § 4(b)(1)] makes clear that . . . mere possession by another federal agency of unexercised authority to regulate certain working conditions is insufficient to displace OSHA's jurisdiction." Even when authority is exercised, complete pre-emption does not occur; instead, standards regarding working conditions are only pre-empted "if the working conditions at issue are the particular ones 'with respect to which' another federal agency has regulated." 122 S.Ct. at 742. Finally, the Memorandum suggests that pre-emption under §4(b)(1) occurs if another agency "has enforcement responsibility."[38] *Mallard Bay Drilling* disposed of this contention eight years before the Memorandum advanced it.

THE LEGISLATIVE HISTORY OF THE CAA DEMONSTRATES THAT CONGRESS INTENDED OSHA STANDARDS TO APPLY TO THE LEGISLATIVE BRANCH.

The legislative history of the CAA further demonstrates that the language used in Section 215(a)(1) of the CAA does exactly what Congress intended it to do – it requires the employing offices to comply with the occupational health and safety standards. The reasons for proposing section 215 were explained by Senator Joseph Lieberman when he introduced S. 2071, a precursor to the CAA:

> The Occupational Safety and Health Act of 1970 was passed to prevent people from being injured or even killed on the job. Congress' failure to meet OSHA's workplace safety standards means that it is putting the health, perhaps even the lives, of our employees at risk. And the proof here, unfortunately, is in the statistics.
>
> Over the years, from July 1992 to June 1993, the last for which most statistics are available, the workers coming under the Architect of the Capitol in their compensation claim rate had the second highest such rate in the entire Federal Government, second only to the Peace Corps, which obviously sends its workers abroad to live in parts of the world where they are exposed to hazards and diseases that our workers fortunately are not. This is a real problem.[39]

As these comments demonstrate, the CAA was enacted in part to specifically address "Congress's failure to meet OSHA's workplace safety standards" and the unacceptably high injury rates that were attributable to this failure.

Moreover, based on the legislative history, there can be little doubt that Congress meant what it said when it required compliance with Section 5, thereby requiring compliance with the

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[37] See 29 U.S.C. § 668 (establishment of programs in Federal agencies) and 29 C.F.R. § 1960.2(b) (defining agency as being in the Executive Department or Branch of the Government).
[38] Final Report at 127.
[39] 140 Cong. Rec. S5181 (May 4, 1994).

occupational health and safety standards. The 1995 bill known as "S. 2" was eventually enacted into law as the CAA. When S. 2 was introduced, the section-by-section analysis of the bill described Section 215 as follows:

> This section requires employees and employing offices to comply with the provisions of section 5 of the Occupational Safety and Health Act of 1970 (29 U.S.C. S. 654). Section 5 requires each employer to furnish employees a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm and requires both employers and employees to comply with the occupational safety and health standards promulgated by the Secretary of Labor under section 6 of that Act (29 U.S.C. S. 655). The requirement that employers and employees comply with the Secretary of Labor's standards is subject to variances granted under subsection (b) and any rules promulgated by the Board under subsection (d). (emphasis added). [40]

This analysis makes clear that, when Congress mandated compliance with Section 5 under CAA § 215(a)(1), it intended to require compliance with the Secretary's occupational safety and health standards (not merely compliance with the General Duty Clause). Moreover, by noting that "the requirement that employers and employees comply with the occupational safety and health standards" is "subject to variances granted . . . and any rules promulgated by the Board," the analysis suggests that the CAA itself imposes the "requirement" to "comply with the . . . standards," but that this requirement is subject to modification by variances and rules issued by the Board. Again, under this analysis, neither the failure to grant variances, nor the failure to adopt regulations, would affect the statutory requirement to comply with the standards.

The section-by-section analysis of Sec. 304 of S. 2 also shows that the authority to promulgate substantive regulations under the CAA was intended to be very limited:

> This section sets forth the procedures of issuing regulations to implement this Act, including regulations the board is required to issue under title II, including appropriate application of exemptions under the laws made applicable in title II. There shall be three sets of substantive rules, one for each House, and one for other employing offices.
>
> The authority conferred by this section is authority only to issue rules that will aid in understanding how the laws apply to the Congress and does not include the authority to limit the substantive rights conferred under this act. Thus, for example, such rules might set forth guidance to Senate offices as to how the board would interpret the family and medical leave act's entitlement to unpaid family or medical leave, in light of the fact that the Senate payroll system does not have a leave without pay status.[41]

Like the analysis of Section 215, this analysis of Section 304 suggests that the Board was not granted the authority to limit the substantive protections provided by the standards, but was granted the authority to issue regulations that would aid in understanding how the standards are to be applied to Congress.

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[40] 141 Cong. Rec. S621, S625 (section-by-section analysis) (January 9, 1995).
[41] 141 Cong. Rec. S621, S628 (section by section analysis) (January 9, 1995).

OOC'S INTERPRETATION OF THE CAA PRESENTS NO SEPARATION OF POWERS QUESTIONS.

The Memorandum also suggests that there would be a "serious separation-of-power question" if Congress delegated "rule-making authority over itself to the Secretary of Labor."[42] Although the Memorandum raises this question, it fails to explain the precise constitutional problem with Congress' decision to incorporate by reference and apply to legislative offices the same occupational health and safety standards applicable to other offices, other than citing cases reiterating the basic principle that the doctrine of separation of powers is a "safeguard against the encroachment or aggrandizement of one branch at the expense of the other."[43]

The legislative history of the CAA shows that the "separation of powers question" was carefully considered by Congress when various enforcement approaches were being considered. Congress had to balance the CAA's principal objective of eliminating the special exemptions that made employment laws inapplicable to the legislative branch with its interest in maintaining some control over the procedures applicable to its operations. In fact, it was concern over "separation of powers" that had derailed prior efforts to remove the exemptions applicable to the legislative branch.[44] In the end, Congress dismissed the vague argument that requiring employing offices in the legislative branch to comply with the laws applicable to everyone else somehow violated the "separation of powers." The consensus that Congress finally reached was described by Senator Grassley during the final debate on S. 2:

> There is a separation of powers. But constitutional analysis is not so general as to say that the Supreme Court will decide a case based upon an argument that the separation of powers has been violated. The claim must be more specific than that.
>
> In the case law, the Supreme Court refuses to strike down legislation on the broad argument that it somehow violates constitutional separation of powers. Specific constitutional provisions must be cited, notwithstanding the novelty of the arrangement that we have set up in this legislation. The Supreme Court's decision upholding the constitutionality of the Sentencing Commission and the independent counsel-these have been court cases within the last 5 or 6 years-demonstrates this point. . . . .
>
> The bill addresses separation of powers ... by providing for legislative branch, rather than executive branch enforcement. The bill was crafted to take into account constitutional issues, and I believe the courts would permit Congress to exercise these powers against its own activities. [45]

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[42] Final Report at 127.
[43] See *Buckley v. Valeo*, 424 U.S. 1, 122, 98 S.Ct, 612, 684, 46 L.Ed.2d 659 (1976).
[44] 141 Cong. Rec. S621, S632 (January 9, 1995) (Comments of Senator Glenn).
[45] 141 Cong. Rec. S621, S639 (January 9, 1995).

As Senator Grassley noted, Congress had the benefit of two Supreme Court cases when it drafted the CAA: *Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (upholding creation of independent counsel) and *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989) (upholding creation of sentencing commission). In these cases, the Supreme Court recognized that "the Framers did not require--and indeed rejected--the notion that the three Branches must be entirely separate and distinct" and that "our constitutional system imposes upon the Branches a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'" 487 U.S. at 693-694; 108 S.Ct. at 2620-2621; 488 U.S. at 380-381; 109 S.Ct. at 659. There is simply nothing inherently unconstitutional with Congress' decision to require itself to comply with the same laws applicable to everyone else.

Moreover, CAA §215 contains several safeguards that prevent "encroachment or aggrandizement of one branch at the expense of the other" – the principal concern underlying the separation-of-powers doctrine. Initially, §215(c) vests enforcement authority in an independent *legislative branch* agency: the Office of Compliance. By keeping enforcement authority out of the executive branch, Congress successfully allayed concerns that an executive branch agency might seek political advantage over Congress by threatening to prosecute or by prosecuting embarrassing violations. Next, while requiring compliance with the occupational health and safety standards, the CAA tempers this requirement with the provisions granting the OOC Board the power to issue variances and interpretative regulations.[46] Finally, the CAA recognizes and preserves the constitutional right of either House of Congress to make and change its own rules.[47]

Consequently, when the CAA is read as a whole, there is no merit to the argument that the doctrine of separation of powers prevents Congress from requiring legislative branch agencies to comply with the occupational health and safety standards.

CITATION 19-1 IS NOT "INVALID."

The Memorandum further suggests in the Executive Summary that "there is no valid citation in effect."[48] The basis for this assertion is not entirely clear. Even if the Panel correctly concluded that "the AOC was not subject to 29 C.F.R. §1910.26 (b)(2) [sic][49] when Citation 19-1 was issued,"[50] it does not follow that the Citation is invalid. As the Panel also reasoned, the AOC nevertheless must comply with the General Duty Clause in §5(a)(1) of the OSHAct.[51]

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[46] §§215(c)(4), 215(d)(2).
[47] §§304(c) and 501.
[48] Final Report at 117.
[49] The standard referenced in the citation is 29 C.F.R. § 1910.36(b)(2) (1999).
[50] Final Report at 130.
[51] Final Report at 3, 125-126, n.12.

Citation 19-1 expressly alleges "violations of Section 215 of the Congressional Accountability Act (2 U.S.C. § 1341) which requires compliance with Section 5 of the Occupational Safety and Health Act (29 U.S.C. § 654)." Under the analysis presented in the Memorandum, the Citation alleges that the AOC violated the General Duty requirements of Section 5(a)(1) of the OSHAct.[52] The Memorandum acknowledges that the open stairwells can "reasonably be viewed as a violation" of the General Duty Clause because these are "recognized hazards that are . . . likely to cause death or serious physical harm."[53] It also suggests that "the OOC could potentially issue a new citation" on this basis.[54] Why there is a need for a new citation is not explained. On its face, the Citation gives notice to the AOC that the open stairwells in the RSOB are recognized hazards that are likely to cause death or serious physical harm and therefore constitute violations of the CAA and Section 5 of the OSHAct. Such notice is all that the law requires.

Citations under the OSHAct, like other administrative pleadings, are to be very liberally construed and very easily amended. *National Realty & Constr. Co. v. OSHRC*, 489 F.2d 1257, 1264 (C.A. D.C. 1973). Although the description of the violation charged need not be "elaborate or technical or drafted in a particular form[,]" the description must "fairly characterize the violative condition so that the citation is adequate both to inform the employer of what must be changed and to allow the Commission, in a subsequent failure-to-correct action, to determine whether the condition was changed."[55] Citation 19-1 fairly apprises the AOC of the violation. The open stairwells are a recognized hazard that must be abated to protect occupants from the hazards posed by fire, smoke, and toxic fumes. Whether the violation is viewed as a breach of the standard set forth in 29 C.F.R. § 1910.36(b)(2) or as a violation of the General Duty Clause, the citation alleges sufficient facts to provide the AOC with adequate notice of the issues. See *Usery v. Marquette Cement Mfg. Co.*, 568 F2d at 906 (2nd Cir., 1977) (no prejudice shown where condition alleged under either General Duty Clause or OSHA standard was identical, described in identical terms in the citation, and proposed the same means of abatement).

THE PANEL FAILS TO GIVE THE REQUISITE DEFERENCE TO THE OOC'S INTEPRETATION OF ITS RULES.

Finally, the Memorandum suggests that the OOC's construction of its own regulations is entitled to little deference because the interpretation is not promulgated through notice-and-comment rulemaking.[56] In fact, the D.C. Circuit has reached just the opposite conclusion. In *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 709 (D.C. Cir. 2009), the court found that deference must be given to the OOC's interpretation of its own rules even if that

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[52] Final Report at 130,132.
[53] Final Report at 132.
[54] Final Report at 117.
[55] *Alden Leeds, Inc. v. Occupational Safety and Health Review Comm'n*, 298 F.3d 256, 261 (3rd Cir.2002) [quoting and citing *Marshall v. B.W. Harrison Lumber Co.*, 569 F.2d 1303, 1308 (5th Cir.1978)]. The citation "must be drafted with sufficient particularity to inform the employer of what he did wrong, *i.e.*, to apprise reasonably the employer of the issues in controversy." *Brock v. Dow Chemical*, 801 F.2d 926, 930 (7th Cir.1986).
[56] Final Report at 130, note 15.

interpretation "comes before the court in the form of an amicus brief." Relying upon *Auer v. Robbins,* 519 U.S. 452, 461, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), the court recognized that the OOC's interpretation is "controlling unless plainly erroneous or inconsistent with the regulation." 575 F.3d at 704.

The OOC has clearly interpreted CAA §215(a)(1) as requiring compliance with the OSHAct standards. This interpretation not only logically and consistently gives meaning to all of the relevant language in the CAA, but is entitled to deference and is "controlling."

II. AUTHORITY HAVING JURISDICTION

In its Final Report, the Panel creates a misplaced and inaccurate comparison of the enforcement authorities of the Secretary of Labor in the executive branch and the General Counsel of the OOC in the legislative branch.[57] Its central premise is that, unlike in the executive branch where federal agencies are "self-governing" with a so-called "Authority Having Jurisdiction" interpreting and enforcing fire protection and life safety codes, in the legislative branch there is a "duplicative AHJ authority structure" involving both the AOC and the OOC.[58] Said the Panel,

> In other federal agencies, the Authority Having Jurisdiction (AHJ), head of the agency, makes facility compliance determinations such as those in Citation 19-1 and has the authority to correct compliance issues. The legislative branch is unique because this responsibility is split between the AOC and the OOC, the enforcement authority. While the AOC answers to Congress, Congress does not answer to the OOC. OOC lacks a full range of administrative remedies and as a consequence of the legislative branch's dispersion of authority and responsibility, Citation 19-1 has gone unresolved for over a decade.[59]

The Panel states that it will utilize this analysis "to develop recommendations on a structure to adjudicate proposed design options for RSOB, as well as other buildings in the Capitol complex."[60]

In the first place, the Panel mischaracterizes the role of the "Authority Having Jurisdiction" (AHJ) in interpreting the Life Safety Code.[61] The phrase "authority having jurisdiction" or "AHJ" is defined in section 3.2.2 of the NFPA *Life Safety Code* (2003) as the "organization, office, or individual responsible for approving equipment, materials, an installation, or a procedure." In NFPA documents, the phrase AHJ is used "in a broad manner, since jurisdictions and approval agencies vary, as do their responsibilities." See Section A.3.2.2,

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[57] Final Report at 3, 6.
[58] Final Report at 5.
[59] Final Report at 3.
[60] Ibid.
[61] Final Report at 3, 6.

NFPA *Life Safety Code* (2003). Generally, "[w]here public safety is primary, the authority having jurisdiction may be a federal, state, or local, or other regional department or individual such as a fire chief; fire marshal; chief of a fire prevention bureau, labor department, or health department . . . or *others having statutory authority.*" *Id.* (emphasis added). Contrary to what is suggested by the Panel, the sole entity "having statutory authority" to enforce citations implementing occupational safety and health fire protection standards in the legislative branch is the Office of Compliance. CAA, §215(2)(c).[62]

Furthermore, the Panel fails to recognize that enforcing OSHAct standards is significantly different in executive branch agencies than in private sector employers. The OSHAct defines an employer as "a person engaged in a business affecting commerce, but does not include the United States."[63] Section 19 of the OSHAct requires executive branch agencies to establish and maintain a comprehensive safety and health program consistent with OSHA standards, subject to the oversight of the Secretary of Labor.[64]

In the private sector, by contrast, the Secretary of Labor is responsible for assuring that employers comply with OSHAct standards and is given statutory enforcement authorities to compel compliance. The Secretary's enforcement regimen, like that of the General Counsel of the OOC, includes citations, complaints, administrative hearings and appeals, and judicial review. None of these authorities is available to the Secretary in the executive branch. It is well settled that "although 29 U.S.C. §668(a) [Section 19 of the OSHAct] does require federal agencies to 'provide safe and healthful places and conditions of employment,' the Act confers no authority upon the Secretary to take enforcement action against federal agencies."[65]

In enacting the safety and health provisions of the CAA, Congress expressly intended "to make clear that the [CAA] applies OSHA to the Legislative Branch in the same manner that it applies to the private sector and not in the manner it is applied to the federal government." H. Rpt. 103-650, Part 2, p. 14. Consequently, the CAA does not require that Congress and its instrumentalities establish and maintain an effective and comprehensive occupational safety and

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[62] CAA, §215(2)(c)(2) provides that "For the purposes of this section, the General Counsel shall exercise the authorities granted to the Secretary of Labor in sections 9 and 10 of the Occupational Safety and Health Act of 1970 (29 U.S.C. 658 and 659), to issue (A) a citation or notice to any employing office responsible for conducting a violation of subsection (a) of this section; or (B) a notification to any employing office that the General Counsel believes has failed to correct a violation fort which a citation has been issued within the period for its correction." Further provisions authorize the General Counsel to file a complaint against the employing office named in the citation for a hearing before a hearing officer, subject to review by the Board of Directors of the OOC and the right to federal appellate court review. CAA, §215(2)(c)(3) and (5). Compliance with must take place "as soon as possible, but not later than the end of the fiscal year in which the citation is issued or the order requiring correction becomes final and not subject to further review." CAA, §215(2)(c)(6).

[63] 29 U.S.C. §652(5).

[64] 29 U.S.C. §668(a).

[65] *Federal Employees for Non-Smokers' Rights v. United States*, 446 F. Supp. 181, 183 (D.C.D.C., 1978), affirmed, 598 F.2d 310 (Table), cert. denied, 100 S. Ct. 926 (1979); *AFGE v. Rumsfeld*, 321 F3d 139, 144 (D.C. Cir., 2003). The Secretary may, however, conduct unannounced inspections and, if violations are found, report them to the head of the agency and make annual reports and recommendations to the President. See 29 U.S.C. §668(b).

health program and other extensive regulatory mandates. 29 C.F.R. §1960. See Appendix A at pp. 19-20 *infra.*

Notwithstanding this intent, the Panel focused on how the AHJ operates in the executive branch. For example, the Panel notes that the General Services Administration ("GSA") considers its Regional Fire Protection Engineer to be the AHJ "for interpreting and enforcing fire protection and life safety codes in GSA-controlled properties."[66] Nevertheless, while GSA considers its Regional Fire Protection Engineer to be the AHJ for the purposes of interpreting whether a GSA-controlled facility is in compliance with the Code, under certain circumstances an OSHA inspector, or the agency's own safety and health inspector, can issue a Notice of Unsafe or Unhealthful Working Condition in a GSA-controlled building if, after an inspection, the inspector finds noncompliance with the Code.[67] OSHA, in fact, has a specific targeted national program to inspect and issue such Notices at federal work sites that experience the highest rate of lost time from worker injuries and illnesses. OSHA Directive Number 10-08 (FAP 01), November 15, 2010. Once OSHA issues such a Notice, the agency must take sufficient action to satisfy OSHA that the unsafe condition has been abated. 29 C.F.R. § 1960.30. Abatement action that satisfies the agency AHJ, but not OSHA, is not sufficient. *Id.*

The role of the AHJ in the private sector is similar to that in the executive branch in that, absent an OSHA citation, the local fire marshal is often the AHJ for the purposes of deciding whether a facility is in compliance with the code. Nevertheless, once a citation is issued, the employer must satisfy OSHA, not merely the local fire marshal, that the hazard has been abated. See 29 C.F.R. § 1903.19.

The Panel's confusion over the role of tHXUS039Rhe AHJ after a citation has been issued is evident in the Executive Summary of the Final Report. In the "Legal Summary" section of the Executive Summary, the Panel asserts that "[i]n other federal agencies, the Authority Having Jurisdiction (AHJ), head of the agency, makes facility compliance determinations such as those in Citation 19-1" and that the "OOC lacks a full range of administrative remedies and as a consequence of the legislative branch's dispersion of authority and responsibility, Citation 19-1 has gone unresolved for over a decade."[68] This first assertion erroneously implies that, with respect to executive branch agencies, OSHA does not have any role in making compliance decisions such as those in Citation 19-1. As noted above, this simply is not true. While an executive branch agency or a private employer may consider its local fire marshal or the agency's fire protection engineer to be the "AHJ" under the Life Safety Code, this does not prevent OSHA from making "facility compliance determinations such as those in Citation 19-1." In fact, the Panel's own legal analysis concluded that "OSHA cites Public Administration buildings for fire and life safety violations on a relatively frequent basis."[69] In each of these

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[66] Final Report at 26.
[67] See 29 C.F.R. §§ 1960.26(c) & 1960.31.
[68] Final Report at 3.
[69] Final Report at 131 (noting that from October 2008 through September 2009, OSHA citations for fire and life safety violations were the fourth, fifth, and thirteen most common citations issued for Public Administration buildings). OSHA's "public administration" classification includes buildings supporting the executive, legislative,

cases, OSHA made facility compliance decisions even though a local fire marshal or agency fire protection engineer may have been considered the "AHJ" under the Life Safety Code. Contrary to what the Panel suggested, once OSHA issues a citation or a notice, whether it be the private sector, or the executive branch, final facility compliance determinations are no longer made by the agency AHJ but by OSHA.[70]

The other assertion made by the Panel in this section of the Final Report is also inaccurate. The OOC does not lack "a full range of administrative remedies" and it is neither a lack of remedies nor a "dispersion of authority and responsibility" that has caused Citation 19 to remain "unresolved for over a decade." To the contrary -- as the Panel's legal analysis noted, the CAA leaves no doubt that the OOC has the authority, jurisdiction and obligation to issue and enforce citations based upon noncompliance with the Life Safety Code.[71] The CAA expressly grants the General Counsel the authority to issue a complaint when a citation remains unabated. CAA §215(c)(3). Under the CAA, the complaint is then presented to a hearing officer for a full hearing and decision, which in turn is subject to review by the OOC Board of Directors, and further review by the United States Court of Appeals for the Federal Circuit.[72]

Similarly, the Panel points to no facts to support its assertion that there has been an "unresolved dispute" between the OOC and AOC relative to Citation 19-1.[73] There is no dispute between the AOC and the OOC over what needs to be done to remediate these hazards. The AOC has never questioned the OOC's fire hazard findings, its authority to issue or enforce Citation 19 or the AOC's own obligation to abate the hazards. While the OOC has repeatedly brought the need for accelerating abatement to the attention of the Architect and Congress through biennial reports,[74] the AOC acknowledged this obligation by developing its 2008

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judicial, administrative and regulatory activities of federal, state, local, and international governments. See http://www.osha.gov/pls/imis/sic_manual.display?id=10&tab=division (cited in Final Report at 131).

[70] When OSHA last modified the fire safety standards (known as "subpart E") in 2002, it specifically noted in the preamble that its intention was to "simplify subpart E, not to replace it." In the preamble, OSHA made clear that it was not simply adopting NFPA 101as the standard because to do so would "result in an illegal delegation of agency authority" and would go "beyond the limited purpose of this rulemaking." OSHA did, however, note that it had reviewed NFPA 101-2000 and agreed that "an employer who demonstrates compliance with [NFPA 101] will be deemed in compliance with 29 C.F.R. §§ 1910, 34, 1910.36 and 1910.37." OSHA further noted that the rulemaking process did not propose "allowing the use of building codes to comply with subpart E" and that it "declines to extend recognition to building codes as a means of determining compliance." 67 Fed. Reg. 67953-67954 (11/7/2002). Consequently, while a local agency AHJ may make a determination regarding compliance with local or agency building codes, this determination is not binding upon OSHA, who will make its own determination regarding whether there has been compliance with the standards set forth in subpart E.

[71] See Final Report at 124. ("[T]he OOC's General Counsel appears to have been acting under clear authority from Congress when it issued Citation 19-1 pursuant to a validly-adopted procedure set forth in the OOC's regulations adopted in the manner prescribed by CAA Section 313, 2 U.S.C. § 1383.").

[72] CAA §§215(c)(3)(5),405(c).

[73] Final Report at 3.

[74] See General Counsel's Reports: *Report on Fire Safety Inspections of Congressional Buildings*, pp. 4-5 (January 2000); *Report on Occupational Safety and Health Inspections*, pp. 7-8 (December 2000); *Report on Occupational Safety and Health Inspections*, p. 21 (November 2002); *Report on Occupational Safety and Health Inspections*, pp.12-14, 56; *110th Congress Progress Report on Occupational Safety and Health Inspections*, pp. 5-6 (March 2008); *Biennial Report on Occupational Safety and Health Inspections*, pp. 2-10, 58 (April 2008).

SALSA abatement plan in consultation with, and submitting it for approval by, the OOC.[75] In any event, that Citation 19 has remained "unresolved for over a decade" has nothing to do with a lack of "administrative remedies" or a "dispersion of authority and responsibility" between the AOC and the OOC.

Contrary to what was suggested by the Panel, after OSHA has issued a citation or notice, no executive agency or private employer has unbridled authority to determine for itself whether the unsafe or unhealthful condition has been sufficiently abated. Since the enactment of the CAA, the same has been true in the legislative branch. The OOC General Counsel, like the Secretary of Labor under the OSHAct, is charged by the CAA with responsibility for issuing citations and deciding whether a citation duly issued has been abated, subject to the right of review, after administrative hearing, by the OOC Board and the Federal Circuit. That said, it has been the practice of the AOC and the OOC to negotiate a mutually acceptable method for abating a hazard, as was the case respecting the AOC's abatement plans for the Russell, Cannon and Capitol Building citations. Further, the AOC may contest a citation, request a modification of abatement (as was requested from and approved by the OOC in this instance), or seek a temporary or permanent variance. Given the carefully crafted statutory scheme embodied in the CAA, there is, contrary to what has been asserted in the Final Report, no "duplicative AHJ authority structure (involving both the AOC and OOC) that governs the Capitol complex," and therefore no demonstrable need "in a subsequent phase of this [Blue Ribbon Panel] project to develop recommendations on a structure to adjudicate proposed design options for RSOB, as well as other buildings in the Capitol complex."[76]

CONCLUSION

Because neither of these Panel conclusions is well founded, both should be rejected. First, the Memorandum negates the explicit requirement of §215(a)(1) of the CAA that incorporates §5(a)(2) of the OSHAct mandating that employers in the legislative branch comply with OSHA safety and health standards. These standards are at the very heart of the Act. See *Usery v. Marquette Cement Mfg. Co., supra*, 568 F2d at 903, n.5 ("The specific standards 'are intended to be the primary method of achieving the policies of the Act,'" citing *Brennan v. OSHRC and Underhill Construction Corp.*, 513 F2d 1032, 1038 (2d Cir. 1975)). The standards presumably give the employer superior notice of the alleged violation and should be used instead of the general duty clause whenever possible. The Memorandum contends that it is necessary to disregard this provision in order to find a rational and logical legislative scheme and to avoid an inconsistent interpretation of the CAA. But this alleged inconsistency is created only by misreading the Act to equate "standards" with "regulations." As the OOC has demonstrated in this memorandum, a careful reading of the CAA (that gives full meaning to all of the words used in the statute) reflects that Congress established a coherent and fully congruent statutory scheme

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[75] *Biennial Report on Occupational Safety and Health Inspections*, pp. 7-8 (June 2009).
[76] Final Report at 5.

that refutes the interpretation set forth in the Memorandum. The CAA incorporates the OSHAct distinction between standards and regulations. Employing offices are required to comply with the OSHAct standards regardless of whether any regulations have been approved by Congress. This interpretation of the CAA is not only consistent with the statutory language, but the legislative history and legislative purpose underlying the CAA.

Furthermore, the conclusions in the Final Report regarding AHJ authority are based on inaccurate assumptions. Contrary to what the Panel suggested, there is nothing unusual about having the OOC make decisions regarding "facility compliance." OSHA frequently makes "facility compliance decisions" regarding public administration buildings that fail to meet the Life Safety Code by issuing citations (in the private sector) and Notices (in the Executive Branch). These Citations and Notices are not affected by who is considered to be the designated AHJ. Similarly, after a Citation or Notice is issued, OSHA decides whether the hazard has been abated, regardless of who is designated as the AHJ. The OOC operates in a similar manner – just as Congress intended when it enacted the CAA. Consequently, contrary to what has been asserted in the Final Report, there is no anomalous "duplicative AHJ authority structure (involving both the AOC and OOC) that governs the Capitol complex," and therefore no demonstrable need "in a subsequent phase of this [Blue Ribbon Panel] project to develop recommendations on a structure to adjudicate proposed design options for RSOB, as well as other buildings in the Capitol complex."[77]

[77] Final Report at 5.

APPENDIX A

REGULATORY REQUIREMENTS IMPOSED ON EXECUTIVE BRANCH AGENCIES UNDER SECTION 19 OF THE OSH ACT AND 29 C.F.R.§1960.

The application of the OSHAct in the executive branch under Section 19 is much different than enforcement of the OSHAct in the private sector and the legislative branch. Executive branch agencies, unlike legislative branch agencies and private employers, are required to develop occupational safety and health programs that comply with comprehensive regulations requiring extensive inspections, reporting, and recordkeeping. While the general duty imposed upon all employers (private sector, executive branch and legislative branch) is the same – compliance with Section 5 of the OSHAct by following the standards issued by OSHA and by otherwise furnishing a place of employment free from recognized hazards that are causing or are likely to cause death or serious physical harm – the specific mandates imposed upon the executive branch are quite extensive due to the provisions of OSHAct §19 and 29 CFR § 1960. Under the CAA, to comply with Section 5 of the OSHAct, legislative offices must submit to inspection by the OOC at least biennially. In contrast, the mandates imposed upon executive branch agencies require that they:

- Submit to inspection by agency safety and health inspectors at least annually.
- Designate an "Agency Safety and Health Official" (holding the rank of Assistant Secretary or equivalent) who will carry out provisions of 29 CFR §1960, Executive Order 12196, and Section 19 of the OSHAct. A principal role for this official is to provide "adequate budgets and staffs to implement the occupational safety and health program at all levels."
- Establish safety and health officials at each appropriate level with sufficient authority and responsibility to plan and assure funds for necessary safety and health staff, materials, sampling, testing, analyses, travel, training and equipment required to identify, analyze and evaluate unsafe or unhealthful working conditions and operations.
- Ensure that performance evaluations of management and supervisory officials measure their effectiveness in meeting the requirements of the occupational safety and health program
- Make available the agency's occupational safety and health plan to employees and employee representatives upon their request.
- Post a conspicuous notice informing employees of the Act, Executive Order and agency occupational safety and health program, and relevant information about safety and health committees.
- Adopt emergency temporary or permanent supplementary standards appropriate for application to working conditions of agency employees for which there exist no appropriate OSHA standards.
- Provide safety and health inspectors with safety and health hazard reports, injury and

illness records, previous inspection reports, and reports of unsafe and unhealthful working conditions.

- Post notices of unsafe or unhealthful working conditions that are identified by the agency's internal safety and health inspectors. These posters must remain until after the hazard has been abated.
- Investigate each accident that results in a fatality or in the hospitalization of three or more employees.
- Investigate working conditions, which employees have reported unsafe or unhealthful, within 24 hours to 20 working days, depending on the potential seriousness of the conditions. These investigations must be made available to the employee within 15 or 30 working days depending on the condition's severity.
- Establish procedures to follow up, to the extent necessary, to verify that hazardous conditions have been abated.
- Prepare an abatement plan that includes a proposed timetable for abatement, an explanation of any delays in the abatement, and a summary of interim steps to abate the hazard.
- Regularly inform established committees and/or employee representatives of the progress on abatement plans.
- Either establish safety and health committees or be subject to unannounced inspections by OSHA. These committees, which have equal representation by management and non-management employees, monitor the performance of agency-wide safety and health programs.
- Participate in the Safety, Health, and Return-to Employment (SHARE) Initiative which requires: (1) the establishment of goals and plans for reduction of injuries and illness; and (2) reporting on progress made toward meeting the established goals. The goals for 2004-2009 were to: (1) reduce by 3% the total number of employee injuries per year; (2) reduce by 3% the annual lost time due to worker injuries, and (3) reduce by 1% the total number of annual lost production days due to worker injuries. (Established by Presidential Memo. 1/9/2004 & 9/29/2006).

Office of Compliance Guidelines for Risk Assessment Codes (RACs) - July 29, 2004

Office of Compliance (OOC) inspectors assign a risk assessment code (RAC) to each hazard encountered during routine inspections. The RAC describes the relative risk of injury, illness or premature death that could result from exposure to a hazard. RACs vary between a RAC 1 for a relatively high risk and a RAC 5 for an insignificant risk. Because the OOC does not identify hazards that have insignificant risks (*de minimis* violations), we do not have RAC 5 findings.

A RAC uses a combination of the *probability* that an employee could be hurt and the *severity* of the illness or injury. The tables below outline the definitions of these elements and the process for combining the elements to determine a RAC. We use two methods: one for *safety* hazards, which could result in injuring an employee, and another for *health* hazards, which are conditions that could cause an occupational illness.

Table 1 shows the matrix used to determine RACs for safety hazards. The inspector finds the RAC by selecting the probability category from the first column and the worst-case severity category from the next four columns. The cell where the severity and probability descriptions intersect contains the appropriate RAC.

Table 1. Safety Risk Assessment Code Matrix

Probability Categories	Hazard Severity Categories			
	I	II	III	IV
Likely to occur immediately (A)	RAC 1	RAC 1	RAC 2	RAC 3
Probably will occur in time (B)	RAC 1	RAC 2	RAC 3	RAC 4
Possible to occur in time (C)	RAC 2	RAC 3	RAC 4	
Unlikely to occur (D)	RAC 3	RAC 4		

OOC has based the structure of the RAC tables (Tables 1 and 2) on information from John Zoldak of The Zoldak Group, Inc., and the definitions of the classifications and categories on the Department of Defense Instruction 6055.1, http://www.dtic.mil/whs/directives/corres/pd2/i60551p.pdf. The definitions of the Hazard Severity categories from the DOD Instruction are as follows:

- *Severity Category I*: Death or permanent total disability.
- *Severity Category II*: Permanent partial or temporary total disability; off work more than 3 months.
- *Severity Category III*: Lost-workday or compensable injury.
- *Severity Category IV:* First aid or minor supportive medical treatment.

RACs for health hazards require a more complex approach. Health RACs include factors such as exposure conditions, routes of entry, medical effects, exposure duration, and the number of employees exposed. Table 2 below outlines the RAC categories for health hazards and Tables 3 through 8 give the process for calculating the probability and severity categories for Table 2.

Table 2. Health Risk Assessment Code Matrix

Probability Categories	Hazard Severity Categories			
	I	II	III	IV
Likely (A)	**RAC 1**	**RAC 1**	**RAC 2**	**RAC 3**
Probable (B)	**RAC 1**	**RAC 2**	**RAC 3**	**RAC 4**
Possible (C)	**RAC 2**	**RAC 3**	**RAC 4**	
Unlikely (D)	**RAC 3**	**RAC 4**		

To determine the Hazard Severity for Table 2, add the factors in Tables 3 and 4, then use Table 5 to select the category.

Table 3. Exposure Points (for use in Table 5)

Is an exposure route other than inhalation possible?	Exposure Conditions			
	< AL	Intermittently ≥ AL, but < OEL	≥ AL, but < OEL	≥ OEL
No	0 points	3 points	5 points	7 points
Yes	2 points	4 points	6 points	9 points

"AL" is the action level, which usually requires training, medical monitoring, records, and other measures. "OEL" is the occupational exposure limit that applies to the situation. These limits include OSHA permissible exposure limits (PELs), threshold limit values (TLV®s) from the American Conference of Governmental Industrial Hygienists (ACGIH), and short-term exposure limits (STELs) and ceiling limits from either OSHA or ACGIH.

Table 4. Medical Effects Points (for use in Table 5)

Condition	Points
No medical effects (could include nuisance odors)	0
Temporary reversible illness requiring supportive treatment (e.g. eye irritation, sore throat)	1 to 2
Temporary reversible illness with limited period of disability (e.g., metal fume fever)	3 to 4
Permanent illness or loss of capacity (e.g., permanent hearing loss)	5 to 6
Severe disabling and irreversible illness or premature death (e.g., asbestosis)	7 to 8

Note: Be sure to use the correct medical effects for exposure conditions.
Use acute effects for exposures > STELs and chronic effects for exposures > time-weighted average OELs.

Table 5. Health Hazard Severity Category (for use in Table 2)	
Health Hazard Severity Category	**Total points from Tables 3 and 4**
I	13 to 17 points
II	9 to 12 points
III	5 to 8 points
IV	1 to 4 points

To determine the Health Hazard Probability for Table 2, add the factors in Tables 6 and 7, then use Table 8 to select the category.

Table 6. Number of Exposed Employees (for use in Table 8)	
Number of Exposed Employees	**Points**
< 5 exposed employees	1 to 2 points
5 to 9 exposed employees	3 to 4 points
10 to 49 exposed employees	5 to 6 points
> 49 exposed employees	7 to 8 points

Table 7. Exposure Duration (for use in Table 8)			
Exposure Frequency (during the year)	**Exposure Duration** (during a week)		
	1 to 8 hours/week	**> 8 but < 30 hours/week**	**≥ 30 hours/week**
Irregular, intermittent	1 to 2 points	4 to 6 points	8 points
Regular, periodic	2 to 3 points	5 to 7 points	8 points

Table 8. Health Hazard Probability Category (for use in Table 2)	
Health Hazard Probability Category	**Total points from Tables 6 and 7**
Likely	14 to 16 points
Probable	10 to 13 points
Possible	5 to 9 points
Unlikely	1 to 4 points

Guidance for Applying Risk Assessment Codes (RACs)

Apply RACs to Hazardous Conditions, Not to Generic Violation Categories

Inspectors should not attempt to match a RAC with a specific description of a violation without considering the conditions in which the violation exists. In other words, they should make no attempt to be consistent in assigning the same RAC to the same violation, unless the conditions involved in the violation are also consistent.

Example: A violation for exposure to asbestos in the air could result in a RAC 1, 2, 3, 4 or 5, depending on the conditions. Exposure to asbestos below the action level with no other contamination would have 8 medical-effects points and, therefore, a Severity Category of III. If a maintenance worker enters a closet with that level of asbestos for a couple of hours a month, the total Health Hazard Probability points would be 4, which would equate to "Unlikely." The resulting RAC would be 5, which would be *de minimis.*

On the other hand, if a group of 6 people has that same asbestos exposure (below the AL with no other contamination) every workday, then the Health Hazard Probability points would be 11, which would equate to "Probable." The resulting RAC would be 3.

Apply RACs to "Covered Employees"

Because the scope of OOC's occupational safety and health inspections is limited to hazards to employees covered under the Congressional Accountability Act, our RACs are based only on those hazards. While other organizations might use RACs to track risks for the public or for potential facility damage, OOC RACs will not cover those types of hazards.

Example: A guardrail does not meet either the OSHA criteria to protect employees or the building code requirements to protect the general public. If the spacing between the railings poses a low risk for employees but a high risk for children, our RAC would be based on the low employee risk rather than the higher risk for members of the public.

Applying RACs for Unknown Exposure Conditions

When employees use substances that could expose them to hazardous levels but the employer has not measured or modeled the exposure, the inspector will need to either sample or estimate the level of exposure to determine the appropriate RAC. Unfortunately, odor levels and irritant levels can rarely be used to indicate levels that are hazardous; therefore, other means will usually be needed to estimate exposure levels.

The specific substance standards in 29 CFR Subpart Z that include permissible exposure limits (PELs) require the employer to determine the exposure level. They also require the employer to protect employees as though exposures exceed the PEL until exposure monitoring demonstrates otherwise. For violations of these standards, calculate the RAC using points for exposures above the PEL, unless there is a clear indication that exposures are less than the PEL.

For substances that do not have specific standards in Subpart Z, the inspector can use judgment

and experience to estimate the potential exposure after reviewing the method of application or use, vapor pressure of the material, process temperature, amount and rate of use, and volume of the area where the substance is used.

Applying a RAC for a Condition Having Multiple Risks

A violation will often have multiple potential outcomes. Examples include:

- Methylene chloride can cause both loss of consciousness during intermittent short-term exposures and long-term exposures can produce cancer.
- Many electrical violations can result in minor shock, major injury, death, localized fires or major facility fires.

To determine the appropriate RAC for such a violation, we look at two scenarios and use the highest RAC between them. We look at the scenario most likely to occur and determine that RAC. Then we look at the scenario with the most severe effects and determine that RAC. The highest of these two RACs (lowest number on our scale) is assigned to the violation.

Do Not Use RACs to Dictate an Abatement Schedule

A RAC provides information about the relative risk. More serious RACs (RAC 1 and RAC 2) should justify more resources and attention to correct hazards than less serious RACs (RAC 3 and RAC 4). We do not, however, use RACs to indicate a time-line for correcting a violation. If a RAC 4 violation can be corrected simply by eliminating an extension cord or by removing an obstruction, then the violation should be corrected immediately.

Do Not Reduce RACs to Reflect Reduced RACs for Interim Control Measures

Conditions that have been assigned serious RACs should usually require the employment of interim control measures. These measures should reduce the probability or severity of an injury or illness and result in a less serious (higher number) RAC. Employing offices will normally adjust these RACs as a part of managing their safety programs.

The OOC does not participate in adjusting RACs unless we receive a formal request to assist with this process.

Apply RACs to Direct, Indirect and Root Causes of Hazards

It is axiomatic that hazards, illnesses, and injuries usually have multiple causes and sources. Correcting a direct cause will physically eliminate the hazard or violation. For example, replacing a chemical that produces hazardous exposures with a chemical that does not produce such exposures addresses the direct cause of the hazard.

RACs also apply to indirect and root causes of hazards. Examples of indirect causes include missing MSDSs that would inform employees of hazardous materials that are otherwise not known, training that has not covered the procedures needed to avoid a hazard, lack of guidance regarding safe processes, an inadequate program in which the missing elements would reduce or eliminate the direct causes, etc.

Typical Examples of Risk Assessment Codes

Table 9 describes several sets of violations and conditions to show how we assign the RACs. These examples are instructional; therefore, no policy is implied by the conditions and hazards included in this table.

Table 9. Typical Examples of Risk Assessment Codes (RACs)

Violations, Conditions, and Potential Hazards	Severity	Probability	RAC
Energized junction box is missing a cover. The box is within 8 feet of the floor and poses a potential electrocution hazard upon contact in a work area or frequently-used walkway or corridor.	I	C	2
Energized junction box is missing a cover. The box is within 8 feet of the floor and poses a potential electrocution hazard upon contact but is not located in a work area or frequently-used walkway or corridor.	I	D	3
Energized junction box is missing a cover. The box is more than 8 feet from the floor (relatively inaccessible) and has flammable materials near the location, and poses a limited fire hazard..	III	B	3
Fire extinguisher not inspected or maintained. It is not located in a sprinkler-protected area and a fire would pose a fire hazard with no protective measures.	III	B	3
Fire extinguisher not inspected or maintained. It is located in a sprinkler-protected area and a fire would pose a fire hazard with incomplete protective measures.	III	C	4
A confined space exists with a potential atmospheric hazard. The space is not labeled or marked as a permit required space; no entry program has been developed. No known entries have been made but the space is accessible and it could pose an inhalation hazard.	I	C	2
A confined space exists with a potential atmospheric hazard. The space is not labeled or marked as a permit-required space; no entry program has been developed. Entries have been made without protective measures, posing a likely inhalation hazard.	I	B	1
3 or 4 employees use methylene chloride (carcinogen) for more than 30 hours a week at levels above the PEL with poor ventilation, no respiratory protection, and no PPE to prevent potential skin exposure.	Table 3 = 9 Table 4 = 7 Total = 16 Severity I	Table 6 = 2 Table 7 = 8 Total = 10 Probable	1
5 or 6 employees use methylene chloride very infrequently at levels above the PEL with poor ventilation, no respiratory protection, and no PPE to prevent potential skin exposure.	Table 3 = 9 Table 4 = 7 Total = 16 Severity I	Table 6 = 3 Table 7 = 1 Total = 4 Unlikely	3

Office of Compliance

Office of the General Counsel

Peter Ames Eveleth
General Counsel

May 23, 2011

The Honorable Charles E. Schumer, Chairman
The Honorable Lamar Alexander, Ranking Member
U.S. Senate Committee on
Rules and Administration
Room 305, Russell Senate Office Building
Washington, D.C. 20510

Re: Final Report, Blue Ribbon Panel on Russell Senate Office Building and Office of Compliance Citation 19-1

Dear Chairman Schumer and Senator Alexander:

After the Office of Compliance identified serious life-threatening fire hazards in the Russell Senate Office Building, the General Counsel issued Citation 19-1 in March 2000, and directed the Architect of the Capitol to develop a plan to abate those hazards. The Architect prepared such a plan (the Senate Alternative Life Safety Approach, or SALSA) in February 2008 which was approved by the General Counsel in March 2008. Given concerns about the effect the plan might have on the historic fabric of the Russell Building (constructed in 1909), in April 2009, you and former Ranking Member Robert F. Bennett requested the Architect to convene an expert panel to address enumerated issues and submit a report containing at least three recommendations for consideration by the Senate Committee on Rules and Administration. The Blue Ribbon Panel issued its Final Report in August 2010, and recommended remedial measures to the Committee. We are submitting this response at this time as we have been advised that the Committee just recently formally received the Panel's Report and recommendations. As the regulatory agency within the legislative branch charged with statutory responsibility under the Congressional Accountability Act to assure that Citations are fully abated, the OOC strongly urges the Committee to support the Panel's recommendations for correcting these unremedied fire and life safety hazards as discussed below.

As the Panel found, the hazards in the Russell Building include unprotected exit pathways, insufficient emergency exit capacity, and excessive exit travel distances in contravention of Life Safety Code requirements. Enclosed as Attachment A is a one-page document summarizing these hazards. The existence and severity of these long standing hazards is undisputed. They have been highlighted by the OOC in successive reports to Congress since January 2000. These and numerous other existing hazards pose such potential threats to building occupants that, as Panel Member and former Fire Marshal Ed Plaugher stated at the Panel's April 2010 briefing, were Russell under his jurisdiction, he would order it closed until the hazards were abated.

The Panel assessed both fire safety and historic preservation concerns. It concluded that Russell's fire safety hazards could be rectified "in a manner that is consistent with historic preservation goals." The Panel considered three Design Options, along with SALSA, to address the deficiencies and proposed nine "General Recommendations" to be implemented in addition to whichever Design Option was selected. The General Recommendations are divided into "Immediate," "Short Term" and "Long Term" Recommendations. The Immediate Recommendations involve attic improvements (removal of combustible materials or installation of automatic sprinkler protection along with smoke barriers and compartmentalization), basement workshop and storage improvements (removal of furniture refinishing workshop, enclosing other workshops with one hour fire separation and removal of combustible materials in the Basement corridor), and inspections (develop and implement annual inspection program focusing on fire prevention best practices). The Short Term Recommendations involve providing smoke control in the Atrium and providing a remote means of egress for all assembly spaces with occupant loads exceeding 50 persons. The Long Term Recommendations include adding protective materials to the attic roof structure, modifying or replacing the HVAC systems to eliminate air-transfer openings, providing fire stopping for or replacing utility shafts and floor openings, and removing the combustible courtyard structure. We agree with and endorse all of these General Recommendations and strongly urge that the Immediate Recommendations be implemented without delay, and that the Short Term and Long Term Recommendations be implemented as soon as practicable.

The Panel evaluated SALSA and the three design options by considering the historic preservation goals as well as nine life safety objectives: (1) maintaining structural integrity during a fire, (2) separating hazardous areas from the remainder of the building, (3) restricting smoke movement from rooms to the exit corridors and to other areas of the building, (4) providing protected occupant egress paths, (5) restricting vertical smoke movement in the Atrium, (6) restricting vertical smoke movement throughout the building, (7) providing adequate egress capacity, (8) limiting exit travel distances, and (9) creating contiguous protected exit paths. While the Panel acknowledged that SALSA along with the General Recommendations would meet these nine safety objectives, the Panel dismissed this as an option because it failed to meet the historic preservation goals. Option 1, on the other hand, fails to meet any of the life safety objectives because all it would do is provide an extension of automatic sprinkler protection and upgrade the fire detection and alarm system to provide smoke detection throughout the building.

Option 2 would meet both the historic preservation goals and the life safety objectives because, in addition to extending sprinklers and smoke detectors, provides for compartmentalization of Russell into separate fire zones. This is accomplished by installing fire-rated pocket doors installed within the walls that are activated only in the event of a fire thereby preventing the spread of fire and toxic gasses while creating protected areas for occupants to escape safely from the building. Option 3 would also meet the historic preservation goals and life safety objectives through the use of a smoke control system, perhaps in conjunction with compartmentalization, to limit the amount and extent of fire spread in the building. However, the Panel cautioned that the feasibility and potential benefit of this approach have not been evaluated and would require further technical investigation and computational fire and egress modeling.

In sum, Design Option 2 and the Architect's SALSA plan, together with the General Recommendations, address all of the life safety objectives that the Panel identified. Design Option 3 requires further study and may be neither technologically nor economically feasible. Design Option 1, which the Panel found provided the least potential for risk reduction, addresses none of the identified life safety objectives. For the reasons detailed in the attached memorandum (Attachment B), the Office of Compliance has concluded:

- In addition to the Design Option that is selected, each of the General Recommendations developed by the Panel for improving the level of fire safety should be implemented on an Immediate, Short Term and Long term basis.

- Design Option 1, unlike the other options, does not create separate fire zones in order to compartmentalize and therefore limit the area of smoke and fire spread. Hence, it would neither prevent the spread of fire, smoke, and toxic gasses throughout the Russell Building nor address the building's lack of exit capacity or excessive travel distances. Hence, it would not abate Citation 19. Vertical compartments reduce the number of occupants exposed to the effects of a fire, allow the occupants to egress horizontally (an essential feature for those who are physically unable to use stairs), reduce exit travel distances, increase available egress capacity, and create areas of safety to protect occupants from the effects of a fire in an adjacent compartment. That said, we assume that the Architect will continue to extend automatic sprinkler protection and upgrade the fire detection and alarm system to provide area smoke detection throughout the building as contemplated by Option 1.

- Design Option 2, if implemented with the General Recommendations, would abate Citation 19. Options 2a, 2b, 2c and SALSA, in conjunction with the General Recommendations, all are sufficient to establish a reasonable level of fire protection within the Russell Building. Unlike the cross-corridor swinging doors in the SALSA plan, all variations of Option 2 involve installation of concealed cross-corridor accordion (Won Door) partitions. The three variations of Option 2 differ in cost, extent of compartmentalization within the building, the degree of building intervention, and level of fire protection.

- Design Option 3 requires extensive further study and computer-generated smoke modeling to determine its feasibility and benefit. Accordingly, without such information, the Office of Compliance is unable to opine on the merits of this Option at this time.

Thus, we agree in major part with the Panel's findings respecting fire and life safety conditions as well as the measures necessary to achieve an acceptable level of fire safety.

As to the Panel's legal analysis, we agree to the extent it recognizes that the OOC has clear authority to issue citations for alleged violations of the CAA, that OOC's issuance of a citation for these types of hazards is consistent with OSHA's practices regarding similar historic buildings, and that these hazards can reasonably be viewed as a violation of Section 5 of the OSHAct. However, we do take issue with the Report respecting two significant matters as to which we believe it is in substantial error. First, it questions the authority of this Office to require compliance with the safety and health standards promulgated by the Secretary of Labor under the Occupational Safety and Health Act of 1970 (OSHAct) absent adoption by OOC of regulations incorporating those standards and approval of those regulations by Congress. Second, it challenges the exclusive authority of the General Counsel of the Office of Compliance to make compliance decisions and to enforce its citations. These issues are addressed separately in the attached memorandum (Attachment C).

The OOC commends the Panel for its comprehensive study of fire and life safety conditions in the Russell Building. By confirming the severity of existing threats to building occupants posed by these long-standing unabated hazards, the Panel highlights the need to immediately implement certain short-term measures to lessen existing dangers. The importance of completing these measures as soon as possible cannot be overstated. As the Panel observed, "These items will have a significant impact on the level of fire safety in the building and are envisioned as viable, discreet, and relatively easy to

accomplish." Compartmentalizing the building into separate fire zones is necessary to assure compliance with the Life Safety Code and Citation 19-1. It will provide protected exit pathways for evacuating the building in an emergency, sufficient emergency exit capacity, and reduction of exit travel distances, while minimizing any adverse impact on the building's historic fabric. Hence, we strongly support Design Option 2 (or in the alternative the SALSA) as affording an adequate level of safety protection to Senators, staff and visitors to the Russell Building.

Now that the Panel has completed its work, the OOC stands ready to work with your Committee, the Architect and other legislative branch stakeholders to ensure that the life-threatening fire hazards in the Russell Building are abated promptly and with appropriate respect for the historic nature of this iconic Senate landmark.

Very truly yours,

Peter Ames Eveleth
General Counsel

cc: Jennifer Griffith
Shaun Parkin

Chrisler, Tamara

From: Chrisler, Tamara
t: Friday, March 18, 2011 8:31 AM
Lila (Appropriations) Helms; Rachelle_Schroeder@appro.senate.gov
Cc: Katie (Appropriations) Batte; Maria (Appropriations) Veklich; Holland, Allan
Subject: OOC Responses for the Record
Attachments: OOC Response for the Record FY 2012 Senate.fin.docx

Good morning,

Attached, please find the OOC's responses to questions posed during our appropriations hearing March 3, 2011. Should you need the responses provided in another format, or should you need additional information, please contact Allan Holland. He is cc'd on this e-mail and can also be reached at 202-724-9268. I will be out of the country until March 28 and unable to access e-mail.

Thank you,
Tamara

Tamara E. Chrisler
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Question No. 1: Please summarize the recommendations contained in the Final Report issued by the Blue-Ribbon Panel that analyzed the fire-safety hazards in the Russell Senate Office Building and your office's response to those recommendations.[1]

Answer: Under the Life Safety Code, buildings on Capitol Hill must provide protected exit routes so that their occupants will be able to safely leave the buildings during an emergency evacuation without being exposed to fire, smoke, or toxic gasses. Because the Russell Building does not have enclosed stairwells or other protected escape route, the General Counsel of the Office of Compliance issued a citation ("Citation 19") in 2000 to require that this life threatening hazard be abated. In 2008, the Architect developed a plan to abate this hazard (known as the "Senate Alternative Life Safety Approach" or "SALSA") that was subsequently approved by the OOC General Counsel. The SALSA plan was designed to provide an alternative to enclosing monumental stairways within the Russell Building. It proposed to create separate "fire zones" within the building that would both contain the fire and provide protected areas within the building and would enable occupants to either completely exit the building or be sheltered in place, free from exposure to fire, smoke and toxic gasses. This compartmentalization would be accomplished by installing fire-rated doors mounted flush with corridor walls that would be closed automatically upon activation of fire alarms. Thereafter, at the request of the Senate Committee on Rules and Administration, the Architect established a Blue Ribbon Panel ("the Panel") of experts to address concerns about the effect the SALSA plan might have on the historic fabric of the Russell Building.

In its Final Report, dated August 23, 2010, the Panel assessed both fire safety and historic preservation concerns. As the Panel found, the hazards in the Russell Building include unprotected exit pathways, insufficient emergency exit capacity, and excessive exit travel distances in contravention of Life Safety Code requirements. It concluded that fire safety hazards in the Russell Building could be rectified "in a manner that is consistent with historic preservation goals." The Panel considered three Design Options, along with the Architect's SALSA plan, to address the deficiencies and proposed nine "General Recommendations" to be implemented in addition to whichever Design Option was selected. The General Recommendations are divided into "Immediate," "Short Term" and "Long Term" Recommendations. The Immediate Recommendations involve attic improvements (removal of stored combustible materials or installation of automatic sprinkler protection along with smoke barriers and compartmentalization), basement workshop and storage improvements (removal of the furniture refinishing workshop, enclosing other workshops with one hour fire separation and removal of combustible materials in the Basement corridor), and inspections (develop and implement an annual inspection program focusing on fire prevention best practices). As to these items, the Panel concluded that they "will have a significant impact on the level of fire safety in the buildings and are envisioned as viable, discreet, and relatively easy to accomplish. These improvements should be undertaken as soon as possible."

The Short Term Recommendations involve providing smoke control in the Atrium and providing a remote means of egress for all assembly spaces with occupant loads exceeding 50 persons. The

[1] The OOC has available, and can provide to the Committee upon request, memoranda containing its detailed responses to the Final Report issued by the Blue Ribbon Panel.

Long Term Recommendations include adding protective materials to the attic roof structure, modifying or replacing the HVAC systems to eliminate air-transfer openings, providing fire stopping for or replacing utility shafts and floor openings, and removing the combustible courtyard structure.

The Panel evaluated SALSA and the three design options by considering the historic preservation goals as well as nine life safety objectives: (1) maintaining structural integrity during a fire, (2) separating hazardous areas from the remainder of the building, (3) restricting smoke movement from rooms to the exit corridors and to other areas of the building, (4) providing protected occupant egress paths, (5) restricting vertical smoke movement in the Atrium, (6) restricting vertical smoke movement throughout the building, (7) providing adequate egress capacity, (8) limiting exit travel distances, and (9) creating contiguous protected exit paths. While the Panel acknowledged that SALSA together with the General Recommendations would meet these nine safety objectives, the Panel dismissed this as an option because it failed to meet historic preservation goals.

The Panel did not evaluate Option 1 in detail. It provides for an extended automatic sprinkler system for fire and smoke control, improvements that already are underway. Option 2 would meet both the historic preservation goals and the life safety objectives because, in addition to extending sprinklers and smoke detectors, it provides for compartmentalization of Russell into separate fire zones. This is accomplished by installing fire-rated pocket doors within the walls that are activated only in the event of a fire thereby preventing the spread of fire and toxic gasses while creating protected areas for occupants to escape safely from the building. Option 3 would also meet the historic preservation goals and life safety objectives through the use of a smoke control system, perhaps in conjunction with compartmentalization, to limit the amount and extent of fire spread in the building. However, the Panel cautioned that the feasibility and potential benefit of this approach have not been evaluated and would require further technical investigation and computational fire and egress modeling.

In sum, Design Option 2 and the Architect's SALSA plan, together with the General Recommendations, address all of the life safety objectives that the Panel identified. Design Option 3 requires further study and may be neither technologically nor economically feasible. Design Option 1, which the Panel found provided the least potential for risk reduction, addresses none of the identified life safety objectives.

The OOC has concluded:

- In addition to whichever Design Option is selected, each of the General Recommendations developed by the Panel for improving the level of fire safety should be implemented on an Immediate, Short Term and Long term basis as soon as practicable.

- Design Option 1, unlike the other options, does not create separate fire zones in order to compartmentalize and therefore limit the area of smoke and fire spread. Hence, it would neither prevent the spread of fire, smoke, and toxic gasses throughout the Russell Building nor address the building's lack of exit capacity or excessive travel distances. Hence, it would not abate Citation 19. Consequently, the OOC cannot support this

Option as currently proposed. Vertical compartments reduce the number of occupants exposed to the effects of a fire, allow the occupants to egress horizontally (an essential feature for those who are physically unable to use stairs), reduce exit travel distances, increase available egress capacity, and create areas of safety to protect occupants from the effects of a fire in an adjacent compartment. That said, we assume that the Architect will continue to extend automatic sprinkler protection and upgrade the fire detection and alarm system to provide area smoke detection throughout the building as contemplated by Option 1.

- Design Option 2, if implemented with the General Recommendations, would abate Citation 19. Options 2a, 2b, 2c and SALSA, in conjunction with the General Recommendations, all are sufficient to establish a reasonable level of fire protection within the Russell Building. Unlike the cross-corridor solid doors in the SALSA plan that would remain open except in an emergency, all variations of Option 2 involve installation of concealed cross-corridor accordion (Won Door) partitions. The three variations of Option 2 differ in cost, extent of compartmentalization within the building, the degree of building intervention, and level of fire protection.

- Design Option 3 requires extensive further study and computer-generated smoke modeling to determine its feasibility and benefit. Accordingly, without such information, the Office of Compliance is unable to opine on the merits of this Option at this time.

Thus, we agree in major part with the Panel's findings respecting fire and life safety conditions as well as the measures necessary to achieve an acceptable level of fire safety.

The Panel's Final Report also contained a legal analysis of the OOC's citation authority. We agree with parts of this analysis and strongly disagree with other parts. We agree to the extent it recognizes that the OOC has clear authority to issue citations for alleged violations of the CAA, that OOC's issuance of a citation for these types of hazards is consistent with OSHA's practices regarding similar historic buildings, and that these hazards can reasonably be viewed as a violation of Section 5 of the Occupational Safety and Health Act of 1970 ("OSHAct"). However, we do take strong issue with the Report respecting two significant matters as to which we believe it is in substantial error. First, it questions the authority of this Office to require compliance with the safety and health standards promulgated by the Secretary of Labor under the OSHAct absent adoption by OOC of regulations incorporating those standards and approval of those regulations by Congress. The analysis disregards the plain language of the CAA requiring employing offices to comply with the standards. In so doing, it ignores the well-recognized distinction between "standards" and "regulations." Only OOC promulgated regulations that implement standards, unlike the standards themselves, require Congressional approval. The legislative history of the CAA supports this interpretation of the CAA. Second, the analysis errs by challenging the exclusive authority of the General Counsel of the Office of Compliance to make compliance decisions and to enforce its citations. Again, the CAA makes plain that this enforcement authority lies exclusively with the General Counsel of the OOC.

Question No. 2: Please describe any statutory changes that could help make your programs or processes more "streamlined" or efficient or that would otherwise save money?

Answer: Pursuant to Section 102b of the CAA, each Congress, the Board of Directors prepares a report analyzing current laws and determining whether those laws should be made applicable to the legislative branch. This most recent 102b report "Recommendations for Improvements to the Congressional Accountability Act" not only provides key recommendations, but also focuses on how these recommendations can produce cost savings across the legislative branch.

Safety and Health Amendments that Will Result in Cost Savings

Subpoena Authority in Safety and Health Investigations. Unlike the Department of Labor and other state and federal entities, subpoena authority in aid of investigations was not given to the OOC under the CAA. This exemption limits the OOC's ability to investigate promptly and effectively safety and health hazards within Congressional workplaces. Currently, the OOC is dependent on information that is voluntarily provided by employing offices and employees when it conducts safety and health investigations. In some instances, the absence of investigatory subpoena authority has significantly contributed to protracted delays in investigations, which results in additional personnel costs for OOC staff conducting the investigation and Congressional staff responding to the investigatory requests. Inordinate delay or provision of only partial information results in faulty witness recollection, the lack and loss of evidence, untimely completion of inspections, and unnecessarily prolonged employee exposure time to hazardous conditions.

Safety and Health Recordkeeping. The recordkeeping requirements included in section 8c of the OSHAct recognize the need for full and accurate information to administer effectively a safety and health program. With records, the OOC could better pinpoint worksites with high numbers of injuries and illness and identify and analyze their causes and use targeted safety programs to reduce and prevent such hazards.

At the urging of this committee, the OOC is no longer conducting the type of "wall-to-wall" inspections that were performed during the prior three Congresses. Beginning with the 112th Congress, the Office has implemented a risk-based inspection process that allows us to focus our inspections on higher-risk areas. We implemented this risk-based process by hiring an Occupational Safety and Health Program Manager who has experience working in the insurance industry performing risk-based assessments of safety hazards. She has worked with the employing offices to develop a risk-based inspection process that focuses on higher-risk areas and allows lower-risk areas to be self-inspected by the employing offices based upon criteria established by the OOC, with oversight and spot-checking also provided by the OOC. We believe that this approach to inspections is consistent with the existing statutory language which grants sufficient discretion to the OOC's General Counsel regarding the procedure and methods used to conduct the biennial inspections mandated by CAA § 215(e).

While the OOC has implemented this process by compiling a tentative and somewhat speculative list of higher-risk areas, the OOC has been hampered in its ability to identify higher-risk areas

because there is no requirement in the CAA that legislative branch agencies maintain injury and illness logs or records. Nor does the CAA require that these logs or records be provided to the OOC when they are being maintained by agencies.

Without these logs and records, the OOC General Counsel cannot access the information needed to develop fully and efficiently a targeted risk-based inspection program aimed at the causes and prevention of occupational injuries and illnesses, as was envisioned by this Committee. 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 then General Accounting 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 the 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 (OSHA 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.

Workplace Rights Amendments that Will Result in Cost-Savings

Notice Posting of Rights. Almost all Federal anti-discrimination, anti-harassment, safety and health, and other workplace rights laws require that employers prominently post notices of those rights and information pertinent to asserting claims for alleged violations of those rights. By providing such notices, employees have a clearer understanding of their rights. Such notices also serve as a reminder to supervisors and co-workers that certain behaviors, such as sexual harassment, are not tolerated in the Congressional workplace and that there are legal consequences for such behaviors. By deterring such behavior, it is anticipated that workplace conflict would diminish and Congress would spend less money and time defending against discrimination claims.

Mandatory Anti-Discrimination/Harassment Training. The private sector and Federal executive branch have long recognized the benefits of mandatory anti-discrimination training for all employees. Much like with ethics laws, managers who do not understand their obligations under workplace rights laws are bound to run afoul of them. By helping managers to better understand workplace rights laws, compliance with those laws improve. Furthermore, managers will know how to quickly address such workplace strife rather than allowing it to fester and grow, resulting in greater legal consequence. It also informs employees about their workplace rights and how workplace conflicts can be resolved. The short amount of time spent on anti-discrimination training "at the front end" can prevent much greater time spent on litigation. The Office is looking into the possibility of implementing this training through computer based programs, a method that appears to be on the increase in the private sector. This could prove to be cost-efficient as well as effective.

Consolidation of Dispute Resolution Programs for All Legislative Branch Agencies. Another area of potential statutory change involves expanding the coverage of Office of Compliance procedures to include those legislative branch agencies currently excluded from some of the provisions of the CAA, i.e., the Library of Congress, the Government Accountability Office, and the Government Printing Office. Such a change would be consistent with ongoing efforts to consolidate specific services in particular legislative branch offices, such as consolidating all police and security services with the U.S. Capitol Police (eliminating a separate LOC police force), moving all accessibility services to a separate Congressional Office of Accessibility Services (eliminating separate House and Senate offices), and implementing a uniform financial management system across all legislative branch agencies. Pursuant to a mandate from the House Committee on Appropriations Subcommittee on the Legislative Branch in fiscal year 2005, this issue has been under study since FY 2006 by the foregoing agencies. The Office of Compliance could accelerate this process to identify potential cost savings that would result from such a legislative change.

Although the GPO is part of the legislative branch, it is not subject to any of the provisions of the CAA. Most GPO employees are included in the federal competitive service and employment laws that apply generally in the executive branch apply at GPO. While covered under their own statutory schemes, the GAO and LOC are not subject to the provisions of the CAA providing protections in the areas of employment discrimination, Fair Labor Standards, labor-management relations, genetic information use and disclosure, veterans' preference, and disability access to public services and accommodations. The GAO and LOC, however, are subject to the provisions in the CAA relating to occupational safety and health, and presumably to those provisions covering polygraph use and procedures, worker adjustment and retraining, uniformed services employment and reemployment, and family and medical leave.

In the areas where there is no coverage under the CAA, the GAO, LOC and GPO utilize their own internal procedures and staff to provide the processes and procedures they are otherwise required to provide by law. In some cases, these agencies also use related agency employment dispute resolution panels or executive branch agencies. Thus, in addition to its own internal processes, the GAO is subject to the dispute resolution procedures of its own Personnel Appeals Board. Labor relations matters of the LOC are regulated by the Federal Labor Relations Authority and the GPO is covered by employment dispute agencies of the executive branch (the Merit Systems Protection Board, the Equal Employment Opportunity Commission, the Office of the Special Counsel, and the Federal Labor Relations Authority). Many of the processes used by the LOC, GAO, and GPO are duplicative of the services provided to the legislative branch by the Office of Compliance under the CAA.

The mandatory counseling and mediation provisions of the CAA provide a cost-effective means to resolve employment disputes. Indeed, these procedures are already in use by such agencies of the legislative branch such as the Office of the Architect of the Capitol, the Congressional Budget Office, and the United States Capitol Police. Employing offices within the House of Representatives and the Senate also utilize the case processing procedures of the Office of Compliance. The CAA's hearing process is a cost effective alternative to litigation for all parties. Consolidating all counseling, mediation, and hearing services for all legislative branch agencies

with the OOC would eliminate the needless duplication of resources that is currently occurring in the LOC, GAO and GPO.

Record-keeping. Another record-keeping recommendation involves workplace rights other than those listed above with respect to safety and health. Most Federal workplace rights statutes that apply to private and public sector employers require the employer to retain personnel records in a certain manner and for a certain period of time. Although some employing offices in Congress keep personnel records, there are no legal requirements to do so under the CAA. Mandating these requirements would assist in speedier resolution of claims because documentary evidence would be available to assist in adjudicating the merits of an employee's claims: employers would be able to use records to assist in demonstrating that personnel actions were carried out in a non-discriminatory manner; employees would be able to show that the employer acted improperly; mediators may use such records to assist the parties in arriving at a resolution; and hearing officers may use such records to determine the merits of a case and whether certain cases should proceed to a hearing or be dismissed without a hearing. In the absence of such records, both parties must present their evidence with lengthy depositions and witness testimonies, all resulting in increased expenditure of tax payer dollars.

Whistleblower Protections. Congress has long recognized whistleblowers as saving taxpayer dollars by exposing waste, fraud, and abuse. The anti-retaliation provisions of the CAA only provide protection to employees who exercise their rights under current provisions of the CAA, and provisions for disclosures of alleged violations of law, abuses, or mismanagement are not included in the CAA. If the CAA were amended to include whistleblower protections, the OOC would not investigate or prosecute claims of waste, fraud, or abuse (the proper authorities would); rather employees who face retaliation for reporting waste, fraud, or abuse to the proper authorities would bring retaliation claims through the confidential alternative dispute resolution process as they would any other workplace rights claim. As in the private sector and Federal executive branch, Congressional staffers would have whistleblower protections and Congress would witness the taxpayer savings that whistleblower protections bring.

Question No. 3: How would a reduction in appropriated funds affect your operations, services, and programs?

Answer: We believe that any reduction in our funding below current levels would be a false economy because such action would only serve to shift costs to or increase costs for other legislative branch agencies as well as the judicial branch.

Based on our analysis, we have determined that any reduction in funding for our OSH program would seriously jeopardize the risk-based inspection process we have inaugurated at the urging of this committee. The importance of our biennial inspections in identifying and reducing hazards cannot be overemphasized: during the 109th Congress, we identified more than 13,000 serious hazards; in the latest biennial inspection in the 111th Congress, we found 5,400 hazards – a significant reduction in hazards and a corresponding increase in safety. The safety and health inspections are currently being performed with a skeletal staff consisting of one full-time employee and one full-time contractor. With higher-risk areas being dispersed over an area that

is greater than 17 million square feet, the inspection staff is spread as thin as it can be. The risk-based inspection program requires that the work of these inspectors be supplemented by staff that can thoroughly analyze the procedures being followed in higher risk areas such as the machine shops, mechanical spaces, and utility areas so that hazards can be identified. This staff must then work with the employing offices to adjust processes and procedures so that potential hazards are minimized or abated. To perform this process in a collaborative manner requires more time and resources than simply performing walk-through inspections and issuing citations wherever violations are found. While we are confident that implementing this risk-based inspection process is worth the time and resources Congress has invested in the program because it will result in a significant reduction in injuries illnesses, and the related costs incurred by legislative branch agencies when these injuries and illnesses occur, we are also very cognizant that we have stretched our resources as far as we can to provide this enhanced service. As it stands now, we are uncertain whether we will be able to complete this targeted schedule with our current level of funding. Any further reduction in funding would probably force us to abandon the risk-based approach and return to an enforcement method involving walk-through inspections and citations. This would mean that the anticipated savings in injury costs associated with the risk-based program would be lost.

Moreover, as we look to the immediate future, the OOC sees an increased need for thorough inspections of higher-risk areas as maintenance and capital improvement projects are being deferred in order to save costs. Deferral of capital projects not only increases maintenance costs, but increases the need for frequent safety inspections. If facilities use mechanical and electrical systems well beyond their useful life expectancy, the risk that these systems will fail and cause fire or injury increases dramatically. It may make sense to defer expensive capital improvement projects during this time of budget constraints; however, it must be recognized that this type of deferral will also increase the need for maintenance and inspection (and the costs associated with them). When these systems reside in buildings with known egress and fire-hazard deficiencies, the failure to be vigilant about safety inspections can be catastrophic. Interim measures such as increasing fire prevention through the use of inspections are a cost-effective way to allow continued use of outdated facilities and systems while maintaining an acceptable level of safety.

Similarly, any reduction in OOC's funding would reduce our ADA inspections and would be more than offset by the increased costs that the AOC would incur. As it stands, ADA inspections can only be performed occasionally when we are able to squeeze time out of the schedules of employees and contractors who are assigned to other duties. There is no specific funding for this program so there is nothing there to cut. In addition, this program is being administered in a way that should result in significant savings. The ADA requires that new construction and alterations be designed and constructed in strict compliance with the ADA Standards for Accessible Design. In the past, the AOC has incurred additional costs when it was discovered that alterations and new construction did not comply with the ADA Standards. The OOC is now finding ways to work with the AOC at the design and pre-construction stages to insure that new construction and alterations comply with the ADA, thereby saving the costs associated with re-constructing completed projects so that they comply with the standards. Our inspection of the Capitol Visitor Center, prior to the completion of construction, is a perfect example of how ADA inspections result in cost savings.

In addition, reducing funding to our employment dispute resolution program would result in diminished services and not in any net savings. The success of the confidential counseling and mediation program is largely due to the OOC's ability to offer these services in an expedited manner. The CAA requires that counseling be completed within 30 days of the request for counseling and that mediation, which lasts 30 days, be commenced within 15 days of the end of counseling. See CAA §§ 402 & 403. Based upon our experience with this program, we have found that employment disputes can often be resolved efficiently and less expensively when access to confidential mediation services can be provided before the parties incur substantial costs, become entrenched in their stances, and begin "trying" their cases in the press. We therefore believe that any cuts to this program will reduce the level of mediation services and drive up the cost of unnecessary litigation.

The OOC also anticipates that the number of requests for counseling relating to employment disputes will increase as funding for legislative branch offices is reduced. These budget cuts will result in more layoffs and terminations, which in turn will likely result in more employees filing requests with the OOC challenging those layoff and termination decisions. Furthermore, because the cuts are occurring throughout all levels of government, more terminated and laid-off employees will be unable to obtain another government position after termination or layoff. This too is likely to fuel an increase in the number of employees filing with the OOC. As unemployment rates increased in the private sector during the last few years, the EEOC saw a dramatic increase in the number of discrimination complaints filed with its offices. In FY 2010, the EEOC received almost 100,000 complaints (99,992). In the ten years between FY 1997 and 2007, the EEOC consistently averaged approximately 80,000 complaints per year (fluctuating between 75,428 and 84,442). In the last three years, the EEOC is averaging closer to 95,000 complaints per year (95,402 in FY 2008, 93,277 in FY 2009 and 99,992 in FY 2010). The OOC anticipates that it too will experience a large increase in the number of filings as budget cuts cause staff reductions. Again, we do not believe that it makes sense to reduce funding for these services at a time of overall budget cuts because this is a time when both the need for these services will be increasing and the probable litigation costs incurred by not providing these services will undoubtedly surpass any apparent savings associated with cutting the services.

Question No. 4: What are the short term costs associated with updating your computer network so that the current two-computer system can be converted to a one-computer system, and how will this save money in the long term?

Answer: The CAA requires the OOC to maintain confidentiality of certain information that is brought to our agency. As a result, we currently maintain a dual network system: one internal/closed system (which consists of servers, desktops, custom applications, and an e-mail system) to allow for the maintenance of confidential information, and one external/open system, provided by the LOC to allow for access to the internet. OOC maintains agency data within the closed network.

This configuration allows the agency to maintain confidential information; however, there are many drawbacks in the current separation of the networks. There are significant costs associated with maintaining the internal network infrastructure; the cost of updating two computers (one for the external and one for the internal) is an additional expense incurred by the agency; and the

loss of productivity for each OOC employee to use two computers daily is an inefficient way to conduct business.

OOC has designed a plan to install a firewall on the backbone of the LOC network. This design will allow OOC to eliminate the internal network and move all OOC servers, custom applications and data to the open LOC network, where our internet accessible desktops currently sit. The firewall will provide the necessary security measures required to maintain the confidentiality of OOC data. OOC's IT staff will no longer need to maintain an internal email system or internal desktops, and the human resources costs associated with operating in a dual network environment will be eliminated.

OOC expects to realize the following from the elimination of the internal network:

- One computer for each employee, rather than two;
- Offset a forthcoming $50,000 cyclical computer desktop replacement cycle in FY 12; and
- A significant decrease in annual productivity costs.

Currently, OOC loses 3% of productivity per staffer, daily, as a result of our current configuration. Given an agency of our size, with our limited resources and the multiple job duties performed by each staffer, a 3% daily loss is comparable to a 30% loss in a larger agency.

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LEGISLATIVE BRANCH APPROPRIATIONS, 2012

SEPTEMBER 15, 2011.—Ordered to be printed

Mr. NELSON, from the Committee on Appropriations, submitted the following

REPORT

[To accompany H.R. 2551]

The Committee on Appropriations, to which was referred the bill (H.R. 2551) making appropriations for the legislative Branch for the fiscal year ending September 30, 2012, and for other purposes, reports the same to the Senate with an amendment and recommends that the bill as amended do pass.

Amount of new budget (obligational) authority

Total of bill as reported to the Senate	$4,190,273,000
Amount of 2011 appropriations	4,543,914,000
Amount of 2012 budget estimate	4,862,245,000
Amount of House allowance	3,318,421,000
Bill as recommended to Senate compared to—	
2011 appropriations	−353,641,000
2012 budget estimate	−671,972,000
House allowance	+871,852,000

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CAPITOL GROUNDS—Continued

[In thousands of dollars]

Item	Amount requested	Committee recommendation
Subtotal, Operating Budget	10,067	8,837
Fiscal Year 2012 Project Budget		
Stormwater Management Study	732	.....
Total, Capitol Grounds	10,799	8,837

SENATE OFFICE BUILDINGS

Appropriations, 2011	$74,243,216
Budget estimate, 2012	87,253,000
House allowance	.....
Committee recommendation	66,453,000

The Committee recommends an appropriation of $66,453,000 for maintenance of the Senate office buildings, of which $13,128,000 shall remain available until September 30, 2016. This is $20,800,000 below the request, and $7,790,216 below the enacted level.

Blue-Ribbon Panel.—A Blue-Ribbon Panel of experts was convened to assess the Office of Compliance Citation, 19–1, "29 CFR 1910.36.(b)(2) All exit stairwells are unprotected against fire, smoke, or toxic fumes, posing an undue danger to the lives and safety of occupants during the period of time necessary for escape in case of fire or other emergency." The panel was directed to consider the level of risk from a fire to the building and the building's current level of fire prevention and fire suppression infrastructure. The Blue-Ribbon Panel issued its final report on August 23, 2010. In order to reduce the risks of fire and life safety issues in the historic Russell Senate Office Building, the Blue-Ribbon Panel recommended that various immediate and short term actions be taken in conjunction with implementation of one of three design options. The Architect of the Capitol [AOC] has completed several of the immediate and short term recommendations and is aggressively pursuing completion of additional recommendations, such as removing higher hazard operations from the Russell Building basement. The AOC continues to pursue execution of design option 1 recommended by the Blue-Ribbon Panel. This recommendation extends the active fire suppression and fire detection systems in the Russell Senate Office Building.

The Committee notes that implementation of the short-term and immediate recommendations, in addition to implementation of design option 1, eliminates all high risk fire scenarios in the Russell Building while minimizing impact to its historic integrity, most effectively utilizing limited resources. The Blue-Ribbon Panel recognized compensatory features of the Russell Building that substantially mitigate life safety risk associated with open stairs, specifically: non-combustible materials, generously proportioned egress, well distributed stairs and circulation systems, quick emergency response operational capability, frequent fire drills, overall high level of maintenance, clutter free egress, relatively safe nature and dis-

tribution of combustibles, limited sources of potential ignition, training provided to building occupants, high level of management and oversight and presence of perimeter and interior security. Considering the risk mitigation of the compensating features and the fact that implementation of design options 2 and 3 result in similar risk exposure to the Russell Building, the Committee considers these options to be cost prohibitive with minimal additional safety improvements beyond those currently being implemented. The Committee concludes that as additional funding resources become available, that funding should be expended on other projects and deferred maintenance requirements that have a greater impact on life and safety throughout all of the Senate office buildings.

The following table displays the budget detail:

SENATE OFFICE BUILDINGS

[In thousands of dollars]

Item	Amount requested	Committee recommendation
Fiscal Year 2012 Operating Budget		
Payroll	42,151	38,148
Facilities Maintenance	6,190	6,190
Furniture Repair	1,807	.....
Jurisdiction Centralized Activities	9,986	8,987
Subtotal, Operating Budget	60,134	53,325
Fiscal Year 2012 Project Budget		
Replace Modular Furniture	3,000	.....
Alternate Life Safety Approach	5,000	.....
Skylight Replacement [HSOB]	8,991	5,000
Infrastructure Improvements, Phase 3, North Wing [DSOB]	6,128	6,128
Minor Construction	4,000	2,000
Subtotal, Project Budget	27,119	13,128
Total, Senate Office Buildings	87,253	66,453

HOUSE OFFICE BUILDINGS

Appropriations, 2011	$150,165,068
Budget estimate, 2012	169,647,000
House allowance	119,154,000
Committee recommendation	119,154,000

The Committee has included funds for maintenance of House office buildings at the level recommended by the House in H.R. 2551. As this item pertains solely to the House, the Committee makes no independent judgment on the House allowance.

CAPITOL POWER PLANT

Appropriations, 2011	$118,895,000
Budget estimate, 2012	142,101,000
House allowance	136,159,000
Committee recommendation	113,139,000

The Committee recommends an appropriation of $113,139,000 for the operations of the Capitol Power Plant. This is supplemented by $8,000,000 in reimbursements, for a total of $121,139,000. This is