OFFICE OF HOUSE EMPLOYMENT COUNSEL'S COMMENTS
REGARDING THE BOARD OF DIRECTORS OF THE OFFICE OF COMPLIANCE'S
2015 FAMILY AND MEDICAL LEAVE ACT PROPOSED REGULATIONS

GENERAL COMMENTS

In its Preamble to the Notice of Proposed Rulemaking and Request for Comments from Interested Parties ("NPRM"),[1] the Board of Directors of the Office of Compliance ("the Board") presents a number of explanations regarding the nature of, and reasoning for, the language of its 2015 Family and Medical Leave Act Proposed Regulations ("Proposed Regulations"). The Board also invites comment on several specific provisions of the Proposed Regulations. The following general discussion points underscore several concerns, questions, and responses of the Office of House Employment Counsel ("OHEC"), regarding the statements and requests contained in the Preamble. In addition, we include in this section our suggestions for clarifying several recurring themes throughout the Proposed Regulations.

1. The Application of Military Family Leave Provisions

By far the biggest proposed amendment to the Office of Compliance's ("OOC") current FMLA regulations is the addition of the "military family leave provisions," based on prior statutory amendments to the FMLA. Preamble at 2-4. We were surprised to learn that the Board believes that the statutory amendments were not made applicable to the legislative branch at the time they were enacted in 2008 and 2009. Specifically, the Board cites Congress's alleged failure to comply with section 102(b)(3) of the Congressional Accountability Act ("CAA"), requiring House and/or Senate Committee reports to state whether or not provisions of a bill apply to the legislative branch.[2] 2 U.S.C. § 1302(b)(3).[3]

Yet, in enacting the CAA, Congress signaled its intent to apply the same substantive FMLA rights and protections applicable in the Executive Branch and the private sector to congressional employees. We are of the view that when a statutory provision of the FMLA that has been generally incorporated by the CAA is amended, the subsequently amended statutory provision applies to congressional employees and employing offices, unless some other provision of the CAA precludes application of the amended statutory provision. *Accord EEOC v. Chrysler Corp.*, 546 F. Supp. 54, 74 (E.D. Mich. 1982), *aff'd*, 733 F.2d 1183 (6th Cir. 1984) (holding that amended enforcement provisions of the Fair Labor Standards Act were generally

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[1] 161 Cong. Rec. H6012-08 (daily ed. Sep. 16, 2015).

[2] Interestingly, one of the reports cited by the Board, H.Rpt 110-146 (May 11, 2007), does not include *any* discussion of that section of the National Defense Authorization Act for Fiscal Year 2008 which contemplates expansion of the FMLA.

[3] The language of this section of the CAA states that "This paragraph *may be waived* in either House by majority vote of that House" (emphasis supplied).

incorporated into the Age Discrimination in Employment Act based on, inter alia, the "complex interplay of [the] two statutory schemes" and legislative history showing intent to generally incorporate the enforcement provisions at issue).[4]

Moreover, the very stumbling block that allegedly prevents the application of the statutory amendments to the FMLA can, according to the Board, apparently be overcome through both *or either* house of Congress choosing to adopt the Board's substantive regulations on the subject. It seems incongruous that the alleged lack of discussion in a Committee Report could erase the application of federal rights and obligations of legislative branch employees and employers, but the internal rule-making authority of *either* chamber of Congress can *amend* the same federal statute without the benefit of approval by the full Congress and the President's signature.

2. The Definition of "Spouse"

The Board requests comment on whether it should "adopt the Department of Labor's (DOL) current definition of spouse or revise the definition." The DOL's current regulations extend the definition of "spouse" to include individuals in same-sex marriages. Moreover, as the Board states in the Preamble, the "DOL has not indicated whether it plans to further amend the definition of spouse" in response to the Supreme Court's decision in *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584 (2015). Yet, the Board has proposed a deviation from the DOL's language by deleting certain language. Therefore, instead of asking the affected entities to

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[4] The CAA incorporates the FMLA through both general and specific references to the FMLA. *Compare* 2 U.S.C. § 1302(a)(5), *with* 2 U.S.C. § 1312. To the extent that the CAA incorporates certain sections of the FMLA but not others, it is arguable that the CAA does not incorporate subsequent amendments to those sections of the FMLA. However, there is an exception to this general rule of statutory construction that applies here. Specifically, "[a] statute of specific reference incorporates the provisions referred to from the statute as of the time of adoption without subsequent amendments, *unless the legislature has expressly or by strong implication shown its intention to incorporate subsequent amendments with the statute*." 2A Sutherland Statutory Construction § 51.08 324 (4th ed. 1973) (emphasis added). This construction of the CAA is also consistent with the canon of statutory construction holding that remedial statutes, such as the CAA and the statutes that it incorporates, should be liberally construed in light of their remedial purposes. *See, e.g., Butler v. Drive Auto. Indus. of Am., Inc.*, 793 F.3d 404, 409 (4th Cir. 2015) ("Title VII should be liberally construed in light of its remedial purpose."); *Hilliard v. Volcker*, 659 F.2d 1125, 1132 (D.C. Cir. 1981) (reiterating "the oftstated judicial admonition that Title VII is remedial in character and should be liberally construed to achieve its purposes") (internal quotations omitted). *See also O'Rourke v. D.C. Police & Firefighters' Ret. & Relief Bd.*, 46 A.3d 378, 389 (D.C. 2012) ("Such remedial legislation is typically given liberal construction by the courts to effectuate its humanitarian purposes, with exemptions and exceptions narrowly construed and doubts resolved in favor of the employee.").

comment on whether the Board *should have* taken this step to begin with, we suggest that the Board explain why it has chosen to deviate from the DOL's current definition.[5]

3. Separate Substantive Regulations for the House and Representatives, the Senate, and the Instrumentalities of Congress

Page 6 of the Preamble states that the Board found no good cause "for varying the text of these regulations" for the House, the Senate, and other affected Congressional employing offices and covered employees. Yet, the practicalities of the unique administrative structures of the House provide good cause for House-specific regulations. For example, 825.307(a) addresses the issue of who, on behalf on an employing office, may contact a health care provider to obtain clarification and/or authentication of a medical certification submitted by the employee. The fourth sentence of this section, which is identical to the DOL's regulation, states "[U]nder no circumstances . . . may the employee's direct supervisor contact the employee's health care provider." This provision would severely limit the ability of the majority of House employing offices to exercise their right to authenticate and/or clarify an employee's medical certification because of the statutory limit on the size of these offices. As further discussed below, we recommend that this provision be amended to address the unique challenges that the majority of House employing offices face regarding the designation of an appropriate employee to verify or clarify an employee's medical documentation. We believe there is good cause for varying the texts of the substantive regulations between the House, the Senate, and the other Congressional instrumentalities in this, and several other areas, described in the Section-by-Section commentary below. Other commenters may have similar concerns based on their unique organizational structures and challenges.

4. Successor in Interest

As noted, and in response to the Board's request for comment on the issue of successor in interest coverage, *see* Preamble at 9, the CAA does not create successor liability and, accordingly, the Board should not adopt the successor in interest language of sections 825.107-09.[6] The term "employing office" under the CAA is given a precise definition that does not provide for successor in interest coverage or liability. That Congress did not intend to create successor liability under the CAA is further demonstrated by its decision not to adopt the FMLA's definition of "employer," which expressly provides for successor liability. *Compare* 2

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[5] The language of the CAA adopting specific sections of the FMLA requires the Board to issue regulations that are "the same as substantive regulations promulgated by the Secretary of Labor to implement the statutory provisions . . . of [the FMLA as incorporated by the CAA] . . . except insofar as 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 the FMLA. 2 U.S.C. § 1312(d)(2).

[6] Consistent with this position, as discussed further below, we recommend that the successor in interest language in Proposed Regulation 825.216(a)(3) be deleted.

U.S.C. § 1301(9) (defining "employing office" without referencing the successor of an employing office), *with* 29 U.S.C. § 2611(4)(A)(ii)(II) (defining "employer" to include "any successor in interest of an employer"). *See also* 2 U.S.C. § 1405(a) (providing that in OOC proceedings the "respondent to the complaint shall be the employing office – (1) involved in the violation, or (2) in which the violation is alleged to have occurred"); 2 U.S.C. § 1408(b) (providing that the defendant in a CAA court action "shall be the employing office alleged to have committed the violation, or in which the violation is alleged to have occurred").

5. Wording the Section Headings in the Form of a Question

The Board also invites comment on the issue of the rewording of the individual section titles. Preamble at 7. Specifically, the Board states that the titles to each section of the existing regulations are in the form of a question, while the Proposed Regulations would reword each question into the "more common format of a descriptive title." *Id.* It is our belief that the current format in the form of a question is user-friendly and facilitates a reader being able to more readily locate a section of the regulations responsive to an immediate question.

6. Use of the terms "employee," "covered employee," "eligible employee," "person," and "individual"

The Proposed Regulations use the terms "employee," "covered employee," and "eligible employee" interchangeably. Section 825.102 clearly states that the term "eligible employee" specifically incorporates the term "covered employee" as defined by the CAA. Accordingly, we urge the Board to use the appropriate term throughout the Proposed Regulations.

In addition, there are several references in the Proposed Regulations to "individual" or "person." Even if these terms are consistent with those used in the DOL regulations, we suggest that the Board either define these terms in section 825.102, explain their use within the specific Proposed Regulations in which they appear, or substitute the term "employee," "eligible employee," or "covered employee," as appropriate.

7. General Commentary on the FMLA Forms

The Board requests comment regarding whether the FMLA forms included in the NPRM should remain a part of the OOC's FMLA regulations, or whether employees and employing offices should instead be directed to the DOL website for the DOL version of the forms. Preamble at 24-25. We believe it is appropriate for the Board to provide its own forms – in both the regulations and on the OOC website – for use in the Legislative Branch for three reasons. First, the fact that the forms are specifically tailored to the Congressional workplace and refer to the CAA could lessen the likelihood that Congressional employees and employing offices might be confused and think that the DOL administers employment laws in the Legislative Branch. Second, referring employees and employing offices to forms issued by the OOC, rather than to forms on DOL's website, furthers the separation-of-powers concerns that underlay the CAA. And, third, it is possible that the DOL may revise its FMLA forms in the future

to account for further regulatory changes. Such DOL regulatory changes will not, however, take effect for the Legislative Branch unless and until adopted by the OOC and Congress. Accordingly, it is conceivable that the forms on the DOL website could reflect future changes to the FMLA that would not yet be applicable to Congress.

We agree with the Board that the regulations should continue to make clear that the OOC forms are optional and that an employing office may use other forms that require the same information.

Also, there is a general inconsistency in the Forms with respect to the manner in which they internally refer to the OOC's regulations. Sometimes the forms use the reference "OOC regulations at" (Form A, page 140 and Form B, page 144, Form E, page 154, under Section II, "INSTRUCTIONS to the EMPLOYEE"). At other times the forms use the reference "Board's regulations at" (Form F, page 157, under Section I; "INSTRUCTIONS to the EMPLOYEE or CURRENT SERVICEMEMBER"). In addition, the forms refer to the FMLA itself, as opposed to the regulations – "under 825.113 of the FMLA") (FORM F, page 159, last line).

SECTION-BY-SECTION COMMENTARY, QUESTIONS, AND SUGGESTIONS

825.1 – Purpose and Scope.

- We suggest clarifying that these regulations specifically supersede and replace the Board's substantive regulations currently applicable to the covered legislative branch entities.

825.100 – The Family and Medical Leave Act.

- Section (a) – Toward the end of the first sentence, the term "call" should be changed to "called" so the phrase reads: ". . . arising out of the fact that the employee's spouse, son, daughter, or parent is a military member on active duty or *called* to covered active duty status . . ." (emphasis supplied).

- Section (b) – This section contains the statement "The employing office or a disbursing or other financial office of *the House of Representatives or* [italicized language is in only the House and Instrumentalities versions of the regulations] the Senate may recover its share only if the employee does not return to work . . . ." It is unclear why the House and Instrumentalities version of these regulations include a reference to the Senate, but the Senate version does not include a reference to the House.

825.102 – Definitions.

- *ADA* – The definition of the "ADA" makes no reference to the phrase "as incorporated by the CAA" – a phrase that is often incorporated in these regulations. We suggest

either using this language consistently as appropriate, or explaining why it should not be incorporated in this definition.

- *Employee* – Because the definition of the term "Employee" in the CAA simply states "The term 'employee' includes an applicant for employment and a former employee," and these regulations state that the term "means an employee as defined by the CAA," we suggest that the definition of "Employee" in the Proposed Regulations is the same as that found in the CAA. This is consistent with the approach taken for the definitions of an "Employee of the Capitol Police," an "Employee of the House of Representatives," an "Employee of the Office of the Architect of the Capitol," and an "Employee of the Senate" in these regulations.

- *Employee employed in an instructional capacity* – The House does not employ any teachers as defined by these regulations. Accordingly, the terms "Employee employed in an instructional capacity" and "Teacher" should be eliminated from the House version of the regulations.

- *Employee of the House of Representatives* – The language in the definition of "Employee of the House of Representatives" includes the phrase "but not any individual employed by any entity listed in subparagraphs (3) through (9) under the definition of *covered employee* above," (emphasis in original). Therefore, the definition of "Employee of the House of Representatives" includes, by reference, an "Employee of the Senate." We suggest correcting the definition to state "but not any individual employed by any entity listed in subparagraphs (2) through (9) under the definition of *covered employee* above."

- *Employee of the Senate* – The language in the definition of "Employee of the Senate" includes the phrase "but not any individual employed by any entity listed in subparagraphs (3) through (9) under the definition of *covered employee* above," (emphasis in original). Therefore, the definition of "Employee of the Senate" includes, by reference, an "Employee of the House of Representatives." We suggest correcting the definition to state "but not any individual employed by any entity listed in subparagraphs (1), or (3) through (9) under the definition of *covered employee* above."

- *FLSA* – The definition of "FLSA" makes no reference to the phrase "as incorporated by the CAA" – a phrase that is often incorporated in these regulations. We suggest either using this language consistently as appropriate, or explaining why it should not be incorporated in this definition.

- *FMLA* – The definition of "FMLA" makes no reference to the phrase "as incorporated by the CAA" – a phrase that is often incorporated in these regulations. We suggest either using this language consistently as appropriate, or explaining why it should not be incorporated in this definition.

- *Group health plan* – The definition of "Group health plan" incorporates the "Federal Employees Health Benefits Program" as well as "any other plan of, or contributed to by an employing office (including a self-insured plan) . . . ." Has the Board determined how, if at all, the Affordable Care Act affects this definition? If so, and the Board has made a determination that it does not affect the definition, we suggest that the Board clarify as much.

- *Health care provider* – We suggest deleting the word "and" at the end of sections (2)(i) and (ii), as well as changing the period to a semi-colon at the end of section (2)(iii).

- *Invitational travel authorization* – We suggest substituting the word "are" for "mean" so that the definition reads "Invitation travel authorization (ITA) or Invitational travel order *are* orders issued . . . ."

- *Spouse* – As discussed above, we suggest that the Board either adopt the current DOL regulation, *see* 80 Fed. Reg. 10,000 (Feb. 25, 2015), or explain the reasoning of the revised language in the Board's Proposed Regulations. *See* Section 2, *supra* pp. 2-3.

825.104 – Covered employing offices.

- Section (c) – The second sentence of this section is apparently a reference to the DOL's method of counting the number of employees for purposes of determining "employer coverage and employee eligibility" under the FMLA. As the numerical requirement for application of the FMLA to Congressional entities was not adopted by the CAA, we suggest deleting the second sentence of this section.

825.110 – Eligible employees.

- Section (a) – While this section expands the definition of eligible employee found in section 825.102, we suggest that the initial statement in 825.102 remain consistent and the language in 825.110(a) be revised to read "An eligible employee is a **covered** employee of ~~a covered~~ an employing office who . . . ."

- Section (a)(2) – To clarify the point that only hours worked *for an employing office as defined by the CAA* count toward eligibility for FMLA leave, we suggest that this section reference section 825.110(c)(1) regarding the aggregation of hours where an employee works for more than one employing office.

- Section (c)(3) – The second sentence of this section references "a *person* reemployed following USERRA-covered service . . ." (italics supplied). We suggest changing the term "person" to "covered employee."

- Section (c)(4) – The parenthetical reference to the FLSA regulations should reference the OOC substantive regulations, rather than the DOL citation (i.e., OOC Regulations §§ H541.1 – H541.3). In addition, because the definition of "teacher" does not apply to any House entity, we suggest either simplifying the clarifying "example" contained in this paragraph (i.e., removing the reference to the definition of teacher), or finding another example that would be relevant to House employing offices.

- Section 825.208(f) of the OOC's current regulations make clear that if, before beginning employment with a new employing office, a covered employee had used FMLA leave with a prior employing office, the subsequent employing office may count that leave toward the covered employee's current FMLA entitlement. In other words, if the covered employee took three weeks of FMLA leave with Member X's office, and three months later, began working for Member Y's office, Member Y's office could count the three weeks of FMLA leave taken with Member X's office against the covered employee's current FMLA leave entitlement. Because a covered employee receives the benefit of the aggregation of time/hours with a prior employing office to determine FMLA eligibility with a *new* employing office, it is consistent that the employee's use of FMLA leave with the prior employing office be counted as well (within the current 12-month entitlement). Accordingly we suggest that the Board incorporate a paragraph (e) in this section that would read:

  > "(e) If, before beginning employment with an employing office, an employee had been employed by another employing office, the subsequent employing office may count against the employee's FMLA leave entitlement FMLA leave taken from the prior employing office."

825.112 – Qualifying reasons for leave, general rule.

- Section (a)(5) – Insert the word "duty" in the parenthetical so that it reads "or has been notified of an impending call or order to covered active *duty* status" (emphasis supplied).

825.120 – Leave for pregnancy or birth.

- Section (a)(3) – The last sentence of this section references the effect of "state pregnancy disability laws." These laws are not applicable to employing offices and we suggest deleting this sentence. If the reasoning for discussing "state pregnancy disability laws" is to underscore the point that the birth mother may suffer pre/post-birth medical complications that would not be subject to the combined limitation of FMLA leave for spouses, the language earlier in this section, as well as in the following section, (a)(4), clarifies that the serious health condition of the birth mother, either before or after the birth, would independently qualify for FMLA leave. Finally, removal of this language would be consistent with the removal of similar references to state law in section

825.121(a)(2) (removing the DOL language that instructs the reader to "*See* § 825.701 regarding non-FMLA leave which may be available under applicable State laws").

- Section (b) – The reference to 825.601 at the conclusion of this section regarding "special rules applicable to instructional employees of schools" is not applicable to House employing offices. We suggest deleting this language.

825.121 – Leave for adoption or foster care.

- Section (b) – The reference to 825.601 at the conclusion of this section regarding "special rules applicable to instructional employees of schools" is not applicable to House employing offices. We suggest deleting this language.

825.122 – Definitions of covered servicemember, spouse, parent, son or daughter, next of kin of covered servicemember, adoption, foster care, son or daughter on covered active duty or call to covered active duty status, son or daughter of a covered servicemember, and parent of a covered servicemember.

- Section (b) – As discussed above, we suggest that the Board either adopt the current DOL regulation, *see* 80 Fed. Reg. 10,000 (Feb. 25, 2015), or explain the reasoning for the revised language in the Board's Proposed Regulations. *See* Section 2, *supra* pp. 2-3.

825.123 – Unable to perform the functions of the position.

- Section (b) – The last sentence of this section begins with the phrase "For purposes of FMLA . . . ." We suggest putting the word "the" before "FMLA." We understand that this simply matches the language in the DOL's regulations, but we suggest correcting what is likely a typographical error in those regulations (consistent with other instances where the Board has corrected typographical errors contained in the DOL regulations).

825.200 – Amount of Leave.

- Section (h) – In discussing the effect of the temporary cessation of an employing office's business activity for one or more weeks, the regulation provides the example of a school closing two weeks for the Christmas/New Year Holiday or for a summer vacation. Similar to the discussion in Section 3 of the General Comments, *supra* p. 3, this is another instance demonstrating a need for FMLA regulations specific to the House. Unlike the Senate, the House no longer has a school and thus this example is not particularly helpful. A more helpful example might refer to the practice of some House offices of closing between Christmas and the New Year Holiday.

- Section (i)(2) – The first sentence of this section states that "[i]f employing offices fail to *designated* a primary employing office pursuant to 825.106 (c) . . . ." The word "designated" should be changed to "designate."

825.205 – Increments of FMLA leave for intermittent or reduced schedule leave.

- Section (a)(2) – This section discusses how to count FMLA leave instances where it is physically impossible for an employee using intermittent leave or working a reduced leave schedule to commence or end work mid-way through a shift. The examples given include where a flight attendant or a railroad conductor is scheduled to work aboard an airplane or train, or a laboratory employee is unable to enter or leave a sealed "clean room" during a certain period of time and no equivalent position is available. We suggest using examples that would occur in the House workplace. Also, given the statement in the definitions section of the Preamble that all references to "airline flight crew employee" have been deleted, the reference to "flight attendant" should be deleted because of the similarity between these descriptions.

825.206 – Interaction with the FLSA.

- Section (a) – This section in the DOL regulations discusses the interaction between the FMLA and the FLSA and states that a salaried, executive, administrative, professional, or *computer employee* are exempt from the minimum wage and overtime requirements of the FLSA. In the Preamble to the NPRM, the Board states that it finds good cause not to include "computer employee" to the list of employees exempt from the overtime and minimum wage requirements of the FLSA. Preamble at 10. The stated rationale for this position is that the term "computer employee" was not included in the Board's September 29, 2004 Proposed Regulations implementing exemptions from the overtime pay requirements under the FLSA and those regulations were never enacted into law. We are puzzled by the Board's pronouncement that it seeks comments on a subject where it has determined that no change is necessary and where there is an existing substantive regulation issued by the Board at 825.206 (a) (specifically citing the Board's FLSA regulations at H541) setting forth the categories of employees who are exempt from the minimum wage and overtime requirements of the FLSA.

- Section (c) – This section refers to ". . . leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition." However, the language of the corresponding DOL regulation refers to ". . . leave to care for a grandparent or for a medical condition which does not qualify as a serious health condition *or serious injury or illness*" (emphasis supplied). It is unclear why there is a variation between the language of the DOL regulations and the proposed amendments to the Board's regulations. We note that the April 19, 1996 FMLA regulations issued by the Board also inexplicably contains this variation in the language from the DOL regulations. Further, the broader description as stated in the DOL regulations more fully captures the scope

of the definition of a "serious health condition." The Board should revise the language in this section to make it consistent with the DOL regulations.

825.207 – Substitution of paid leave.

- Section (f) – This section discusses employing office policies on payout or required use of compensatory time. The Board states that it seeks comments regarding the language in this section because it does not know whether, or under what circumstances, employing offices currently allow or require that paid compensatory time be used for a FMLA reason and is counted against an employee's FMLA leave entitlement. Preamble at 11. The proposed language is appropriate *with regard to House employing offices*, given the fact that there is no reason to treat compensatory time differently than paid annual or sick leave for purposes of substitution of that time for unpaid FMLA leave.

825.216 – Limitations on employee's right to reinstatement.

- Section (a)(3) – As stated in Section 4 of the General Comments, *supra* pp. 3-4, the CAA does not create successor liability and, accordingly, the Board should not adopt the successor in interest language proposed in 825.216(a)(3). The inclusion of this section is particularly puzzling given the internal direction to "*See* 825.107," because the Proposed Regulations specifically did *not* adopt 825.107. Further, the proposed language is unnecessary from a practical standpoint. Employing offices of the House do not "assign" projects to other employing offices in the manner contemplated by this regulation; rather, Congress (or a particular house of Congress) authorizes certain employing offices to carry out functions and duties by statute and/or resolution. *See, e.g.*, 2 USC §§ 5301 to 5310, 5321-29, 5341-46 (discussing Members and Member offices); *id.* §§ 5501 to 5624 (discussing congressional officers and their offices). Finally, if Congress or a house of Congress were to re-assign a particular project from one employing office to another as contemplated by the proposed regulation, Congress can specify in the authorizing legislation or resolution whether the second employing office will be deemed the "successor" of the first employing office for purposes of the CAA. Thus, the second sentence of this section should be deleted.

- Section (e) – The Board's proposed language states that an employing office that does not have "a uniformly-applied policy governing outside or supplemental employment" "may not deny benefits to which an employee is entitled under FMLA" on the basis of the employee's outside or supplemental employment during a period of FMLA leave. This ignores the fact that there are statutory and ethics rules governing the outside employment of all House employees. *See, e.g.*, House Ethics Manual (2008 Ed.) 185-246. To address this oversight, we recommend that the Board amend the second sentence of this section to include the following italicized language:

> "An employing office which does not have such a policy may not deny benefits to which an employee is entitled under FMLA, as made applicable by the CAA, on this basis unless the FMLA leave was fraudulently obtained as in paragraph (d) of this section *or the employee's outside or supplemental employment violates applicable law, regulation, or House Rule*."

825.220 – Protection for employees who request leave or otherwise assert FMLA rights.

- Section (d) – We agree that the regulation should be amended to clarify that employing offices are permitted to settle FMLA claims without OOC or court approval unless the settlement agreement is covered by section 1414 or 1415 of the CAA. That being said, the phrase "based on past employing office conduct" found in the third sentence of this section hints of presumptive inappropriate conduct by employing offices. The phrase is unnecessary to achieve the goal of this sentence and we suggest deleting it.

- Section (e) – The proposed regulation as currently drafted provides that "[i]ndividuals, and not merely covered employees, are protected from retaliation" for opposing practices made unlawful by the FMLA. The term "individual," however, is not defined in the regulations and is not used in the CAA. Because the CAA only creates substantive rights for certain statutorily defined "covered employees," the Board should amend this regulation to state (consistent with the current OOC FMLA regulation): "Covered employees, and not merely eligible employees, are protected from retaliation . . . ." *Cf.* OOC FMLA Regulation 825.220(e) (same language).

825.300 – Employing office notice requirements.

- Sections (b) and (c) – These sections invite employing offices to use Form C to meet their obligation to provide employees with the required notice of eligibility rights and responsibilities. These sections also provide that employing offices must translate the notice when required to do so under 825.300(a)(4). *See* 825.300(b)(2) and (c)(1). However, the proposed regulation does not include a section 825.300(a)(4), and the Preamble does not address why this section was omitted from the Board's Proposed Regulations (*e.g.*, one possible explanation is that it is based on a statutory provision that was not incorporated by the CAA). Accordingly, the Board should delete the language requiring translation of the notice or, if it determines that employing offices have a statutory duty to provide translations, explain the basis for this determination. In any event, we suggest that the OOC provide a Spanish language translation of its prototype forms and notices, as Spanish is the most widely spoken second language in the United States. Because many congressional employing offices do not have in-house capability to translate notices, uniform prototype notices in Spanish will encourage consistency and assist in compliance with the FMLA.

825.301 – Designation of FMLA leave.

- Section (e) – The second sentence of this section regarding categories of potential remedies directs the reader to "*See* 825.400(c)." DOL regulation § 825.400(c) includes an extensive discussion of the specific types or remedies available and under what circumstances such remedies may be appropriate. However, there is no such discussion in the equivalent section in the Proposed Regulations – simply a reference to the "Regulations of the Office of Compliance describing and governing these procedures" found at the OOC's website. Indeed, section 825.400 of the Proposed Regulations addresses the CAA's statutory requirements for requesting counseling, requesting mediation, and pursuing a complaint either before the OOC or in federal court. Thus, the reference to 825.400(c) in this section is apparently in error and we suggest deleting it. If this reference was *not* included in error, we ask that the Board explain this reference.

825.304 – Employee failure to provide notice.

- Section (a) – This section suggests that an employing office meet certain notice requirements by posting the OOC's FMLA poster. Because the FMLA's posting requirements do not apply to congressional employing offices, the Board has good cause to clarify that an employing office can also meet its notice requirements by distributing a written FMLA policy to employees, or including an FMLA policy in an employee handbook.

825.307 – Authentication and clarification of medical certification for leave taken because of an employee's own serious health condition or the serious health condition of a family member; second and third opinions.

- Section (a) – The fourth sentence of this section addresses the issue of who within an employing office may contact the eligible employee's health care provider to clarify and/or authenticate the medical certification submitted by the employee. Specifically, the sentence, which is the same as that in the DOL's regulation, states that "Under no circumstances, however, may the employee's direct supervisor contact the employee's health care provider." As discussed in Section 3, *supra* p. 3, this provision would be unworkable with respect to many employing offices of the House, particularly Member offices due to the statutory limit on the size of those offices. Specifically, under 2 U.S.C. §5321(a), Member offices are permitted to employ no more than 22 employees (this covers the total number of employees for both the Washington, D.C. and district offices). Accordingly, the vast majority of House employing offices do not have separate human resources divisions to assure compliance with the FMLA. Rather, in actual practice, it is often the employee's direct supervisor (*e.g.* the District Director or the Chief of Staff) who handles FMLA requests. If the direct supervisor is prohibited from contacting the employee's health care provider, this would mean that the employing office would have to find someone else – perhaps a peer/co-worker of the employee

seeking FMLA – to contact the health care provider. This would unnecessarily expand the scope of individuals with knowledge of the employee's FMLA request, and would be inconsistent with the spirit of the regulations requiring that access to such FMLA-related information be limited to as few persons as possible to preserve privacy and confidentiality. It is also notable that the DOL regulation applies to employers who have at least 50 employees (29 C.F.R. § 825.104(a)), or are public agencies that are more likely to have other managers or a human resources office to contact health care providers. We believe that, with respect to the House, there is good cause to deviate from the DOL regulations and to delete the fourth sentence from subsection (a).

- In addition, we suggest that the reference to the Health Insurance Portability and Accountability Act (HIPAA) in section (a) be deleted. HIPAA, and the regulations promulgated thereunder, allows the Secretary of Health and Human Services to take enforcement action against health plans, health care clearinghouses, and specific health care providers for violations of privacy standards. 42 U.S.C. §1320d, *et seq*.; 45 C.F.R. §§ 160.102, 160.312. HIPAA does not create any obligations for Congressional employing offices. Thus, although a *health care provider* may require that a patient complete an appropriate HIPAA-authorization before that health care provider will speak to a representative of that patient's employing office, there is no basis for any implication that HIPPA applies *to Congressional employers*. We suggest that the regulatory language in subsection (a) referencing HIPPA be deleted.

825.310 – Certification for leave taken to care for a covered servicemember (military caregiver leave).

- Section (d) – The reference to 825.122(j) in the final sentence of subsection (d) appears to be incorrect. The correct citation should be 825.122(k).

825.311 – Intent to return to work.

- Section (b) – This section states that, "subject to COBRA requirements or 5 U.S.C. § 8905a," employing offices do not need to maintain health benefits once an employee gives unequivocal notice of his or her intent not to return to work. The DOL regulations do not contain the reference to 5 U.S.C. § 8905(a). It is unclear whether the Board considered the application of the Affordable Care Act and/or enrollment in state exchanges in developing its language. We request that the Board state its position on this issue.

825.313 – Failure to provide certification.

- Section (b) – While consistent with the language of the DOL regulation that states "If the employee never produces the certification, the leave is not FMLA leave," the proposed regulation necessarily begs the question: when can an employing office plausibly state that the employee "never" produced a certification? Given this ambiguity, we suggest

that the Board deviate from the DOL language and provide more direction in this area by amending the last sentence of this section to read "If the employee fails to produce the certification after a reasonable amount of time under the circumstances, the leave is not FMLA leave." Although there still may be a question of what constitutes a "reasonable amount of time under the circumstances," this language, in our view, provides more clarity on the issue.

825.400 – Enforcement of FMLA rights, as made applicable by the CAA.

- As suggested in the Board's Preamble at page 10, we agree that there is good cause not to adopt this DOL regulation because the enforcement provisions of the FMLA differ from those applicable in CAA actions. However, in 825.400(c), we recommend identifying the exact name/nature of the procedures referenced (presumably, these are the Procedural Rules of the Office of Compliance), and also clarifying that these procedures only apply to CAA complaints pending before the OOC, not those brought in federal court.

825.600-825.604 – Special rules for school employees, definitions; Special rules for school employees, limitations on intermittent leave; Special rules for school employees, limitations on leave near the end of an academic term; Special rules for school employees, duration of FMLA leave; Special rules for school employees, restoration to an equivalent position.

- Similar to the discussion in Section 3 in the General Comments, *supra* p. 3, this is another instance demonstrating a need for FMLA regulations specific to the House. Unlike the Senate, the House no longer has a school and thus these regulations are inapplicable to the House.

825.700 – Interaction with employing office's policies.

- Section (a) – We agree that the Board should follow the DOL regulation so that the Proposed Regulation complies with the Supreme Court's decision in *Ragsdale v. Wolverine World Wide*, 535 U.S. 81 (2002) (holding that an employer may retroactively designate leave as FMLA leave under certain circumstances). However, we urge the Board to further clarify the following language: "An employing office must observe any employment benefit program or plan that provides greater family or medical leave rights to employees than the rights established by the FMLA." Specifically, the Board should clarify what constitutes such an employment benefit program or plan. This section as currently drafted discusses a hypothetical example of a collective bargaining agreement which provides for reinstatement rights based on seniority; however, we recommend that the Board offer additional examples (e.g., to clarify whether leave policies set forth in an employee handbook qualify) and clarify that this language does not contemplate the application of state law.

825. 702 – Interaction with anti-discrimination laws, as applied by section 201 of the CAA.

- We agree that references to employers that receive Federal financial assistance and that contract with the Federal government should be removed from this section because such employers are not covered employing offices under the CAA. As stated in Section 7, *supra* pp. 4-5, we further recommend that the OOC follow its past practice of creating FMLA-related forms that are CAA-compliant rather than directing covered employees and employing offices to the DOL website for the appropriate forms.

SPECIFIC COMMENTS ON LANGUAGE OF THE FORMS ATTACHED TO THE NPRM

FORM B

- Pagination/line spacing needs to be corrected: the line for Employee's signature and date is at the bottom of page 144, but the reference to Employee Signature and Date is at the top of page 145.

- The "yes/no" boxes on page 145 overlap with respect to the question "Will the patient need to have treatment visits at least twice per year due to the condition?"

FORM E

- Under Section II, Instructions, page 154, the reference to OOC regulation 825.310 is incorrect. The reference should be to 825.309. (This appears to be an error in the DOL form as well).

- Under Section II, Part C, page 155, the following italicized text is missing and should be included: "If leave is requested to meet with a third party (such as to arrange for childcare *or parental care*, to attend counseling . . .)."

FORM F

- Under Section I, "INSTRUCTIONS to the EMPLOYEE or CURRENT SERVICEMEMBER," page 157, the citation to 825.310(f) is incorrect. The correct citation is 825.310(g). (This appears to be an error in the DOL form as well).

- Under Section II, "INSTRUCTIONS to the HEALTH CARE PROVIDER" in the second paragraph, page 157, there is an error. It currently reads "A complete and sufficient certification to support a request for FMLA leave due to a **covered** servicemember's serious injury or illness…" The word "**covered**" should be "**current**."

- Under Section II, Part B: MEDICAL STATUS, item (2), page 160, the word "**gravitated**" should be "**aggravated**."

FORM G

- There is an extra "check box" after "Next of Kin" on the last line of page 161.

- In Section II, Part C, on p. 164, under items (2) and (4), the yes/no boxes overlap.