authority for individual terrorists to be treated as agents of foreign powers under the Foreign Intelligence Surveillance Act of 1978.

S. 3371

At the request of Mr. WYDEN, the name of the Senator from Hawaii (Mr. SCHATZ) was added as a cosponsor of S. 3371, a bill to amend titles II, XVIII, and XIX of the Social Security Act to improve the affordability and enrollment procedures of the Medicare program, and for other purposes.

S. 3391

At the request of Mr. REED, the name of the Senator from Michigan (Ms. STABENOW) was added as a cosponsor of S. 3391, a bill to reauthorize the Museum and Library Services Act.

S. 3421

At the request of Mr. BLUMENTHAL, the name of the Senator from Hawaii (Mr. SCHATZ) was added as a cosponsor of S. 3421, a bill to require air carriers to provide all flight attendants with scheduled rest periods of at least 10 consecutive hours between duty periods and to comply with fatigue management plans for flight attendants that have been approved by the Federal Aviation Administration.

S. 3431

At the request of Mrs. GILLIBRAND, the name of the Senator from Maine (Ms. COLLINS) was added as a cosponsor of S. 3431, a bill to coordinate and advance fibrosis research activities at the National Institutes of Health, and for other purposes.

S. 3436

At the request of Mr. RUBIO, the names of the Senator from Montana (Mr. DAINES) and the Senator from Kansas (Mr. ROBERTS) were added as cosponsors of S. 3436, a bill to prevent proposed regulations relating to restrictions on liquidation of an interest with respect to estate, gift, and generation-skipping transfer taxes from taking effect.

S. 3441

At the request of Mrs. GILLIBRAND, the names of the Senator from Connecticut (Mr. BLUMENTHAL) and the Senator from Florida (Mr. RUBIO) were added as cosponsors of S. 3441, a bill to provide for the vacating of certain convictions and expungement of certain arrests of victims of human trafficking.

S. 3464

At the request of Mr. ALEXANDER, the name of the Senator from Maine (Mr. KING) was added as a cosponsor of S. 3464, a bill to provide incremental increases to the salary threshold for exemptions for executive, administrative, professional, outside sales, and computer employees under the Fair Labor Standards Act of 1938, and for other purposes.

S. RES. 537

At the request of Mr. RUBIO, the name of the Senator from Georgia (Mr. PERDUE) was added as a cosponsor of S. Res. 537, a resolution expressing profound concern about the ongoing political, economic, social and humanitarian crisis in Venezuela, urging the release of political prisoners, and calling for respect of constitutional and democratic processes.

S. RES. 590

At the request of Mr. WYDEN, the names of the Senator from Maryland (Mr. CARDIN), the Senator from Virginia (Mr. KAINE), the Senator from Massachusetts (Mr. MARKEY), the Senator from Hawaii (Mr. SCHATZ) and the Senator from Rhode Island (Mr. WHITEHOUSE) were added as cosponsors of S. Res. 590, a resolution commemorating 100 years of health care services provided by Planned Parenthood.

S. RES. 612

At the request of Mr. REED, the name of the Senator from New Hampshire (Mrs. SHAHEEN) was added as a cosponsor of S. Res. 612, a resolution recognizing the Weatherization Assistance Program during its 40th anniversary year for its history of reducing the energy costs of families with low incomes, making low-income households healthier and safer, positively impacting the environment, and supporting jobs and new technology.

AUTHORITY FOR COMMITTEES TO MEET

COMMITTEE ON ENVIRONMENT AND PUBLIC WORKS

Mr. MCCONNELL. Mr. President, I ask unanimous consent that the Committee on Environment and Public Works be authorized to meet during the session of the Senate on November 15, 2016, at 5:30 p.m., in the President's Room of the Capitol.

The PRESIDING OFFICER. Without objection, it is so ordered.

NOTICE: REGISTRATION OF MASS MAILINGS

The filing date for the 2016 third quarter Mass Mailing report is Tuesday, October 25, 2016. An electronic option is available on Webster that will allow forms to be submitted via a fillable pdf document. If your office did no mass mailings during this period, please submit a form that states ''none.''

Mass mailing registrations or negative reports can be submitted electronically or delivered to the Senate Office of Public Records, 232 Hart Building, Washington, D.C. 20510–7116.

The Senate Office of Public Records is open from 9:00 a.m. to 5:00 p.m. For further information, please contact the Senate Office of Public Records at (202) 224–0322.

NOTICE OF ADOPTED RULEMAKING

Mr. HATCH. Mr. President, I ask unanimous consent that the attached documentation from the Office of Compliance be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

U.S. CONGRESS,
OFFICE OF COMPLIANCE,
Washington, DC, November 15, 2016.

Hon. ORRIN G. HATCH,
President Pro Tempore of the U.S. Senate, Washington, DC.

DEAR MR. PRESIDENT: Section 303 of the Congressional Accountability Act of 1995 (CAA), 2 U.S.C. 1383, requires that, with regard to the amendment of the rules governing the procedures of the Office, the Executive Director ''shall, subject to the approval of the Board [of Directors], adopt rules governing the procedures of the Office . . . .'' and ''[u]pon adopting rules . . . shall transmit notice of such action together with a copy of such rules to the Speaker of the House of Representatives and the President pro tempore of the Senate for publication in the Congressional Record on the first day of which both Houses are in session following such transmittal.''

Having published a general notice of proposed rulemaking in the Congressional Record on September 9, 2014, provided a comment period of at least 30 days after publication of such notice, and obtained the approval of the Board of Directors for the adoption of these rules as required by Section 303(a) and (b) of the CAA, 2 U.S.C. 1383(a) and (b), I am transmitting the attached Amendments to the Procedural Rules of the Office of Compliance to the President Pro Tempore of the United States Senate for publication in the Senate section of the Congressional Record on the first day on which both Houses are in session following the receipt of this transmittal. In accordance with Section 303(b) of the CAA, these amendments to the Procedural Rules shall be considered issued by the Executive Director and in effect as of the date on which they are published in the Congressional Record.

Any inquiries regarding this notice should be addressed to Barbara J. Sapin, Executive Director of the Office of Compliance, Room LA–200, 110 2nd Street, S.E., Washington, DC 20540.

Sincerely,

BARBARA J. SAPIN,
Executive Director,
Office of Compliance.

FROM THE EXECUTIVE DIRECTOR OF THE OFFICE OF COMPLIANCE

NOTICE OF ADOPTED RULEMAKING (''NARM''),

ADOPTED AMENDMENTS TO THE RULES OF PROCEDURE, NOTICE OF ADOPTED RULEMAKING, AS REQUIRED BY 2 U.S.C. § 1383, THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, AS AMENDED ("CAA").

INTRODUCTORY STATEMENT

On September 9, 2014, a Notice of Proposed Amendments to the Procedural Rules of the Office of Compliance (''Office'' or ''OOC''), as amended in June 2004 (''2004 Procedural Rules'' or ''2004 Rules'') was published in the Congressional Record at S5437, and H7372. As required under the Congressional Accountability Act of 1995 (''Act'') at section 303(b) (2 U.S.C. 1383(b)), a 30 day period for comments from interested parties followed. In response to the Notice of Proposed Rulemaking, the Office received a number of comments regarding the proposed amendments. Specifically, the Office received comments from the Committee on House Administration, the Office of the Senate Chief Counsel for Employment, the U.S. Capitol Police, the Architect

of the Capitol, and the U.S. Capitol Police Labor Committee.

The Executive Director and the Board of Directors of the Office of Compliance have reviewed all comments received regarding the Notice, have made certain additional changes to the proposed amendments in response thereto, and herewith issue the final Amended Procedural Rules (Rules) as authorized by section 303(b) of the Act, which states in part: ''Rules shall be considered issued by the Executive Director as of the date on which they are published in the Congressional Record.'' See, 2 U.S.C. 1383(b).

These Procedural Rules of the Office of Compliance may be found on the Office's web site: *www.compliance.gov*.

Supplementary Information: The Congressional Accountability Act of 1995 (CAA), PL 104–1, was enacted into law on January 23, 1995. The CAA applies the rights and protections of 13 federal labor and employment statutes to covered employees and employing offices within the Legislative Branch of Government. Section 301 of the CAA (2 U.S.C. 1381) established the Office of Compliance as an independent office within that Branch. Section 303 (2 U.S.C. 1383) directed that the Executive Director, as the Chief Operating Officer of the agency, adopt rules of procedure governing the Office of Compliance, subject to approval by the Board of Directors of the Office of Compliance. The rules of procedure generally establish the process by which alleged violations of the laws made applicable to the Legislative Branch under the CAA will be considered and resolved. The rules include procedures for counseling, mediation, and election between filing an administrative complaint with the Office of Compliance or filing a civil action in U.S. District Court. The rules also include the procedures for processing Occupational Safety and Health investigations and enforcement, as well as the process for the conduct of administrative hearings held as the result of the filing of an administrative complaint under all of the statutes applied by the Act, for appeals of a decision by a Hearing Officer to the Board of Directors of the Office of Compliance, and for the filing of an appeal of a decision by the Board of Directors to the United States Court of Appeals for the Federal Circuit. The rules also contain other matters of general applicability to the dispute resolution process and to the operation of the Office of Compliance.

The Office's response and discussion of the comments is presented below:

Discussion

SUBPART A—GENERAL PROVISIONS OF THE RULES

There were a number of comments submitted in reference to the proposed amendments made to Subpart A, General Provisions of the Rules. With respect to the amendments to the Filing and Computation of Time under section 1.03(a), one commenter noted that the provisions allowing the Board, Hearing Officer, Executive Director and General Counsel to determine the method by which documents may be filed in a particular proceeding ''in their discretion'' are overly broad. The commenter also requested clarification on whether there would be different methods used for filing in the same case, whether five (5) additional days would be added regardless of the type of service, and whether the OOC would inform the opposing party of the prescribed dates for a response.

The Office does not find as overly broad the amendment allowing the Board, Hearing Officer, Executive Director, and General Counsel the discretion to determine the method by which documents may be filed. The 2004 version of these Rules, as well as the CAA, confer the Office and independent Hearing Officers with wide discretion in conducting hearings and other processes. The Office further finds that there is no need to clarify whether different methods can be used in the same case, as long as whatever method chosen is made clear to parties. Finally, as the Rules are clear that five additional days will be added when documents are served by mail, the Office does not believe that it is necessary to include a requirement that the OOC inform parties of the specific dates that are required for response. That information can be ascertained from information on the method of filing.

As the OOC has indicated that it intends to move toward electronic filing, one commenter voiced support for the Office's decision to permit parties to file electronically. However, the commenter indicated that it would be beneficial for the proposed Rules to contain procedures for storing electronic material in a manner that will protect confidentiality and ensure compliance with section 416 of the CAA.

The Office routinely handles all materials in a secure and confidential manner, regardless of the format. Because the Office's confidential document management is covered in its own standard operating procedures, there is no need to include those procedures in these Rules.

Section 1.03(a)(2)(ii) of the Proposed Rules provided that documents other than requests for mediation that are mailed were deemed to be filed on the date of their postmark. However, mailed requests for mediation were to be deemed filed on the date they were received in the Office. (1.03(a)(2)(i)) This was a proposed change to the Rules that had established the date of filing for requests for mediation *and complaints* as the date when they were received in the Office. One commenter asserted that in changing the date of filing for complaints served by mail from the date received in the Office to the date of the postmark, the rules gave a covered employee an additional five days to file an OOC complaint. Upon review of all comments, the Office has determined that, because mail delivery on the Capitol campus is irregular due to security measures, it is best to use the date of postmark as the date of filing. This will ensure that all filings that under ordinary circumstances would be timely would not be deemed untimely because of any delay in mail delivery on the Hill. This includes the filing of a request for mediation, which will be deemed received in the Office as the date of postmark. In using the postmark as the date of filing for all mailed documents, the Office sees no advantage gained in one method of filing over the other, but rather views this as a way of curtailing any disadvantage to those who use mail for filing at a time when there are often significant delays in mail delivery to offices on the Hill.

In sections 1.03(a)(3) and (4) of the Proposed Rules, the Office changed the filing deadline for fax and electronic submissions from 5:00 pm Eastern Time on the last day of the applicable filing period to 11:59 pm Eastern Time on the last day of the applicable filing period. One commenter noted that while submissions under section 1.03(a)(3) require in person hand delivery by 5:00 p.m., this deadline is inconsistent with the 11:59 p.m. deadline required for faxed and electronically filed documents. The commenter stated that the filing deadlines should be the same for all types of delivery and receipt options.

This is not an unusual situation. Often there are different filing deadlines, depending on the mode of delivery. However, to ensure consistency, the Office has changed the language so that the same time will be used for filing all documents coming into the Office.

Under Proposed Rule section 1.03(a)(4), commenters noted that there was ambiguity regarding email time display and one commenter proposed the addition of a new rule requiring prompt acknowledgement of the receipt of an emailed document to ensure that it has been received by the parties.

In view of this comment, the Office added language to the Adopted Rules, providing that when the Office serves a document electronically, the service date and time will be based on the document's timestamp information. No further change is necessary. Confirmation of the transmittal of a document can be shown from the date and timestamp on the email, which is typically more reliable than a recipient's acknowledgment.

One commenter noted that under Proposed Rule section 1.03(c), there should be some way of notifying parties when the Office is ''officially closed for business.'' The Office determined that it is not necessary to include in the Procedural Rules how the Office will notify parties of closures. The Office generally follows the Office of Personnel Management closure policy with respect to inclement weather and other official government closures. Further, information on the Office's closures appears on the Office's website at *www.compliance.gov* and is provided on the Office's mainline at 202.724.9250.

In response to the proposed changes to the new section 1.06 (formerly section 1.04) in the Proposed Rules, several commenters indicated that while records of Hearing Officers may be made public if required for the purposes of judicial review under Section 407, the Procedural Rules do not address circumstances where records are also necessary for purposes of civil action review under section 408 for res judicata purposes.

After review of these comments, the Office believes that this concern is adequately addressed in the Adopted Rules. Section 1.08(d), includes a broader statement concerning the appropriate use of records in other proceedings, and allows the submission of a Hearing Officer's decision in another proceeding, as long as the requirements in section 1.08(d) are met. Nothing in these Rules prohibits a party or its representative from disclosing information obtained in confidential proceedings when it is reasonably necessary to investigate claims, ensure compliance with the Act or prepare a prosecution or defense. While section 1.08(d) does allow for the submission of Hearing Officer decisions under the appropriate circumstances, it also serves to preserve the confidentiality of these records. Thus, the party making the disclosure shall take all reasonably appropriate steps to ensure that persons to whom the information is disclosed maintain the confidentiality of such information.

With respect to the new section 1.07, Designation of a Representative, a commenter noted that the requirement that only one person could be designated as a representative was problematic since there have been situations when more than one attorney would be needed to represent an employing office or employee. The suggestion was made that the limitations apply only to a party for point of contact purposes. As the purpose of limiting the number of designated representatives was to eliminate any confusion caused by having to serve more than one representative per party, the Office has modified the language to indicate that only one representative may be designated to receive service.

There were several comments to section 1.07(c) of the Proposed Regulations. The proposals to section 1.07(c) provided that in the event of a revocation of a designation of representative, the Executive Director, OOC General Counsel, Mediator, Hearing Officer or OOC Board has the discretion to grant a

party ''additional time . . . to allow the party to designate a new representative as consistent with the Act.'' The commenters noted that the CAA is a waiver of sovereign immunity that must be strictly construed and that there is no discretion to extend statutory deadlines to give a party time to designate a new representative, including time to request counseling under section 402, to request and complete mediation under section 403, to file a complaint or initiate a civil action under section 404, or to file an appeal under section 406 of the CAA. Commenters urged that the rule be modified to clarify this point.

As the adopted language notes that additional time may be granted *only as consistent with the CAA*, it should be clear that in granting any additional time to designate a new representative, the Executive Director, OOC General Counsel, Mediator, Hearing Officer or OOC Board will ensure that statutory deadlines are observed.

Deletion of the section 1.07 of the 2004 Procedural Rules, the breach of confidentiality provision, generated the most comments. Commenters generally noted that the Proposed Procedural Rules would eliminate the existing process for filing a complaint based on violation of the confidentiality provisions of section 416 of the CAA. The effect of this proposed rule change would be that, if there was a confidentiality breach, a party could obtain relief only pursuant to an ''agreement'' facilitated by the Mediator during the mediation period or through sanctions issued by a Hearing Officer during a section 405 proceeding (see Proposed Procedural Rules sections 2.04(k) and 7.12(b)). Commenters expressed concern that under the Proposed Rules, if an individual violated section 416 of the CAA at any other time in the process, no remedy would be available. Most commenters felt that this was inconsistent with the confidentiality requirements of the CAA, and that the Procedural Rules should include a complaint procedure for resolving independent violations of section 416. For example, one commenter noted that, under the Proposed Procedural Rules, if parties agree to a settlement during mediation, there is no remedy available to the employing office if the employee decides to publicize the terms of the settlement or any statements made during mediation. Similarly, if a covered employee never initiates a section 405 proceeding, but instead drops the matter or initiates a section 408 proceeding, the Proposed Procedural Rules would allow the employee to publicize any statements made during mediation, with no fear of sanction. The uncertainty regarding confidentiality would result in parties being less candid in mediation and, thereby, undermine it as a dispute resolution process.

Section 1.07 of the 2004 Procedural Rules, permitting the filing with the Executive Director of stand-alone complaints of violation of the confidentiality provisions, has been deleted because the OOC Board held, as a matter of statutory interpretation of the CAA, that it did not have the statutory authority to independently resolve a breach of confidentiality action brought under the Procedural Rules, without the existence of an underlying complaint under section 405 of the CAA. *Taylor v. U.S. Senate Budget Comm.* No. 10–SN–31 (CFD), 2012 WL 588440 (OOC Board Feb. 14, 2012); see *Massa v. Katz & Rickher*, No. 10–HS–59 (CFD) (OOC Board May 8, 2012) (dismissing complaint alleging breach of confidentiality on subject-matter jurisdiction grounds because the complainant ''never filed a complaint [under section 405 of the CAA] against an employing office alleging violation of sections 201–207 of the CAA.''). In other words, the Board's authority to adjudicate a breach of confidentiality is limited to employment rights proceedings initiated by a complaint filed by a covered employee against an employing office alleging violations of laws specifically incorporated by the CAA under 2 U.S.C. §§1311–1317. Section 405 of the CAA, by its terms, limits the filing of a complaint to a covered employee who has completed mediation and section 406 of the CAA limits Board review to any party aggrieved by the decision of a Hearing Officer under section 405(g) of the CAA. For this reason, the Board determined that section 1.07(e) of the Procedural Rules could only apply to those orders and decisions regarding sanctions that were in a final order issued under section 405(g). While the CAA and the procedural rules mandate that parties in counseling, mediation, and hearing maintain confidentiality, there is no statutory provision within the CAA which addresses the authority of a Hearing Officer or the Board to address independent breaches of confidentiality. See 2 U.S.C. §1416

Other commenters noted that under *Taylor, supra,* the Board also appears to take the position that there is no provision in the CAA authorizing an employing office to bring a breach of confidentiality claim against a complainant. See also, *Eric J.J. Massa v. Debra S. Katz and Alexis H. Rickher*, Case No.: 10–HS–59 (CFD), (May 8, 2012) and *Taylor*. One commenter strongly disagreed with this conclusion, noting that just as the confidentiality obligations of the CAA clearly and unambiguously apply equally to employing offices and employees, so too should the ability to assert claims for breach of statutory confidentiality. The commenter asserts that a contrary reading of the statute, as appears to have been implicitly suggested in the above-referenced cases (denying employing offices the ability to bring claims for breach of confidentiality against employees), is inconsistent with the purpose and intent of the confidentiality provisions of the CAA.

Again, because under section 405 of the CAA, the filing of a complaint is limited to a *covered employee* who has completed counseling and mediation (and the General Counsel in limited circumstances), and there is no mechanism in the CAA for enforcement of confidentiality breaches outside of a section 405 proceeding, there is similarly no process in the CAA under which an employing office can *initiate* a breach of confidentiality claim that can be enforced. The Procedural Rules, however, do provide that within the context of a section 405 proceeding, an employing office may make a breach of confidentiality claim and the Hearing Officer is authorized to order a number of sanctions if a breach is found.

Comments were also made that limiting remedies for breaches of confidentiality to procedural and evidentiary sanctions was inappropriate and, that the effect of that limitation was to make the penalty for breach of confidentiality nonexistent for a complainant who chooses not to file a complaint with the OOC because no procedural or evidentiary sanctions would ever be applicable. The commenter requested that the Rules clarify that monetary damages may be awarded against both employing offices *and employees* for a demonstrated breach of confidentiality.

In the absence of any express authority, the Board has decided that ''the Office and its Hearing Officers have the power to control and supervise proceedings conducted under Sections 402, 403, and 405 of the [CAA], and may rely on this power to impose appropriate sanctions for a breach of the [CAA's] confidentiality requirements.'' *Taylor v. U.S. Senate Budget Comm; Massa v. Katz & Rickher*. The Board has further held that a breach of the CAA's confidentiality provisions does not independently entitle an employee to monetary damages absent a violation of one of the ''money-mandating'' statutes it applies. *Office of the Architect of the Capitol v. Cienfuegos,* No. 11–AC–138 (CV, RP), 2014 WL 7139940, *n.1 (OOC Board Dec. 11, 2014). The Board's authority is therefore limited to deciding breaches of confidentiality during the pendency of a complaint filed pursuant to section 405 of the CAA, and the Adopted Rules so provide.

Further, as to the deletion of section 1.07(d), covering contents or records of confidential proceedings, the comments noted that mediation does not bestow confidentiality to facts or evidence that exist outside of mediation and the language needs the significant qualification that currently exists in section 1.07(d) (''. . . A participant is free to disclose facts and other information obtained from any source outside of the confidential proceedings . . .''). The commenter recommended that the entire language of section 1.07(d) of the 2004 Procedural Rules be retained in the new Rules.

The Office agrees that including the current section 1.07(d) in the Adopted Rules (now in the Adopted Rules as section 1.08(e)) would give appropriate guidance on the contents and records of confidential proceedings.

There were multiple comments concerning the confidentiality provisions in section 1.08 of the Proposed Rules. One such comment noted that ''communications between attorneys and clients should never amount to a confidentiality breach absent a protective order''; yet, with the deletion of the ''Breach of Confidentiality Provisions'' section, there is no timeframe listed for when a party can claim a confidentiality breach. Commenters urged the OOC to reinstitute the previous requirement. Because of the Board rulings limiting the authority of the Board to review a breach of confidentiality claim outside of a section 405 proceeding, there does not need to be a timeframe for a party to claim the breach. The claim would have to occur during the section 405 proceeding itself. Because circumstances would differ in each case, setting a time frame for a breach of confidentiality should be left up to the Hearing Officer and the OOC Board of Directors.

Commenters noted that section 1.08(c) was also inconsistent because it prohibits disclosure of a written or oral communication that is prepared for the purpose of, or occurs during, counseling. The most important document that allows for the preparation of a defense to a claim is the formal request for counseling. That written document is necessary to identify the claims that a Complainant has properly exhausted under the CAA. Some commenters requested that the Office provide the employing office with the request for counseling.

Counseling is to be strictly confidential, therefore, the request itself will not be provided to other parties by the Office. As the Circuit Court for the District of Columbia noted in *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 713 (D.C. Cir. 2009), ''Congress's inclusion of provisions requiring the Office to issue written notices of the end of counseling and the end of mediation must be read in light of the provisions on confidentiality. Those provisions, sections 1416(a) and (b), provide that counseling and mediation, respectively, shall be strictly confidential.'' 2 U.S.C. §1416(a) & (b). *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 711 (D.C. Cir. 2009). The court noted that, ''nothing in the CAA suggests Congress intended courts to engage in a mini-trial on the content of the counseling and mediation sessions, an inquiry that would be fraught with problems. . . . Congress expressly limited the ability of the court to review the

substance of compliance with these processes.'' *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d at 711.

One commenter objected to section 1.08(d) of the Proposed Rules, noting that mediators should not be able to discuss substantive matters from mediation with the Office. The commenter noted that to permit mediators to consult with the OOC regarding the substance of the mediation violates the principle that ''[a]ll mediation shall be strictly confidential,'' 2 U.S.C. §1416(b), and is inconsistent with the OOC's role as a neutral. Specifically, the commenter points out that as the OOC appoints the Hearing Officer to handle the subsequent complaint, the Executive Director rules on a number of procedural issues in any subsequent case, and in view of the OOC's adjudicative role in the complaint process, allowing the mediator to consult with the OOC regarding substantive issues related to the mediation may negatively impact the OOC's neutrality, and/or the perception of the parties that the OOC is neutral.

The Office agrees with the commenter that under the CAA, ''[a]ll mediation shall be strictly confidential.'' CAA §416(b). The confidentiality provision regarding mediation is further clarified in section 2.04(j) of the Procedural Rules, which provides that the ''Office will maintain the independence of the mediation process and the mediator. No individual, who is appointed by the Executive Director to mediate, may conduct or aid in a hearing conducted under section 405 of the Act with respect to the same matter or shall be subject to subpoena or any other compulsory process with respect to the same matter.'' However, the CAA requires both counseling and mediation, in part, to assist employees and employing offices in reaching an early resolution of their disputes. When a neutral mediator believes that consulting with the Office on administrative, procedural, or even substantive matters will expedite and facilitate resolution of the dispute, there is no reason for the mediator not to be able to do that. In fact, the purposes of the counseling and mediation provisions are best served if the OOC encourages the mediator to do everything he or she can to expedite resolution of the matter.

Furthermore, because Mediators are barred from serving as Hearing Officers in the same case under CAA section 403(d), there is no chance that a Mediator who consults with the Office will use that information to make a determination that will be binding upon the parties. Section 403(d) of the CAA is designed to inspire confidence in and maintain the integrity of the mediation process by encouraging the parties to be frank and forthcoming, without fear that such information may later be used against them. See, *e.g.*, 141 Cong. Rec. S629 (January 9, 1995). In essence, if the parties know that the mediator will not be involved in investigating or determining the validity of any of the allegations being made, they may be more willing to work cooperatively with the Mediator during the mediation. This is also the theory behind a key provision of the EEOC's ADR Policy Statement: ''In order to ensure confidentiality, those who serve as neutrals for the Commission should be precluded from performing any investigatory or enforcement function related to charges with which they may have been involved. The dispute resolution process must be insulated from the investigative and compliance process.'' EEOC, Notice No. 915.002 (7/17/95).

Because Mediators under the CAA are insulated from the investigative and compliance process, there is no statutory or ethical bar that would prevent them from consulting with the office if it would facilitate resolution of the dispute.

One comment also noted that the proposed rule sections 1.08(b) and (c) may be read to allow a ''participant'' to publicize the fact that a covered employee has requested and/or engaged in counseling and mediation, and the fact that an individual has filed an OOC complaint. See also, 2.03(d), 2.04(b) and 5.01(h) (requiring the OOC—but not participants—to keep confidential the ''invocation of mediation'' and ''the fact that a complaint has been filed with the [OOC] by a covered employee''). The Commenter notes that these disclosures would violate the strict confidentiality mandated by the CAA and that the proposed rule should not be adopted.

It is the opinion of the Office that the strict confidentiality mandated by the CAA applies to the discussions and content of conversations that go on in counseling, mediation, and the hearing, rather than the fact of filing of a request for counseling, invocation of mediation, or a complaint. Indeed, section 1.08(e), added back into the Adopted Rules, spells out that it is the information actually obtained in the counseling, mediation or hearing proceedings that is to be kept confidential, not necessarily the fact that a hearing or mediation is being held. Moreover, to ensure confidentiality and consistent with *the Office of Compliance Administrative and Technical Corrections Act of 2015* (PL 114–6), all participants are advised of the confidentiality requirement under the CAA.

In another comment, it was noted that the waiver provision under section 1.08(e) of the Proposed Rules was not clear and appeared to conflict with the statutory requirement of confidentiality under section 416 of the CAA. Where there is a waiver of confidentiality, it is unclear whether a waiver releases all requirements for confidentiality including making records public in proceedings, waiving the confidentiality requirements of proceedings before a Hearing Officer, and waiving the sanctions requirement under section 1.08(f). It is important that any waiver be clear as to why it would be permissible despite the language in section 416 of the CAA and how such a waiver affects documents, proceedings, and testimony. The commenter further notes that the language of the waiver does not make clear that all participants must agree to waive confidentiality and should therefore be deleted from the Rules.

The Office agrees that the waiver language in section 1.08(e) of the Proposed Rules is too confusing and not meant as a general waiver. Accordingly, the waiver language has been deleted in the Adopted Rules.

One comment noted that section 1.08(f) of the Proposed Regulations would remove the requirement that the OOC advise participants of their confidentiality obligations in a timely fashion. Section 1.06(b) of the 2004 Procedural Rules requires the OOC to provide this notification ''[a]t the time that any individual... becomes a participant,'' and that language is not included in Proposed Procedural Rule 1.08(f). Such early notice is critical to ensuring that CAA-mandated confidentiality is maintained and, thus, the existing rule should be retained.

The Office of Compliance Administrative and Technical Corrections Act of 2015 (PL 114–6), requires the Executive Director to notify each person participating in mediation and in the hearing and deliberations process of the confidentiality requirement and of the sanctions applicable to any person who violates the confidentiality requirement. The Office has created notifications to be provided to participants during all phases of the administrative process, including in mediation and at hearings, and includes a statement on its request for counseling form advising that ''all counseling shall be strictly confidential.'' Consistent with this and in agreement with the comment, section 1.08(f) of the Adopted Rules is modified to provide that, ''[t]he Executive Director will advise all participants in mediation and hearing at the time they become participants of the confidentiality requirements of Section 416 of the Act and that sanctions may be imposed by the Hearing Officer for a violation of those requirements. No sanctions may be imposed except for good cause and the particulars of which must be stated in the sanction order.''

SUBPART B—PRE-COMPLAINT PROCEDURES APPLICABLE TO CONSIDERATION OF ALLEGED VIOLATIONS OF PART A OF TITLE II OF THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

In reviewing the change in the Proposed Rules, the Office has decided to delete the reference in section 2.03 of the 2004 Rules to an ''official'' form that should be used to file a formal request for counseling and has replaced it in the Adopted Rules with the following language: ''Individuals wishing to file a formal request for counseling may call the Office for a form to use for this purpose.''

There were several comments to section 2.03 of the Proposed Rules. One commenter noted that the strict confidentiality provision discussed in section 2.03(d) should refer to the confidentiality provisions described in sections 2.03(e)(1)–(2) and 1.08. In addition, the commenter maintained that the words ''should be used'' should be deleted and replaced with the word ''shall'' so that the counseling period only pertains to the enumerated items.

The Office has decided to leave the language as proposed (''should be used'') to provide the most flexibility to the Counselor and employee depending on the circumstances of each case.

There were comments that section 2.03(e)(1) of the Proposed Rules was inconsistent with the requirements in section 1.08(d). The commenter noted that, for example, section 2.03(e)(1) provides that ''all counseling shall be kept strictly confidential and shall not be subject to discovery.'' The commenter noted that it is not clear that the Office of Compliance Procedural Rules can control the release of discoverable information in federal district court. Notwithstanding that restriction, section 2.03(e)(1) is inconsistent with the exceptions provided in section 1.08(d) which permits disclosing information obtained in confidential proceedings when reasonably necessary to investigate claims, ensure compliance with the Act or prepare its prosecution or defense.

Additional comments noted that section 2.03(e)(1) of the Proposed Rule would permit the OOC to publicize certain statistical information regarding CAA proceedings, which is consistent with section 301(h)(3) of the CAA, but the proposed rule would remove this language: ''. . . so long as that statistical information does not reveal the identity of the employees involved or of employing offices that are the subject of a request for counseling.'' To ensure compliance with section 416 of the CAA, the rule should specify that the OOC will not publicize this detailed information in its statistical reports.

The Office believes that the CAA's confidentiality requirements found in section 416 of the CAA confer upon it the obligation to safeguard the confidentiality of such information. It is for that reason, the language limiting the discovery of information discussed in counseling was added. To ensure that its intention to protect the information is understood, the Office has decided to keep that language in the A Rules. Further, to preserve confidentiality of statistical information released as part of the reporting under section 301(h)(3) of the CAA, language has been put back in, indicating that statistical information will not reveal the identity

of individual employees or employing offices that are the subject of specific requests for counseling.

In addition, by way of clarification, the Office has added a reference in section 2.03(e)(2) of the Adopted Rules to section 416(a) of the CAA indicating that the employee and the Office may agree to waive confidentiality during the counseling process for the limited purpose of allowing the Office to notify the employing office of the allegations.

Noting that section 2.03(m) of the proposed rules requires the Capitol Police to enter into a Memorandum of Understanding (MOU) to permit an employee to use the Capitol Police internal grievance process, one commenter observed that there was no such requirement in section 401 of the CAA.

As the language in the proposed regulation indicates, a MOU may be necessary to address certain procedural and notification requirements. The OOC believes that the best way to work out notice and follow up details is through a MOU. However, the language does not mandate a MOU, but rather indicates that an MOU would be helpful in addressing administrative and procedural issues that could come up should the Executive Director decide to recommend that an employee use an internal process.

There were several comments noting that inclusion of ''good cause'' language in section 2.04(b) of the Proposed Rules would allow a covered employee additional time to file a request for mediation outside of the statutory 15-day period. The commenter asserted that there is no support for a ''good cause'' extension in the statute, and thus the OOC lacks authority to create such an extension in its Proposed Procedural Rules.

Typically, a final decision as to timeliness is up to the Hearing Officer and neither the Office nor the Mediator will dismiss a request for mediation where the request may be late. The intent of this amendment was to allow the Office to close the case if a request for mediation was not timely filed and make the decision not to forward for mediation. Because the 15-day time limit in which to file a request for mediation is statutory, the Office has deleted the ''good cause'' language from the Adopted Rules. However, a case may be closed if the request for mediation is not filed within 15 days of receipt of a Notice of the End of Counseling. In most cases, the final decision as to whether a request for mediation has been timely filed is up to the fact finder. In any event, a decision on an issue of equitable tolling would still be up to the Hearing Officer to decide.

In section 2.04(f)(2) of the Proposed Rules, language was added to the agreement to mediate that read that the Agreement to Mediate would define what is to be kept confidential during mediation. Commenters noted that everything in mediation is confidential and the statute does not permit the parties, the Mediator, or the OOC to redefine or limit what aspects of the mediation are confidential and which are not. This addition in the Proposed Rules was intended to create a contractual agreement on confidential matters. There is no question that a person can waive confidentiality. But the default in this section should be that matters are confidential unless there is a waiver, not the other way around. Therefore, this language is being deleted from the Adopted Rules.

The Office received comments on section 2.04(g) related to the procedures by some oversight committees for approving settlements. Commenters requested that the proposed change be modified to make it clear that Members of the committees need not be present for mediation, nor must they be reachable by phone during the mediation. It is understood that in some cases, an oversight committee has specific procedures for approving settlements that might not fit exactly into the parameters established under section 2.04(g). Section 414 of the Act does provide for this. The Act states: ''Nothing in this chapter shall affect the power of the Senate and the House of Representatives, respectively, to establish rules governing the process by which a settlement may be entered into by such House or by any employing office of such House.'' Because this provision is set forth in the Act, it is not necessary to modify the language in section 2.04(g) of the Rules.

There were additional comments to proposed Procedural Rule 2.04(g). Commenters noted that the rule as proposed would grant the Mediator the authority to require ''any party'' to attend a mediation meeting in person and that there was nothing in the CAA that would give a Mediator this authority. As a general rule, Mediators do not ''direct'' individuals to attend mediation in person, unless the Mediator believes that a specific person's presence would advance the mediation. However, the Office has revised the language in the Adopted Rules to indicate that the Mediator may ''specifically request'' a party or individual's presence.

One commenter stated that the OOC should not alter established practice by participating in mediations, as allowed in Section 2.04(g). In response, the Office notes that as the 2004 Rules include the Office as a possible participant in mediation, the Proposed Rules did not change established practice. However, to ensure that participation by the Office does not interfere with the mediation process, the Amended Rules include language that requires the permission of the Mediator and the parties before the Office can participate in mediation. This is not meant to require permission from the parties when the Office appoints an in-house mediator. Such an appointment is left exclusively to the Executive Director.

There were several comments to section 2.04(i) of the Proposed Rules. Commenters noted that the notice of the end of mediation period should advise the employing office of the date and mode of transmission of the notice that was sent to the complainant or add a presumption to the new rule, stating that the notice is presumed to have been received on the day it is sent by facsimile or email, or within 5 calendar days if sent by first class mail.

However, the *Technical Amendments Act* modified section 404 of the CAA and established that the deadline to elect proceedings after the end of mediation was 'not later than 90 days but not sooner than 30 days after the *end of the period of mediation*.' (Emphasis added) As this changed the deadline from the receipt of the notice of end of mediation to the end of the mediation period itself, section 2.04(i) of the Adopted Rules was changed accordingly. Section 205(a), regarding election of proceedings, was also modified to reflect the changes made by *Technical Amendments Act*.

SUBPART C—COMPLIANCE, INVESTIGATION, AND ENFORCEMENT UNDER SECTION 210 OF THE CAA (ADA PUBLIC SERVICES)—INSPECTIONS AND COMPLAINTS

In the NPRM published on September 9, 2014, the Executive Director proposed a new Subpart C of the Procedural Rules setting forth rules and procedures for the inspection, investigation and complaint provisions contained in sections 210(d) and (f) of the CAA relating to Public Services and Accommodations under Titles II and III of the Americans with Disabilities Act (ADA). On September 9, 2014, the OOC Board also published a NPRM with substantive regulations implementing Section 210 of the CAA, including sections 210(d) and (f). In response to the NPRMs, the Executive Director received comments to both the proposed ADA procedural rules and the proposed substantive regulations that were similar or substantially related. While the ADA substantive regulations have been adopted by the Board of Directors, they have not yet been approved by Congress. The Executive Director has therefore decided to withdraw the proposed procedural rules contained in Subpart C relating to section 210 of the CAA. Any future procedural rules regarding the inspection, investigation and complaint provisions contained in sections 210(d) and (f) of the CAA relating to ADA Public Services and Accommodations will be promulgated when the substantive regulations implementing section 210 of the CAA have been approved.

SUBPART D—COMPLIANCE, INVESTIGATION, ENFORCEMENT AND VARIANCE PROCESS UNDER SECTION 215 OF THE CAA (OCCUPATIONAL SAFETY AND HEALTH ACT OF 1970)—INSPECTIONS, CITATIONS, AND COMPLAINTS

Regarding sections 4.02(a), 4.03(a) and (b), two commenters objected to defining ''place of employment'' as ''any place where covered employees work.'' The 2004 Rules referred to ''places of employment under the jurisdiction of employing offices.'' The language in the 2004 Procedural Rules is the same language used in section 215(c)(1) of the CAA. Section 215(c)(1) describes the authorities of the General Counsel, which are the same as those granted to the Secretary of Labor by subsections (a), (d), (e), and (f) of section 8 of the Occupational Safety and Health Act of 1970 (OSHAct) (29 U.S.C. §§ 657(a), (d), (e), and (f)). Notably, section 8(a) grants the ''right to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, workplace or environment *where work is performed by an employee of an employer*.'' (Emphasis added). The CAA refers to the same authorities for periodic inspections as it does for requests for inspections, that is, section 215(c)(1), and therefore section 8(a) of the OSHAct. Thus, the General Counsel's authority for periodic inspections and requests for inspections covers not only legislative branch facilities that are under the jurisdiction of employing offices, such as the Hart or Rayburn office buildings, but any place where covered employees work, such as the Architect of the Capitol's workshop in the U.S. Supreme Court building. One commenter expressed concern this would mean the General Counsel could visit a telework employee's home office to conduct an inspection, since the home office is where a covered employee works, but not where an employing office has ''jurisdiction''. However, the General Counsel would not inspect an area and make findings that are beyond the reach of any employing office to address. The efforts in this section of the Procedural Rules are intended to more accurately reflect, rather than broaden, its authority to inspect.

One commenter objected to language in section 4.02(a) that authorizes the General Counsel to review records ''maintained by or under the control of the covered entity.'' The 2004 Rules refers to records ''required by the CAA and regulations promulgated thereunder, and other records which are directly related to the purpose of the inspection.'' The concern is that the General Counsel is imposing record-keeping requirements. However, the language does not require entities to create records or even to maintain records, but addresses the authority of the General Counsel to review records that are maintained. Further, whether a record is ''directly related to the purpose of the inspection'' is a matter that may be raised by

an entity whether that language is in the section or not. The General Counsel is not seeking the right to review records that have nothing to do with the inspection. Moreover, whether a record is ''directly'' related is not always readily apparent when a record request is first made, and the better course is to avoid misunderstandings and delays in inspections because of a debate over degrees of relatedness.

One commenter suggested inserting the words ''upon notification to the appropriate employing office(s)'' in section 4.02(a) after, ''the General Counsel is authorized'' and before, ''to enter without delay and at reasonable times, . . .''. As noted above, that language is from section 8(a) of the OSHAct. There is no requirement to provide advance notice of an inspection to employing offices but in practice the approach of the General Counsel is to provide notification well in advance. The employing offices usually provide an escort for access and assistance during the inspection. The General Counsel has even rescheduled an inspection when no escort shows. The General Counsel's periodic inspection calendars are provided to employing offices at the beginning of each Congress and posted on the OOC's website.

The same commenter asked the Executive Director to revise section 4.03(a)(1) to reflect the General Counsel's practice of providing advance notice of an inspection and the scheduling of a pre-inspection opening conference. The current language requires that the General Counsel provide a copy of the notice of violation to the employing office ''no later than at the time of inspection.'' The commenter also asked the Executive Director to revise section 4.06(a), which states that advance notice of inspections may not be given except under the situations listed in (a)(1) through (4). The Executive Director agrees that the practice of the General Counsel has defaulted to giving advance notice, as opposed to not giving advance notice. However, flexibility is still needed to inspect without advance notice, usually for exigent circumstances. In such situations, and under the 2004 Procedural Rules, the General Counsel need not first persuade an employing office that the matter falls under an exception to advance notice.

The commenter also suggested that the Executive Director revise section 4.11 on Citations to reflect other processes used by OOC, such as the Serious Deficiency Notice and case reports, adding that the General Counsel rarely issues citations and does not issue *de minimis* violations. The commenter asked that the Executive Director change section 4.12 on Imminent Danger to include OOC's use of the Serious Deficiency Notice; change section 4.14 to require the General Counsel to notify the employing office that it failed to correct a violation before the General Counsel files a complaint, rather than having the notification be optional; and change section 4.25 on applications for temporary variances and other relief to include the Request for Modification of Abatement process used by the General Counsel.

The suggested changes regarding notification of inspections, citations, imminent danger, notification before filing a complaint, and applications for temporary variances/requests for modification of abatement, were raised by the commenter, not in response to any changes the Executive Director proposed in the NPRM. The Executive Director is therefore reluctant to discuss them without further notice and opportunity to comment for all stakeholders. While the processes of the General Counsel that have developed since 2004 in these areas are not wholly reflected in the Procedural Rules, they are not inconsistent with the Rules or with the authorities granted to the General Counsel under the CAA. They are examples of how the operational needs of the parties and OOC can be accommodated without first revising the Procedural Rules.

One commenter was supportive of OOC's effort to balance the OSHAct, which requires citations to be posted unedited and un-redacted, with concern over the disclosure of security information. More specifically, the Executive Director had added the following language to section 4.13(a) on the posting of citations: ''When a citation contains security information as defined in Title 2 of the U.S. Code, section 1979, the General Counsel may edit or redact the security information from the copy of the citation used for posting or may provide to the employing office a notice for posting that describes the alleged violation without referencing the security information.'' However, the commenter wanted the Executive Director to go further and include other security information, such as ''sensitive but unclassified'' information, and to address how OOC will protect all security information it encounters during all stages of the OSH inspection process. The Executive Director does not believe the Procedural Rules are the place for setting forth OOC's safeguards and internal handling procedures for security information. The reference to 2 U.S.C. §1979 was an effort to use an established definition of security information that applies to the Legislative Branch, rather than leaving it to the OOC to decide what is security information. A document marked as classified or sensitive but unclassified by the classifying or originating entity will be handled accordingly.

SUBPART E—COMPLAINTS

Commenters suggested deleting newly proposed language in section 5.01(b)(1) that would permit the Executive Director to return a complaint that was filed prematurely, without prejudice. The commenters asserted that the provision is unfair to employing offices and places the Executive Director in the position of giving legal advice to complainants.

The Office disagrees that allowing a complainant to cure a defect in their filing is improper, and has added language giving the Executive Director discretion to return all early filed Complaints to the complaining employee for filing within the prescribed period, and with an explanation of the applicable time limits. It is clear that no complaint will be processed until it is timely. Giving the Executive Director the discretion to return a complaint in these circumstances does not give the Executive Director the authority to process a complaint that is filed prematurely.

In comments to section 5.01(g) of the proposed regulations, commenters suggested that a respondent be permitted to file a motion to dismiss in lieu of an answer. They explained that the rule should give the Hearing Officer discretion to allow a respondent to file a motion to dismiss in lieu of an answer. Otherwise, a party will be forced to waste resources responding to a complaint that may be dismissed or significantly altered by a Hearing Officer's ruling on the motion to dismiss. They conclude that filing a motion to dismiss should suspend the obligation to file an answer.

The Office declines to make this change in the Adopted Rules, believing that a direct response to the allegations is vital, and any party wishing to file a motion to dismiss in addition to an answer may do so. While a motion to dismiss option was added to the Proposed Procedural Rules because many stakeholders indicated that they would like to see it added, this language was not intended to replace the filing of an answer. When there is no adverse action like a removal or suspension, and the claim involves harassment or retaliation, the employing office has no requirement to provide the complainant with the administrative file or investigation, and there is no requirement under the Rules that the agency provide this information before the time to answer. In those circumstances, the complainant must rely on the answer for information in order to respond. While it is in the Hearing Officer's discretion whether to extend the time to allow the respondent to file an answer and to stay discovery while ruling on a motion to dismiss, the Office has decided to keep language requiring an answer. In hearings under the CAA, the time frames are typically very short and a requirement for respondent to answer keeps the process moving forward.

Sections 5.03(f) and (g) of the Proposed Rules were modified to allow a Hearing Officer to dismiss a complaint after withdrawal—with or without prejudice. Several commenters objected to this change. One commenter suggested such a dismissal be with prejudice only, another suggested the Board identify factors a Hearing Officer must consider when dismissing a complaint or permitting a complainant to re-file, and another suggested the language be modified to clarify that a Hearing Officer cannot expand a complainant's time to file a complaint—and that a complaint that would otherwise be time-barred under section 404 may not be re-filed.

While it is clear that a withdrawal of a complaint with or without prejudice cannot be used to extend the statutory time frame, the Executive Director has added language to the Adopted Rules indicating that the authority of the Hearing Officer is consistent with section 404 of the CAA.

Section 5.03(h) was added in the Proposed Rules requiring a representative to provide sufficient notice to the Hearing Officer and the parties of his or her withdrawal in a matter, and clarifying that the employee will be considered pro se until another representative has been designated in writing. Commenters suggested that the Board define what is meant by ''sufficient'' notice.

The Office recognizes that with respect to the conduct of a hearing, the Hearing Officer is in the best position to determine what constitutes sufficient notice under the circumstances, and so must have flexibility in making determinations. Therefore, the Executive Director declines to make the changes as requested.

SUBPART F—DISCOVERY AND SUBPOENAS

In general, several commenters asserted that Proposed Procedural Rules sections 2.03(e)(1), 6.01(a), and 6.02(a) are invalid to the extent that they would limit the availability of OOC employees and records in the discovery process, because there is no statutory basis for this evidentiary privilege.

The Executive Director believes that the CAA's confidentiality requirements found in section 416 of the CAA confer upon the Office the obligation to safeguard the confidentiality of such information. Accordingly, to ensure that its intention to safeguard confidential information is clear, the Executive Director declines to make any changes in the A Rules to these sections.

In the Proposed Rules section 6.01(b) language about initial disclosure was modified to specify that information, including witness lists and discovery documents, must be provided to the opposing party within 14 days of a pre-hearing conference. A commenter suggested that this rule places an unfair burden on employing offices who should not be required to turn over witness lists and discovery documents without a request.

The Office believes that, given the limited time between the filing of a complaint and

opening of the hearing, this requirement should be kept as proposed because it will promote the prompt and fair exchange of information and reduce delay in the proceedings. This process should not pose an unfair burden on employing offices because of the ready availability of the information to the employing office.

One commenter expressed concern that the changes proposed to section 6.01(c), permit the parties to engage in ''reasonable prehearing discovery,'' without defining what types of discovery are reasonable, or the volume of discovery that is appropriate, given the limited time involved in the process. The language in the 2004 Procedural Rules, permitting discovery only as authorized by the Hearing Officer was more equitable because the Hearing Officer had greater control over the proceedings, and better ability to prevent discovery abuses, or the use of delay tactics. Additionally, application of the Federal Rules of Civil Procedure to the types and volume of discovery may be helpful to the parties' understanding of the process.

This comment misapprehends the Hearing Officer's authority. Section 405(e) of the CAA provides that ''[r]easonable prehearing discovery may be permitted at the discretion of the hearing officer.'' The authority is therefore permissive, not restrictive. It has always been the policy of the Office to encourage early and voluntary exchange of relevant information and the Rules, as amended, allow a hearing officer to authorize discovery, but do not mandate it.

One commenter suggested that section 6.01(c)(1) be modified to state that, when a motion to dismiss is filed, discovery is stayed until the Hearing Officer has ruled on the motion.

The Executive Director declines to make this modification. As noted above, because the time frames in the hearing process are limited, requiring that discovery be stayed until there is a ruling on a motion to dismiss could take up valuable time. In any event, the Hearing Officer should have the most flexibility to make a decision to stay discovery depending on the circumstances of each case.

Section 6.01(d)(1) of the Proposed Rules provides: ''A party must make a claim for privilege no later than the due date for the production of the information.'' One commenter suggested that a claim for privilege belongs to a party and cannot be waived except by the party. Thus, section 6.01(d)(1) cannot place a limitation on a party's right to assert a privilege and would be inconsistent with the inadvertent disclosure identified in section 6.01(d)(2). As an example, the commenter notes that one may have inadvertently disclosed privileged information on the last day of discovery which would require that it be returned or destroyed in accordance with section 6.01(d)(2). However, if the privilege was not asserted on the last day of discovery, the Procedural Rules would allow the opposing party to keep the inadvertently disclosed documents. Thus, by limiting the timing of the asserted privilege, a conflict is created between sections 6.01(d)(1) and 6.01(d)(2).

The Office is not attempting, by this rule, to place a limit on a party's right to assert a privilege, but rather to ensure that if a party intends to assert a privilege it does so in a timely way. Until a privilege is asserted, the assumption is that the information is not privileged. Therefore, this rule is not inconsistent with section 6.01(d)(2) that requires that information that has been claimed as privileged and inadvertently disclosed be returned or destroyed, even if disclosed on the last day of discovery.

Section 6.02(a) was modified in the Proposed Rules to clarify that OOC employees and service providers acting in their official capacities, and confidential case-related documents maintained by the OOC, cannot be subpoenaed. In addition, the rules clarify that employing offices must make their employees available for discovery and hearings without a subpoena. One commenter requested that an employing office only be required to make available witnesses under their control during actual work hours and work shifts on the day of the hearing and, otherwise, that subpoenas be used. Another commenter suggested the provision be revised to state: ''Employing offices shall make reasonable efforts to make their management-level employees available for discovery and hearing without requiring a subpoena.''

Often, the timing and pacing of a hearing depends on the availability of witnesses. The Executive Director believes that it is important that the parties willingly commit to the hearing process to ensure the most efficient and equitable outcome possible. By requiring employing offices to make their employees available without a subpoena, the purpose of the Proposed Rule was to ensure that employees will be readily available when called as witnesses, therefore reducing the administrative burdens on the parties, the Hearing Officer, and the Office.

SUBPART G—HEARINGS

As a general comment, one commenter stated that it was unclear what authority under the CAA the Board of Directors was utilizing to authorize a Hearing Officer to issue sanctions under sections 7.02 and 7.12(b). The commenter maintained that sanctions are not authorized under the CAA and, thus, Procedural Rules incorporating substantive provisions are beyond the scope of authority permitted under the CAA. The commenter further suggested that because sanctions provisions affect the rights of the parties, they are substantive in nature and the appropriate avenue should a substantive sanctions provision be requested is to pursue a statutory amendment to the CAA.

The Executive Director disagrees. It is clear that a Hearing Officer has the ability to use sanctions to run an orderly and proper hearing. Moreover, the CAA provides this authority. Thus, under section 405(d) of the CAA, the Hearing Officer is required to conduct the hearing in ''accordance with the principles and procedures set forth in section 554 through 557 of title 5.'' Specifically, under 5 U.S.C.557: ''The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of . . . the appropriate rule, order, sanction, relief, or denial thereof.'' Further, under section 405(g) of the CAA, ''the hearing officer shall issue a written decision [that] shall . . . contain a determination of whether a violation has occurred and order such remedies as are appropriate pursuant to subchapter II of this chapter.''

Another comment in this area pointed to section 7.02(b)(1)(G) of the 2004 Rules that authorizes a Hearing Officer to ''order that the non-complying party, or the representative advising that party, pay all or part of the attorney's fees and reasonable expenses of the other party or parties or of the Office, caused by such non-compliance, unless the Hearing Officer or the Board finds that the failure was substantially justified or that other circumstances make an award of attorney's fees and/or expenses unjust.''

The Office notes that because section 415 of the CAA requires that only funds appropriated to an account of the Office in the Treasury may be used for the payment of awards and settlements under the CAA, this provision has been deleted from the Adopted Rules.

Section 7.02(b)(4) of the Proposed Rules permits a Hearing Officer to dismiss a frivolous claim. One commenter suggested that this rule be modified to make it clear that, when a respondent has moved to dismiss a claim on the grounds that it is frivolous, no answer should be required to be filed and no discovery taken ''unless and until the motion is denied.'' Another commenter suggested that allegations that a claim is frivolous be resolved through a motion to dismiss, referenced in section 5.01(g).

As stated previously, the Executive Director is declining to delete the requirement that an answer be filed in all complaint proceedings. Moreover, the Office recognizes that a claim alleging that a matter is frivolous may always be subject to a motion to dismiss and the Hearing Officer has the discretion to move the case as appropriate. Therefore, qualifying language need not be included in these rules. In order to clarify one point, the Office has added language indicating that a Hearing Officer may dismiss a claim, *sua sponte*, for the filing of a frivolous claim.

Some commenters noted that the CAA did not authorize each of the remedies for failure to maintain confidentiality under section 7.02(b)(5). While the Hearing Officer is authorized to issue a decision under section 405, the commenters note that Congress did not authorize remedies for breach of confidentiality. Accordingly, the Board of Directors of the Office of Compliance is required to seek a statutory correction should it desire to provide remedies for breach of confidentiality. Where Congress sought to provide a remedy under the CAA, it specifically incorporated it. Compare 2 U.S.C. 1313(b), 2 U.S.C. 1314(b), 2 U.S.C. 1317(b), and 2 U.S.C. 1331(c) incorporating a remedy provision with the absence of a remedy provision in 2 U.S.C. 1416.

For the reasons below, the Office declines to delete this section. The CAA does provide for sanctions and remedies for the failure to maintain confidentiality. Under the Office of Compliance Administrative and Technical Corrections Act of 2015, section 2 U.S.C. 1416(c) of the CAA was amended to: ''The Executive Director shall notify each person participating in a proceeding or deliberation to which this subsection applies of the requirements of this subsection and *of the sanctions applicable to any person who violates the requirements of this subsection.*'' (Emphasis added.)

Section 7.07 gives the Hearing Officer discretion when a party fails to appear for hearing. One commenter suggested that the rule be amended to require the complainant to appear at hearings.

The rule, as written, is intended to allow the Hearing Officer discretion to determine when the presence of a party is required for the proceeding to move forward.

With respect to sections 7.13(d) and (e), one commenter noted that these sections ''purport to limit the availability of interlocutory appeals'', and section 8.01(e) purports to limit the availability of judicial review. Because these issues should be addressed by substantive rulemaking, these proposed Procedural Rules are invalid and should not be adopted.

These provisions are not substantive, but are procedural. Therefore no changes need to be made. Thus, under the Proposed Rules, the time within which to file an interlocutory appeal is described in section 7.13(b); section 7.13(c) provides the standards upon which a Hearing Officer determines whether to forward a request for interlocutory review to the Board; and section 7.13(d) provides that the decision of the Hearing Officer to

forward or decline to forward a request for review is not appealable. The Office's rule permitting the Hearing Officer to determine whether a question should be forwarded to the Board is consistent with judicial practice, and the Board retains discretion whether or not to entertain the appeal. Under 28 USC 1292(b):

When a district judge, in making in a civil action an order not otherwise appealable under this section,[1] shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

There were several comments on section 7.15(a) of the Proposed Regulations regarding the closing of the record of the hearing. One commenter noted that the OOC should identify what factors or guidance a Hearing Officer must follow in determining the amount of time that the record is to remain open. Another commenter objected to allowing any documents to be entered into the record after the close of a hearing.

A complete record is essential to a determination by the Hearing Officer. The Hearing Officer is in the best position to determine how long the record should be kept open and what information is most relevant to creating a complete record upon which to issue a decision. Because the Hearing Officer should be accorded appropriate discretion, the Executive Director sees no reason to make the changes noted.

There were several comments to section 7.16 concerning sufficient time to respond to motions. One commenter recommended that a provision be added to the Rules stating that a Hearing Officer shall provide a party at least two business days to respond to a written motion. Another commenter recommended that a rule be adopted that expressly permits the hearing to be opened just for purposes of arguing a dispositive motion, such as a motion to dismiss, thereby allowing the parties to avoid spending time and resources when a case can be dismissed because it is frivolous or because it fails to state a claim.

The Executive Director does not believe that any revisions are required to this section. As the time frames under the CAA for the issuance of the decision of a Hearing Officer are very short (a decision must be issued within 90 days of the end of the hearing), it is crucial that the Hearing Officer be accorded the most discretion in conducting the hearing.

One commenter suggested that the Rules include directions to Hearing Officers to *sua sponte* dismiss abated cases. The commenter maintained that when a Member of the House of Representatives leaves office, the Member's personal office ceases to exist and the case abates. Citing *Hamilton-Hayyim* v. *Office of Congressman Jackson*, Case No. 12–C–6392, 2014 WL 1227243 (N.D. 111. Mar. 25, 2014); accord *Oklahoma Natural Gas Co*. v. *Oklahoma,* 273 U.S. 257, 259–260 (1927); *Bowles* v. *Wilke,* 175 F.2d 35. 38–39 (7th Cir. 1949), the commenter noted that the CAA ''demonstrates a congressional mandate . . . to end any employment action liability of that respective Member's personal office'' at the time the Member leaves office. *Hamilton-Hayyim,* 2014 WL 1227243 at *2.10 When a Hearing Officer becomes aware that a Member's personal office ceases to exist, the Rules should provide that the Hearing Officer will dismiss the case, *sua sponte*.

For the reasons stated herein, the Office disagrees with this interpretation and the Executive Director declines to provide such a rule, leaving it to the Hearing Officer or Board to make the determination on the issue. An ''employing office'' does not cease to exist when a Member resigns or otherwise leaves office. The clear intent of the CAA is to subject the Legislative Branch to liability for violation of federal employment laws, not to subject Members personally to such liability. 2 U.S.C. §1302. Moreover, a Member is not directly involved in the litigation, as Congress's attorneys defend the action and have the ultimate authority to make litigation decisions. Id. §1408(d). Additionally, there is no financial risk to a Member, as any monetary settlement or award is paid from a statutory fund. Id. §1415(a).

Courts considering this issue have reached this same conclusion. In *Hanson* v. *Office of Senator Mark Dayton*, 535 F. Supp. 2d 25 (D.D.C. 2008), the court found no ambiguity as to the meaning of the term ''employing office'' and opined that although the CAA defines ''employing office'' as the personal office of a Member, there is absolutely no indication in the CAA or elsewhere that Congress intended the naming device to insulate former Congressional offices from suit under the CAA. The court therefore expressly held that the expiration of a Senator's term did not moot or abate the lawsuit. Indeed, the term ''employing office'' is merely ''an organizational division within Congress, established for Congress's administrative convenience, analogous to a department within a large corporation'' and the term exists solely ''to be named as a defendant in [CAA] actions.'' *Fields* v. *Office of Eddie Bernice Johnson,* 459 F. 3d 1, 27–29 (D.C. Cir. 2006); see *Bastien* v. *Office of Senator Ben Nighthorse Campbell,* No. 01–cv–799, 2005 WL 3334359, at *4, (D. Colo. Dec. 5, 2005) (''[T]he term 'employing office' actually refers to Congress and Congress is the responsible entity under the CAA.''), quoted in 454 F.3d 1072, 1073 (10th Cir. 2006).

To the extent that the commenter disagrees with the above explanation and relies on *Hamilton-Hayyim* v. *Office of Congressman Jesse Jackson, Jr.,* No. 12–c–6392, 2014 WL 1227243 (N.D. Ill. Mar. 25, 2014), it is the belief of the Office that the case misapplied clearly established law as described above and should not affect the Procedural Rules. *Hamilton-Hayyim* conflates the issue of successor or continuing liability under Rule 25(d) of the Federal Rules of Civil Procedure with the role of an ''employing office'' in a suit under the CAA. As grounds for its holding, the court in *Hamilton-Hayyim* found that a suit against an employing office becomes moot or abates upon the resignation of a Member because Congress did not statutorily create successor liability which infers that ''Congress certainly does not want to burden a new Member with the liability of a former Member.'' Id. at *2. This rationale does not comport with the CAA. There is no burden on a new Member resulting from an existing action against a former Member under the CAA because the obligation to provide a legal defense rests with the Office of House Employment Counsel and any resulting financial responsibility is paid through a fund. 2 U.S.C. §1408, 1415(a). The Executive Director believes that the holding in *Hamilton-Hayyim* is contrary to the clear intent of the CAA which is to hold Legislative Branch employing offices, not Members, accountable for violations of specific labor and employment laws. Because an employing office does not cease to exist for purposes of suit under the CAA when a Member leaves office, the Executive Director declines to make the change suggested.

SUBPART I—OTHER MATTERS OF GENERAL APPLICABILITY

One commenter stated that section 9.01(a) is unclear as to what is meant by a ''decision of the Office.'' If the procedural rule is meant to be a decision of the Board of Directors of the Office of Compliance, the rule should be clarified. The definition of a final decision of the Office can be found in sections 405(g)[2] and 406(e)[3] of the CAA. Therefore no further revisions are necessary.

There were comments to section 9.02(c)(2) of the Proposed Rules asking for clarification of the circumstances under which the Office or a Hearing Officer would initiate settlement discussions once the mediation period has ended. The Office sees no reason to change the language. As there are many situations that can come up in hearing where a Hearing Officer may conclude that the parties are interested in discussing settlement, the decision as to whether to initiate settlement discussions should be left up to the Office or Hearing Officer as circumstances dictate.

One commenter noted that Proposed Procedural Rule §9.03(d) would give the Executive Director sole authority to resolve alleged violations of settlement agreements, in the event that the parties do not agree on a method for resolving disputes. There is nothing in the CAA that gives the Executive Director the authority to resolve contractual disputes, and this rule should not be adopted.

The Office notes that the rule specifically states that the Office may provide assistance in resolving the dispute, including the services of a mediator and that allegations of a breach of a settlement will be reviewed, investigated, or mediated as appropriate. It does not say that the Executive Director will resolve those alleged violations, but rather, assist the parties in doing so.

One commenter noted that proposed Procedural Rule §9.04 states that, after a settlement agreement has been approved by the Executive Director, ''[n]o payment shall be made from such account until the time for appeal of a decision has expired.'' This rule should clarify that it does not apply to settlements reached in the absence of a ''decision'' that may be appealed.

The Office has clarified section 9.04 in the Amended Rules and included language that indicates that this rule does not apply to situations where a settlement has been reached and there is no decision that could be appealed.

EXPLANATION REGARDING THE TEXT OF THE PROPOSED AMENDMENTS:

Material from the 2004 version of the Rules is printed in roman type. The text of the adopted amendments shows ***[****deletions in italicized type within bold italics brackets****]*** and **added text in underlined bold.** Only subsections of the Rules that include adopted amendments are reproduced in this NOTICE. The insertion of a series of small dots (. . . .) indicates additional, un-amended text within a

[1] Orders other than ''[i]nterlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions. . . .''

[2] Section 405 Complaint and Hearing, (g) Decision. ''. . . If a decision is not appealed under section 1406 of this title to the Board, the decision shall be considered the final decision of the Office.''

[3] Section 406 Appeal to the Board, (e) Decision. ''. . . A decision that does not require further proceedings before a hearing officer shall be entered in the records of the Office as a final decision.''

section has not been reproduced in this document. The insertion of a series of asterisks (* * * * *) indicates that the un-amended text of entire sections of the Rules have not been reproduced in this document. For the text of other portions of the Rules which are not proposed to be amended, please access the Office of Compliance web site at www.compliance.gov.

ADOPTED AMENDMENTS

§ 1.01 Scope and Policy.

These rules of the Office of Compliance govern the procedures for consideration and resolution of alleged violations of the laws made applicable under Parts A, B, C, and D of title II of the Congressional Accountability Act of 1995. The rules include **definitions,** procedures for counseling, mediation, and for electing between filing a complaint with the Office of Compliance and filing a civil action in a district court of the United States **under Part A of title II**. The rules also address the procedures for **compliance, investigation, and enforcement under Part B of title II,** [*variances*] and **for** compliance, investigation, [*and*] enforcement**, and variance** under Part C of title II**. The rules include** [*and*] procedures for the conduct of hearings held as a result of the filing of a complaint and for appeals to the Board of Directors of the Office of Compliance from Hearing Officer decisions, as well as other matters of general applicability to the dispute resolution process and to the operations of the Office of Compliance. It is the policy of the Office that these rules shall be applied with due regard to the rights of all parties and in a manner that expedites the resolution of disputes.

§ 1.02 Definitions.

Except as otherwise specifically provided in these rules, for purposes of this Part:

. . . . .

(b) *Covered Employee*. The term ''covered employee'' means any employee of

. . . . .

(3) the [*Capitol Guide Service*] **Office of Congressional Accessibility Services**;

(4) the Capitol Police;

. . . . .

(9) for the purposes stated in paragraph (q) of this section, the [*General Accounting*] **Government Accountability** Office or the Library of Congress.

. . . . .

(d) *Employee of the Office of the Architect of the Capitol*. The term ''employee of the Office of the Architect of the Capitol'' includes any employee of the Office of the Architect of the Capitol, **or** the Botanic Garden [*or the Senate Restaurants*].

(e) *Employee of the Capitol Police*. The term ''employee of the Capitol Police'' includes civilian employees and any member or officer of the Capitol Police.

(f) *Employee of the House of Representatives*. The term ''employee of the House of Representatives'' includes an individual occupying a position the pay for which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives, but not any such individual employed by any entity listed in subparagraphs [*(3)*] **(2)** through (9) of paragraph (b) above.

(g) *Employee of the Senate*. The term ''employee of the Senate'' includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs **(1) and** (3) through (9) of paragraph (b) above.

(h) *Employing Office*. The term ''employing office'' means:

. . . . .

(4) the [*Capitol Guide Service*] **Office of Congressional Accessibility Services,** the Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, and the Office of Compliance; or

(5) for the purposes stated in paragraph [*(q)*] **(r)** of this section, the [*General Accounting*] **Government Accountability** Office and the Library of Congress

. . . . . .

(j) *Designated Representative.* The term ''designated representative'' means an individual, firm, or other entity designated in writing by a party to represent the interests of that party in a matter filed with the Office.

. . . . .

—Re-letter subsequent paragraphs—

[*(o)*]**(p)** *General Counsel*. The term ''General Counsel'' means the General Counsel of the Office of Compliance **and any authorized representative or designee of the General Counsel.**

[*(p)*]**(q)** *Hearing Officer*. The term ''Hearing Officer'' means any individual [designated] **appointed** by the Executive Director to preside over a hearing conducted on matters within the Office's jurisdiction.

[*(q)*]**(r)** *Coverage of the* [*General Accounting*] ***Government Accountability*** *Office and the Library of Congress and their Employees*. The term ''employing office'' shall include the [*General Accounting*] **Government Accountability** Office and the Library of Congress, and the term ''covered employee'' shall include employees of the [*General Accounting*] **Government Accountability** Office and the Library of Congress, for purposes of the proceedings and rulemakings described in subparagraphs (1) and (2):

. . . . .

§ 1.03 Filing and Computation of Time

(a) *Method of Filing*. Documents may be filed in person, **electronically, by facsimile (FAX),** or by mail, including express, overnight and other expedited delivery. [*When specifically requested by the Executive Director, or by a Hearing Officer in the case of a matter pending before the Hearing Officer, or by the Board of Directors in the case of an appeal to the Board, any document may also be filed by electronic transmittal in a designated format, with receipt confirmed by electronic transmittal in the same format. Requests for counseling under section 2.03, requests for mediation under section 2.04 and complaints under section 5.01 of these rules may also be filed by facsimile (FAX) transmission. In addition, the Board or a Hearing Officer may order other documents to be filed by FAX. The original copies of documents filed by FAX must also be mailed to the Office no later than the day following FAX transmission.*] The filing of all documents is subject to the limitations set forth below. **The Board, Hearing Officer, the Executive Director, or the General Counsel may, in their discretion, determine the method by which documents may be filed in a particular proceeding, including ordering one or more parties to use mail, FAX, electronic filing, or personal delivery. Parties and their representatives are responsible for ensuring that the Office always has their current postal mailing and e-mail addresses and FAX numbers.**

. . . . .

(2) [***Mailing***] ***By Mail.***

[*(i) If mailed, including express, overnight and other expedited delivery, a request for mediation or a complaint is deemed filed on the date of its receipt in the Office.*] [*(ii) A document,*] **Documents,** [*other than a request for mediation, or a complaint, is*] **are** deemed filed on the date of [*its*] **their** postmark or proof of mailing to the Office. Parties, including those using franked mail, are responsible for ensuring that any mailed document bears a postmark date or other proof of the actual date of mailing. In the absence of a legible postmark a document will be deemed timely **filed** if it is received by the Office at Adams Building, Room LA 200, 110 Second Street, S.E., Washington, D.C. 20540–1999, by mail within five (5) days of the expiration of the applicable filing period.

(3) ***By FAX*** [*Faxing Documents.*] Documents transmitted by FAX machine will be deemed filed on the date received at the Office at 202–426–1913, or[*, in the case of any document to be filed or submitted to the General Counsel,*] on the date received at the Office of the General Counsel at 202–426–1663 **if received by 5:00 PM Eastern Time. Faxed documents received after 5:00 PM Eastern Time will be deemed filed the following business day.** A FAX filing will be timely only if the document is received no later than 5:00 PM Eastern Time on the last day of the applicable filing period. Any party using a FAX machine to file a document bears the responsibility for ensuring both that the document is timely and accurately transmitted and confirming that the Office has received a facsimile of the document. [*The party or individual filing the document may rely on its FAX status report sheet to show that it filed the document in a timely manner, provided that the status report indicates the date of the FAX, the receiver's FAX number, the number of pages included in the FAX, and that transmission was completed.*] **The time displayed as received by the Office on its FAX status report will be used to show the time that the document was filed. When the Office serves a document by FAX, the time displayed as sent by the Office on its FAX status report will be used to show the time that the document was served. A FAX filing cannot exceed 75 pages, inclusive of table of contents, table of authorities, and attachments. Attachments exceeding 75 pages must be submitted to the Office in person or by electronic delivery. The date of filing will be determined by the date the brief, motion, response, or supporting memorandum is received in the Office, rather than the date the attachments, were received in the Office.**

(4) *By Electronic Mail.* Documents transmitted electronically will be deemed filed on the date received at the Office at oocefile@compliance.gov, or on the date received at the Office of the General Counsel at OSH@compliance.gov if received by 5:00 PM Eastern Time. Documents received electronically after 5:00 PM Eastern Time will be deemed filed the following business day. An electronic filing will be timely only if the document is received no later than 5:00 PM Eastern Time on the last day of the applicable filing period. Any party filing a document electronically bears the responsibility for ensuring both that the document is timely and accurately transmitted and for confirming that the Office has received the document. The time displayed as received or sent by the Office will be based on the document's timestamp information and used to show the time that the document was filed or served.

(b) *Service by the Office.* At its discretion, the Office may serve documents by mail, FAX, electronic transmission, or personal or commercial delivery.

[*(b)*]**(c)** *Computation of Time*. All time periods in these rules that are stated in terms of days are calendar days unless otherwise noted. However, when the period of time prescribed is five (5) days or less, intermediate Saturdays, Sundays, [*and*] federal government holidays, **and other full days that the Office**

is officially closed for business shall be excluded in the computation. To compute the number of days for taking any action required or permitted under these rules, the first day shall be the day after the event from which the time period begins to run and the last day for filing or service shall be included in the computation. When the last day falls on a Saturday, Sunday, [*or*] federal government holiday, **or a day the Office is officially closed**, the last day for taking the action shall be the next regular federal government workday.

[*(c)*](d) *Time Allowances for Mailing, **Fax, or Electronic Delivery** of Official Notices.* Whenever a person or party has the right or is required to do some act within a prescribed period after the service of a notice or other document upon him or her and the notice or document is served by [*regular, first-class*] mail, five (5) days shall be added to the prescribed period. [*Only two (2) days shall be added if a document is served by express mail or other form of expedited delivery.*] When documents are served by certified mail, return receipt requested, the prescribed period shall be calculated from the date of receipt as evidenced by the return receipt. **When documents are served electronically or by FAX, the prescribed period shall be calculated from the date of transmission by the Office.**

[*(d) Service or filing of documents by certified mail, return receipt requested. Whenever these rules permit or require service or filing of documents by certified mail, return receipt requested, such documents may also be served or filed by express mail or other forms of expedited delivery in which proof of date of receipt by the addressee is provided.*]

[*§ 9.01*] § 1.04 Filing, Service, and Size Limitations of Motions, Briefs, Responses and Other Documents.

(a) *Filing with the Office; Number **and Format.*** **One copy of requests for counseling and mediation, requests for inspection under OSH, unfair labor practice charges, charges under titles II and III of the ADA,** [*one original and three copies of*] all motions, briefs, responses, and other documents must be filed [*, whenever required,*] with the Office or Hearing Officer. [*However, when a party aggrieved by the decision of a Hearing Officer or a party to any other matter or determination reviewable by the Board files an appeal or other submission with the Board, one original and seven copies of any submission and any responses must be filed with the Office. The Office, Hearing Officer, or Board may also request a*]**A** party [*to submit*] **may file** an electronic version of any submission in a [*designated*] format **designated by the Executive Director, General Counsel, Hearing Officer, or Board**, with receipt confirmed by electronic transmittal in the same format.

(b) *Service.* The parties shall serve on each other one copy of all motions, briefs, responses and other documents filed with the Office, other than the request for counseling, the request for mediation and complaint. Service shall be made by mailing, **by fax or e-mailing,** or by hand delivering a copy of the motion, brief, response or other document to each party, or if represented, the party's representative, on the service list previously provided by the Office. Each of these documents must be accompanied by a certificate of service specifying how, when and on whom service was made. It shall be the duty of each party to notify the Office and all other parties in writing of any changes in the names or addresses on the service list.

. . . . .

(d) *Size Limitations.* Except as otherwise specified [*by the Hearing Officer, or these rules,*] no brief, motion, response, or supporting memorandum filed with the Office shall exceed 35 **double-spaced** pages, [*or 8,750 words,*] exclusive of the table of contents, table of authorities and attachments. The Board, the **Executive Director,** or Hearing Officer may [*waive, raise or reduce*] **modify** this limitation **upon motion and** for good cause shown**;** or on [*its*] **their** own initiative. Briefs, motions, responses, and supporting memoranda shall be on standard letter-size paper (8-1/2″ x 11″). **To the extent that such a filing exceeds 35 double-spaced pages, the Hearing Officer, Board, or Executive Director may, in their discretion, reject the filing in whole or in part, and may provide the parties an opportunity to refile.**

[*§ 9.02*] § 1.05 Signing of Pleadings, Motions and Other Filings; Violation of Rules; Sanctions.

(a) ***Signing.*** Every pleading, motion, and other filing of a party represented by an attorney or other designated representative shall be signed by the attorney or representative. A party who is not represented shall sign the pleading, motion or other filing. **In the case of an electronic filing, an electronic signature is acceptable.** The signature of a representative or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other filing; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

(b) ***Sanctions.*** If a pleading, motion, or other filing is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person who is required to sign. If a pleading, motion, or other filing is signed in violation of this rule, a Hearing Officer or the Board, as appropriate, upon motion or upon [*its*] **their** own initiative, [*shall*] **may** impose [*upon the person who signed it, a represented party, or both,*] an appropriate sanction, which may include [*an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other filing, including a reasonable attorney's fee. A Hearing Officer or the Board, as appropriate, upon motion or its own initiative may also impose an appropriate sanction, which may include*] the sanctions specified in section 7.02[*, for any other violation of these rules that does not result from reasonable error*].

[*§ 1.04*] § 1.06 Availability of Official Information.

(a) *Policy.* It is the policy of the Board, the [*Office*] **Executive Director**, and the General Counsel, except as otherwise ordered by the Board, to make available for public inspection and copying final decisions and orders of the Board and the Office, as specified and described in paragraph (d) below.

. . . . .

(c) *Copies of Forms.* Copies of blank forms prescribed by the Office for the filing of complaints and other actions or requests may be obtained from the Office **or on line at www.compliance.gov**.

. . . . .

(f) *Access by Committees of Congress.* [*At the discretion of the Executive Director, the*] **The** Executive Director**, at his or her discretion,** may provide to the [*Committee on Standards of Official Conduct of the House of Representatives*] **House Committee on Ethics** and the [*Select Committee on Ethics of the Senate*] **U.S. Senate Select Committee on Ethics** access to the records of the hearings and decisions of the Hearing Officers and the Board, including all written and oral testimony in the possession of the Office. The identifying information in these records may be redacted at the discretion of the Executive Director. The Executive Director shall not provide such access until the Executive Director has consulted with the individual filing the complaint at issue, and until a final decision has been entered under section 405(g) or 406(e) of the Act.

[*§ 1.05*] § 1.07 Designation of Representative.

(a) [*An employee, other charging individual or*] **A** party [*a witness, a labor organization, an employing office, or an entity alleged to be responsible for correcting a violation*] wishing to be represented [*by another individual,*] must file with the Office a written notice of designation of representative**. No more than one representative,** [*or*] **firm, or other entity may be designated as representative for a party for the purpose of receiving service, unless approved in writing by the Hearing Officer or Executive Director.** The representative may be, but is not required to be, an attorney. **If the representative is an attorney, he or she may sign the designation of representative on behalf of the party.**

(b) *Service Where There is a Representative.* [*All service*] **Service** of documents shall be [*directed to*] **on** the representative unless **and until such time** as the represented [*individual, labor organization, or employing office*] **party or representative, with notice to the party,** [*specifies otherwise and until such time as that individual, labor organization, or employing office*] notifies the Executive Director, **in writing,** of [*an amendment*] **a modification** or revocation of the designation of representative. Where a designation of representative is in effect, all time limitations for receipt of materials [*by the represented individual or entity*] shall be computed in the same manner as for **those who are** unrepresented [*individuals or entities*]**,** with service of the documents, however, directed to the representative[*, as provided*].

(c) ***Revocation of a Designation of Representative.*** **A revocation of a designation of representative, whether made by the party or by the representative with notice to the party, must be made in writing and filed with the Office. The revocation will be deemed effective the date of receipt by the Office. At the discretion of the Executive Director, General Counsel, Mediator, Hearing Officer, or Board, additional time may be provided to allow the party to designate a new representative as consistent with the Act.**

[*§ 1.06*] § 1.08 [*Maintenance of*] Confidentiality.

(a) *Policy.*[*In accord with section 416 of the Act, it is the policy of*] **Except as provided in sections 416(d), (e), and (f) of the Act,** the Office [*to*] **shall** maintain[*, to the fullest extent possible, the*] confidentiality in counseling, mediation, **and in** [*of*] the proceedings and deliberations **of Hearing Officers and the Board in accordance with sections 416(a), (b), and (c) of the Act.** [*of the participants in proceedings conducted under sections 402, 403, 405 and 406 of the Act and these rules.*]

(b) [*At the time that any individual, employing office or party, including a designated representative, becomes a participant in counseling under section 402, mediation under section 403, the complaint and hearing process under section 405, or an appeal to the Board under section 406 of the Act, or any related proceeding, the Office will advise the participant of the confidentiality requirements of section 416 of the Act and these rules and that sanctions may be imposed for a violation of those requirements.*] ***Participant.*** **For the purposes of this rule, participant means an individual or entity who takes part as either a party, witness, or designated representative in counseling under Section 402 of the Act, mediation under section 403, the complaint and hearing process under section 405, or an appeal to the Board under Section 406 of the Act, or any related proceeding which is expressly or by necessity deemed confidential under the Act or these rules.**

(c) ***Prohibition.*** **Unless specifically authorized by the provisions of the Act or by these rules, no participant in counseling, mediation or other proceedings made confidential under Section 416 of the Act (''confidential proceedings'') may disclose a written or oral communication that is prepared for the purpose of or that**

occurs during counseling, mediation, and the proceedings and deliberations of Hearing Officers and the Board.

(d) *Exceptions.* Nothing in these rules prohibits a party or its representative from disclosing information obtained in confidential proceedings when reasonably necessary to investigate claims, ensure compliance with the Act or prepare its prosecution or defense. However, the party making the disclosure shall take all reasonably appropriate steps to ensure that persons to whom the information is disclosed maintain the confidentiality of such information. These rules do not preclude a Mediator from consulting with the Office with permission from the party that is the subject of the consultation, except that when the covered employee is an employee of the Office a Mediator shall not consult with any individual within the Office who might be a party or witness. These rules do not preclude the Office from reporting statistical information to the Senate and House of Representatives.

(e) *Contents or Records of Confidential Proceedings.* For the purpose of this rule, the contents or records of counseling, mediation or other proceeding includes the information disclosed by participants to the proceedings, and records disclosed by the opposing party, witnesses, or the Office. A participant is free to disclose facts and other information obtained from any source outside of the confidential proceedings. For example, an employing office or its representatives may disclose information about its employment practices and personnel actions, provided that the information was not obtained in a confidential proceeding. However, an employee who obtains that information in mediation or other confidential proceeding may not disclose such information. Similarly, information forming the basis for the allegation of a complaining employee may be disclosed by that employee, provided that the information contained in those allegations was not obtained in a confidential proceeding. However, the employing office or its representatives may not disclose that information if it was obtained in a confidential proceeding.

(f) *Sanctions.* The Executive Director will advise all participants in mediation and hearing at the time they become participants of the confidentiality requirements of Section 416 of the Act and that sanctions may be imposed by the Hearing Officer for a violation of those requirements. No sanctions may be imposed except for good cause and the particulars of which must be stated in the sanction order.

*[§ 1.07 **Breach of Confidentiality Provisions.***

(a) In General. Section 416(a) of the CAA provides that counseling under section 402 shall be strictly confidential, except that the Office and a covered employee may agree to notify the employing office of the allegations. Section 416(b) provides that all mediation shall be strictly confidential. Section 416(c) provides that all proceedings and deliberations of Hearing Officers and the Board, including any related records shall be confidential, except for release of records necessary for judicial actions, access by certain committees of Congress, and, in accordance with section 416(f), publication of certain final decisions. Section 416(c) does not apply to proceedings under section 215 of the Act, but does apply to the deliberations of Hearing Officers and the Board under section 215. See also sections 1.06, 5.04, and 7.12 of these rules.

(b) Prohibition. Unless specifically authorized by the provisions of the CAA or by order of the Board, the Hearing Officer or a court, or by the procedural rules of the Office, no participant in counseling, mediation or other proceedings made confidential under section 416 of the CAA (''confidential proceedings'') may disclose the contents or records of those proceedings to any person or entity, Nothing in these rules prohibits a bona fide representative of a party under section 1.05 from engaging in communications with that party for the purpose of participation in the proceedings, provided that such disclosure is not made in the presence of individuals not reasonably necessary to the representative's representation of that party. Moreover, nothing in these rules prohibits a party or its representative from disclosing information obtained in confidential proceedings for the limited purposes of investigating claims, ensuring compliance with the Act or preparing its prosecution or defense, to the extent that such disclosure is reasonably necessary to accomplish the aforementioned purposes and provided that the party making the disclosure takes all reasonably appropriate steps to ensure that persons to whom the information is disclosed maintain the confidentiality of such information.

(c) Participant. For the purposes of this rule, participant means any individual or party, including a designated representative, that becomes a participant in counseling under section 402, mediation under section 403, the complaint and hearing process under section 405, or an appeal to the Board under section 406 of the Act, or any related proceeding which is expressly or by necessity deemed confidential under the Act or these rules.

(d) Contents or Records of Confidential Proceedings. For the purpose of this rule, the contents or records of counseling, mediation or other proceeding includes information disclosed by participants to the proceedings, and records disclosed by either the opposing party, witnesses or the Office. A participant is free to disclose facts and other information obtained from any source outside of the confidential proceedings. For example, an employing office or its representatives may disclose information about its employment practices and personnel actions, provided that the information was not obtained in a confidential proceeding. However, an employee who obtains that information in mediation or other confidential proceeding may not disclose such information. Similarly, information forming the basis for the allegation of a complaining employee may be disclosed by that employee, provided that the information contained in those allegations was not obtained in a confidential proceeding. However, the employing office or its representatives may not disclose that information if it was obtained a confidential proceeding.

(e) Violation of Confidentiality. Any complaint regarding a violation of the confidentiality provisions must be made to the Executive Director no later than 30 days after the date of the alleged violation. Such complaints may be referred by the Executive Director to a Hearing Officer. The Hearing Officer is also authorized to initiate proceedings on his or her own initiative, or at the direction of the Board, if the alleged violation occurred in the context of Board proceedings. Upon a finding of a violation of the confidentiality provisions, the Hearing Officer, after notice and hearing, may impose an appropriate sanction, which may include any of the sanctions listed in section 7.02 of these rules, as well as any of the following:

(1) an order that the matters regarding which the violation occurred or any other designated facts shall be taken to be established against the violating party for the purposes of the action in accordance with the claim of the other party;

(2) an order refusing to allow the violating party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(3) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing with or without prejudice the action or proceedings or any part thereof, or rendering a judgment by default against the violating party;

(4) in lieu of any of the foregoing orders or in addition thereto, the Hearing Officer shall require the party violating the confidentiality provisions or the representative advising him, or both, to pay, at such time as ordered by the Hearing Officer, the reasonable expenses, including attorney fees, caused by the violation, unless the Hearing Officer finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. Such an order shall be subject to review on appeal of the final decision of the Hearing Officer under section 406 of the Act. No sanctions may be imposed under this section except for good cause and the particulars of which must be stated in the sanction order.]

SUBPART B—PRE-COMPLAINT PROCEDURES APPLICABLE TO CONSIDERATION OF ALLEGED VIOLATIONS OF PART A OF TITLE II OF THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995

§ 2.01 Matters Covered by Subpart B.

(a) These rules govern the processing of any allegation that sections 201 through 206 of the Act have been violated and any allegation of intimidation or reprisal prohibited under section 207 of the Act. Sections 201 through 206 of the Act apply to covered employees and employing offices certain rights and protections of the following laws:

. . . . .

(10) Chapter 35 (relating to veteran's preference) of title 5, United States Code
(11) Genetic Information Nondiscrimination Act of 2008.

(b) This subpart applies to the covered employees and employing offices as defined in section 1.02(b) and (h) of these rules and any activities within the coverage of sections 201 through 206**(a)** and 207 of the Act and referenced above in section 2.01(a) of these rules.

* * * * *

§ 2.03 Counseling.

(a) *Initiating a Proceeding; Formal Request for Counseling.**[In order]*** **T**o initiate a proceeding under these rules **regarding an alleged violation of the Act, as referred to in section 2.01(a), above**, an employee shall file a written request for counseling with the Office***[.]*** ***[**regarding an alleged violation of the Act, as referred to in section 2.01(a), above**.]*** **Individuals wishing to file a formal request for counseling may call the Office for a form to use for this purpose.** ***[**All requests for counseling shall be confidential, unless the employee agrees to waive his or her right to confidentiality under section 2.03(e)(2), below.]***

(b) *Who May Request Counseling.* A covered employee who**, in good faith,** believes that he or she has been or is the subject of a violation of the Act as referred to in section 2.01(a) may formally request counseling.

(c) *When, How and Where to Request Counseling.* A request for counseling must be in writing, and shall be filed pursuant to the requirements of section 2.03(a) of these Rules with the Office of Compliance at Room LA–200, 110 Second Street, S.E., Washington, D.C. 20540–1999; FAX 202–426–1913; TDD 202–426–1912, not later than 180 days after the alleged violation of the Act.

(d) ***[**Purpose**]*** ***Overview*** of **the** *Counseling Period.* **The Office will maintain strict confidentiality throughout the counseling period.** The ***[**purpose of the**]*** counseling period ***[**shall**]*** **should** be **used**: to discuss the employee's concerns and elicit information regarding the matter(s) which the employee believes constitute a violation(s) of the Act; to advise the employee of his or her rights and responsibilities under the Act and the procedures of the Office under these rules; to evaluate the matter; and to assist the employee in achieving an early resolution of the matter, if possible.

(e) *Confidentiality and Waiver.*

(1) Absent a waiver under paragraph 2, below, all counseling shall be **kept** strictly confidential **and shall not be subject to discovery.**

All participants in counseling shall be advised of the requirement for confidentiality and that disclosure of information deemed confidential could result in sanctions later in the proceedings. Nothing in these rules shall prevent a counselor from consulting with personnel within the Office concerning a matter in counseling, except that, when the person being counseled is an employee of the Office, the counselor shall not consult with any individual within the Office who might be a party or witness without the consent of the person requesting counseling. Nothing contained in these rules shall prevent the Executive Director from **compiling and publishing statistical information such as that required by Section 301(h)(3) of the Act,** so long as that statistical information does not reveal the identity of *[the employees]* **an individual employee** *[involved]* or of **an** employing office*[s]* that *[are]* **is** the subject of a **specific** request for counseling.

(2) *[The]* **In accord with section 416(a) of the Act, the** employee and the Office may agree to waive confidentiality *[of]* **during** the counseling process for the limited purpose of **allowing the Office** *[contacting the employing office]* to *[obtain information]* **notify the employing office of the allegations** *[to be used in counseling the employee or to attempt a resolution of any disputed matter(s).]* Such a limited waiver must be written on the form supplied by the Office and signed by both the counselor and the employee.

. . . . .

(g) *Role of Counselor [in Defining Concerns]*. The Counselor *[may]* **shall**:

(1) obtain the name, home and office mailing **and e-mail** addresses, and home and office telephone numbers of the person being counseled;

(2) obtain the name and title of the person(s) whom the employee claims has engaged in a violation of the Act**, e-mail address, if known,** and the employing office in which this person(s) works;

. . . . .

(5) obtain the name, **business and e-mail** addresse**s,** and telephone number of the employee's representative, if any, and whether the representative is an attorney.

*[(i)]***(h)** *Counselor Not a Representative*. The Counselor shall inform the person being counseled that the counselor does not represent either the employing office or the employee. The Counselor provides information **regarding the Act and the Office** and may act as a third-party intermediary with the goals of increasing the individual's understanding of his or her rights and responsibilities under the Act and of promoting the early resolution of the matter.

*[(j)]***(i)** *Duration of Counseling Period*. The period for counseling shall be 30 days, beginning on the date that the request for counseling is *[received by the Office]* **filed by the employee in accordance with section 1.03(a) of these rules,** unless the employee **requests in writing on a form provided by the Office to reduce the period** and the *[Office]* **Executive Director** agrees *[to reduce the period]*.

*[(h)]***(j)** *Role of Counselor in Attempting Informal Resolution*. In order to attempt to resolve the matter brought to the attention of the counselor, the counselor must obtain a waiver of confidentiality pursuant to section 2.03(e)(2) of these rules. If the employee executes such a waiver, the counselor may:

(1) conduct a limited inquiry for the purpose of obtaining any information necessary to attempt an informal resolution or formal settlement;

(2) reduce to writing any formal settlement achieved and secure the signatures of the employee, his or her representative, if any, and a member of the employing office who is authorized to enter into a settlement on the employing office's behalf; and, pursuant to section 414 of the Act and section 9.05 of these rules, seek the approval of the Executive Director. Nothing in this subsection, however, precludes the employee, the employing office or their representatives from reducing to writing any formal settlement.

(k) *Duty to Proceed*. An employee who initiates a proceeding under this part shall be responsible at all times for proceeding, regardless of whether he or she has designated a representative**, and shall notify the Office in writing of any change in pertinent contact information, such as address, e-mail, fax number, etc.** An employee, however, may withdraw from counseling once without prejudice to the employee's right to reinstate counseling regarding the same matter, provided that the request to reinstate counseling **is in writing and** is *[received in]* **filed with** the Office not later than 180 days after the date of the alleged violation of the Act and that counseling on a single matter will not last longer than a total of 30 days.

(l) *Conclusion of the Counseling Period and Notice*. The Executive Director shall notify the employee in writing of the end of the counseling period**[**,**]** by *[certified mail, return receipt requested,]* **first class mail,** *[or by]* personal delivery evidenced by a written receipt, **or electronic transmission**. The Executive Director, as part of the notification of the end of the counseling period, shall inform the employee of the right and obligation, should the employee choose to pursue his or her claim, to file with the Office a request for mediation within 15 days after receipt by the employee of the notice of the end of the counseling period.

(m) *Employees of the Office of the Architect of the Capitol and Capitol Police*.

(1) Where an employee of the Office of the Architect of the Capitol or of the Capitol Police requests counseling under the Act and these rules, the Executive Director**, in his or her sole discretion,** may recommend that the employee use the *[grievance]* **internal** procedures of the Architect of the Capitol or the Capitol Police **pursuant to a Memorandum of Understanding (MOU) between the Architect of the Capitol and the Office or the Capitol Police and the Office addressing certain procedural and notification requirements**. The term ''*[grievance]* **internal** procedure(s)'' refers to **any** internal procedure of the Architect of the Capitol and the Capitol Police**, including grievance procedures referred to in section 401 of the Act,** that can provide a resolution of the matter(s) about which counseling was requested. Pursuant to section 401 of the Act *[and by agreement with the Architect of the Capitol and the Capitol Police Board]*, when the Executive Director makes such a recommendation, the following procedures shall apply:

(i) The Executive Director shall recommend **in writing** to the employee that the employee use the *[grievance]* **internal** procedures of the Architect of the Capitol or of the Capitol Police, as appropriate, for a period generally up to 90 days, unless the Executive Director determines, **in writing, that** a longer period is appropriate *[for resolution of the employee's complaint through the grievance procedures of the Architect of the Capitol or the Capitol Police]*. **Once the employee notifies the Office that he or she is using the internal procedure, the employee shall provide a waiver of confidentiality to allow the Executive Director to notify the Architect of the Capitol or the Capitol Police that the Executive Director has recommended that the employee use the internal procedure.**

(ii) The period during which the matter is pending in the internal procedure shall not count against the time available for counseling or mediation under the Act.

(iii) If the dispute is resolved to the employee's satisfaction, the employee shall so notify the Office within 20 days after the employee has been served with a final decision resulting from the internal procedure.

[(ii)] **(iv)** After *[having contacted the Office and having utilized]* **using** the *[grievance]* **internal** procedures *[of the Architect of the Capitol or of the Capitol Police]*, the employee may notify the Office that he or she wishes to return to the procedures under these rules:

(A) within 60 days after the expiration of the period recommended by the Executive Director, if the matter has not resulted in a final decision **or a decision not to proceed**; or

(B) within 20 days after service of a final decision **or a decision not to proceed,** resulting from the *[grievance]* **internal** procedures *[of the Architect of the Capitol or of the Capitol Police Board]*.

[(iii)] The period during which the matter is pending in the internal grievance procedure shall not count against the time available for counseling or mediation under the Act. If the grievance is resolved to the employee's satisfaction, the employee shall so notify the Office within 20 days after the employee has received service of the final decision resulting from the grievance procedure. If no request to return to the procedures under these rules is received within 60 days after the expiration of the period recommended by the Executive Director the Office will issue a Notice of End of Counseling, as specified in section 2.04(i) of these Rules.*]*

(v) If a request to return to counseling is not made by the employee within the time periods outlined above, the Office will issue a Notice of the End of Counseling.

(2) Notice to Employees who Have Not Initiated Counseling with the Office. When an employee of the Architect of the Capitol or the Capitol Police raises in the internal procedures of the Architect of the Capitol or of the Capitol Police *[Board]* an allegation which may also be raised under the procedures set forth in this subpart, the Architect of the Capitol or the Capitol Police *[Board should]* **shall, in accordance with the MOU with the Office,** advise the employee in writing that a request for counseling about the allegation must be initiated with the Office within 180 days after the alleged violation of law occurred if the employee intends to use the procedures of the Office.

(3) Notice in Final Decisions when Employees Have Not Initiated Counseling with the Office. When an employee raises in the internal procedures of the Architect of the Capitol or of the Capitol Police *[Board]* an allegation which may also be raised under the procedures set forth in this subpart, any *[final]* decision **issued** *[pursuant to the procedures of the Architect of the Capitol or of the Capitol Police Board should]* **under such procedure, shall, pursuant to the MOU with the Office,** include notice to the employee of his or her right to initiate the procedures under these rules within 180 days after the alleged violation occurred.

(4) Notice in Final Decisions when There Has Been a Recommendation by the Executive Director. When the Executive Director has made a recommendation under paragraph 1 above, the Architect of the Capitol or the Capitol **Police** *[Board should]* **shall, pursuant to the MOU with the Office,** include with the final decision notice to the employee of his or her right to resume the procedures under these rules within 20 days after service on the employee of the final decision and shall transmit a copy of the final decision, settlement agreement, or other final disposition of the case to the Executive Director.

§ 2.04 Mediation.

(a) ***[Explanation]*** ***Overview.*** Mediation is a process in which employees, employing offices and their representatives, if any, meet separately and/or jointly with a *[neutral]* **Mediator** trained to assist them in resolving disputes. As *[parties to]* **participants in** the mediation, employees, employing offices, and

their representatives discuss alternatives to continuing their dispute, including the possibility of reaching a voluntary, mutually satisfactory resolution. The [*neutral*] **Mediator** has no power to impose a specific resolution, and the mediation process, whether or not a resolution is reached, is strictly confidential, pursuant to section 416 of the Act.

(b) *Initiation*. Not more than 15 days after receipt by the employee of the notice of the conclusion of the counseling period under section 2.03(l), the employee may file with the Office a written request for mediation. **Except to provide for the services of a Mediator and notice to the employing office, the invocation of mediation shall be kept confidential by the Office.** The request for mediation shall contain the employee's name, **home and e-mail** addresses, [*and*] telephone number, and the name of the employing office that is the subject of the request. Failure to request mediation within the prescribed period [*will*] **may** preclude the employee's further pursuit of his or her claim. **If a request for mediation is not filed within 15 days of receipt of a Notice of the End of Counseling, the case may be closed and the employee will be so notified.**

. . . . .

(d) Selection of [*Neutrals*] ***Mediators****; Disqualification*. Upon receipt of the request for mediation, the Executive Director shall assign one or more [*neutrals*] **Mediators from a master list developed and maintained pursuant to section 403 of the Act,** to commence the mediation process. In the event that a [*neutral*] **Mediator** considers him or herself unable to perform in a neutral role in a given situation, he or she shall withdraw from the matter and immediately shall notify the Office of the withdrawal. Any party may ask the Office to disqualify a [*neutral*] **Mediator** by filing a written request, including the reasons for such request, with the Executive Director. This request shall be filed as soon as the party has reason to believe there is a basis for disqualification. The Executive Director's decision on this request shall be final and unreviewable.

(e) *Duration and Extension*.

. . . . .

(2) The [*Office*] **Executive Director** may extend the mediation period upon the joint written request of the parties, or of the appointed mediator on behalf of the parties[, *to the attention of the Executive Director*]. The request shall be written and filed with the [*Office*] **Executive Director** no later than the last day of the mediation period. The request shall set forth the joint nature of the request and the reasons therefore, and specify when the parties expect to conclude their discussions. Requests for additional extensions may be made in the same manner. Approval of any extensions shall be within the sole discretion of the [*Office*] **Executive Director.**

(f) *Procedures*.

(1) The [*Neutral's*] **Mediator's** Role. After assignment of the case, the [*neutral*] **Mediator** will promptly contact the parties. The [*neutral*] **Mediator** has the responsibility to conduct the mediation, including deciding how many meetings are necessary and who may participate in each meeting. The [*neutral*] **Mediator** may accept and may ask the parties to provide written submissions.

(2) The Agreement to Mediate. At the commencement of the mediation, the [*neutral*] **Mediator** will ask the [*parties*] **participants and/or their representatives** to sign an agreement prepared by the Office (''the Agreement to Mediate''). The Agreement to Mediate will set out the conditions under which mediation will occur, including the requirement that the participants adhere to the confidentiality of the process **and a notice that a breach of the mediation agreement could result in sanctions later in the proceedings.** The Agreement to Mediate will also provide that the parties to the mediation will not seek to have the Counselor or the [*neutral*] **Mediator** participate, testify or otherwise present evidence in **any subsequent administrative action under section 405 or** any civil action under section 408 of the Act or any other proceeding.

(g) Who May Participate. The covered employee[,] **and** the employing office[, *their respective representatives, and the Office may meet, jointly or separately, with the neutral. A representative of the employee and a representative of the employing who has actual authority to agree to a settlement agreement on behalf of the employee or the employing office, as the case may be, must be present at the mediation or must be immediately accessible by telephone during the mediation.*] **may elect to participate in mediation proceedings through a designated representative,** ***provided,*** **that the representative has actual authority to agree to a settlement agreement or has immediate access to someone with actual settlement authority, and** ***provided further,*** **that should the Mediator deem it appropriate at any time, the physical presence in mediation of any party may be specifically requested. The Office may participate in the mediation process, with permission of the Mediator and the parties. The Mediator will determine, as best serves the interests of mediation, whether the participants may meet jointly or separately with the Mediator.**

(h) *Informal Resolutions and Settlement Agreements*. At any time during mediation the parties may resolve or settle a dispute in accordance with section [*9.05*] **9.03** of these rules.

(i) *Conclusion of the Mediation Period and Notice*. If, at the end of the mediation period, the parties have not resolved the matter that forms the basis of the request for mediation, the Office shall provide the employee, and the employing office, and their representatives, with written notice that the mediation period has concluded. The written notice [*to the employee*] will be [*sent by certified mail, return receipt requested, or will be*] personally delivered evidenced by a written receipt, **or sent by first class mail, e-mail, or fax.** [, *and it*] **The notice will specify the date the mediation period ended** and also [*notify*] **provide information about** the employee**'s** [*of his or her*] right to elect to file a complaint with the Office in accordance with section 405 of the Act and section 5.01 of these rules or to file a civil action pursuant to section 408 of the Act and section [*2.06*] **2.07** of these rules.

(j) *Independence of the Mediation Process and the* [*Neutral*] ***Mediator.*** The Office will maintain the independence of the mediation process and the [*neutral*] **Mediator.** No individual, who is appointed by the Executive Director to mediate, may conduct or aid in a hearing conducted under section 405 of the Act with respect to the same matter or shall be subject to subpoena or any other compulsory process with respect to the same matter.

[(k) Confidentiality. Except as necessary to consult with the parties, the parties' their counsel or other designated representatives, the parties to, the mediation, the neutral and the Office shall not disclose, in whole or in part, any information or records obtained through, or prepared specifically for, the mediation process. This rule shall not preclude a neutral from consulting with the Office, except that when the covered employee is an employee of the Office a neutral shall not consult with any individual within the Office who might be a party or witness. This rule shall also not preclude the Office from reporting statistical information to the Senate and House of Representatives that does not reveal the identity of the employees or employing offices involved in the mediation. All parties to the action and their representatives will be advised of the confidentiality requirements of this process and of the sanctions that might be imposed for violating these requirements.]

(k) ***Violation of Confidentiality in Mediation.*** **An allegation regarding a violation of the confidentiality provisions may be made by a party in a mediation to the mediator during the mediation period and, if not resolved by agreement in mediation, to a hearing officer during proceedings brought under Section 405 of the Act**

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§ 2.05 Election of Proceeding.

(a) Pursuant to section 404 of the Act, not later than 90 days after [*a covered employee receives notice of*] the end of mediation under section 2.04(i) of these rules, but no sooner than 30 days after that date, the covered employee may either:

. . . . .

(2) file a civil action in accordance with section 408 of the Act and section [*2.06*] **2.07,** below, in the United States [*District Court*] **district court** for the district in which the employee is employed or for the District of Columbia.

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(b) A covered employee who files a civil action pursuant to section [*2.06*] **408 of the Act**, may not thereafter file a complaint under section [*5.01*] **405 of the Act** on the same matter.

§ 2.06 Certification of the Official Record

(a) Certification of the Official Record shall contain the date the Request for Counseling was made; the date and method of delivery the Notification of End of Counseling Period was sent to the complainant; the date the Notice was deemed by the Office to have been received by the complainant; the date the Request for Mediation was filed; and the date the mediation period ended.

(b) At any time after a complaint has been filed with the Office in accordance with section 405 of the Act and the procedure set out in section 5.01, below; or a civil action filed in accordance with section 408 of the Act and section 2.07, below, in the United States District Court, a party may request and receive from the Office Certification of the Official Record.

(c) Certification of the Official Record will not be provided until after a complaint has been filed with the Office or the Office has been notified that a civil action has been filed in district court.

§ [*2.06*] **2.07 Filing of Civil Action.**

. . . . .

(c) Communication Regarding Civil Actions Filed with District Court. The party filing any civil action with the United States District Court pursuant to sections 404(2) and 408 of the Act shall provide a written notice to the Office that the party has filed a civil action, specifying the district court in which the civil action was filed and the case number. **Failure to notify the Office that such action has been filed may result in delay in the preparation and receipt of the Certification of the Official Record.**

* * * * *

§ 4.02 Authority for Inspection.

(a) Under section 215(c)(1) of the CAA, upon written request of any employing office or covered employee, the General Counsel is authorized to enter without delay and at reasonable times any place **where covered employees work (''place of employment'')** ***[****of employment under the jurisdiction of an employing office****]*; to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein; to question privately any employing office, operator, agent or employee; and to review records **maintained by or under the control of the covered entity.** ***[****required by the CAA and regulations promulgated thereunder, and other records which are directly related to the purpose of the inspection.****]***

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§ 4.03 Requests for Inspections by Employees and Covered Employing Offices.

(a) *By Covered Employees and Representatives.*

(1) Any covered employee or representative of covered employees who believes that a violation of section 215 of the CAA exists in any place of employment ***[****under the jurisdiction of employing offices****]*** may request an inspection of such place of employment by giving notice of the alleged violation to the General Counsel. Any such notice shall be reduced to writing on a form available from the Office, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or the representative of the employees. A copy shall be provided to the employing office or its agent by the General Counsel or the General Counsel's designee no later than at the time of inspection, except that, upon the written request of the person giving such notice, his or her name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available by the General Counsel.

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(b) *By Employing Offices.* Upon written request of any employing office, the General Counsel or the General Counsel's designee shall inspect and investigate places of employment ***[****under the jurisdiction of employing offices****]*** under section 215(c)(1) of the CAA. Any such requests shall be reduced to writing on a form available from the Office.

* * * * *

§ 4.10 Inspection Not Warranted; Informal Review.

(a) If the General Counsel's designee determines that an inspection is not warranted because there are no reasonable grounds to believe that a violation or danger exists with respect to a notice of violation under section 4.03(a), he or she shall notify the party giving the notice ***[****in writing****]*** of such determination **in writing**. The complaining party may obtain review of such determination by submitting **and serving** a written statement of position with the General Counsel***[****,****]*** and ***[****, at the same time, providing****]*** the employing office ***[****with a copy of such statement by certified mail****]***. The employing office may submit **and serve** an opposing written statement of position with the General Counsel***[****,****]*** and ***[****, at the same time, provide****]*** the complaining party ***[****with a copy of such statement by certified mail****]***. Upon the request of the complaining party or the employing office, the General Counsel, at his or her discretion, may hold an informal conference in which the complaining party and the employing office may orally present their views. After considering all written and oral views presented, the General Counsel shall affirm, modify, or reverse the designee's determination and furnish the complaining party and the employing office with written notification of this decision and the reasons therefor. The decision of the General Counsel shall be final and not reviewable.

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§ 4.11 Citations.

(a) If, on the basis of the inspection, the General Counsel believes that a violation of any requirement of section 215 of the CAA, ***[****or of****]*** **including** any **occupational safety or health standard promulgated by the Secretary of Labor under Title 29 of the U.S. Code, section 655, or of any other regulation** ***[****standard****]***, rule or order promulgated pursuant to section 215 of the CAA, has occurred, he or she shall issue to the employing office responsible for correction of the violation, ***[****as determined under section 1.106 of the Board's regulations implementing section 215 of the CAA,****]*** either a citation or a notice of de minimis violations that ***[****have****]*** **has** no direct or immediate relationship to safety or health. An appropriate citation or notice of de minimis violations shall be issued even though, after being informed of an alleged violation by the General Counsel, the employing office immediately abates, or initiates steps to abate, such alleged violation. Any citation shall be issued with reasonable promptness after termination of the inspection. No citation may be issued under this section after the expiration of 6 months following the occurrence of any alleged violation **unless the violation is continuing or the employing office has agreed to toll the deadline for filing the citation.**

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§ 4.13 Posting of Citations.

(a) Upon receipt of any citation under section 215 of the CAA, the employing office shall immediately post such citation, or a copy thereof, unedited, at or near each place an alleged violation referred to in the citation occurred, except as provided below. Where, because of the nature of the employing office's operations, it is not practicable to post the citation at or near each place of alleged violation, such citation shall be posted, unedited, in a prominent place where it will be readily observable by all affected employees. For example, where employing offices are engaged in activities which are physically dispersed, the citation may be posted at the location to which employees report each day. Where employees do not primarily work at or report to a single location, the citation may be posted at the location from which the employees operate to carry out their activities. **When a citation contains security information as defined in Title 2 of the U.S. Code, section 1979, the General Counsel may edit or redact the security information from the copy of the citation used for posting or may provide to the employing office a notice for posting that describes the alleged violation without referencing the security information.** The employing office shall take steps to ensure that the citation **or notice** is not altered, defaced, or covered by other material. Notices of de minimis violations need not be posted.

(b) Each citation, **notice,** or a copy thereof, shall remain posted until the violation has been abated, or for 3 working days, whichever is later. The pendency of any proceedings regarding the citation shall not affect its posting responsibility under this section unless and until the Board issues a final order vacating the citation.

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* * * * *

§ 4.15 Informal Conferences.

At the request of an 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 issued by the General Counsel. Any settlement entered into by the parties at such conference shall be subject to the approval of the Executive Director under section 414 of the CAA and section ***[****9.05****]*** **9.03** of these rules. If the conference is requested by the employing office, an affected employee or the employee's representative shall be afforded an opportunity to participate, at the discretion of the General Counsel. If the conference is requested by an employee or representative of employees, the employing office shall be afforded an opportunity to participate, at the discretion of the General Counsel. Any party may be represented by counsel at such conference.

* * * * *

SUBPART E—COMPLAINTS

§ 5.01 Complaints.

(a) *Who May File.*

(1) An employee who has completed **the** mediation **period** under section 2.04 may timely file a complaint with the Office alleging any violation of sections 201 through 207 of the Act***[****.****]*****, under the Genetic Information Nondiscrimination Act, or any other statute made applicable under the Act.**

(2) The General Counsel may **timely** file a complaint alleging a violation of section 210, 215 or 220 of the Act.

(b) *When to File.*

(1) A complaint may be filed by an employee no sooner than 30 days after the date of receipt of the notice under section 2.04(i), but no later than 90 days after receipt of that notice. **In cases where a complaint is filed with the Office sooner than 30 days after the date of receipt of the notice under section 2.04(i), the Executive Director, at his or her discretion, may return the complaint to the employee for filing during the prescribed period without prejudice and with an explanation of the prescribed period of filing.**

. . . . .

(c) *Form and Contents.*

(1) *Complaints Filed by Covered Employees.* A complaint shall be **in writing and may be** written or typed on a complaint form available from the Office. All complaints shall be signed by the covered employee, or his or her representative, and shall contain the following information:

(i) the name, mailing and **e-mail** addresses, and telephone number(s) of the complainant;

. . . . .

(v) a brief description of why the complainant believes the challenged conduct is a violation of the Act or **the relevant sections of the Genetic Information Nondiscrimination Act** and the section(s) of the Act involved;

. . . . .

(vii) the name, **mailing and e-mail** addresses, and telephone number of the representative, if any, who will act on behalf of the complainant.

(2) *Complaints Filed by the General Counsel.* A complaint filed by the General Counsel shall be in writing, signed by the General Counsel or his designee and shall contain the following information:

(i) the name, **mail and e-mail** addresses**, if available**, and telephone number of, as applicable, (A) each entity responsible for correction of an alleged violation of section 210(b), (B) each employing office alleged to have violated section 215, or (C) each employing office and/or labor organization alleged to have violated section 220, against which complaint is brought;

. . . . .

(e) *Service of Complaint.* Upon receipt of a complaint or an amended complaint, the Office shall serve the respondent, or its designated representative, by hand delivery **[***or certified mail***]** **or first class mail, e-mail, or facsimile** with a copy of the complaint or amended complaint and **[***a copy of these rules***]** **written notice of the availability of these rules at www.compliance.gov. A copy of these rules may also be provided if requested by either party.** The Office shall include a service list containing the names and addresses of the parties and their designated representatives.

(f) *Answer.* Within 15 days after receipt of a copy of a complaint or an amended complaint, the respondent shall file an answer with the Office and serve one copy on the complainant. **[***The answer shall contain a statement of the position of the respondent on each of the issues raised in the complaint or amended complaint, including admissions, denials, or explanations of each allegation made in the complaint and any affirmative defenses or other defenses to the complaint.***]** **In answering a complaint, a party must state in short and plain terms its defenses to each claim asserted against it and admit or deny the allegations asserted against it by an opposing party.** Failure to **[***file an answer***]** **deny an allegation, other than one relating to the amount of damages,** or to raise a claim or defense as to any allegation(s) shall constitute an admission of such allegation(s). Affirmative defenses not raised in an answer that could have reasonably been anticipated based on the facts alleged in the complaint shall be deemed waived. A respondent's motion for leave to amend an answer to interpose a denial or affirmative defense will ordinarily be granted unless to do so would unduly prejudice the rights of the other party or unduly delay or otherwise interfere with or impede the proceedings.

(g) *Motion to Dismiss.* In addition to an answer, a respondent may file a motion to dismiss, or other responsive pleading with the Office and serve one copy on the complainant. Responses to any motions shall be in compliance with section 1.04(c) of these rules

(h) *Confidentiality.* The fact that a complaint has been filed with the Office by a covered employee shall be kept confidential by the Office, except as allowed by these rules.

§ 5.02 Appointment of the Hearing Officer.

Upon the filing of a complaint, the Executive Director will appoint an independent Hearing Officer, who shall have the authority specified in sections 5.03 and 7.01(b) below. The Hearing Officer shall not be the Counselor involved in or the **[***neutral***]** **Mediator** who mediated the matter under sections 2.03 and 2.04 of these rules.

§ 5.03 Dismissal, Summary Judgment and Withdrawal of Complaints.

. . . . .

(f) *Withdrawal of Complaint by Complainant.* At any time a complainant may withdraw his or her own complaint by filing a notice with the Office for transmittal to the Hearing Officer and by serving a copy on the employing office or representative. Any such withdrawal must be approved by the Hearing Officer **and may be with or without prejudice to refile at the Hearing Officer's discretion, consistent with section 404 of the CAA.**

(g) *Withdrawal of Complaint by the General Counsel.* At any time prior to the opening of the hearing the General Counsel may withdraw his complaint by filing a notice with the Executive Director and the Hearing Officer and by serving a copy on the respondent. After opening of the hearing, any such withdrawal must be approved by the Hearing Officer **and may be with or without prejudice to refile at the Hearing Officer's discretion, consistent with section 404 of the CAA.**

(h) *Withdrawal From a Case by a Representative.* A representative must provide sufficient notice to the Hearing Officer and the parties of record of his or her withdrawal. Until the party designates another representative in writing, the party will be regarded as *pro se.*

§ 5.04 Confidentiality.

Pursuant to section 416(c) of the Act, except as provided in sub-sections 416(d), (e) and (f), all proceedings and deliberations of Hearing Officers and the Board, including any related records, shall be confidential. Section 416(c) does not apply to proceedings under section 215 of the Act, but does apply to the deliberations of Hearing Officers and the Board under section 215. A violation of the confidentiality requirements of the Act and these rules **[***could***]** **may** result in the imposition of **procedural or evidentiary** sanctions. **[***Nothing in these rules shall prevent the Executive Director from reporting statistical information to the Senate and House of Representatives, so long as that statistical information does not reveal the identity of the employees involved or of employing offices that are the subject of a matter.***]** See also sections **[***1.06***]** **1.08** **[***1.07***]** **1.09** and 7.12 of these rules.

SUBPART F—DISCOVERY AND SUBPOENAS

§ 6.01 Discovery. (a) **[***Explanation***]** ***Description.*** Discovery is the process by which a party may obtain from another person, including a party, information, not privileged, reasonably calculated to lead to the discovery of admissible evidence, for the purpose of assisting that party in developing, preparing and presenting its case at the hearing. **No discovery, oral or written, by any party shall** **[***This provision shall not be construed to permit any discovery, oral or written, to***]** be taken **of or** from **an** employees of the Office **of Compliance,** **[***or the***]** Counselor**[***(s)***]**, or **Mediator** **[***the neutral(s) involved in counseling and mediation.***]****, including files, records, or notes produced during counseling and mediation and maintained by the Office.**

(b) ***Initial Disclosure.*** **[***Office Policy Regarding Discovery. It is the policy of the Office to encourage the early and voluntary exchange of relevant and material nonprivileged information between the parties, including the names and addresses of witnesses and copies of relevant and material documents, and to encourage Hearing Officers to develop procedures which allow for the greatest exchange of relevant and material information and which minimizes the need for parties to formally request such information.***]** **Within 14 days after the pre-hearing conference or as soon as the information is known, and except as otherwise stipulated or ordered by the Hearing Officer, a party must, without awaiting a discovery request, provide to the other parties: the name and, if known, mail and e-mail addresses and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses; and a copy or a description by category and location of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.**

(c) *Discovery Availability.* Pursuant to section 405(e) of the Act, the Hearing Officer in his or her discretion may permit reasonable prehearing discovery. In exercising that discretion, the Hearing Officer may be guided by the Federal Rules of Civil Procedure **and the underlying statute.**

(1) The **[***Hearing Officer may authorize***]** **parties may take** discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection or other purposes; physical and mental examinations; and requests for admission.

(2) The Hearing Officer may **adopt standing orders** or make any order setting forth the forms and extent of discovery, including orders limiting the number of depositions, interrogatories, and requests for production of documents, and may also limit the length of depositions.

. . . . .

(d) *Claims of Privilege.*

(1) Information Withheld. Whenever a party withholds information otherwise discoverable under these rules by claiming that it is privileged or confidential or subject to protection as hearing or trial preparation materials, the party shall make the claim expressly **in writing** and shall describe the nature of the documents, communications or things not produced or disclosed in a manner that, without revealing the information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection. **A party must make a claim for privilege no later than the due date for the production of the information. (2) Information Produced As Inadvertent Disclosure. If information produced in discovery is subject to a claim of privilege or of protection as hearing preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the Hearing Officer or the Board under seal for a determination of the claim. The producing party must preserve the information until the claim is resolved.**

§ 6.02 Request for Subpoena.

(a) *Authority to Issue Subpoenas.* At the request of a party, a Hearing Officer may issue subpoenas for the attendance and testimony of witnesses and for the production of correspondence, books, papers, documents, or other records. The attendance of witnesses and the production of records may be required from any place within the United States. However, no subpoena **requested by any**

party may be issued for the attendance or testimony of an employee [*with*] of the Office of Compliance, a Counselor or a Mediator, acting in their official capacity, including files, records, or notes produced during counseling and mediation and maintained by the Office. Employing offices shall make their employees available for discovery and hearing without requiring a subpoena.

. . . . .

(d) *Rulings*. The Hearing Officer shall promptly rule on the request for the subpoena.

* * * * *

SUBPART G—HEARINGS

§ 7.01 The Hearing Officer.

. . . . .

(b) *Authority*. Hearing Officers shall conduct fair and impartial hearings and take all necessary action to avoid undue delay in the disposition of all proceedings. They shall have all powers necessary to that end unless otherwise limited by law, including, but not limited to, the authority to:

. . . . .

(14) maintain and enforce the confidentiality of proceedings; and

. . . . .

§ 7.02 Sanctions.

. . . . .

(b) The Hearing Officer may impose sanctions upon the parties under, but not limited to, the circumstances set forth in this section.

(1) *Failure to Comply with an Order*. When a party fails to comply with an order (including an order for the taking of a deposition, for the production of evidence within the party's control, or for production of witnesses), the Hearing Officer may:

[*(a)*](A) draw an inference in favor of the requesting party on the issue related to the information sought;

[*(b)*](B) stay further proceedings until the order is obeyed;

[*(c)*](C) prohibit the party failing to comply with such order from introducing evidence concerning, or otherwise relying upon, evidence relating to the information sought;

[*(d)*](D) permit the requesting party to introduce secondary evidence concerning the information sought;

[*(e)*](E) strike, in whole or in part, [*any part of*] the complaint, briefs, answer, or other submissions of the party failing to comply with the order, as appropriate;

[*(f)*](F) direct judgment against the noncomplying party in whole or in part.[*; or*]

[*(g) order that the non-complying party, or the representative advising that party, pay all or part of the attorney's fees and reasonable expenses of the other party or parties or of the Office, caused by such non-compliance, unless the Hearing Officer or the Board finds that the failure was substantially justified or that other circumstances make an award of attorney's fees and/or expenses unjust.*]

(2) *Failure to Prosecute or Defend*. If a party fails to prosecute or defend a position, the Hearing Officer may dismiss the action with prejudice or [*rule for the complainant*] decide the matter, where appropriate.

. . . . .

(4) *Filing of frivolous claims*. If a party files a frivolous claim, the Hearing Officer may dismiss the claim, *sua sponte*, in whole or in part, with prejudice or decide the matter for the party alleging the filing of the frivolous claim.

(5) *Failure to maintain confidentiality*. An allegation regarding a violation of the confidentiality provisions may be made to a Hearing Officer in proceedings under Section 405 of the CAA. If, after notice and hearing, the Hearing Officer determines that a party has violated the confidentiality provisions, the Hearing Officer may:

(A) direct that the matters related to the breach of confidentiality or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(B) prohibit the party breaching confidentiality from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(C) strike the pleadings in whole or in part;

(D) stay further proceedings until the breach of confidentiality is resolved to the extent possible;

(E) dismiss the action or proceeding in whole or in part; or

(F) render a default judgment against the party breaching confidentiality.

(c) No sanctions may be imposed under this section except for good cause and the particulars of which must be stated in the sanction order.

* * * * *

§ 7.04 Motions and Prehearing Conference.

. . . . .

(b) *Scheduling of the Prehearing Conference*. Within 7 days after assignment, the Hearing Officer shall serve on the parties and their designated representatives written notice setting forth the time, date, and place of the prehearing conference, except that the Executive Director may, for good cause, extend up to an additional 7 days the time for serving notice of the prehearing conference.

(c) *Prehearing Conference Memoranda*. The Hearing Officer may order each party to prepare a prehearing conference memorandum. At his or her discretion, the Hearing Officer may direct the filing of the memorandum after discovery by the parties has concluded. [*That*] The memorandum may include:

. . . . .

(3) the specific relief, including, where known, a calculation of [*the amount of*] any monetary relief [*,*] or damages that is being or will be requested;

(4) the names of potential witnesses for the party's case, except for potential impeachment or rebuttal witnesses, and the purpose for which they will be called and a list of documents that the party is seeking from the opposing party, and, if discovery was permitted, the status of any pending request for discovery. (It is not necessary to list each document requested. Instead, the party may refer to the request for discovery.); and

. . . . .

(d) At the prehearing conference, the Hearing Officer may discuss the subjects specified in paragraph (c) above and the manner in which the hearing will be conducted [*and proceed*]. In addition, the Hearing Officer may explore settlement possibilities and consider how the factual and legal issues might be simplified and any other issues that might expedite the resolution of the dispute. The Hearing Officer shall issue an order, which recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and which limits the issues to those not disposed of by admissions, stipulations, or agreements of the parties. Such order, when entered, shall control the course of the proceeding, subject to later modification by the Hearing Officer by his or her own motion or upon proper request of a party for good cause shown.

§ 7.05 Scheduling the Hearing.

. . . . .

(b) *Motions for Postponement or a Continuance*. Motions for postponement or for a continuance by either party shall be made in writing to the [*Office*] Hearing Officer, shall set forth the reasons for the request, and shall state whether the opposing party consents to such postponement. Such a motion may be granted by the Hearing Officer upon a showing of good cause. In no event will a hearing commence later than 90 days after the filing of the complaint.

§ 7.06 Consolidation and Joinder of Cases.

. . . . .

(b) *Authority*. The Executive Director prior to the assignment of a complaint to a Hearing Officer; a Hearing Officer during the hearing; or the Board [*, the Office, or a Hearing Officer*] during an appeal may consolidate or join cases on their own initiative or on the motion of a party if to do so would expedite processing of the cases and not adversely affect the interests of the parties, taking into account the confidentiality requirements of section 416 of the Act.

§ 7.07 Conduct of Hearing; Disqualification of Representatives.

. . . . .

(c) No later than the opening of the hearing, or as otherwise ordered by the Hearing Officer, each party shall submit to the Hearing Officer and to the opposing party typed lists of the hearing exhibits and the witnesses expected to be called to testify, excluding impeachment or rebuttal witnesses [*, expected to be called to testify*].

. . . . .

(f) Failure of either party to appear, present witnesses, or respond to an evidentiary order may result in an adverse finding or ruling by the Hearing Officer. At the discretion of the Hearing Officer, the hearing may also be held in the absence of the complaining party if the representative for that party is present.

[*(f)*](g) If the Hearing Officer concludes that a representative of an employee, a witness, a charging party, a labor organization, an employing office, or an entity alleged to be responsible for correcting a violation has a conflict of interest, he or she may, after giving the representative an opportunity to respond, disqualify the representative. In that event, within the time limits for hearing and decision established by the Act, the affected party shall be afforded reasonable time to retain other representation.

§ 7.08 Transcript.

. . . . .

(b) *Corrections*. Corrections to the official transcript will be permitted. Motions for correction must be submitted within 10 days of service of the transcript upon the [*party*] parties. Corrections of the official transcript will be permitted only upon approval of the Hearing Officer. The Hearing Officer may make corrections at any time with notice to the parties.

* * * * *

§ 7.12 Confidentiality.

(a) Pursuant to section 416 of the Act and section 1.08 of these Rules, all proceedings and deliberations of Hearing Officers and the Board, including the transcripts of hearings and any related records, shall be confidential, except as specified in sections 416(d), (e),

and (f) of the Act **and section 1.08(d) of these Rules**. All parties to the proceeding and their representatives, and witnesses who appear at the hearing, will be advised of the importance of confidentiality in this process and of their obligations, subject to sanctions, to maintain it. This provision shall not apply to proceedings under section 215 of the Act, but shall apply to the deliberations of Hearing Officers and the Board under that section.

(b) *Violation of Confidentiality.* An allegation regarding a violation of confidentiality occurring during a hearing may be resolved by a Hearing Officer in proceedings under Section 405 of the CAA. After providing notice and an opportunity to the parties to be heard, the Hearing Officer, in accordance with section 1.08(f) of these Rules, may make a finding of a violation of confidentiality and impose appropriate procedural or evidentiary sanctions, which may include any of the sanctions listed in section 7.02 of these Rules.

§ 7.13 Immediate Board Review of a Ruling by a Hearing Officer.

. . . . .

(b) *Time for Filing.* A motion by a party for interlocutory review of a ruling of the Hearing Officer shall be filed with the Hearing Officer within 5 days after service of the ruling upon the parties. The motion shall include arguments in support of both interlocutory review and the determination requested to be made by the Board upon review. Responses, if any, shall be filed with the Hearing Officer within 3 days after service of the motion.

[*(b)***](c)** *Standards for Review.* In determining whether to **certify and** forward a request for interlocutory review to the Board, the Hearing Officer shall consider **all of** the following:

. . . . .

[*(c) Time for Filing. A motion by a party for interlocutory review of a ruling of the Hearing Officer shall be filed with the Hearing Officer within 5 days after service of the ruling upon the parties. The motion shall include arguments in support of both interlocutory review and the determination requested to be made by the Board upon review. Responses, if any, shall be filed with the Hearing Officer within 3 days after service of the motion.***]**

(d) *Hearing Officer Action.* If **all** the conditions set forth in paragraph **[***(b)***](c)** above are met, the Hearing Officer shall **certify and** forward a request for interlocutory review to the Board for its immediate consideration. Any such submission shall explain the basis on which the Hearing Officer concluded that the standards in paragraph [(b)**](c)** have been met. **The decision of the Hearing Officer to forward or decline to forward a request for review is not appealable.**

(e) *Grant of Interlocutory Review Within Board's Sole Discretion.* **Upon the Hearing Officer's certification and decision to forward a request for review, [***T***]**the Board, in its sole discretion, may grant interlocutory review. **The Board's decision to grant or deny interlocutory review is not appealable.**

. . . . .

[*(g) Denial of Motion not Appealable; Mandamus. The grant or denial of a motion for a request for interlocutory review shall not be appealable. The Hearing Officer shall promptly bring a denial of such a motion, and the reasons therefor, to the attention of the Board. If, upon consideration of the motion and the reason for denial, the Board believes that interlocutory review is warranted, it may grant the review sua sponte. In addition, the Board may in its discretion, in extraordinary circumstances, entertain directly from a party a writ of mandamus to review a ruling of a Hearing Officer.***]**

[*(h)***](g)** *Procedures before Board.* Upon its **[***acceptance of a ruling of the Hearing Officer for***] decision to grant** interlocutory review, the Board shall issue an order setting forth the procedures that will be followed in the conduct of that review.

[*(i)***](h)** *Review of a Final Decision.* Denial of interlocutory review will not affect a party's right to challenge rulings, which are otherwise appealable, as part of an appeal to the Board under section 8.01 from the Hearing Officer's decision issued under section 7.16 of these rules.

§ 7.14 Proposed Findings of Fact and Conclusions of Law; Posthearing Briefs.

[*(a)***]** *May be* **[***Filed***] *Required.*** The Hearing Officer may **[***permit***] require** the parties to file **proposed findings of fact and conclusions of law and/or** posthearing briefs on the factual and the legal issues presented in the case.

[*(b) Length. No principal brief shall exceed 50 pages, or 12,500 words, and no reply brief shall exceed 25 pages, or 6,250 words, exclusive of tables and pages limited only to quotations of statutes, rules, and the like. Motions to file extended briefs shall be granted only for good cause shown; the Hearing Officer may in his or her discretion also reduce the page limits. Briefs in excess of 10 pages shall include an index and a table of authorities.*

*(c) Format. Every brief must be easily readable. Briefs must have double spacing between each line of text, except for quoted texts and footnotes, which may be single-spaced.***]**

§ 7.15 Closing the Record of the Hearing.

(a) Except as provided in section 7.14, the record shall be closed at the conclusion of the hearing. However, when the Hearing Officer allows the parties to submit **argument, briefs, documents or** additional evidence previously identified for introduction, **the record will remain open for as much time as the Hearing Officer grants for that purpose [***additional evidence previously identified for introduction, the Hearing Officer may allow an additional period before the conclusion of the hearing as is necessary for that purpose***]**.

(b) Once the record is closed, no additional evidence or argument shall be accepted into the hearing record except upon a showing that new and material evidence has become available that was not available despite due diligence prior to the closing of the record **or it is in rebuttal to new evidence or argument submitted by the other party just before the record closed. [***However, the***] The** Hearing Officer shall **also** make part of the record any **[***motions for attorney fees, supporting documentation, and determinations thereon, and***]** approved correction to the transcript.

§ 7.16 Hearing Officer Decisions; Entry in Records of the Office; Corrections to the Record; Motions to Alter, Amend or Vacate the Decision.

. . . . .

(b) **The Hearing Officer's written decision shall:**

(1) state the issues raised in the complaint;

(2) describe the evidence in the record;

(3) contain findings of fact and conclusions of law, and the reasons or bases therefore, on all the material issues of fact, law, or discretion that were presented on the record;

(4) contain a determination of whether a violation has occurred; and

(5) order such remedies as are appropriate under the CAA.

[*(b)***](c)** Upon issuance, the decision and order of the Hearing Officer shall be entered into the records of the Office.

[*(c)***](d)** The Office shall promptly provide a copy of the decision and order of the Hearing Officer to the parties.

[*(d)***](e)** If there is no appeal of a decision and order of a Hearing Officer, that decision becomes a final decision of the Office, which is subject to enforcement under section 8.03 of these rules.

(f) Corrections to the Record. After a decision of the Hearing Officer has been issued, but before an appeal is made to the Board, or in the absence of an appeal, before the decision becomes final, the Hearing Officer may issue an erratum notice to correct simple errors or easily correctible mistakes. The Hearing Officer may do so on motion of the parties or on his or her own motion with or without advance notice.

(g) After a decision of the Hearing Officer has been issued, but before an appeal is made to the Board, or in the absence of an appeal, before the decision becomes final, a party to the proceeding before the Hearing Officer may move to alter, amend or vacate the decision. The moving party must establish that relief from the decision is warranted because: (1) of mistake, inadvertence, surprise, or excusable neglect; (2) there is newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new hearing; (3) there has been fraud, misrepresentation, or misconduct by an opposing party; (4) the decision is void; or (5) the decision has been satisfied, released, or discharged; it is based on an earlier decision that has been reversed or vacated; or applying it prospectively is no longer equitable. The motion shall be filed within 15 days after service of the Hearing Officer's decision. No response shall be filed unless the Hearing Officer so orders. The filing and pendency of a motion under this provision shall not relieve a party of the obligation to file a timely appeal or operate to stay the action of the Hearing Officer unless so ordered by the Hearing Officer.

SUBPART H—PROCEEDINGS BEFORE THE BOARD

§ 8.01 Appeal to the Board.

(a) No later than 30 days after the entry of the **final** decision and order of the Hearing Officer in the records of the Office, an aggrieved party may seek review of that decision and order by the Board by filing with the Office a petition for review by the Board. The appeal must be served on the opposing party or its representative.

. . . . .

(3) **[***Upon written delegation by the Board,***] In any case in which the Board has not rendered a determination on the merits,** the Executive Director is authorized to**:** determine any request for extensions of time to file any post-petition for review document or submission with the Board **[***in any case in which the Executive Director has not rendered a determination on the merits,***]; determine any request for enlargement of page limitation of any post-petition for review document or submission with the Board; or require proof of service where there are questions of proper service. [***Such delegation shall continue until revoked by the Board.***]**

. . . . .

(d) Upon appeal, the Board shall issue a written decision setting forth the reasons for its decision. The Board may **dismiss the appeal or** affirm, reverse, modify or remand the decision and order of the Hearing Officer in whole or in part. Where there is no remand the decision of the Board shall be entered in the records of the Office as the final decision of the Board and shall be subject to judicial review.

(e) The Board may remand the matter to **[***the***] a** Hearing Officer for further action or proceedings, including the reopening of the record for the taking of additional evidence. **The decision by the Board to remand a case is not subject to judicial review under Section 407 of the Act. The procedures for a remanded hearing shall be governed by subparts F, G, and H of these Rules.** The Hearing Officer shall render a decision or report to the Board, as ordered, at the conclusion of proceedings on the remanded matters. **[***Upon receipt of the decision or report, the Board shall determine whether the views of the parties on the content of the decision or report*

should be obtained in writing and, where necessary, shall fix by order the time for the submission of those views.] A decision of the Board following completion of the remand shall be entered in the records of the Office as the final decision of the Board and shall be subject to judicial review **under Section 407 of the Act.**

. . . . .

(h) *Record.* The **docket sheet,** complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, stipulations, exhibits, documentary evidence, any portions of depositions admitted into evidence, **docketed Memoranda for the Record, or correspondence between the Office and the parties**, and the transcript of the hearing (together with any electronic recording of the hearing if the original reporting was performed electronically) together with the Hearing Officer's decision and the petition for review, any response thereto, any reply to the response and any other pleadings shall constitute the record in the case.

. . . . .

(j) An appellant may move to withdraw a petition for review at any time before the Board renders a decision. The motion must be in writing and submitted to the Board. The Board, at its discretion, may grant such a motion and take whatever action is required.

§ 8.02 Reconsideration.

After a final decision or order of the Board has been issued, a party to the proceeding before the Board, who can establish in its moving papers that reconsideration is necessary because the Board has overlooked or misapprehended points of law or fact, may move for reconsideration of such final decision or order. The motion shall be filed within 15 days after service of the Board's decision or order. No response shall be filed unless the Board so orders. The filing and pendency of a motion under this provision shall not relieve a party of the obligation to file a timely appeal or operate to stay the action of the Board unless so ordered by the Board. **The decision to grant or deny a motion for reconsideration is within the sole discretion of the Board and is not appealable.**

§ 8.03 Compliance with Final Decisions, Requests for Enforcement.

(a) Unless the Board has, in its discretion, stayed the final decision of the Office during the pendency of an appeal pursuant to section 407 of the Act, and except as provided in sections 210(d)(5) and 215(c)(6) **of the Act**, a party required to take any action under the terms of a final decision of the Office shall carry out its terms promptly, and shall within 30 days after the decision or order becomes final and goes into effect by its terms, provide the Office and all other parties to the proceedings with a compliance report specifying the manner in which compliance with the provisions of the decision or order has been accomplished. If complete compliance has not been accomplished within 30 days, the party required to take any such action shall submit a compliance report specifying why compliance with any provision of the decision or order has not yet been fully accomplished, the steps being taken to assure full compliance, and the anticipated date by which full compliance will be achieved. **A party may also file a petition for attorneys fees and/or damages unless the Board has, in its discretion, stayed the final decision of the Office during the pendency of the appeal pursuant to Section 407 of the Act.**

. . . . .

(d) **To the extent provided in Section 407(a) of the Act and Section 8.04 of this section, the appropriate** *[Any]* party may petition the Board for enforcement of a final decision of the Office or the Board. The petition shall specifically set forth the reasons why the petitioner believes enforcement is necessary.

. . . . .

* * * * *

§ 8.05 Application for Review of an Executive Director Action.

For additional rules on the procedures pertaining to the Board's review of an Executive Director action in Representation proceedings, refer to Parts 2422.30–31 of the Substantive Regulations of the Board, available at www.compliance.gov.

§ 8.06 Expedited Review of Negotiability Issues.

For additional rules on the procedures pertaining to the Board's expedited review of negotiability issues, refer to Part 2424 of the Substantive Regulations of the Board, available at www.compliance.gov.

§ 8.07 Review of Arbitration Awards.

For additional rules on the procedures pertaining to the Board's review of arbitration awards, refer to Part 2425 of the Substantive Regulations of the Board, available at www.compliance.gov.

§ 8.08 Procedures of the Board in Impasse Proceedings.

For additional rules on the procedures of the Board in impasse proceedings, refer to Part 2471 of the Substantive Regulations of the Board, available at www.compliance.gov.

SUBPART I—OTHER MATTERS OF GENERAL APPLICABILITY

[§ 9.01 Filing, Service and Size Limitations of Motions, Briefs, Responses and other Documents.

§ 9.02 Signing of Pleadings, Motions and Other Filings; Violations of Rules; Sanctions]

[§ 9.03] **§ 9.01 Attorney's Fees and Costs**

[§ 9.04] **§ 9.02 Ex parte Communications**

[§ 9.05] **§ 9.03 Informal Resolutions and Settlement Agreements**

[§ 9.06] **§ 9.04 Revocation, Amendment or Waiver of Rules**

[§ 9.01 Filing, Service, and Size Limitations of Motions, Briefs, Responses and Other Documents.

(a) Filing with the Office; Number. One original and three copies of all motions, briefs, responses, and other documents, must be filed, whenever required, with the Office or Hearing Officer. However, when a party aggrieved by the decision of a Hearing Officer or a party to any other matter or determination reviewable by the Board files an appeal or other submission with the Board, one original and seven copies of any submission and any responses must be filed with the Office. The Office, Hearing Officer, or Board may also request a party to submit an electronic version of any submission in a designated format, with receipt confirmed by electronic transmittal in the same format.

(b) Service. The parties shall serve on each other one copy of all motions, briefs, responses and other documents filed with the Office, other than the request for counseling, the request for mediation and complaint. Service shall be made by mailing or by hand delivering a copy of the motion, brief, response or other document to each party, or if represented, the party's representative, on the service list previously provided by the Office. Each of these documents, must be accompanied by a certificate of service specifying how, when and on whom service was made. It shall be the duty of each party to notify the Office and all other parties in writing of any changes in the names or addresses on the service list.

(c) Time Limitations for Response to Motions or Briefs and Reply. Unless otherwise specified by the Hearing Officer or these rules, a party shall file a response to a motion or brief within 15 days of the service of the motion or brief upon the party. Any reply to such response shall be filed and served within 5 days of the service of the response. Only with the Hearing Officer's advance approval may either party file additional responses or replies.

(d) Size Limitations. Except as otherwise specified by the Hearing Officer or these rules, no brief, motion, response, or supporting memorandum filed with the Office shall exceed 35 pages, or 8,750 words, exclusive of the table of contents, table of authorities and attachments. The Board, the Office, Executive Director, or Hearing Officer may waive, raise or reduce this limitation for good cause shown or on its own initiative. Briefs, motions, responses, and supporting memoranda shall be on standard letter-size paper (8-1/2″ x 11″).

§ 9.02 Signing of Pleadings, Motions and Other Filings; Violation of Rules; Sanctions

Every pleading, motion, and other filing of a party represented by an attorney or other designated representative shall be signed by the attorney or representative. A party who is not represented shall sign the pleading, motion or other filing. The signature of a representative or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other filing; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other filing is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the person who is required to sign. If a pleading, motion, or other filing is signed in violation of this rule, a Hearing Officer or the Board, as appropriate, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other filing, including a reasonable attorney's fee. A Hearing Officer, the Executive Director, or the Board, as appropriate, upon motion or its own initiative may also impose an appropriate sanction, which may include the sanctions specified in section 7.02, for any other violation of these rules that does not result from reasonable error.]

[§ 9.03] **§ 9.01 Attorney's Fees and Costs**

(a) Request. No later than *[20]* **30** days after the entry of a **final** *[Hearing Officer's]* decision **of the Office,** *[under section 7.16, or after service of a Board decision by the Office the complainant, if he or she is a]* **the** prevailing party*[,]* may submit to the Hearing Officer **or Arbitrator** who *[heard]* **decided** the case initially a motion for the award of reasonable attorney's fees and costs, following the form specified in paragraph (b) below. *[All motions for attorney's fees and costs shall be submitted to the Hearing Officer.]* The Hearing Officer **or Arbitrator**, after giving the respondent an opportunity to reply, shall rule on the motion. Decisions regarding attorney's fees and costs are collateral and do not affect the finality or appealability of a final decision issued by the *[Hearing Officer]* **Office.** *[A ruling on a motion for attorney's fees and costs may be appealed together with the final decision of the Hearing Officer. If the motion for attorney's fees is ruled on after the final decision has been issued by the Hearing Officer, the ruling may be appealed in the same manner as a final decision, pursuant to section 8.01 of these Rules.]*

(b) *Form of Motion.* In addition to setting forth the legal and factual bases upon which the attorney's fees and/or costs are sought, a motion for an award of attorney's fees and/or costs shall be accompanied by:

. . . . .

(3) the attorney's customary billing rate for similar work **with evidence that the rate is consistent with the prevailing community rate for similar**

services in the community in which the attorney ordinarily practices; ***[and]***

(4) an itemization of costs related to the matter in question***[.]*****; and**

(5) evidence of an established attorney-client relationship.

[§ 9.04] **§ 9.02 Ex parte Communications**

(a) *Definitions.*

. . . . .

(3) For purposes of section ***[9.04]*** **9.02** , the term *proceeding* means the complaint and hearing proceeding under section 405 of the CAA, an appeal to the Board under section 406 of the CAA, a pre-election investigatory hearing under section 220 of the CAA, and any other proceeding of the Office established pursuant to regulations issued by the Board under the CAA

. . . . .

(c) *Prohibited Ex Parte Communications and Exceptions.*

. . . . .

(2) The Hearing Officer or the Office may initiate attempts to settle a matter at any time. The parties may agree to waive the prohibitions against ex parte communications during settlement discussions, and they may agree to any limits on the waiver.

—Renumber subsequent paragraphs—

. . . . .

[§ 9.05] **§ 9.03 Informal Resolutions and Settlement Agreements.**

. . . . .

(b) *Formal Settlement Agreement.* The parties may agree formally to settle all or part of a disputed matter in accordance with section 414 of the Act. In that event, the agreement shall be in writing and submitted to the Executive Director for review and approval. **The settlement is not effective until it has been approved by the Executive Director.** If the Executive Director does not approve the settlement, such disapproval shall be in writing, shall set forth the grounds therefor, and shall render the settlement ineffective.

(c) *Requirements for a Formal Settlement Agreement.* A formal settlement agreement requires the signature of all parties or their designated representatives on the agreement document before the agreement can be submitted to the Executive Director **for signature**. **A formal settlement agreement should not be submitted to the Executive Director for signature until the appropriate revocation periods have expired.** A formal settlement agreement cannot be rescinded after the signatures of all parties have been affixed to the agreement, unless by written revocation of the agreement voluntarily signed by all parties, or as otherwise permitted by law.

(d) *Violation of a Formal Settlement Agreement.* If a party should allege that a formal settlement agreement has been violated, the issue shall be determined by reference to the formal dispute resolution procedures of the agreement. **Settlements should include specific dispute resolution procedures.** If the ***[particular]*** formal settlement agreement does not have a stipulated method for dispute resolution of an alleged violation ***[of the agreement]***, **the Office may provide assistance in resolving the dispute, including the services of a Mediator at the discretion of the Executive Director.** ***[the following dispute resolution procedure shall be deemed to be a part of each formal settlement agreement approved by the Executive Director pursuant to section 414 of the Act:]*** **Where the settlement agreement does not have a stipulated method for resolving violation allegations,** ***[Any complaint]*** **an allegation** ***[regarding]*** **of** a violation ***[of a formal settlement agreement]*** may be filed with the Executive Director, **but** no later than 60 days after the party to the agreement becomes aware of the alleged violation. Such ***[complaints may be referred by the Executive Director to a Hearing Officer for a final decision. The procedures for hearing and determining such complaints shall be governed by subparts F, G, and H of these Rule.]*** **allegations will be reviewed, investigated or mediated by the Executive Director or designee, as appropriate.**

[§ 9.06] **§ 9.04 Payments required pursuant to Decisions, Awards, or Settlements under section 415(a) of the Act**

Whenever a **final** decision or award pursuant to sections 405(g), 406(e), 407, or 408 of the Act, or an approved settlement pursuant to section 414 of the Act, require the payment of funds pursuant to section 415(a) of the Act, the decision, award, or settlement shall be submitted to the Executive Director to be processed by the Office for requisition from the account of the Office of Compliance in the Department of the Treasury, and payment. **No payment shall be made from such account until the time for appeal of a decision has expired, unless a settlement has been reached in the absence of a decision to be appealed.**

[§ 9.07] **§ 9.05 Revocation, Amendment or Waiver of Rules**

(a) The Executive Director, subject to the approval of the Board, may revoke or amend these rules by publishing proposed changes in the Congressional Record and providing for a comment period of not less than 30 days. Following the comment period, any changes to the rules are final once they are published in the Congressional Record.

(b) The Board or a Hearing Officer may waive a procedural rule contained in this Part in an individual case for good cause shown if application of the rule is not required by law.

ORDERS FOR WEDNESDAY, NOVEMBER 16, 2016

Mr. MCCONNELL. Mr. President, I ask unanimous consent that when the Senate completes its business today, it adjourn until 2:30 p.m., Wednesday, November 16; that following the prayer and pledge, the morning hour be deemed expired, the Journal of proceedings be approved to date, and the time for the two leaders be reserved for their use later in the day; finally, that following leader remarks, the Senate resume consideration of the motion to proceed to Calendar No. 543, S. 3110.

The PRESIDING OFFICER. Without objection, it is so ordered.

ADJOURNMENT UNTIL 2:30 P.M. TOMORROW

Mr. MCCONNELL. Mr. President, if there is no further business to come before the Senate, I ask unanimous consent that it stand adjourned under the previous order.

There being no objection, the Senate, at 6:49 p.m., adjourned until Wednesday, November 16, 2016, at 2:30 p.m.

NOMINATIONS

Executive nominations received by the Senate:

THE JUDICIARY

RAINEY RANSOM BRANDT, OF THE DISTRICT OF COLUMBIA, TO BE AN ASSOCIATE JUDGE OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, VICE LEE F. SATTERFIELD, RETIRING.

FOREIGN SERVICE

THE FOLLOWING-NAMED CAREER MEMBERS OF THE SENIOR FOREIGN SERVICE OF THE UNITED STATES DEPARTMENT OF AGRICULTURE FOR PROMOTION WITHIN THE SENIOR FOREIGN SERVICE OF THE UNITED STATES OF AMERICA, CLASS OF CAREER MINISTER:

DAVID CHARLES MILLER, OF WASHINGTON
SCOTT S. SINDELAR, OF MINNESOTA

THE FOLLOWING-NAMED CAREER MEMBER OF THE SENIOR FOREIGN SERVICE OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT FOR PROMOTION WITHIN THE SENIOR FOREIGN SERVICE OF THE UNITED STATES OF AMERICA, CLASS OF CAREER MINISTER:

ALEXANDER DICKIE IV, OF TEXAS

THE FOLLOWING-NAMED MEMBERS OF THE FOREIGN SERVICE OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT FOR APPOINTMENT AS A FOREIGN SERVICE OFFICER, A CONSULAR OFFICER, AND A SECRETARY IN THE DIPLOMATIC SERVICE OF THE UNITED STATES OF AMERICA:

MARVA MICHELLE BUTLER, OF TEXAS
ADONIS MARIANO MATOS DE MELLO, OF FLORIDA

THE FOLLOWING-NAMED CAREER MEMBERS OF THE SENIOR FOREIGN SERVICE OF THE UNITED STATES DEPARTMENT OF AGRICULTURE FOR PROMOTION WITHIN THE SENIOR FOREIGN SERVICE OF THE UNITED STATES OF AMERICA, CLASS OF MINISTER-COUNSELOR:

JEANNE F. BAILEY, OF ILLINOIS
CLAY M. HAMILTON, OF TEXAS
BOBBY GENE RICHEY, JR., OF TEXAS
ERIC A. WENBERG, OF WYOMING

THE FOLLOWING-NAMED CAREER MEMBERS OF THE FOREIGN SERVICE FOR PROMOTION INTO THE SENIOR FOREIGN SERVICE, AS A CAREER MEMBER OF THE SENIOR FOREIGN SERVICE OF THE UNITED STATES OF AMERICA, CLASS OF COUNSELOR:

ALI ABDI, OF VIRGINIA
MICHAEL LEO CONLON, OF VIRGINIA
PAUL ALLEN SPENCER-MACGREGOR, OF VIRGINIA
W. GARTH THORBURN II, OF FLORIDA
ROBERT HENRY HANSON, OF WISCONSIN

THE FOLLOWING-NAMED CAREER MEMBERS OF THE SENIOR FOREIGN SERVICE OF THE UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT FOR PROMOTION WITHIN THE SENIOR FOREIGN SERVICE OF THE UNITED STATES OF AMERICA, CLASS OF MINISTER-COUNSELOR:

JIM NELSON BARNHART, JR., OF GEORGIA
ANDREW M. HERSCOWITZ, OF CALIFORNIA
TERESA L. MCGHIE, OF NEVADA

THE FOLLOWING-NAMED CAREER MEMBERS OF THE FOREIGN SERVICE FOR PROMOTION INTO THE SENIOR FOREIGN SERVICE, AS A CAREER MEMBER OF THE SENIOR FOREIGN SERVICE OF THE UNITED STATES OF AMERICA, CLASS OF COUNSELOR:

HAVEN G. CRUZ-HUBBARD, OF MARYLAND
TIMOTHY J. DONNAY, OF VERMONT
JOSEPH L. DORSEY, OF VIRGINIA
PETER WILLIAM DUFFY, OF NEW HAMPSHIRE
JOHN L. DUNLOP, OF VIRGINIA
MICHAEL JAMES EDDY, OF MISSOURI
GABRIEL F. GRAU, OF FLORIDA
ALER GRUBBS, OF INDIANA
ANDREW DAVID HOLLAND, OF CALIFORNIA
KAREN R. HUNTER, OF FLORIDA
JENNIFER MARIE LINK, OF ILLINOIS
SANDRA K. MINKEL, OF NEVADA
DIANE B. MOORE, OF NEW YORK
THOMAS R. MORRIS, OF VIRGINIA
MARGARET ELIZABETH ENIS SPEARS, OF MARYLAND
TANYA S. URQUIETA, OF SOUTH DAKOTA
ANNE N. WILLIAMS, OF MARYLAND

IN THE AIR FORCE

THE FOLLOWING AIR NATIONAL GUARD OF THE UNITED STATES OFFICERS FOR APPOINTMENT IN THE RESERVE OF THE AIR FORCE TO THE GRADE INDICATED UNDER TITLE 10, U.S.C., SECTIONS 12203 AND 12212:

To be brigadier general

COL. JOEL E. DEGROOT
COL. CHRISTOPHER M. FAUX
COL. ROBERT J. GREGORY III
COL. HENRY U. HARDER, JR.
COL. ERIC W. LIND
COL. DAVID D. ZWART

THE FOLLOWING AIR NATIONAL GUARD OF THE UNITED STATES OFFICERS FOR APPOINTMENT IN THE RESERVE OF THE AIR FORCE TO THE GRADE INDICATED UNDER TITLE 10, U.S.C., SECTIONS 12203 AND 12212:

To be major general

BRIG. GEN. DAVID P. BACZEWSKI
BRIG. GEN. TIMOTHY J. CATHCART
BRIG. GEN. BRIAN T. DRAVIS
BRIG. GEN. JAMES O. EIFERT
BRIG. GEN. RICHARD W. KELLY
BRIG. GEN. CHRISTOPHER J. KNAPP
BRIG. GEN. JON K. MOTT
BRIG. GEN. CLAYTON W. MOUSHON
BRIG. GEN. KERRY L. MUEHLENBECK
BRIG. GEN. HOWARD P. PURCELL
BRIG. GEN. DAVID P. SAN CLEMENTE
BRIG. GEN. MICHAEL R. TAHERI
BRIG. GEN. ROGER E. WILLIAMS, JR.

THE FOLLOWING AIR NATIONAL GUARD OF THE UNITED STATES OFFICER FOR APPOINTMENT IN THE RESERVE OF THE AIR FORCE TO THE GRADE INDICATED UNDER TITLE 10, U.S.C., SECTIONS 12203 AND 12212:

To be major general

BRIG. GEN. JESSE T. SIMMONS, JR.