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Via Electronic Mail (rule-comments@ocwr.gov)
Teresa M. James
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Re: Comments on the Notice of Proposed Rulemaking Implementing Section 210 of the Congressional Accountability Act (2 U.S.C. § 1331)

Dear Ms. James:

As you know, on July 26, 2022, the Board of Directors (the Board) of the Office of Congressional Workplace Rights (the OCWR) submitted for publication in the Congressional Record a Notice of Proposed Rulemaking and Request for Comments from Interested Parties (NPRM) regarding "modifications" to its prior substantive regulations (Modified Regulations) implementing Titles II and III of the Americans with Disabilities Act (ADA) as incorporated in the Congressional Accountability Act (CAA). 168 CONG. REC. H7158 (daily ed. July 26, 2022). The Office of House Employment Counsel (OHEC) hereby submits the following comments, pursuant to 2 U.S.C. § 1384(b)(2), to the Board's Modified Regulations. The NPRM specifically states that the Board "is not soliciting additional comments on [its previously] adopted amendments at this time." 168 CONG. REC. at H7159. Accordingly, OHEC has focused the majority of its comments on specific areas of concern in the Modified Regulations, but expressly incorporates by reference the comments submitted by the Committee on House Administration on October 9, 2014 (CHA Comments) and published on the OCWR website, as we believe the points and authorities raised in the 2014 comments remain particularly relevant to an appropriate consideration of the Modified Regulations.

1. The Modified Regulations propose to remove substantive regulations in favor of procedural rules, depriving Congress of its role of review and adoption.

In its 2014 NPRM, the Board proposed regulations regarding the expansion of the authority of the General Counsel of the OCWR (then the Office of Compliance) to include "what amounts to uninhibited and unchallengeable discovery by the General Counsel from the entity responsible for correcting the alleged violation." CHA Comments at 6. These previously proposed regulations include allowing the General Counsel access to "all physical areas subject to an inspection or investigation, individuals with relevant knowledge concerning the inspection or investigation who can be interviewed or questioned, and documents pertinent to the

investigation," and the ability to require "written answers to questions" instead of requesting submissions of position statements. *Id.* at 6-7. As the CHA said in its Comments in 2014, this is "tantamount to interrogatories which cannot be objected to." *Id.* at 7.

The CHA comments point out the lack of any legal authority for such a broad expansion of the authority of the General Counsel. Yet, in its "modification" to its prior regulations, the Board has withdrawn this proposed substantive regulation proposal, stating that the expansion of the General Counsel's role regarding "the investigation and prosecution of charges of discrimination using the Office's mediation and hearing processes (section 210(d) of the CAA) and (2) the biennial ADA inspection and reporting obligations (section 210(f) of the CAA)" would "best [be] implemented by adopting and publishing amendments to the OCWR's Procedural Rules." 168 CONG. REC. at H7159. This scheme, however, is in direct contradiction to the statutory requirement in 2 U.S.C. § 1331(e)(1) requiring that the Board use the procedures of 2 U.S.C. § 1384 to adopt *substantive regulations* to implement section 210 of the CAA, rather than the simpler standard for adopting *procedural rules* under 2 U.S.C § 1383. Indeed, the Board's proposal that the General Counsel's authority be addressed and expanded through the adoption of *procedural rules* would all but guarantee that the objections and concerns of the Committee, and shared by OHEC, would not only go unaddressed, but would be circumvented entirely. This is directly contrary to the review process for substantive regulations that Congress set up when it enacted the CAA in 1995.

2. **Adoption of § 36.206, granting members of the public standing to bring retaliation claims against Member Offices, is outside the Board's authority under the CAA.**

As the Board correctly recognizes, the CAA's anti-retaliation provision at section 207 does not authorize retaliation claims for individuals who are not covered employees. Other than with respect to certain USERRA claims (that have no applicability to the subject matter of these proposed regulations), section 207 is the ***only*** provision of the CAA that authorizes a retaliation claim. 28 C.F.R. § 36.206 proposes to create the right to a retaliation claim for non-employees. However, because there is no statutory basis for nonemployees to claim retaliation under the CAA, the Board is without authority to adopt 28 C.F.R. § 36.206. The Board cannot create a substantive right that Congress has not authorized by statute. *West Virginia v. Environmental Protection Agency,* 142 S.Ct 2587, 2609 (2022) (rejecting agency's promulgation of rule that "effected a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind," noting that "[a]gencies have only those powers given to them by Congress, and 'enabling legislation' is generally not an 'open book to which the agency [may] add pages and change the plot line.'").

In addition to the lack of any statutory basis for a retaliation claim for non-employees, the history of the Department of Justice's adoption of 28 C.F.R. § 36.206 further supports its inapplicability to the Legislative Branch. Specifically, 28 C.F.R. § 36.206 is based on section 503 of the ADA (42 U.S.C. § 12203), which prohibits retaliation. *See Nondiscrimination on the Basis of Disability by Public Accommodations and in Commercial Facilities,* 56 FR 35544-01, 1991 WL 304374 at *35559 (July 26, 1991) (Department of Justice commentary when 28 C.F.R.

§ 36.206 was adopted in the Federal Register, noting that that provision "implements section 503 of the ADA"). Because Section 503 of the ADA is not incorporated by the CAA, *see* 2 U.S.C. § 1331(b), the Board has no authority to adopt the Executive Branch regulation implementing this inapplicable statutory provision.

3. Adoption of the Architectural Barriers Act Standard regarding "Leases" is inconsistent with the CAA and reveals a larger problem with wholesale adoption of regulations by incorporation without individual analysis.

The application of a standard under the Architectural Barriers Act (ABA) is inconsistent with the Board's authority under 2 U.S.C.§ 1384 of the CAA and does not consider current appropriations, procurement, and leasing practices and requirements of the House.

The ABA applies to buildings "leased in whole or in part by the United States." *See* 42 U.S.C. § 4151(2). Leases entered into by U.S. Representatives for district office operations do not fit under the ABA where such leases are made in the name of the Member of Congress as lessee and the Member is *personally responsible* for performance under such leases. Any different interpretation would be incongruous with how Congress appropriates funds within the House. Attempting to apply the ABA to cover district office leases entered into by Members of Congress, in particular, could result in violations of both the Antideficiency Act, 31 U.S.C. § 1341, and the Adequacy of Appropriations Act, 41 U.S.C. § 11, where an individual Member office does not have funding to address potential non-compliance with ABA standards.

Moreover, even if the Board determines that the ABA should *somehow* be applicable to the House in spite of the reasoning set forth above, the method of incorporation proposed by the Board is highly problematic. Not only does this proposed ABA subsection include language that is not relevant to House offices (*e.g.*, leases for "Residential Dwelling Units" and "Emergency Transportable House Units"), adoption of *only* ABA standard subsection F202.6 fundamentally distorts the intended scope of application of the requirements set forth in that subsection. Other ABA standards set forth in Chapter 2 clarify that, for example, the standards apply only to additions and alterations to existing buildings or facilities (*see* ABA standard F202.1) and that unaltered existing spaces must only comply with earlier standards in place at the time the building or facility was built or last altered (*see* ABA standard F203.2). The leasing requirements proposed by the Board also completely ignore the very real difficulties Member offices may face when trying to find practical, centrally located, and functional office space within the budgetary constraints of the Members' Representational Allowance. As underscored in the Committee's 2014 comments, the Department of Justice, in its section-by-section analysis of its Title II regulations, specifically stated that "requiring that public entities only lease accessible space would significantly restrict the options of [covered public entities] in seeking leased space, which would be particularly burdensome in rural or sparsely populated areas." 28 C.F.R. Pt. 35, App. B.

The discussion of leases alone augers in favor of a more detailed evaluation of the numerous regulations that the Board proposes to adopt simply by reference and incorporation.

And in reviewing the issues posed by the Modified Regulations, OHEC submits that wholesale reconsideration of the 2014 comments is warranted.

As we share the common goal of creating and maintaining the accessibility of the services and public areas of the House community, we appreciate the opportunity to submit these comments. Please let me know if you have any questions or would like to discuss any aspect of these comments further.

Sincerely,

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