UNITED STATES CAPITOL POLICE
OFFICE OF THE EMPLOYMENT COUNSEL

Frederick M. Herrera
Employment Counsel

Scharon L. Ball
Senior Counsel

Robin J. Matthew
Associate Counsel

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Tamara E. Chrisler
Executive Director
Office of Compliance
Room LA200
110 Second Street, S.E.
Washington, D.C. 20540-1999

Re: Comments on Notice of Proposed Rulemaking and Request for Comments from Interested Parties Implementing Certain Substantive Employment Rights and Protections for Veterans as Required under 2 U.S.C. 1316 (USERRA)

Dear Ms. Chrisler:

The Office of Compliance Notice of Proposed Rulemaking ("NPR") regarding the above was published in the Congressional Record on April 21, 2008 (S3188-S3203) and on May 8, 2008 (H3338-H3400). In accordance with section 304(b)(2) of the Congressional Accountability Act ("CAA") and the NPR, comments are to be submitted to the Office of Compliance by June 9, 2008.

The United States Capitol Police Office of Employment Counsel and the Office of the General Counsel offer the following comments and observations with respect to the NPR.

I. The Anti-Discrimination and Anti-Retaliation Regulation from Employer Discrimination and Retaliation Have Been Changed Without Good Cause.

As an initial matter it is unclear why the Office of Compliance is citing to its *Britton v. Office of the Architect of the Capitol*, 02-AC-20 (CV, RP) in support of a different retaliation standard. First, the USCP was not a party to that decision and notes that the district court for the District of Columbia has taken a different position than what is asserted by the Office of Compliance. Thus, there is still an open question about whether the *Britton* rationale will withstand court scrutiny.

Nevertheless, the *Britton* decision has no applicability to 38 U.S.C. §§ 4311(a) and 4311(b) made applicable by section 206(a) of the CAA. Substantive regulations for USERRA should not be changed to take place of substantive regulations for section 207 provisions of reprisal. Moreover, the *Britton* decision should not be bootstrapped to substantive regulations to suggest Congressional support for the Office of Compliance

Britton decision. Reliance on the *Britton* decision is not good cause to modify the Department of Labor ("DOL") Regulations.

With regard to regulation § 1002.19, it is suggested that the language be changed to more accurately reflect the DOL Regulation. The last clause of the sentence should change "is performing" to "has performed" to be consistent with the regulations and service in the uniformed services should refer to §1002.5(t) of the regulations.

It is also unclear why the numbering of §§ 1002.20 and 1002.21 was changed. It is suggested that those two sections be reversed to be more in line with DOL Regulations. It is also suggested that the wording in § 1002.21 be tracked to follow the DOL regulation covering §1002.20. There is no good cause to include section 207(a) when the answer to the regulation is "yes" citing to the last sentence of 38 U.S.C. 4311(b) which states that "[t]he prohibition in this subsection shall apply with respect to a person regardless of whether that person has performed service in the uniformed services." Thus, it is suggested that the response to § 1002.21 read "Yes. An employing office is prohibited from taking actions against an individual for any of the activities protected by the CAA and consistent with 38 U.S.C. § 4311(b), whether or not he or she has performed service in the uniformed services."

Finally, it is unclear why § 1002.22 covering burden of proving discrimination or retaliation in violation of USERRA was dropped. That provision is consistent with USERRA, is not affected by 38 U.S.C. § 4311(c) or (d), and is consistent with law. It is suggested that the § 1002.22 be included in the regulations which will also be consistent with the last sentence of § 1002.41.

II. General Comments

Several of the definitions found under § 1002.5 should be edited to be consistent with the CAA and the federal government benefits program. For example § 1002.5(c) definition of "covered employee" should track 2 U.S.C. § 1301 such that the term "any employee" is too broadly defined and not consistent with § 1301. Additionally, the "Capitol Police Board" should be deleted consistent with § 1301(3)(D). Finally, "former employee" is omitted. Section 1002.5(h) definition of "Employee of the Capitol Police Board" should be corrected to reflect consistency with § 1301(6) "Employee of the Capitol Police." Under § 1002.34 regarding the coverage of regulations, it is suggested that the regulations cite to coverage under § 1301(3) of the CAA and not to § 1002.5, subsection (e) of the regulations.

The definition of a health plan found in § 1002.5(l) should be limited to coverage under the Federal Employees Health Benefit Program as that is the only health plan offered to legislative branch employees. The definition of seniority found in § 1002.5(q) should be deleted for good cause as such a definition may be in conflict with seniority

definitions found within collective bargaining agreements between unions and the employing offices.

§ 1002.101 states that an employee in the legislative branch "may work part-time for two employing offices." That statement is overly broad as a USCP employee is not permitted to work part-time for two employing offices.

Finally, it is suggested that the Board of Directors revisit provisions of subsections C, D, and E and tailor those regulations to fit the specific requirements of the employing offices of the legislative branch.

Should you have any questions about our response to the NPR, please let us know. Again, thank you for the opportunity to submit comments to the Board of Directors of the Office of Compliance concerning proposed substantive regulations for USERRA, made applicable under section 206 of the CAA.

Sincerely,

Gretchen E. DeMar
General Counsel

Frederick M. Herrera
Employment Counsel