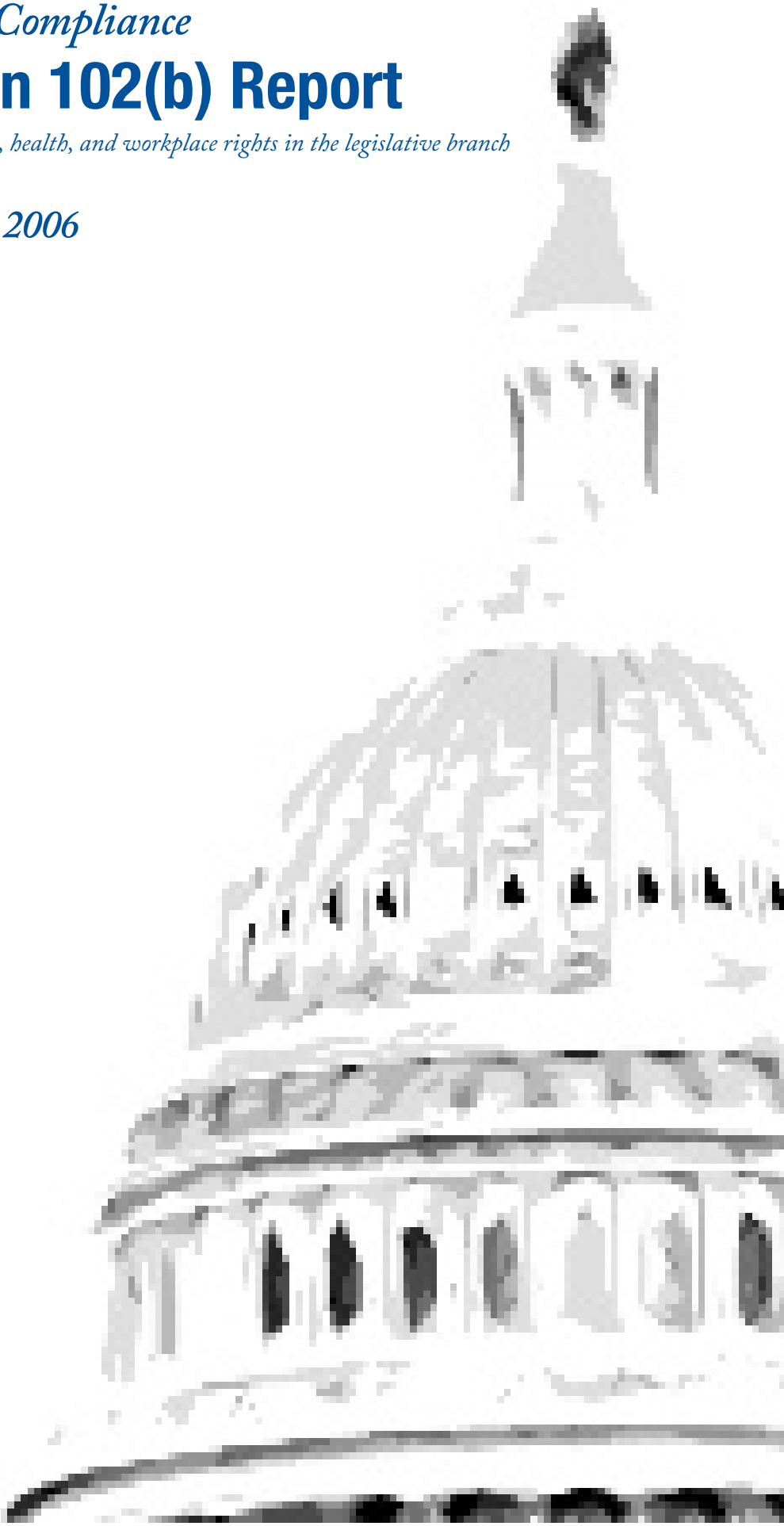
Office of Compliance

Section 102(b) Report

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

December 2006



Office of Compliance

2006 Section 102(b) Report

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December 2006

This is the sixth biennial report submitted to Congress by the Board of Directors of the Office of Compliance of the U.S. Congress, pursuant to the requirements of section 102(b) of the Congressional Accountability Act (2 U.S.C. 1302 (b)). Section 102(b) of the Act states in relevant part:

Beginning on December 31, 1996, and every 2 years thereafter, the Board shall report on (A) whether or to what degree [provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees; and (B) access to public services and accommodations] ... are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch. The presiding officers of the House of Representatives and the Senate shall cause each such report to be printed in the Congressional Record and each such report shall be referred to the committees of the House of Representatives and the Senate with jurisdiction.

*Bracketed portion from section 102(b)(1).

Introduction

Prior to the enactment of the Congressional Accountability Act of 1995 (CAA), Congress recognized the need to legislate many aspects of the workplace, and it did so by passing laws to address workplace rights and the employment relationship. These laws, however, were not applicable to Congress. Congress had excluded itself and other instrumentalities of the legislative branch from the requirements of these laws. Passage of the CAA, with nearly unanimous approval, in the opening days of the 104th Congress, reflected a national consensus that Congress must live under the laws it enacts for the rest of society.

The CAA is not meant to be static. The Act intended that there be an ongoing, vigilant review of federal law to ensure that Congress continue to apply to itself - where appropriate - the labor, employment, health, and safety laws it passes. To further this goal, the Board of Directors of the Office of Compliance ("Board") was tasked with the responsibility of reviewing federal laws each Congress to make recommendations on how the CAA could be expanded. Since its creation, the Board has duly submitted biennial Reports to Congress, starting in 1996, detailing the limited and prudent amendments that should be made to the CAA. There was also an Interim Report in 2001, regarding Section 508 of the Rehabilitation Act of 1973. In past reports, the Board has taken a broad approach in presenting its recommendations to amend the Congressional Accountability Act, and has encouraged Congress to consider and act upon those recommendations. By including Appendices A through C in this Report, the Board incorporates these prior recommendations as part of this Report: amendments to the Rehabilitation Act, title II and title III of the Civil Rights Act, record-keeping and notice posting, jury duty, bankruptcy, garnishment, and employee protection provisions of environmental statutes. The Board continues to ask that these prior recommendations be implemented.

Now that Congress has had substantial time to reflect on the contents of the Board's prior reports, it is critical that Congress continue the example set in 1995 with the enactment of the original provisions of the CAA. Without action on the Board's recommendations, the worthy goal of the Congressional Accountability Act gradually may be eroded.

The overwhelming bipartisan support for the CAA's passage in 1995 is a testament to the importance of - and support for - the principles the CAA embodies, both in Congress and in the electorate as a whole. While recognizing the enormous importance of many of the other issues faced today by Congress, the Board is hopeful that issuance of this 2006 Section 102(b) Report will result in legislative action to finally implement these recommendations, so that the CAA remains current with the employment needs of the legislative branch.

Executive Summary

In this 2006 Report, the Board is prioritizing its recommendations, without in any way diminishing the importance of the recommendations made in prior Reports. In this current Report, the Board focuses on two areas of vital and immediate concern to the covered community - safety and health, and veterans' rights - and urges Congress to take action on them.

The Office of Compliance Office of the General Counsel ("OGC") is responsible for ensuring safety and health of legislative branch employees through the enforcement of the provisions of the Occupational Safety and Health Act ("OSHA"). This responsibility includes inspection of the covered community, which the Office of the General Counsel performs in collaboration with employing offices. While enormous progress has been achieved by the Office of the Architect of the Capitol ("AOC") and other employing offices in improving health and safety conditions, there remain circumstances where progress will be enhanced if the OGC is provided specific tools to perform: whistle blower and similar retaliation protection, temporary restraining orders, investigatory subpoenas, and recognition by the responsible party for health and safety violations in covered facilities. With these tools, the Office of the General Counsel would be better positioned to ensure that the covered community is a safe and healthy one for its employers and employees, as well as its visitors.

Congress has enacted laws to ensure that soldiers with civilian employment will not be penalized for their time spent away from their employers while serving in the military. Through the enactment of these laws, Congress ensured that military service will not prevent individuals from remaining professionally competitive with their civilian counterparts. The Veterans' Employment Opportunities Act ("VEOA") and the Uniformed Services Employment and Reemployment Act ("USERRA") currently provide protections for military personnel entering and returning to federal and other civilian workforces. Under VEOA, Congress has enacted protections for these soldiers, so that in certain circumstances, they receive a preference for selection to federal employment. Regulations for these laws have been implemented in the executive branch, and the Board encourages Congress to implement corresponding regulations in the legislative branch.

Recommendations

I. Whistle Blower Protection Act Application to the CAA

Retaliation Protections

Over the years, the Office of Compliance has received numerous inquiries from legislative branch employees about their legal rights following their having reported allegations of employer wrongdoing or mismanagement. Unfortunately, these employees are not currently protected from employment retaliation by any law. The retaliation provisions of the CAA limit protection to employees who, in general, exercise their rights under the statute. Whistle blower protections are intended specifically to prevent employers from taking retaliatory employment action against an employee who discloses information which he or she believes evidences a violation of law, gross mismanagement, or substantial and specific danger to public health or safety.

The Whistle Blower Protection Act ("WPA") prohibits executive branch personnel decision makers from taking any action to:

> *(3) coerce the political activity of any person (including the providing of any political contribution or service), or take any action against any employee or applicant for employment as a reprisal for the refusal of any person to engage in such political activity;*
>
> *(4) deceive or willfully obstruct any person with respect to such person's right to compete for employment;*
>
> *(5) influence any person to withdraw from competition for any position for the purpose of improving or injuring the prospects of any other person for employment;*
>
> *(6) grant any preference or advantage not authorized by law, rule, or regulation to any employee or applicant for employment (including defining the scope or manner of competition or the requirements for any position) for the purpose of improving or injuring the prospects of any particular person for employment;*
>
> *(7) appoint, employ, promote, advance, or advocate for the appointment, promotion, advancement, in or to a civilian position any individual who is a relative (as defined in section 3110(a)(3) of this title) of such employee if such position is in the agency in which the employee is serving as a public official (as defined in section 3110(a)(2) of this title) or over which such employee exercises jurisdiction or control as such an official;*

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employ ment because of –

(A) any disclosure of information by an employee or applicant for employment because of –

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such informa tion is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures of information which the employee or applicant reasonably believes evidences –

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, if such disclosure is not specifically prohibited by law and if such informa tion is not specifically required by Executive Order to be kept secret in the interest of national defense or the conduct of foreign affairs.

(9) take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of –

(A) the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation;

(B) testifying for or otherwise lawfully assisting any individu- al in the exercise of any right referred to in subparagraph (A);

(C) cooperating with or disclosing information to the Inspector General of an agency, or the Special Counsel, in accordance with applicable provisions of law; or

(D) for refusing to obey an order that would require the indi- vidual to violate a law;

(10) discriminate for or against any employee or applicant for employ ment on the basis of conduct which does not adversely affect the per- formance of the employee or applicant or the performance of others; except that nothing in this paragraph shall prohibit an agency from taking into account in determining suitability or fitness any convic- tion of the employee or applicant of any crime under the laws of any State or the District of Columbia, or of the United States.[1]

1 Subsections (b)(11) and (b)(12) refer to "competitive service," merit systems principles, and other specific personnel matters within the

Over the years, legislative branch employees have proven essential in informing the General Counsel of the possible existence of serious hazards that may affect the safety and health of employees, management representatives, and members of the public that would otherwise not come to his attention. In order to assure the free flow of this information, it is incumbent upon Congress to protect employees from intimidation and retaliation when they exercise their rights to report and allege violations.

On July 17, 2006, Senator Chuck Grassley introduced a bill[2] to Congress that would amend the Congressional Accountability Act to give legislative branch employees some of the whistle blower protection rights that are available to executive branch employees. In the executive branch, employees can take allegations of employment reprisal based on whistle blowing to the Office of the Special Counsel or can bring an individual action directly before the Merit Systems Protection Board.[3] As the bill is written, legislative branch employees would bring such matters to the Office of Compliance's dispute resolution program. Although this program provides a mechanism for employees to bring a complaint, the employees would have to prosecute these very technical issues themselves, or incur the cost of hiring an attorney to litigate these issues. Employees of the executive branch do not bear such a burden. To assure that whistle blower protection rights are effectively vindicated, it is imperative that the General Counsel be granted the same authority to investigate and prosecute OSHA-type violations of the CAA, as is provided under other remedial labor laws.

Executive agencies that are required to enforce labor and employment rights are often given explicit statutory authority to conduct investigations and litigation respecting charges of employer intimidation and retaliation of employees. For example, the General Counsel of the Federal Labor Relations Authority may investigate discrimination based on the filing

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executive branch that are not relevant to legislative branch employment. Accordingly, the Board does not recommend that subsections (b)(11) and (b)(12) be included within the CAA. The Board does recommend, however, that, in accord with subsection (c) of section 2302, Congress require each agency head to be responsible for, or appropriately delegate responsibility for, the prevention of prohibited personnel practices, and for ensuring that agency employees know their rights under this section. The Board also recommends the addition of subsection (d), which prohibits 2302 from being interpreted as "extinguish[ing] or lessen[ing] any effort to achieve equal employment opportunity through affirmative action or any right or remedy available to any employee or applicant for employment in the civil service ..."

2 S.3676, 109th Cong. (2006)

3 *See* 5 U.S.C. 1201 *et seq.*

of an unfair labor practice.[4] Under the Occupational Safety and Health Act, the Secretary of Labor is given very clear authority to investigate and prosecute reprisals.[5] The Equal Employment Opportunity Commission is granted authority to initiate charges and conduct investigations into claims of discrimination.[6] The National Labor Relations Act also grants to its General Counsel the authority to issue a complaint upon the filing of an employee charge of retaliation.[7]

Covered employees who have sought information from the Office of Compliance respecting their substantive rights under the safety and health provisions of the CAA have expressed concern about their exposure when they come forward to provide evidence in such investigations. They have also indicated reluctance or financial inability to shoulder the litigation burden without the support of the Office of the General Counsel investigative process and enforcement procedures.

The Board of Directors believes that the ability of the General Counsel to investigate and prosecute retaliation in the OSH process would effectively serve to relieve employees of these burdens. It would also preserve confidence in the CAA and empower legislative branch employees to exercise their rights without fear of adverse action in reprisal for their protected activities.

Protection from Solicitation of Recommendations

The Board believes that the subsection (b)(2) rule of the Whistle Blower Protection Act should be made applicable to all legislative branch employing offices, other than the two houses of Congress and the entities listed in section 220(e)(2)(A)-(E) of the CAA.

The Board urges Congress to discourage "political" recommendations in the filling of covered positions. Specifically, subsection (b)(2) of the Whistle Blower Protection Act provides that anyone with personnel authority may not:

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4 *See* 5 U.S.C. § 7118(a)(1).

5 *See* 29 U.S.C. § 660(c)(2). See also Federal Mine Safety and Health Act, 30 U.S.C. § 815 which grants the Secretary of Labor the authority to prosecute a discrimination claim before the Federal Mine Safety and Health Review Commission.

6 These procedures do not apply to federal sector equal employment opportunity.

7 29 U.S.C. § 158(a)(4); § 160(b).

solicit or consider any recommendation or statement, oral or writ ten, with respect to any individual who requests or is under consider ation for any personnel action unless such recommendation or statement is based on the personal knowledge or records of the person furnishing it and consists of - (A) an evaluation of the work performance, ability, aptitude, or general qualifications of such individual; or (B) an evalua tion of the character, loyalty, or suitability of such individual . . .

The Board recommends that Congress apply this restriction to anyone with personnel authority in any legislative branch employing office, other than the two houses of Congress and the entities listed in section 220(e)(2)(A)-(E) of the CAA.

II. Increased Safety and Health Compliance Tools

Temporary Restraining Orders

The Occupational Safety and Health Act is applied, in part, to the legislative branch through Section 215(b) of the Congressional Accountability Act. Under this section, the remedy for a violation of the CAA is a corrective order similar to such an order granted under the remedial section of the OSH Act. Among other things, the OSH Act authorizes the Secretary of Labor to seek a temporary restraining order in district court in the case of imminent danger. Such enforcement authority is necessary for the General Counsel of the Office of Compliance to ensure that safety and health violations are remedied expeditiously. The General Counsel takes the position that although Section 215(b) of the CAA does not expressly provide preliminary injunctive relief as a remedy, such authority is implied by the Act's terms. Certain employing offices, as well as other stakeholders, however, differ with this interpretation, as the language is not stated directly in the Act. Accordingly, the Board seeks to amend the current language of the Act to alleviate all ambiguity and to make clear the General Counsel's authority to seek such relief.

Express authority to seek preliminary injunctive relief is essential to the General Counsel's ability to eliminate promptly all potential workplace hazards. Although a situation has not been presented yet where a court injunction was necessary to resolve a case of imminent danger, the General Counsel can foresee the very likelihood of having to do so. In fiscal year 2006, the General Counsel increased his efforts to remedy two serious violations which posed imminent danger to workers: unabated safety violations which existed in the Capitol Power Plant utility tunnels since before 1999, and the lack of safety shoring for AOC workers in trenches surrounding Library of Congress buildings. Fortunately, the prompt filing of a formal complaint led the AOC to implement immediate interim abatement measures to protect workers in the tunnels from imminent harm. In

addition, the filing of a citation for the safety shoring violation prompted the AOC to take immediate steps to install appropriate shoring to protect its employees.

In both of these instances, the need for injunctive relief was obviated due to the prompt and voluntary compliance of the AOC. However, in other situations, employing offices may not so readily accept responsibility for correcting an imminent safety hazard. For example, the increased use of contractors to perform construction and repair work on Capitol Hill creates situations where the responsibility for assuring safe conditions may not be as clear, or as readily accepted, by an employing office. Cases of that nature demonstrate the need for the availability of injunctive relief to ensure the immediate and ongoing safety of employees and members of the public pending resolution of issues of responsibility and cost.

The Board urges Congress to recognize the General Counsel's need to have the authority to seek preliminary injunctive relief. Although implicitly provided in the Act, the current language under Section 215(b) creates ambiguity as to whether such authority has been granted to the General Counsel. The Board recommends that the CAA be amended to clarify that the General Counsel has the standing to seek a temporary restraining order in Federal district court and that the court has jurisdiction to issue the order.

Investigatory Subpoenas

The General Counsel of the Office of Compliance is responsible for conducting health and safety inspections in covered offices in the legislative branch. In implementation of this mandate, the General Counsel is granted many, but not all, of the same authorities that are granted to the Secretary of Labor under section 8 of the Occupational Safety and Health Act.[8] One of the significant authorities granted to the Secretary of Labor is that of issuing investigatory subpoenas in aid of inspections. Other federal agencies, such as the National Labor Relations Board and the Federal Labor Relations Authority, likewise are given such authority in implementation of their authority to investigate complaints. However, the Congressional Accountability Act does not grant to the General Counsel the authority to require the attendance of witnesses and the production of evidence in furtherance of his investigations.

While most employing offices do not directly refuse to provide requested information during the General Counsel's investigations, significant delays in providing information are, unfortunately, not unusual. The

8 29 U.S.C. § 657.

lack of authority to compel the prompt release of information and witnesses from employing offices hampers the ability of the General Counsel to enforce health and safety regulations. To conduct a thorough workplace inspection, the General Counsel must interview witnesses and examine information that may reside solely within the possession of the employing office, and not otherwise readily available to employees, the public, or the General Counsel. Absent the authority to issue investigatory subpoenas, an employing office may, with impunity, refuse or simply stall in responding to the General Counsel's requests for information. Such actions would hinder investigations and may exacerbate potential health and safety hazards. Recently, an employing office argued that the General Counsel was not entitled to the records of results of testing for hearing damage performed on legislative employees. The General Counsel was without an efficient mechanism to gain access to this information.

Currently, the only means to compel production of documents or testimony when cooperation is not forthcoming is to issue a citation and a complaint, and institute legal proceedings against the employing office. Besides being costly, this process is counterproductive to the General Counsel's efforts to maintain and further a collaborative relationship with employing offices. In addition, the inherent delays of litigation may have the effect of exposing employees and the public to unabated hazard and significant risk of exposure or injury. Prompt production of information or access to witnesses allows the General Counsel to collaborate with employing offices and make an informed decision and assess risks and hazards. This authority will directly enhance the ability of the General Counsel to carry out his statutory duty to maintain a safe and healthy workplace.

The Office of the Architect of the Capitol is Responsible for Safety and Health Violations in Covered Facilities

In its Report on Occupational Safety and Health Inspections for the 108th Congress, the General Counsel raised a concern regarding enforcing compliance with the OSH Act where work is performed by contractors hired by the Architect of the Capitol. In the 108th Biennial Report, three specific incidents were cited wherein AOC contractors created hazardous situations that posed significant risk to property in one instance, and severe bodily injury to employees and the public in the other two. The latter two conditions were corrected by the AOC, even though the AOC asserted it had no obligation to do so. In the other situation, a citation was issued by the General Counsel; however, the AOC has contested this citation, asserting that it has limited, if any, responsibility to monitor or ensure compliance with OSHA regulations and safety standards whenever work is performed by contractors.

OSHA, rather than the Office of Compliance General Counsel, has jurisdiction over AOC private sector contractors. As the AOC increasingly relies on such contractors to perform its construction and repair work, it is foreseeable that safety and health enforcement in the legislative branch could increasingly devolve to OSHA rather than the Office of Compliance General Counsel. Were the AOC to prevail in its contention that it was not responsible for hazards created by its contractors, the ability of the General Counsel to protect legislative branch employees would be severely undermined. Moreover, divided jurisdiction over the elimination of hazardous conditions that affect legislative branch employees would appear to be contrary to the purpose of the CAA.

The General Counsel's jurisdiction to hold an employing office accountable for complying with safety standards does not turn on whether the employing office performs its work directly or through the use of a contractor. Otherwise, the health and safety in much of the legislative branch would depend on the diligence and skill of independent contractors rather than that of the Architect of the Capitol. The Government Accountability Office recently expressed a similar concern that the "AOC had not fully exercised its authority to have the contractors take corrective actions to address recurring safety concerns" in regard to construction at the Capitol Visitor Center.[9]

OSHA has a "Multi-Employer Citation Policy,"[10] under which employers can be considered both a "controlling and exposing employer engaged in construction and repair work." This policy requires that these multi-employers be held accountable and responsible for any safety violations in their facilities. Because the AOC is charged with the responsibility for the supervision and control of all services necessary for the protection and care of the Capitol and the Senate and House Office Buildings, the AOC would be considered a multi-employer, under OSHA's definition, and thereby accountable and responsible for any safety violations in its facilities.[11] The Board of Directors encourages Congress to adopt OSHA's policy to ensure the uniform pattern of enforcement throughout the legislative branch.

The Board urges Congress to take a realistic look at the safety and health concerns in the covered community. Much work has been done, and progress continues to be made, to ensure that Congress provides a safe

9 See "Testimony of David M. Walker, Comptroller General of the United States Before the Subcommittee on the Legislative Branch, Committee on Appropriations, U.S. Senate" (May 17, 2005), p. 9.

10 OSHA Directive CPL 2-0.124, December 10, 1999.

11 Id, Sections X(c) and X(e).

and healthy environment for its employees and visitors. In order to ensure this continued progress, there are certain mechanisms that must be in place for the General Counsel of the Office of Compliance to ensure that safety and health risks are at a minimum and are thoroughly and expeditiously addressed. The Board encourages Congress to allow the General Counsel to implement these tools to meet this goal.

III. Veterans' Rights

Veterans' Employment Opportunities Act

Since the end of the Civil War, the United States Government has granted veterans a certain degree of preference in federal employment, in recognition of their duty to country, sacrifice, and exceptional capabilities and skills. Initially, these preferences were provided through a series of statutes and Executive Orders. In 1944, however, Congress passed the first law that granted our service men and women preference in federal employment: the Veterans' Preference Act of 1944.[12] The Veterans' Preference Act provided that veterans who are disabled or who served in military campaigns during specified time periods are "preference eligible" veterans and would be entitled to preference over non-veterans (and over non-preference-eligible veterans) in decisions involving selections and retention in reductions-in-force.

In 1998, Congress passed the Veterans Employment Opportunities Act ("VEOA")[13], which "strengthen[s] and broadens"[14] the rights and remedies available to military veterans who are entitled to preferences in federal employment. In particular, Congress clearly stated in the law itself that certain "rights and protections" of veterans' preference law provisions for certain executive branch employees, "shall apply" to certain "covered employees" in the legislative branch.[15]

Initially, the Board published an Advanced Notice of Proposed Rulemaking for VEOA regulations on February 28, 2000, and March 9, 2000. Upon consideration of the comments received, the Board changed its approach and published a Notice of Proposed Rulemaking on December 6, 2001. Since that time, the Board has engaged in extensive discussions with stakeholders to obtain input and suggestions into the drafting of the regulations. The Board is mindful that stakeholder input is critical in ensuring that the proposed regulations capture the particular workings and procedures of the legislative branch. To that end, the Board is committed

12 Act of June 27, 1944, ch. 287, 58 Stat. 387, amended and codified in various provisions of Title 5 of the United States Code.

13 Pub. L. 105-339, 112 Stat. 3186 (October 31, 1998).

14 Sen. Rept. 105-340, 105 Cong., 2d Sess. at 19 (Sept. 21, 1998).

15 VEOA " 4(c)(1) and (5).

to investing as much time as is necessary to promulgate and implement the VEOA regulations.

One of the most critical aspects of drafting these regulations has been to acknowledge the longstanding and significant differences between the personnel policies and practices, as well as the history, of the legislative branch and the executive branch. In particular, the executive branch distinguishes between employees in the "competitive service" and the "excepted service," often with differing personnel rules applying to these two services. The legislative branch has no such classification system and hence, no dichotomy.

Although the CAA mandates application to the legislative branch of certain VEOA provisions originally drafted for the executive branch, the Board notes the central distinction made in the underlying statute: certain veterans' preference protections (regarding hiring) applied only to executive branch employees in the "competitive" service, while others (governing reductions in force and transfers) applied both to the "competitive" and "excepted" service. For example, the hiring practice in the executive branch includes a numeric rating and ranking process. Such process includes a point-preference for certain veterans. Because no such rating and ranking process exists in the legislative branch, the application of the point-preference had to be adjusted to properly fit the particular practices of the legislative branch.

The extensive discussions with various stakeholders across Congress and the legislative branch have raised these issues and have provided a forum in which to discuss how best to address these unsuited areas of the regulations. The suggestions made and comments received by stakeholders have allowed the Board to engage in thoughtful deliberation and careful consideration of the particular needs of the legislative branch. Accordingly, the Board has crafted proposed regulations that it believes will fit the practices and procedures of the varying entities in the covered community.

Uniformed Services Employment and Re-employment Rights Act

The Uniformed Services Employment and Re-employment Rights Act ("USERRA") was enacted in December 1994, and the Department of Labor submitted regulations for the executive branch in 2005. USERRA's provisions ensure that entry and re-entry into the civilian workforce are not hindered by participation in non-career military service. USERRA accomplishes that purpose by providing rights in two kinds of cases: discrimina-

tion based on military service, and denial of an employment benefit as a result of military service.

Currently, the Board is engaged in drafting proposed regulations for USERRA's application to the legislative branch. During the 110th Congress, the Board will present its proposed regulations to stakeholders and engage in similar consultations as with the proposed VEOA draft regulations. The Board anticipates that this interactive and collaborative approach will allow the Board, as with the VEOA draft regulations, to ascertain the concerns and particular demands of the legislative branch with respect to application of these regulations.

There is a need for both VEOA and USERRA regulations in the legislative branch. Congress has seen fit to provide service men and women certain protections in federal civilian employment, and without adopted regulations, these protections are without legal effect in the legislative branch. The particular procedures and practices in the legislative branch necessitate regulations written especially for the legislative branch. The Board encourages Congress to adopt these regulations, once proposed, so that VEOA and USERRA protections can be provided specifically to employees of the legislative branch with regulations suitable to the needs of the covered community.

Conclusion

As the tenth anniversary of the Congressional Accountability Act of 1995 has now passed, it is time for a comprehensive analysis and update of the law to ensure that it continues to reflect the commitment by the lawmakers of this nation to democratic accountability.

With this 102b Report, the Board of Directors of the Office of Compliance urges the leadership of both houses of Congress to seriously consider the recommendations included in this report. The Board encourages Congress to look at the recent activities in the covered community to recognize the need for the implementation of these recommendations. In particular, the efforts made by the Office of the General Counsel of the Office of Compliance and the Office of the Architect of the Capitol to eliminate safety and health hazards that exist in the covered community have been successful due to the collaborative nature of the approach to the problem. However, certain safety issues and certain hazards may only be successfully addressed by the use of other mechanisms, such as specific retaliation protections for whistle blowers, preliminary injunctive relief, investigative subpoenas, and the General Counsel's ability to investigate and prosecute OSH claims of retaliation.

A fair workplace consists of fair treatment for its applicants and employees who serve in the military. The legislative branch attracts and employs many men and women who have collateral military responsibility. Congress has enacted laws which ensure that these individuals receive the same treatment as their civilian counterparts. Those service men and women who make application for federal employment in the legislative branch and those individuals returning from active duty must be assured, through appropriate regulation, that their service in the military will not hinder them from serving in their country's legislative branch of government.

The Board also encourages the leadership to increase Congress's compliance with section 102(b)(3) of the CAA. Section 102(b)(3) requires that every House and Senate committee report accompanying a bill or joint resolution that impacts terms and conditions of employment or access to public services or accommodations must "describe the manner in which the provisions of the bill or joint resolution apply to the legislative branch" or "in the case of a provision not applicable to the legislative branch, include a statement of the reasons the provision does not apply." Congress has made efforts to include such language in proposed bills, and the Board encourages its continued effort.

This Board, its executive appointees, and the staff of the Office of Compliance are prepared to work with the leadership, our oversight committees, other interested Members, and instrumentalities in Congress and

the legislative branch to make these recommendations part of the Congressional Accountability Act during the 110th Congress.

Respectfully submitted,

Susan S. Robfogel, Chair

Barbara L. Camens

Alan V. Friedman

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Appendix A

Employment and Civil Rights Which Still do Not Apply to Congress or Other Legislative Branch Instrumentalities

The statutes below, with the exception of Section 508 of the Rehabilitation Act, were all first identified by the Board in 1996 as not included among the laws which were applied to Congress through the Congressional Accountability Act of 1995. The absence of section 508 of the Rehabilitation Act was first identified in our 2001 Interim Report to Congress. We here repeat the recommendations - made in our Reports of 1996, 1998, 2000, 2002, and 2004, as well as those of the Interim 2001 Report - that these statutes should also be applied to Congress and the legislative branch through the Act.

The 1998 amendments to section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d)

In November 2001, the Board submitted an Interim Section 102(b) Report to Congress regarding the 1998 amendments to the Rehabilitation Act of 1973 in which the Board urged Congress to make those amendments applicable to itself and the legislative branch. The purpose of the 1998 amendments is to:

> *require each Federal agency to procure, maintain, and use electronic and information technology that allows individuals with disabilities the same access to technology as individuals without disabilities. [Senate Report on S. 1579, March 1998]*

As of this time, some five years later, software and other equipment which is "508 compliant" is readily available and in use by some employing offices. The Board encourages consistent use of these technologies so that individuals with impairments may have the same opportunities to access materials as others.

The Board reiterates its recommendation that Congress and the legislative branch, including the General Accounting Office, Government Printing Office, and Library of Congress, be required to comply with the mandates of section 508.

Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a to 2000a-6, 2000b to 2000b-3)

These titles prohibit discrimination or segregation on the basis of race, color, religion, or national origin regarding the goods, services, facilities, privileges, advantages, and accommodations of "any place of public accommodation" as defined in the Act. Although the CAA incorporated the protections of titles II and III of the ADA, which prohibit discrimination on the basis of disability with respect to access to public services and accom-

modations[16], it does not extend protection against discrimination based upon race, color, religion, or national origin with respect to access to public services and accommodations. For the reasons set forth in the 1996, 1998 and 2000 Section 102(b) Reports, the Board has determined that the rights and protections afforded by titles II and III of the Civil Rights Act of 1964 against discrimination with respect to places of public accommodation should be applied to employing offices within the legislative branch.

Prohibition against discrimination on the basis of jury duty (28 U.S.C. § 1875)

Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative branch employment. For the reasons set forth in the 1996, 1998, and 2000 Section 102(b) Reports, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Prohibition against discrimination on the basis of bankruptcy (11 U.S.C. § 525)

Section 525(a) provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person who is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. For the reasons stated in the 1996, 1998 and 2000 Section 102(b) Reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Prohibition against discharge from employment by reason of garnishment (15 U.S.C. § 1674(a))

Section 1674(a) prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the legislative branch. For the reasons set forth in the 1996, 1998 and 2000 Section 102(b) Reports, the Board has determined that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

16 Access to public accommodations, in this sense, includes an individual's "full enjoyment" of goods and services, and is not limited to the physical access of the place of accommodation. See National Federation of the Blind v. Target Corp., 2006 WL 2578282 (N.D. Cal. Sept. 6, 2006).

Appendix B

Regulatory Enforcement Provisions for Laws Which Are Already Applicable to the Legislative Branch under the Act

Record-keeping and notice-posting requirements of the private sector CAA laws

As mentioned in its 1998, 2000, 2002, and 2004 Reports, experience in the administration of the Act leads the Board to recommend that all currently inapplicable record-keeping and notice-posting provisions be made applicable under the CAA. For the reasons set forth in its prior reports of 1998, 2002, and 2004, the Board recommends that the Office be granted the authority to require that records be kept and notices posted in the same manner as required by the agencies that enforce the provisions of law made applicable by the CAA in the private sector.

Other enforcement authorities exercised by the agencies that implement the CAA laws for the private sector

To further the goal of parity, the Board also recommends that Congress grant the Office the remaining enforcement authorities that executive branch agencies utilize to administer and enforce the provisions of law made applicable by the CAA in the private sector. Implementing agencies in the executive branch have investigatory and prosecutorial authorities with respect to all of the private sector CAA laws, except the WARN Act. Based on the experience and expertise of the Office, granting these same enforcement authorities would make the CAA more comprehensive and effective. By taking these steps to live under full agency enforcement authority, the Congress will strengthen the bond that the CAA created between the legislator and the legislated.

Appendix C

Employee Protection Provisions of Environmental Statutes

Since its 1996 Report, the Board has addressed the inclusion of employee protection provisions of a number of statutory schemes: the Toxic Substances Control Act, Clean Water Act, Safe Drinking Water Act, Energy Reorganization Act, Solid Waste Disposal Act/Resources Conservation Recovery Act, Clean Air Act, and Comprehensive Environmental Response, Compensation and Liability Act. In its 1996 Section 102(b) Report, the Board stated:

> *It is unclear to what extent, if any, these provisions apply to entities in the Legislative Branch. Furthermore, even if applicable or partly applicable, it is unclear whether and to what extent the Legislative Branch has the type of employees and employing offices that would be subject to these provisions. Consequently, the Board reserves judgement on whether or not these provi sions should be made applicable to the Legislative Branch at this time.*

Further, in the 1998 Report the Board concluded that, while it remained unclear whether some or all of the environmental statutes apply to the legislative branch, "[t]he Board recommends that Congress should adopt legislation clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the Legislative Branch."

In the 2002 and 2004 Reports, the Board explicitly analyzed these protections and recommended that the employee protection provisions of these acts be placed within the CAA and applied to all covered employees, including employees of the Government Accountability Office, Government Printing Office, and Library of Congress. The Board reiterates those recommendations herein, including its recommendation to eliminate the separation of powers conflict inherent in enforcing these statutes, and urges Congress to include such amendments to the Act.

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