AS AMENDED NOVEMBER 2016

This edition of the Procedural Rules of the Office of Compliance contains all amendments made as of November 2016. All previous versions of the Procedural Rules are obsolete.

# PROCEDURAL RULES
## OF THE OFFICE OF COMPLIANCE

OFFICE OF COMPLIANCE
EST. 1995
UNITED STATES CONGRESS

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# INTRODUCTION TO THE CONGRESSIONAL ACCOUNTABILITY ACT AND THE OFFICE OF COMPLIANCE

**The Congressional Accountability Act (CAA),** enacted in 1995, was one of the first pieces of legislation passed by the 104th Congress. The CAA requires Congress and legislative branch employing offices to follow many of the same employment and workplace safety laws applied to private business and the Federal government. The CAA also established a dispute resolution procedure for the legislative branch that emphasizes counseling and mediation for the early resolution of disputes.

The CAA applies thirteen civil rights, labor, and workplace safety laws to the U.S. Congress and its instrumentalities. These include the Age Discrimination in Employment Act of 1967; the Americans with Disabilities Act of 1990; Title VII of the Civil Rights Act of 1964; the Employee Polygraph Protection Act of 1988; the Fair Labor Standards Act of 1938; the Family and Medical Leave Act of 1993; the Federal Service Labor-Management Relations Statute; the Occupational Safety and Health Act of 1970; the Rehabilitation Act of 1973; veterans' employment and reemployment rights at Chapter 43 of Title 38 of the U.S. Code; the Worker Adjustment and Retraining Notification Act; and the Genetic Information Nondiscrimination Act.

The CAA protects over 30,000 employees of the legislative branch, including employees of the House of Representatives and the Senate (including both Washington, D.C. and state district office staff); the Office of the Architect of the Capitol; the Capitol Police; the Office of Congressional Accessibility Services; the Congressional Budget Office; the Office of the Attending Physician; the Office of Compliance. Certain provisions of the CAA also apply to the Government Accountability Office and to the Library of Congress. The CAA established the Office of Compliance as an independent office to administer and enforce the Act. The Office operates an alternative dispute resolution system to resolve disputes and complaints arising under the Act; carries out an education and training program for the regulated community on the rights and responsibilities under the Act; and advises Congress on needed changes and amendments to the Act. The General Counsel of the Office of Compliance has independent investigatory and enforcement authority for certain violations of the Act.

# PROCEDURAL RULES OF THE OFFICE OF COMPLIANCE
## AS AMENDED NOVEMBER 2016


Subpart A—General Provisions

**§1.01 Scope and Policy**

**§1.02 Definitions**

**§1.03 Filing and Computation of Time**

**§1.04 Filing, Service, and Size Limitations of Motions, Briefs, Responses, and Other Documents**

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

**§1.06 Availability of Official Information**

**§1.07 Designation of Representative**

**§1.08 Confidentiality**


### §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, and for compliance, investigation, enforcement, and variance under Part C of title II. The rules include 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:

(a) *Act.* The term "Act" means the Congressional Accountability Act of 1995;

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

(1) the House of Representatives;

(2) the Senate;

(3) the Office of Congressional Accessibility Services;

(4) the Capitol Police;

(5) the Congressional Budget Office;

(6) the Office of the Architect of the Capitol;

(7) the Office of the Attending Physician;

(8) the Office of Compliance; or

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

(c) *Employee.* The term "employee" includes an applicant for employment and a former employee, except as provided in section 2421.3(b) of the Board's rules under section 220 of the Act.

(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.

(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 (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:

(1) the personal office of a Member of the House of Representatives or a Senator;

(2) a committee of the House of Representatives or the Senate or a joint committee;

(3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate;

(4) the 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 (r) of this section, the Government Accountability Office and the Library of Congress

(i) *Party.* The term "party" means:

(1) an employee or employing office in a proceeding under Part A of title II of the Act;

(2) a charging individual, an entity alleged to be responsible for correcting a violation, or the General Counsel in a proceeding under Part B of title II of the Act;

(3) an employee, employing office, or as appropriate, the General Counsel in a proceeding under Part C of title II of the Act; or

(4) a labor organization, individual employing office or employing activity, or, as appropriate, the General Counsel in a proceeding under Part D of title II of the Act.

(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.

(k) *Respondent.* The term "respondent" means the party against which a complaint is filed.

(l) *Office.* The term "Office" means the Office of Compliance.

(m) *Board.* The term "Board" means the Board of Directors of the Office of Compliance.

(n) *Chair.* The term "Chair" means the Chair of the Board of Directors of the Office of Compliance.

(o) *Executive Director.* The term "Executive Director" means the Executive Director of the Office of Compliance.

(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.

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

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

(1) Any proceeding under section 215 of the Act applies to covered employees and employing offices certain rights and protections of the Williams-Steiger Occupational Safety and Health Act of 1970.

(2) Any proceeding or rulemaking for purposes of section 9.04 of these rules.

### §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. 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.

(1) *In Person*. A document shall be deemed timely filed if it is hand delivered to the Office in: Adams Building, Room LA 200, 110 Second Street, SE, Washington, D.C. 20540-1999, before 5:00 p.m. Eastern Time on the last day of the applicable time period.

(2) *By Mail.* Documents are deemed filed on the date 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, SE, Washington, D.C. 20540-1999, by mail within five (5) days of the expiration of the applicable filing period.

(3) *By FAX.* Documents transmitted by FAX machine will be deemed filed on the date received at the Office at

202-426-1913, or on the date received at the Office of the General Counsel at 202-426-1663 if received by 5:00 p.m. Eastern Time. Faxed documents received after 5:00 p.m. 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 p.m. 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 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 p.m. Eastern Time. Documents received electronically after 5:00 p.m. 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 p.m. 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 by the Office will be used to show the time that the document has been filed. When the Office serves a document electronically, the time displayed as sent by the Office will be used to show the time that the document was served. 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.

(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, 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, 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.

(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 mail, five (5) days shall be added to the prescribed period. 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.

### §1.04 Filing, Service, and Size Limitations of Motions, Briefs, Responses, and Other Documents.

(a) *Filing with the Office; Number and Form.* 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, all motions, briefs, responses, and other documents must be filed with the Office or Hearing Officer. A party may file an electronic version of any submission in a 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.

(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 no brief, motion, response, or supporting memorandum filed with the Office shall exceed 35 double-spaced pages, exclusive of the table of contents, table of authorities and attachments. The Board, the Executive Director, or Hearing Officer may modify this limitation upon motion and for good cause shown, or on 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.

### §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 their own initiative, may impose an appropriate sanction, which may include the sanctions specified in section 7.02.

### §1.06 Availability of Official Information.

(a) *Policy.* It is the policy of the Board, the 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.

(b) *Availability.* Any person may examine and copy items described in paragraph (a) above at the Office of Compliance, Adams Building, Room LA 200, 110 Second Street, SE, Washington, D.C. 20540-1999, under conditions prescribed by the Office, including requiring payment for copying costs, and at reasonable times during normal working hours so long as it does not interfere with the efficient operations of the Office. As ordered by the Board, the Office may withhold or place under seal identifying details or other necessary matters, and, in each case, the reason for the withholding or sealing shall be stated in writing.

(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.

(d) *Final Decisions.* Pursuant to section 416(f) of the Act, a final decision entered by a Hearing Officer or by the Board under section 405(g) or 406(e) of the Act, which is in favor of the complaining covered employee, or in favor of the charging party under section 210 of the Act, or reverses a Hearing Officer's decision in favor of a complaining covered employee or charging party, shall be made public, except as otherwise ordered by the Board. The Board may make public any other decision at its discretion.

(e) *Release of Records for Judicial Action.* The records of Hearing Officers and the Board may be made public if required for the purpose of judicial review under section 407 of the Act.

(f) *Access by Committees of Congress.* 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 (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.

### §1.07 Designation of Representative.

(a) A party wishing to be represented must file with the Office a written notice of designation of representative. No more than one representative, 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 Of-

ficer 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* Service of documents shall be on the representative unless and until such time as the represented party or representative, with notice to the party, notifies the Executive Director in writing of a modification or revocation of the designation of representative. Where a designation of representative is in effect, all time limitations for receipt of materials shall be computed in the same manner as for those who are unrepresented, with service of the documents, however, directed to the representative.

(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.

### §1.08 Confidentiality.

(a) *Policy.* Except as provided in sections 416(d), (e), and (f) of the Act, the Office shall maintain confidentiality in counseling, mediation, and the proceedings and deliberations of Hearing Officers and the Board in accordance with sections 416(a),(b), and (c) of the Act.

(b) *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, 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 the mediation and hearing at the time they became 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

**§2.01 Matters Covered by Subpart B**

**§2.02 Requests for Advice and Information**

**§2.03 Counseling**

**§2.04 Mediation**

**§2.05 Election of Proceeding**

**§2.06 Certification of the Official Record**

**§2.07 Filing of Civil Action**

### §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:

(1) the Fair Labor Standards Act of 1938

(2) Title VII of the Civil Rights Act of 1964

(3) Title I of the Americans with Disabilities Act of 1990

(4) the Age Discrimination in Employment Act of 1967

(5) the Family and Medical Leave Act of 1993

(6) the Employee Polygraph Protection Act of 1988

(7) the Worker Adjustment and Retraining Notification Act

(8) the Rehabilitation Act of 1973

(9) Chapter 43 (relating to veterans' employment and reemployment) of title 38, United States Code.

(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.

### §2.02 Requests for Advice and Information.

At any time, an employee or an employing office may seek from the Office informal advice and information on the procedures of the Office and under the Act and information on the protections, rights and responsibilities under the Act and these rules. The Office will maintain the confidentiality of requests for such advice or information.

### §2.03 Counseling.

(a) *Initiating a Proceeding; Formal Request for Counseling.* To 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. Individuals wishing to file a formal request for counseling may call the Office for a form to use for this purpose.

(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, SE, Washington, D.C. 20540-1999; FAX 202- 426-1913; not later than 180 days after the alleged violation of the Act.

(d) *Overview of the Counseling Period.* The Office will maintain strict confidentiality throughout the counseling period. The counseling period 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 an individual employee or of an employing office that is the subject of a specific request for counseling.

(2) In accordance with Section 416(a) of the Act, 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. Such a limited waiver must be written on the form supplied by the Office and signed by both the counselor and the employee.

(f) *Role of Counselor in Informing Employee of his or her Rights and Responsibilities.* The counselor will provide the employee with appropriate information concerning rights and responsibilities under the Act and these rules.

(g) *Role of Counselor.* The Counselor 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;

(3) obtain a detailed description of the action(s) at issue, including all relevant dates, and the covered employee's reason(s) for believing that a violation may have occurred;

(4) inquire as to the relief sought by the covered employee;

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

(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.

(i) *Duration of Counseling Period.* The period for counseling shall be 30 days, beginning on the date that the request for counseling is 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 Executive Director agrees.

(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 must be in writing and 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 first class mail, 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 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 "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, 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 internal procedure 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. 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 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.

(iv) After using the internal procedures, 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, or longer if the Executive Director has extended the time period, 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 internal procedures.

(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 an allegation which may also be raised under the procedures set forth in this subpart, the Architect of the Capitol or the Capitol Police 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, an allegation which may also be raised under the procedures set forth in this subpart, any decision issued 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, 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) *Overview.* Mediation is a process in which employees, employing offices and their representatives, if any, meet separately and/or jointly with a mediator trained to assist them in resolving disputes. As 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 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, telephone number, and the name of the employing office that is the subject of the request. Failure to request mediation within the prescribed period 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 will be closed and the employee will be so notified.

(c) *Notice of Commencement of the Mediation Period.* The Office shall notify the employing office or its designated representative of the commencement of the mediation period.

(d) *Selection of Mediators; Disqualification.* Upon receipt of the request for mediation, the Executive Director shall assign one or more 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 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 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 disqualifica-

tion. The Executive Director's decision on this request shall be final and unreviewable.

(e) *Duration and Extension.*

(1) The mediation period shall be 30 days beginning on the date the request for mediation is received, unless the Office grants an extension.

(2) The 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. The request shall be written and filed with the 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 Executive Director.

(f) *Procedures.*

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

(2) The Agreement to Mediate. At the commencement of the mediation, the mediator will ask the participants and/or their representatives to sign an agreement prepared by the Office ("the Agreement to Mediate"). The Agreement to Mediate will define what is to be kept confidential during mediation and 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 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 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 required. The Office may participate in the mediation process through a representative and/or observer. 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 9.03 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 will be personally delivered evidenced by a written receipt, or sent by first class mail, e-mail, or fax. The notice will specify the mode of delivery and also provide information about the employee's 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 2.07 of these rules.

(j) *Independence of the Mediation Process and the Mediator.* 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.

(k) *Violation of Confidentiality in Mediation.* An allegation regarding a violation of the confidentiality provisions may be made by a party in 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.

(l) *Employees of the Office of the Architect of the Capitol and the Capitol Police.* At any time during the mediation period, the Executive Director may recommend that the employee use the grievance procedures of the Architect of the Capitol and the Capitol Police in accordance with the procedures set forth in section 2.03(m) of these rules.

### §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:

(1) file a complaint with the Office in accordance with section 405 of the Act and the procedure set out in section 5.01, below; or

(2) file a civil action in accordance with section 408 of the Act and section 2.07, below in the United States

district court for the district in which the employee is employed or for the District of Columbia.

(b) A covered employee who files a civil action pursuant to section 408 of the Act, may not thereafter file a complaint under section 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; the date and method of delivery the Notification of End of Mediation Period was sent to the complainant; and the date the Notice was deemed by the Office to have been received by the complainant.

(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.

### §2.07 Filing of Civil Action.

(a) *Filing.* Section 404 of the Act provides that as an alternative to filing a complaint under section 408 of the Act and section 5.01 of these rules, a covered employee who receives notice of the end of mediation pursuant to section 403 of the Act and section 2.04(i) of these rules may elect to file a civil action in accordance with Section 408 of the Act in the United States district court for the district in which the employee is employed or for the District of Columbia.

(b) *Time for Filing.* A covered employee may file such a civil action no earlier than 30 days after receipt of the notice under the section 2.04(i), but no later than 90 days after that receipt.

(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.

## Subpart C—Compliance, Investigation, and Enforcement under Section 210 of the CAA (ADA Public Services)—Inspections and Complaints

[Reserved]

## 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


**§4.01 Purpose and Scope**

**§4.02 Authority for Inspection**

**§4.03 Request for Inspections by Employees and Employing Offices**

**§4.04 Objection to Inspection**

**§4.05 Entry Not a Waiver**

**§4.06 Advance Notice of Inspection**

**§4.07 Conduct of Inspections**

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**§4.09 Consultation with Employees**

**§4.10 Inspection Not Warranted; Informal Review**

**§4.11 Citations**

**§4.12 Imminent Danger**

**§4.13 Posting of Citations**

**§4.14 Failure to Correct a Violation for Which a Citation Has Been Issued; Notice of Failure to Correct Violation; Complaint**

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## Rules of Practice for Variances, Limitations, Variations, Tolerances, and Exemptions


**§4.20 Purpose and Scope**

**§4.21 Definitions**

**§4.22 Effect of Variances**

**§4.23 Public Notice of a Granted Variance, Limitation, Variation, Tolerance, or Exemption**

**§4.24 Form of Documents**

**§4.25 Applications for Temporary Variances and other Relief**

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**§4.27 Modification or Revocation of Orders**

**§4.28 Action on Applications**

**§4.29 Consolidation of Proceedings**

**§4.30 Consent Findings and Rules or Orders**

**§4.31 Order of Proceedings and Burden of Proof**

## Inspections, Citations and Complaints

### §4.01 Purpose and Scope.

The purpose of sections 4.01 through 4.15 of this subpart is to prescribe rules and procedures for enforcement of the inspection and citation provisions of section 215(c)(1) through (3) of the CAA. For the purpose of sections 4.01 through 4.15, references to the "General Counsel" include any authorized representative of the General Counsel. In situations where sections 4.01 through 4.15 set forth general enforcement policies rather than substantive or procedural rules, such policies may be modified in specific circumstances where the General Counsel or the General Counsel's designee determines that an alternative course of action would better serve the objectives of section 215 of the CAA.

### §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"); 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.

(b) Prior to inspecting areas containing information which is classified by an agency of the United States Government (and/or by any congressional committee or other authorized entity within the legislative branch) in the interest of national security, and for which security clearance is required as a condition for access to the area(s) to be inspected, the individual(s) conducting the inspection shall have obtained the appropriate security clearance.

### §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 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.

(2) If upon receipt of such notification the General Counsel's designee determines that the notice meets the requirements set forth in subparagraph (1) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he or she shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. Inspections under this section shall not be limited to matters referred to in the notice.

(3) Prior to or during any inspection of a place of employment, any covered employee or representative of employees may notify the General Counsel's designee in writing of any violation of section 215 of the CAA which he or she has reason to believe exists in such place of employment. Any such notice shall comply with the requirements of subparagraph (1) of this section.

(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 section 215(c)(1) of the CAA. Any such requests shall be reduced to writing on a form available from the Office.

### §4.04 Objection to Inspection.

Upon a refusal to permit the General Counsel's designee, in exercise of his or her official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employing office, operator, agent, or employee, in accordance with section 4.02, or to permit a representative of employees to accompany the General Counsel's designee during the physical inspection of any workplace in accordance with section 4.07, the General Counsel's designee shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The General Counsel's designee shall endeavor to ascertain the reason for such refusal,

and shall immediately report the refusal and the reason therefor to the General Counsel, who shall take appropriate action.

### §4.05 Entry Not a Waiver.

Any permission to enter, inspect, review records, or question any person, shall not imply or be conditioned upon a waiver of any cause of action or citation under section 215 of the CAA.

### §4.06 Advance Notice of Inspections.

(a) Advance notice of inspections may not be given, except in the following situations:

(1) in cases of apparent imminent danger, to enable the employing office to abate the danger as quickly as possible;

(2) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection;

(3) where necessary to assure the presence of representatives of the employing office and employees or the appropriate personnel needed to aid in the inspection; and

(4) in other circumstances where the General Counsel determines that the giving of advance notice would enhance the probability of an effective and thorough inspection.

(b) In the situations described in paragraph (a) of this section, advance notice of inspections may be given only if authorized by the General Counsel, except that in cases of apparent imminent danger, advance notice may be given by the General Counsel's designee without such authorization if the General Counsel is not immediately available. When advance notice is given, it shall be the employing office's responsibility promptly to notify the authorized representative of employees, if the identity of such representative is known to the employing office. (See section 4.08(b) as to situations where there is no authorized representative of employees.) Upon the request of the employing office, the General Counsel will inform the authorized representative of employees of the inspection, provided that the employing office furnishes the General Counsel's designee with the identity of such representative and with such other information as is necessary to enable him promptly to inform such representative of the inspection. Advance notice in any of the situations described in paragraph (a) of this section shall not be given more than 24 hours before the inspection is scheduled to be conducted, except in apparent imminent danger situations and in other unusual circumstances.

### §4.07 Conduct of Inspections.

(a) Subject to the provisions of section 4.02, inspections shall take place at such times and in such places of employment as the General Counsel may direct. At the beginning of an inspection, the General Counsel's designee shall present his or her credentials to the operator of the facility or the management employee in charge at the place of employment to be inspected; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection and the records specified in section 4.02 which he or she wishes to review. However, such designation of records shall not preclude access to additional records specified in section 4.02.

(b) The General Counsel's designee shall have authority to take environmental samples and to take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately, any employing office, operator, agent, or employee of a covered facility. As used herein, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges, and other similar devices to employees in order to monitor their exposures.

(c) In taking photographs and samples, the General Counsel's designees shall take reasonable precautions to insure that such actions with flash, spark-producing, or other equipment would not be hazardous. The General Counsel's designees shall comply with all employing office safety and health rules and practices at the workplace or location being inspected, and they shall wear and use appropriate protective clothing and equipment.

(d) The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employing office.

(e) At the conclusion of an inspection, the General Counsel's designee shall confer with the employing office or its representative and informally advise it of any apparent safety or health violations disclosed by the inspection. During such conference, the employing office shall be afforded an opportunity to bring to the attention of the General Counsel's designee any pertinent information regarding conditions in the workplace.

(f) Inspections shall be conducted in accordance with the requirements of this subpart.

(g) *Trade Secrets.*

(1) At the commencement of an inspection, the employing office may identify areas in the establishment which contain or which might reveal a trade secret as referred to in section 15 of the OSHAct and section 1905 of title 18 of the United States Code. If the General Counsel's designee has no clear reason to question such identification, information contained in such areas, including all negatives and prints of photographs, and environmental samples, shall be labeled "confidential-

trade secret" and shall not be disclosed by the General Counsel and/or his designees, except that such information may be disclosed to other officers or employees concerned with carrying out section 215 of the CAA or when relevant in any proceeding under section 215. In any such proceeding the Hearing Officer or the Board shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

(2) Upon the request of an employing office, any authorized representative of employees under section 4.08 in an area containing trade secrets shall be an employee in that area or an employee authorized by the employing office to enter that area. Where there is no such representative or employee, the General Counsel's designee shall consult with a reasonable number of employees who work in that area concerning matters of safety and health.

### §4.08 Representatives of Employing Offices and Employees.

(a) The General Counsel's designee shall be in charge of inspections and questioning of persons. A representative of the employing office and a representative authorized by its employees shall be given an opportunity to accompany the General Counsel's designee during the physical inspection of any workplace for the purpose of aiding such inspection. The General Counsel's designee may permit additional employing office representatives and additional representatives authorized by employees to accompany the designee where he or she determines that such additional representatives will further aid the inspection. A different employing office and employee representative may accompany the General Counsel's designee during each different phase of an inspection if this will not interfere with the conduct of the inspection.

(b) The General Counsel's designee shall have authority to resolve all disputes as to who is the representative authorized by the employing office and employees for the purpose of this section. If there is no authorized representative of employees, or if the General Counsel's designee is unable to determine with reasonable certainty who is such representative, he or she shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(c) The representative(s) authorized by employees shall be an employee(s) of the employing office. However, if in the judgment of the General Counsel's designee, good cause has been shown why accompaniment by a third party who is not an employee of the employing office (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the General Counsel's designee during the inspection.

(d) The General Counsel's designee may deny the right of accompaniment under this section to any person whose conduct interferes with a fair and orderly inspection. With regard to information classified by an agency of the U.S. Government (and/or by any congressional committee or other authorized entity within the legislative branch) in the interest of national security, only persons authorized to have access to such information may accompany the General Counsel's designee in areas containing such information.

### §4.09 Consultation with Employees.

The General Counsel's designee may consult with employees concerning matters of occupational safety and health to the extent he or she deems necessary for the conduct of an effective and thorough inspection. During the course of an inspection, any employee shall be afforded an opportunity to bring any violation of section 215 of the CAA which he or she has reason to believe exists in the workplace to the attention of the General Counsel's designee.

### §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 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 the employing office. The employing office may submit and serve an opposing written statement of position with the General Counsel and the complaining party. 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.

(b) If the General Counsel's designee determines that an inspection is not warranted because the requirements of section 4.03(a)(1) have not been met, he or she shall notify the complaining party in writing of such determination. Such determination shall be without prejudice to the filing of a new notice of alleged violation meeting the requirements of section 4.03(a)(1).

### §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, 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, 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, either a citation or a notice of de minimis violations that 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.

(b) Any citation shall describe with particularity the nature of the alleged violation, including a reference to the provision(s) of the CAA, standard, rule, regulation, or order alleged to have been violated. Any citation shall also fix a reasonable time or times for the abatement of the alleged violation.

(c) If a citation or notice of de minimis violations is issued for a violation alleged in a request for inspection under section 4.03(a)(1), or a notification of violation under section 4.03(a)(3), a copy of the citation or notice of de minimis violations shall also be sent to the employee or representative of employees who made such request or notification.

(d) After an inspection, if the General Counsel determines that a citation is not warranted with respect to a danger or violation alleged to exist in a request for inspection under section 4.03(a)(1) or a notification of violation under section 4.03(a)(3), the informal review procedures prescribed in 4.15 shall be applicable. After considering all views presented, the General Counsel shall affirm the previous determination, order a reinspection, or issue a citation if he or she believes that the inspection disclosed a violation. The General Counsel shall furnish the party that submitted the notice and the employing office with written notification of the determination and the reasons therefor. The determination of the General Counsel shall be final and not reviewable.

(e) Every citation shall state that the issuance of a citation does not constitute a finding that a violation of section 215 has occurred.

(f) No citation may be issued to an employing office because of a rescue activity undertaken by an employee of that employing office with respect to an individual in imminent danger unless:

(1) (i) such employee is designated or assigned by the employing office to have responsibility to perform or assist in rescue operations, and

(ii) the employing office fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

(2) (i) such employee is directed by the employing office to perform rescue activities in the course of carrying out the employee's job duties, and

(ii) the employing office fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

(3) (i) such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as a workplace operation where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water; and

(ii) such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual; and

(iii) the employing office has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.

(4) For the purpose of this policy, the term "imminent danger" means the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

### §4.12 Imminent Danger.

Whenever and as soon as a designee of the General Counsel concludes on the basis of an inspection that conditions or practices exist in any place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided for by section 215(c), he or she shall inform the affected employees and employing offices of the danger and that he or she is recommending the filing of a petition to restrain such conditions or practices and for other appropriate relief in accordance with section 13(a) of the OSHAct, as

applied by section 215(b) of the CAA. Appropriate citations may be issued with respect to an imminent danger even though, after being informed of such danger by the General Counsel's designee, the employing office immediately eliminates the imminence of the danger and initiates steps to abate such danger.

### §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.

(c) An employing office to whom a citation has been issued may post a notice in the same location where such citation is posted indicating that the citation is being contested before the Board, and such notice may explain the reasons for such contest. The employing office may also indicate that specified steps have been taken to abate the violation.

### §4.14 Failure to Correct a Violation for Which a Citation Has Been Issued; Notice of Failure to Correct Violation; Complaint.

(a) If the General Counsel determines that an employing office has failed to correct an alleged violation for which a citation has been issued within the period permitted for its correction, he or she may issue a notification to the employing office of such failure prior to filing a complaint against the employing office under section 215(c)(3) of the CAA. Such notification shall fix a reasonable time or times for abatement of the alleged violation for which the citation was issued and shall be posted in accordance with section 4.13 of these rules. Nothing in these rules shall require the General Counsel to issue such a notification as a prerequisite to filing a complaint under section 215(c)(3) of the CAA.

(b) If after issuing a citation or notification, the General Counsel believes that a violation has not been corrected, the General Counsel may file a complaint with the Office against the employing office named in the citation or notification pursuant to section 215(c)(3) of the CAA. The complaint shall be submitted to a Hearing Officer for decision pursuant to subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406. The procedures of sections 7.01 through 7.16 of these rules govern complaint proceedings under this section.

### §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 9.03 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.

## Rules of Practice for Variances, Limitations, Variations, Tolerances, and Exemptions

### §4.20 Purpose and Scope.

Sections 4.20 through 4.31 contain rules of practice for administrative proceedings to grant variances and other relief under sections 6(b)(6)(A) and 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970, as applied by section 215(c)(4) of the CAA.

### §4.21 Definitions.

As used in sections 4.20 through 4.31, unless the context clearly requires otherwise—

(a) *OSHAct* means the Williams-Steiger Occupational Safety and Health Act of 1970, as applied to covered employees and employing offices under section 215 of the CAA.

(b) *Party* means a person admitted to participate in a hearing conducted in accordance with this subpart. An applicant for relief and any affected employee shall be entitled to be named parties. The General Counsel shall be deemed a party without the necessity of being named.

(c) *Affected employee* means an employee who would be affected by the grant or denial of a variance, limitation, variation, tolerance, or exemption, or any one of the employee's authorized representatives, such as the employee's collective bargaining agent.

### §4.22 Effect of Variances.

All variances granted pursuant to this part shall have only future effect. In its discretion, the Board may decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employing office involved and a proceeding on the citation or a related issue concerning a proposed period of abatement is pending before the General Counsel, a Hearing Officer, or the Board until the completion of such proceeding.

### §4.23 Public Notice of a Granted Variance, Limitation, Variation, Tolerance, or Exemption.

The Board will transmit every final action granting a variance, limitation, variation, tolerance, or exemption under this part to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that such final action be published in the Congressional Record. Every such final action shall specify the alternative to the standard involved which the particular variance permits.

### §4.24 Form of Documents.

Any applications for variances and other papers which are filed in proceedings under sections 4.20 through 4.31 of these rules shall be written or typed. All applications for variances and other papers filed in variance proceedings shall be signed by the applying employing office, by its attorney or other authorized representative, and shall contain the information required by sections 4.25 or 4.26 of these rules, as applicable.

### §4.25 Applications for Temporary Variances and Other Relief.

(a) *Application for Variance.* Any employing office, or class of employing offices, desiring a variance from a standard, or portion thereof, authorized by section 6(b)(6)(A) of the OSHAct, as applied by section 215 of the CAA, may file a written application containing the information specified in paragraph (b) of this section with the Board. Pursuant to section 215(c)(4) of the CAA, the Board shall refer any matter appropriate for hearing to a Hearing Officer under subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406. The procedures set forth at sections 7.01 through 7.16 of these rules shall govern hearings under this subpart.

(b) *Contents.* An application filed pursuant to paragraph (a) of this section shall include:

(1) the name and address of the applicant;

(2) the address of the place or places of employment involved;

(3) a specification of the standard or portion thereof from which the applicant seeks a variance;

(4) a representation by the applicant, supported by representations from qualified persons having first-hand knowledge of the facts represented, that the applicant is unable to comply with the standard or portion thereof by its effective date and a detailed statement of the reasons therefor;

(5) a statement of the steps the applicant has taken and will take, with specific dates where appropriate, to protect employees against the hazard covered by the standard;

(6) a statement of when the applicant expects to be able to comply with the standard and of what steps the applicant has taken and will take, with specific dates where appropriate, to come into compliance with the standard;

(7) a statement of the facts the applicant would show to establish that

(i) the applicant is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date;

(ii) the applicant is taking all available steps to safeguard its employees against the hazards covered by the standard; and

(iii) the applicant has an effective program for coming into compliance with the standard as quickly as practicable;

(8) a statement that the applicant has informed its affected employees of the application by giving a copy thereof to their authorized representative, posting a statement, giving a summary of the application, and specifying where a copy may be examined, at the place or places where notices to employees are normally posted, and by other appropriate means; and

(9) a description of how affected employees have been informed of the application and of their right to petition the Board for a hearing.

(c) *Interim Order.*

(1) *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The Hearing Officer to whom the Board has referred the application may rule ex parte upon the application.

(2) *Notice of Denial of Application.* If an application filed pursuant to paragraph (c)(1) of this section is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the Grant of an Interim Order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties and the terms of the order shall be transmitted by the Board to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record. It shall be a condition of the order that the affected employing office shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

### §4.26 Applications for Permanent Variances and Other Relief.

(a) *Application for Variance.* Any employing office, or class of employing offices, desiring a variance authorized by section 6(d) of the OSHAct, as applied by section 215 of the CAA, may file a written application containing the information specified in paragraph (b) of this section, with the Board. Pursuant to section 215(c)(4) of the CAA, the Board shall refer any matter appropriate for hearing to a Hearing Officer under subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406.

(b) *Contents.* An application filed pursuant to paragraph (a) of this section shall include:

(1) the name and address of the applicant;

(2) the address of the place or places of employment involved;

(3) a description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the applicant;

(4) a statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide employment and places of employment to employees which are as safe and healthful as those required by the standard from which a variance is sought;

(5) a certification that the applicant has informed its employees of the application by:

(i) giving a copy thereof to their authorized representative;

(ii) posting a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and

(iii) by other appropriate means; and

(6) a description of how employees have been informed of the application and of their right to petition the Board for a hearing.

(c) *Interim Order.*

(1) *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The Hearing Officer to whom the Board has referred the application may rule ex parte upon the application.

(2) *Notice of Denial of Application.* If an application filed pursuant to paragraph (c)(1) of this section is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the Grant of an Interim Order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties, and the terms of the order shall be transmitted by the Board to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record. It shall be a condition of the order that the affected employing office shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

### §4.27 Modification or Revocation of Orders.

(a) *Modification or Revocation.* An affected employing office or an affected employee may apply in writing to the Board for a modification or revocation of an order issued under section 6(b)(6)(A), or 6(d) of the OSHAct, as applied by section 215 of the CAA. The application shall contain:

(1) the name and address of the applicant;

(2) a description of the relief which is sought;

(3) a statement setting forth with particularity the grounds for relief;

(4) if the applicant is an employing office, a certification that the applicant has informed its affected employees of the application by:

(i) giving a copy thereof to their authorized representative;

(ii) posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and

(iii) other appropriate means;

(5) if the applicant is an affected employee, a certification that a copy of the application has been furnished to the employing office; and

(6) any request for a hearing, as provided in this part.

(b) *Renewal.* Any final order issued under section 6(b)(6)(A) of the OSHAct, as applied by section 215 of the CAA, may be renewed or extended as permitted by the applicable section and in the manner prescribed for its issuance.

### §4.28 Action on Applications.

(a) *Defective Applications.*

(1) If an application filed pursuant to sections 4.25(a), 4.26(a), or 4.27 does not conform to the applicable section, the Hearing Officer or the Board, as applicable, may deny the application.

(2) Prompt notice of the denial of an application shall be given to the applicant.

(3) A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial.

(4) A denial of an application pursuant to this paragraph shall be without prejudice to the filing of another application.

(b) *Adequate Applications.*

(1) If an application has not been denied pursuant to paragraph (a) of this section, the Office shall cause to be published a notice of the filing of the application, which the Board will transmit to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record.

(2) A notice of the filing of an application shall include:

(i) the terms, or an accurate summary of the application;

(ii) a reference to the section of the OSHAct applied by section 215 of the CAA under which the application has been filed;

(iii) an invitation to interested persons to submit within a stated period of time written data, views, or arguments regarding the application; and

(iv) information to affected employing offices, employees, and appropriate authority having jurisdiction over employment or places of employment covered in the application of any right to request a hearing on the application.

### §4.29 Consolidation of Proceedings.

On the motion of the Hearing Officer or the Board or that of any party, the Hearing Officer or the Board may consolidate or contemporaneously consider two or more proceedings which involve the same or closely related issues.

### §4.30 Consent Findings and Rules or Orders.

(a) *General.* At any time before the reception of evidence in any hearing, or during any hearing, a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceeding. The allowance of such opportunity and the duration thereof shall be in the discretion of the Hearing Officer, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement which will result in a just disposition of the issues involved.

(b) *Contents.* Any agreement containing consent findings and rule or order disposing of a proceeding shall also provide:

(1) that the rule or order shall have the same force and effect as if made after a full hearing;

(2) that the entire record on which any rule or order may be based shall consist solely of the application and the agreement;

(3) a waiver of any further procedural steps before the Hearing Officer and the Board; and

(4) a waiver of any right to challenge or contest the validity of the findings and of the rule or order made in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) submit the proposed agreement to the Hearing Officer for his or her consideration; or

(2) inform the Hearing Officer that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and rule or order is submitted within the time allowed therefor, the Hearing Officer may accept such agreement by issuing his or her decision based upon the agreed findings.

### §4.31 Order of Proceedings and Burden of Proof.

(a) *Order of Proceeding.* Except as may be ordered otherwise by the Hearing Officer, the party applicant for relief shall proceed first at a hearing.

(b) *Burden of Proof.* The party applicant shall have the burden of proof.

## Subpart E—Complaints

**§5.01 Complaints**

**§5.02 Appointment of the Hearing Officer**

**§5.03 Dismissal, Summary Judgment, and Withdrawal of Complaint**

**§5.04 Confidentiality**

### §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.

(2) A complaint may be filed by the General Counsel

(i) after the investigation of a charge filed under section 210 or 220 of the Act, or

(ii) after the issuance of a citation or notification under section 215 of the Act.

(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;

(ii) the name, address, and telephone number of the employing office against which the complaint is brought;

(iii) the name(s) and title(s) of the individual(s) involved in the conduct that the employee claims is a violation of the Act;

(iv) a description of the conduct being challenged, including the date(s) of the conduct;

(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;

(vi) a statement of the relief or remedy sought; and

(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;

(ii) notice of the charge filed alleging a violation of section 210 or 220 and/or issuance of a citation or notification under section 215;

(iii) a description of the acts and conduct that are alleged to be violations of the Act, including all relevant dates and places, and the names and titles of the responsible individuals; and

(iv) a statement of the relief or remedy sought.

(d) *Amendments.* Amendments to the complaint may be permitted by the Office or, after assignment, by a Hearing Of-

ficer, on the following conditions: that all parties to the proceeding have adequate notice to prepare to meet the new allegations; that the amendments, as appropriate, relate to the violations for which the employee has completed counseling and mediation, or relate to the charge(s) investigated and/or the citation or notification issued by the General Counsel; and that permitting such amendments will not unduly prejudice the rights of the employing office, the labor organization, or other parties, unduly delay the completion of the hearing, or otherwise interfere with or impede the proceedings.

(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 first class mail, e-mail, or facsimile with a copy of the complaint or amended complaint and 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. 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 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 mediator who mediated the matter under sections 2.03 and 2.04 of these rules.

### §5.03 Dismissal, Summary Judgment and Withdrawal of Complaints.

(a) A Hearing Officer may, after notice and an opportunity to respond, dismiss any claim that the Hearing Officer finds to be frivolous or that fails to state a claim upon which relief may be granted, including, but not limited to, claims that were not advanced in counseling or mediation.

(b) A Hearing Officer may, after notice and an opportunity to respond, dismiss a complaint because it fails to comply with the applicable time limits or other requirements under the Act or these rules.

(c) If the General Counsel or any complainant fails to proceed with an action, the Hearing Officer may dismiss the complaint with prejudice.

(d) *Summary Judgment.* A Hearing Officer may, after notice and an opportunity for the parties to address the question of summary judgment, issue summary judgment on some or all of the complaint.

(e) *Appeal.* A final decision by the Hearing Officer made under section 5.03(a)–(d) or 7.16 of these Rules may be subject to appeal before the Board if the aggrieved party files a timely petition for review under section 8.01. A final decision under section 5.03(a)–(d) which does not resolve all of the claims or issues in the case(s) before the Hearing Officer may not be appealed to the Board in advance of a final decision entered under section 7.16 of these rules, except as authorized pursuant to section 7.13 of these Rules.

(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.

(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.

(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 may result in the imposition of procedural or evidentiary sanctions. See also sections 1.08, 1.09 and 7.12 of these rules.

## Subpart F—Discovery and Subpoenas

**§6.01 Discovery**

**§6.02 Requests for Subpoenas**

**§6.03 Service**

**§6.04 Proof of Service**

**§6.05 Motion to Quash**

**§6.06 Enforcement**

### §6.01 Discovery.

(a) *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 be taken of or from an employee of the Office of Compliance, counselor, or mediator, including files, records, or notes produced during counseling and mediation and maintained by the Office.

(b) *Initial Disclosure.* Within 14 days after the pre-hearing conference 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 parties may engage in reasonable prehearing discovery.

(1) The 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.

(3) The Hearing Officer may issue any other order to prevent discovery or disclosure of confidential or privileged materials or information, as well as hearing or trial preparation materials and any other information deemed not discoverable, or to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.

(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 testi-

mony 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 by any party may be issued for the attendance or testimony of an employee of the Office of Compliance, a counselor, or a mediator, 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.

(b) *Request.* A request for the issuance of a subpoena requiring the attendance and testimony of witnesses or the production of documents or other evidence under paragraph (a) above shall be submitted to the Hearing Officer at least 15 days in advance of the date scheduled for the commencement of the hearing. If the subpoena is sought as part of the discovery process, the request shall be submitted to the Hearing Officer at least 10 days in advance of the date set for the attendance of the witness at a deposition or the production of documents. The Hearing Officer may waive the time limits stated above for good cause.

(c) *Forms and Showing.* Requests for subpoenas shall be submitted in writing to the Hearing Officer and shall specify with particularity the witness, correspondence, books, papers, documents, or other records desired and shall be supported by a showing of general relevance and reasonable scope.

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

### §6.03 Service.

Subpoenas shall be served in the manner provided under rule 45(b) of the Federal Rules of Civil Procedure. Service of a subpoena may be made by any person who is over 18 years of age and not a party to the proceeding.

### §6.04 Proof of Service.

When service of a subpoena is effected, the person serving the subpoena shall certify the date and the manner of service. The party on whose behalf the subpoena was issued shall file the server's certification with the Hearing Officer.

### §6.05 Motion to Quash.

Any person against whom a subpoena is directed may file a motion to quash or limit the subpoena setting forth the reasons why the subpoena should not be complied with or why it should be limited in scope. This motion shall be filed with the Hearing Officer before the time specified in the subpoena for compliance and not later than 10 days after service of the subpoena.

### §6.06 Enforcement.

(a) *Objections and Requests for Enforcement.* If a person has been served with a subpoena pursuant to section 6.03, but fails or refuses to comply with its terms or otherwise objects to it, the party or person objecting or the party seeking compliance may seek a ruling from the Hearing Officer. The request for a ruling shall be submitted in writing to the Hearing Officer. However, it may be made orally on the record at the hearing at the Hearing Officer's discretion. The party seeking compliance shall present the proof of service and, except where the witness was required to appear before the Hearing Officer, shall submit evidence, by affidavit or declaration, of the failure or refusal to obey the subpoena.

(b) *Ruling by Hearing Officer.*

(1) The Hearing Officer shall promptly rule on the request for enforcement and/or the objection(s).

(2) On request of the objecting witness or any party, the Hearing Officer shall; or on the Hearing Officer's own initiative, the Hearing Officer may, refer the ruling to the Board for review.

(c) *Review by the Board.* The Board may overrule, modify, remand, or affirm the ruling of the Hearing Officer and in its discretion, may direct the General Counsel to apply in the name of the Office for an order from a United States district court to enforce the subpoena.

(d) *Application to an Appropriate Court; Civil Contempt.* If a person fails to comply with a subpoena, the Board may direct the General Counsel to apply, in the name of the Office, to an appropriate United States district court for an order requiring that person to appear before the Hearing Officer to give testimony or produce records. Any failure to obey a lawful order of the district court may be held by such court to be a civil contempt thereof.

## Subpart G—Hearings

**§7.01 The Hearing Officer**

**§7.02 Sanctions**

**§7.03 Disqualification of the Hearing Officer**

**§7.04 Motions and Prehearing Conference**

**§7.05 Scheduling the Hearing**

**§7.06 Consolidation and Joinder of Cases**

**§7.07 Conduct of Hearing; Disqualification of Representatives**

**§7.08 Transcript**

**§7.09 Admissibility of Evidence**

**§7.10 Stipulations**

**§7.11 Official Notice**

**§7.12 Confidentiality**

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

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

**§7.15 Closing the record**

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

### §7.01 The Hearing Officer.

(a) *Exercise of Authority.* The Hearing Officer may exercise authority as provided in paragraph (b) of this section upon his or her own initiative or upon the motion of a party, as appropriate.

(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:

(1) administer oaths and affirmations;

(2) rule on motions to disqualify designated representatives;

(3) issue subpoenas in accordance with section 6.02;

(4) rule upon offers of proof and receive relevant evidence;

(5) rule upon discovery issues as appropriate under sections 6.01 to 6.06;

(6) hold prehearing conferences for the settlement and simplification of issues;

(7) convene a hearing as appropriate, regulate the course of the hearing, and maintain decorum at and exclude from the hearing any person who disrupts, or threatens to disrupt, that decorum;

(8) exclude from the hearing any person, except any complainant, any party, the attorney or representative of any complainant or party, or any witness while testifying;

(9) rule on all motions, witness and exhibit lists, and proposed findings, including motions for summary judgment;

(10) require the filing of briefs, memoranda of law, and the presentation of oral argument with respect to any question of fact or law;

(11) order the production of evidence and the appearance of witnesses;

(12) impose sanctions as provided under section 7.02 of these rules;

(13) file decisions on the issues presented at the hearing;

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

(15) waive or modify any procedural requirements of subparts F and G of these rules so long as permitted by the Act.

### §7.02 Sanctions.

(a) The Hearing Officer may impose sanctions on a party's representative necessary to regulate the course of the hearing.

(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) draw an inference in favor of the requesting party on the issue related to the information sought;

(B) stay further proceedings until the order is obeyed;

(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) permit the requesting party to introduce secondary evidence concerning the information sought;

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

(F) direct judgment against the non-complying party in whole or in part; or

(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 decide the matter, where appropriate.

(3) *Failure to Make Timely Filing.* The Hearing Officer may refuse to consider any request, motion or other action that is not filed in a timely fashion in compliance with this Part.

(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.

### §7.03 Disqualification of the Hearing Officer.

(a) In the event that a Hearing Officer considers himself or herself disqualified, either because of personal bias or of an interest in the case or for some other disqualifying reason, he or she shall withdraw from the case, stating in writing or on the record the reasons for his or her withdrawal, and shall immediately notify the Office of the withdrawal.

(b) Any party may file a motion requesting that a Hearing Officer withdraw on the basis of personal bias or of an interest in the case or for some other disqualifying reason. This motion shall specifically set forth the reasons supporting the request and be filed as soon as the party has reason to believe that there is a basis for disqualification.

(c) The Hearing Officer shall promptly rule on the withdrawal motion. If the motion is granted, the Executive Director will appoint another Hearing Officer within 5 days. Any objection to the ruling of the Hearing Officer on the withdrawal motion shall not be deemed waived by further participation in the hearing and may be the basis for an appeal to the Board from the decision of the Hearing Officer under section 8.01 of these rules. Such objection will not stay the conduct of the hearing.

### §7.04 Motions and Prehearing Conference.

(a) *Motions.* When a case is before a Hearing Officer, motions of the parties shall be filed with the Hearing Officer and shall be in writing except for oral motions made on the record during the hearing. All written motions and any responses to them shall include a proposed order, where applicable. Only with the Hearing Officer's advance approval may either party file additional responses to the motion or to the response to the motion. Motions for extension of time will be granted only for good cause shown.

(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. The memorandum may include:

(1) the major factual contentions and legal issues that the party intends to raise at the hearing in short, successive, and numbered paragraphs, along with any proposed stipulations of fact or law;

(2) an estimate of the time necessary for presentation of the party's case;

(3) the specific relief, including, where known, a calculation 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

(5) a brief description of any other unresolved issues.

(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. 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 modifica-

tion 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.

(a) *Date, Time, and Place of Hearing.* The Office shall issue the notice of hearing, which shall fix the date, time, and place of hearing. In no event, absent a postponement granted by the Office, will a hearing commence later than 60 days after the filing of the complaint.

(b) *Motions for Postponement or a Continuance.* Motions for postponement or for a continuance by either party shall be made in writing to the 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.

(a) *Explanation.*

(1) Consolidation is when two or more parties have cases that might be treated as one because they contain identical or similar issues or in such other appropriate circumstances.

(2) Joinder is when one person has two or more claims pending and they are united for consideration. For example, where a single individual who has one appeal pending challenging a 30-day suspension and another appeal pending challenging a subsequent dismissal, joinder might be warranted.

(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 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.

(a) Pursuant to section 405(d)(1) of the Act, the Hearing Officer shall conduct the hearing in closed session on the record. Only the Hearing Officer, the parties and their representatives, and witnesses during the time they are testifying, shall be permitted to attend, except that the Office may not be precluded from observing the hearings. The Hearing Officer, or a person designated by the Hearing Officer or the Executive Director, shall control the recording of the proceedings.

(b) The hearing shall be conducted as an administrative proceeding. Witnesses shall testify under oath or affirmation. Except as specified in the Act and in these rules, the Hearing Officer shall conduct the hearing, to the greatest extent practicable, in accordance with the principles and procedures in sections 554 through 557 of title 5 of the United States Code.

(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.

(d) At the commencement of the hearing, or as otherwise ordered by the Hearing Officer, the Hearing Officer may consider any stipulations of facts and law pursuant to section 7.10, take official notice of certain facts pursuant to section 7.11, rule on objections made by the parties and hear the examination and cross-examination of witnesses. Each party will be expected to present his or her case in a concise manner, limiting the testimony of witnesses and submission of documents to relevant matters.

(e) Any evidentiary objection not timely made before a Hearing Officer shall, in the absence of clear error, be deemed waived on appeal to the Board.

(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 absence of the complaining party if the representative for that party is present.

(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.

(a) *Preparation.* An accurate electronic or stenographic record of the hearing shall be kept and shall be the sole official record of the proceeding. The Office shall be responsible for the cost of transcription of the hearing. Upon request, a copy of a transcript of the hearing shall be provided to each party, provided, however, that such party has first agreed to maintain and respect the confidentiality of such transcript in accordance with the applicable rules prescribed by the Office or the Hearing Officer in order to effectuate section 416(c) of the Act. Additional copies of the transcript shall be made available to a party at the party's expense. Exceptions to the

payment requirement may be granted for good cause shown. A motion for an exception shall be made in writing and accompanied by an affidavit or declaration setting forth the reasons for the request. Requests for copies of transcripts shall be directed to the Office. The Office may, by agreement with the person making the request, make arrangements with the official hearing reporter for required services to be charged to the requester.

(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 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.

### §7.09 Admissibility of Evidence.

The Hearing Officer shall apply the Federal Rules of Evidence to the greatest extent practicable. These rules provide, among other things, that the Hearing Officer may exclude evidence if, among other things, it constitutes inadmissible hearsay or its probative value is substantially outweighed by the danger of unfair prejudice, by confusion of the issues, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

### §7.10 Stipulations.

The parties may stipulate as to any matter of fact. Such a stipulation will satisfy a party's burden of proving the fact alleged.

### §7.11 Official Notice.

(a) The Hearing Officer on his or her own motion or on motion of a party, may take official notice of a fact that is not subject to reasonable dispute because it is either:

(1) a matter of common knowledge; or

(2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Official notice taken of any fact satisfies a party's burden of proving the fact noticed.

(b) Where a decision, or part thereof, rests on the official notice of a material fact not appearing in the evidence in the record, the fact of official notice shall be so stated in the decision, and any party, upon timely request, shall be afforded an opportunity to show the contrary.

### §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 ACT. 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.

(a) *Review Strongly Disfavored.* Board review of a ruling by a Hearing Officer while a proceeding is ongoing (an "interlocutory appeal") is strongly disfavored. In general, a request for interlocutory review may go before the Board for consideration only if the Hearing Officer, on his or her own motion or by motion of the parties, determines that the issue presented is of such importance to the proceeding that it requires the Board's immediate attention.

(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.

(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:

(1) whether the ruling involves a significant question of law or policy about which there is substantial ground for difference of opinion;

(2) whether an immediate review of the Hearing Officer's ruling by the Board will materially advance the completion of the proceeding; and

(3) whether denial of immediate review will cause undue harm to a party or the public.

(d) *Hearing Officer Action.* If all the conditions set forth in paragraph (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 (c) have been met. The decision of the Hearing Office 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, the Board, in its sole discretion, may grant interlocutory review. The Board's decision to grant or deny interlocutory review is not appealable.

(f) *Stay Pending Review.* Unless otherwise directed by the Board, the stay of any proceedings during the pendency of either a request for interlocutory review or the review itself shall be within the discretion of the Hearing Officer, provided that no stay shall serve to toll the time limits set forth in section 405(d) of the Act.

(g) *Procedures before the Board.* Upon its 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.

(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.

*May be Required.* The Hearing Officer may 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.

### §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.

(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. The Hearing Officer shall also make part of the record 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.

(a) Pursuant to section 405(g) of the Act, no later than 90 days after the conclusion of the hearing, the Hearing Officer shall issue a written decision.

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

(1) state the issues raised in the complaint;

(2) describe the evidence in record;

(3) contain findings of fact and conclusions of law, and the reasons or basis therefore, on all the material issues of fact, law, or discretion 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.

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

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

(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 deci-

sion. 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**

**§8.02 Reconsideration**

**§8.03 Compliance with Final Decisions, Requests for Enforcement**

**§8.04 Judicial Review**

**§8.05 Application for Review of an Executive Director Action**

**§8.06 Exceptions to Arbitration Awards**

**§8.07 Expedited Review of Negotiability**

**§8.08 Procedures of the Board in Impasse Proceedings**


### §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.

(b) (1) Unless otherwise ordered by the Board, within 21 days following the filing of a petition for review to the Board, the appellant shall file and serve a supporting brief in accordance with section 9.01 of these rules. That brief shall identify with particularity those findings or conclusions in the decision and order that are challenged and shall refer specifically to the portions of the record and the provisions of statutes or rules that are alleged to support each assertion made on appeal.

(2) Unless otherwise ordered by the Board, within 21 days following the service of the appellant's brief, the opposing party may file and serve a responsive brief. Unless otherwise ordered by the Board, within 10 days following the service of the appellee's responsive brief, the appellant may file and serve a reply brief.

(3) 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; 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.

(c) Upon the request of any party or upon its own order, the Board, in its discretion, may hold oral argument on an appeal.

(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 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. 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.

(f) Pursuant to section 406(c) of the Act, in conducting its review of the decision of a Hearing Officer, the Board shall set aside a decision if it determines that the decision was:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not consistent with law;

(2) not made consistent with required procedures; or

(3) unsupported by substantial evidence.

(g) In making determinations under paragraph (f), above, the Board shall review the whole record, or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(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.

(i) The Board may invite amicus participation, in appropriate circumstances, in a manner consistent with the requirements of section 416 of the CAA.

(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.

(b) The Office may require additional reports as necessary.

(c) If the Office does not receive notice of compliance in accordance with paragraph (a) of this section, the Office shall make inquiries to determine the status of compliance. If the Office cannot determine that full compliance is forthcoming, the Office shall report the failure to comply to the Board and recommend whether court enforcement of the decision should be sought.

(d) To the extent provided in Section 407(a) of the Act and Section 8.04 of this section, the appropriate 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.

(e) Upon receipt of a report of non-compliance or a petition for enforcement of a final decision, or as it otherwise determines, the Board may issue a notice to any person or party to show cause why the Board should not seek judicial enforcement of its decision or order.

(f) Within the discretion of the Board, it may direct the General Counsel to petition the Court for enforcement under section 407(a)(2) of a decision under section 406(e) of the Act whenever the Board finds that a party has failed to comply with its decision and order.

### §8.04 Judicial Review.

Pursuant to section 407 of the Act,

(a) the United States Court of Appeals for the Federal Circuit shall have jurisdiction over any proceeding commenced by a petition of:

  (1) a party aggrieved by a final decision of the Board under section 406(e) in cases arising under part A of title II;

  (2) a charging individual or respondent before the Board who files a petition under section 210(d)(4);

  (3) the General Counsel or a respondent before the Board who files a petition under section 215(c)(5); or

  (4) the General Counsel or a respondent before the Board who files a petition under section 220(c)(3) of the Act.

(b) The United States Court of Appeals for the Federal Circuit shall have jurisdiction over any petition of the General Counsel, filed in the name of the Office and at the direction of the Board, to enforce a final decision under section 405(g) or 406(e) with respect to a violation of part A, B, C, or D of title II of the Act.

(c) The party filing a petition for review shall serve a copy on the opposing party or parties or their representative(s).

### §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 Attorney's Fees and Costs**

**§9.02 Ex parte Communications**

**§9.03 Informal Resolutions and Settlement Agreements**

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

**§9.05 Revocation, Amendment or Waiver of Rules**


### §9.01 Attorney's Fees and Costs.

(a) *Request.* No later than 30 days after the entry of a final decision of the Office, the prevailing party may submit to the Hearing Officer or Arbitrator who decided the case a motion for the award of reasonable attorney's fees and costs, following the form specified in paragraph (b) below. 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 Office.

(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:

(1) accurate and contemporaneous time records;

(2) a copy of the terms of the fee agreement (if any);

(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;

(4) an itemization of costs related to the matter in question; and

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

### §9.02 Ex parte Communications.

(a) *Definitions.*

(1) The term *interested person outside the Office* means any covered employee and agent thereof who is not an employee or agent of the Office, any labor organization and agent thereof, any employing office and agent thereof, and any individual or organization and agent thereof, who is or may reasonably be expected to be involved in a proceeding or a rulemaking, and the General Counsel and any agent thereof when prosecuting a complaint proceeding before the Office pursuant to sections 210, 215, or 220 of the CAA. The term also includes any employee of the Office who becomes a party or a witness for a party other than the Office in proceedings as defined in these rules.

(2) The term *ex parte communication* means an oral or written communication

(i) that is between an interested person outside the Office and a Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking;

(ii) that is related to a proceeding or a rulemaking;

(iii) that is not made on the public record;

(iv) that is not made in the presence of all parties to a proceeding or a rulemaking; and

(v) that is made without reasonable prior notice to all parties to a proceeding or a rulemaking.

(3) For purposes of section 9.04, 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.

(4) The term *period of rulemaking* means the period commencing with the issuance of an advance notice of proposed rulemaking or of a notice of proposed rulemaking, whichever issues first, and concluding with the issuance of a final rule.

(b) *Exception to Coverage.* The rules set forth in this section do not apply during periods that the Board designates as periods of negotiated rulemaking.

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

(1) During a proceeding, it is prohibited knowingly to make or cause to be made:

(i) a written ex parte communication if copies thereof are not promptly served by the communicator on all parties to the proceeding in accordance with section 9.01 of these Rules; or

(ii) an oral ex parte communication unless all parties have received advance notice thereof by the communicator and have an adequate opportunity to be present.

(2) The Hearing Officer or the Office may initiate attempts to settle a matter informally 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.

(3) During the period of rulemaking, it is prohibited knowingly to make or cause to be made a written or an oral ex parte communication. During the period of rulemaking, the Office shall treat any written ex parte communication as a comment in response to the advance notice of proposed rulemaking or the notice of proposed rulemaking, whichever is pending, and such communications will therefore be part of the public rulemaking record.

(4) Notwithstanding the prohibitions set forth in (1) and (2), the following ex parte communications are not prohibited:

(i) those which relate solely to matters which the Board member or Hearing Officer is authorized by law, Office rules, or order of the Board or Hearing Officer to entertain or dispose of on an ex parte basis;

(ii) those which all parties to the proceeding agree, or which the responsible official formally rules, may be made on an ex parte basis;

(iii) those which concern only matters of general significance to the field of labor and employment law or administrative practice;

(iv) those from the General Counsel to the Office or the Board when the General Counsel is acting on behalf of the Office or the Board under any section of the CAA; and

(v) those which could not reasonably be construed to create either unfairness or the appearance of unfairness in a proceeding or rulemaking.

(5) It is prohibited knowingly to solicit or cause to be solicited any prohibited ex parte communication.

(d) *Reporting of Prohibited Ex Parte Communications.*

(1) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who determines that he or she is being asked to receive a prohibited ex parte communication shall refuse to do so and inform the communicator of this rule.

(2) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding who knowingly receives a prohibited ex parte communication shall (i) notify the parties to the proceeding that such a communication has been received; and (ii) provide the parties with a copy of the communication and of any response thereto (if written) or with a memorandum stating the substance of the communication and any response thereto (if oral). If a proceeding is then pending before either the Board or a Hearing Officer, and if the Board or Hearing Officer so orders, these materials shall then be placed in the record of the proceeding. Upon order of the Hearing Officer or the Board, the parties may be provided with a full opportunity to respond to the alleged prohibited ex parte communication and to address what action, if any, should be taken in the proceeding as a result of the prohibited communication.

(3) Any Board member involved in a rulemaking who knowingly receives a prohibited ex parte communication shall cause to be published in the Congressional Record a notice that such a communication has been received and a copy of the communication and of any response thereto (if written) or with a memorandum stating the substance of the communication and any response thereto (if oral). Upon order of the Board, these materials shall then be placed in the record of the rulemaking and the Board shall provide interested persons with a full opportunity to respond to the alleged prohibited ex parte communication and to address what action, if any, should be taken in the proceeding as a result of the prohibited communication.

(4) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who knowingly receives a prohibited ex parte communication and who fails to comply with the requirements of subsections (1), (2), or (3) above, is subject to internal censure or discipline through the same procedures that the Board utilizes to address and resolve ethical issues.

(e) *Penalties and Enforcement.*

(1) Where a person is alleged to have made or caused another to make a prohibited ex parte communication, the Board or the Hearing Officer (as appropriate) may issue to the person a notice to show cause, returnable within a stated period not less than seven days from the date thereof, why the Board or the Hearing Of-

ficer should not determine that the interests of law or justice require that the person be sanctioned by, where applicable, dismissal of his or her claim or interest, the striking of his or her answer, or the imposition of some other appropriate sanction, including but not limited to the award of attorneys' fees and costs incurred in responding to a prohibited ex parte communication. Sanctions shall be commensurate with the seriousness and unreasonableness of the offense, accounting for, among other things, the advertency or inadvertency of the prohibited communication.

(2) Any Board member or Hearing Officer who is or may reasonably be expected to be involved in a proceeding or a rulemaking and who knowingly makes or causes to be made a prohibited ex parte communication is subject to internal censure or discipline through the same procedures that the Board utilizes to address and resolve ethical issues.

### §9.03 Informal Resolutions and Settlement Agreements.

(a) *Informal Resolution.* At any time before a covered employee who has filed a formal request for counseling files a complaint under section 405, a covered employee and the employing office, on their own, may agree voluntarily and informally to resolve a dispute, so long as the resolution does not require a waiver of a covered employee's rights or the commitment by the employing office to an enforceable obligation.

(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 cannot 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. Parties are encouraged to include in their settlements specific dispute resolution procedures. If the formal settlement agreement does not have a stipulated method for dispute resolution of an alleged violation, the Office may provide assistance in resolving the dispute, including the services of a mediator as determined by the Executive Director. Where the settlement agreement does not have a stipulated method for resolving violation allegations, an allegation of a violation must be filed with the Executive Director no later than 60 days after the party to the agreement becomes aware of the alleged violation. Such allegations will be reviewed, investigated or mediated, as appropriate, by the Executive Director or designee.

### §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.

### §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.

**Procedural Rules of the Office of Compliance**

Notes 02–426–1912

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