SECTION 102(b) REPORT

Review and Report on the Applicability to the Legislative Branch of Federal Laws Relating to Terms and Conditions of Employment and Access to Public Services and Public Accommodations

Prepared by the Board of Directors of the Office of Compliance Pursuant to Section 102(b) of the Congressional Accountability Act of 1995, 2 U.S.C. § 1302(b)

December 31, 2000

SECTION 102(b) REPORT

Section 102(a) of the Congressional Accountability Act (CAA) lists the eleven laws that, "shall apply, as prescribed by this Act, to the legislative branch of the Federal Government."[1] Section 102(b) directs the Board of Directors (Board) of the Office of Compliance (Office) to:

> review provisions of Federal law (including regulations) relating to (A) the terms and conditions of employment (including hiring, promotion, demotion, termination, salary, wages, overtime compensation, benefits, work assignments or reassignments, grievance and disciplinary procedures, protection from discrimination in personnel actions, occupational health and safety, and family and medical and other leave) of employees, and (B) access to public services and accommodations.

And, on the basis of this review,

> [b]eginning on December 31, 1996, and every 2 years thereafter, the board shall report on (A) whether or to what degree the provisions described in paragraph (1) are applicable or inapplicable to the legislative branch, and (B) with respect to provisions inapplicable to the legislative branch, whether such provisions should be made applicable to the legislative branch.

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[1]The nine private-sector laws made applicable by the CAA are: the Fair Labor Standards Act of 1938 (29 U.S.C. § 201 et seq.) (FLSA), Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq.) (Title VII), the Americans with Disabilities Act of 1990 (42 U.S.C. § 12101 et seq.) (ADA), the Age Discrimination in Employment Act of 1967 (29 U.S.C. § 621 et seq.) (ADEA), the Family and Medical Leave Act of 1993 (29 U.S.C. § 2611 et seq.) (FMLA), the Occupational Safety and Health Act of 1970 (29 U.S.C. § 651 et seq.) (OSHAct), the Employee Polygraph Protection Act of 1988 (29 U.S.C. § 2001 et seq.) (EPPA), the Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.) (WARN Act), and section 2 of the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA). The two federal-sector laws made applicable by the CAA are: Chapter 71 of title 5, United States Code (relating to federal service labor-management relations) (Chapter 71), and the Rehabilitation Act of 1973 (29 U.S.C. § 701 et seq.). This report uses the term "CAA laws" to refer to these eleven laws.

I. Background

In December of 1996, the Board completed its first biennial report mandated under section 102(b) of the CAA (1996 Section 102(b) Report or 1996 Report).[2] In that Report the Board reviewed and analyzed the universe of federal law relating to labor, employment and public access, made initial recommendations, and set priorities for future reports. To conduct its analysis, the Board organized the provisions of federal law according to the kinds of entities to which they applied, and systematically analyzed whether and to what extent they were already applied to the legislative branch or whether the legislative branch was already covered by other comparable legislation. This analysis generated four comprehensive tables of laws which were categorized as: (1) provisions of law generally applicable in the private sector and/or in state and local government that also are already applicable to entities in the legislative branch, a category which included nine of the laws made applicable by the CAA; (2) provisions of law that apply only in the federal sector, a category which included the two exclusively federal-sector laws applied to the legislative branch by the CAA; (3) private-sector and/or state- and local-government provisions of law that do not apply in the legislative branch, but govern areas in which Congress has already applied to itself other, comparable provisions of law and; (4) private-sector laws which do not apply or have only very limited application in the legislative branch.

The Board then turned to its task of recommending which statutes should be applied to the legislative branch. In light of the large body of statutes that the Board had identified and reviewed, the Board determined that it could not make recommendations concerning every possible change in legislative-branch coverage. In setting its priorities for making recommendations from among the categories of statutes that the Board had identified for analysis and review, the Board sought to mirror the priorities of the CAA. Because legislative history suggested that the highest priority of the CAA was the application of private-sector protections to congressional employees where those employees had little or no protection, the Board focused its recommendations in its first report on applying the private-sector laws not currently applicable to the legislative branch.

The Board also determined in its 1996 Section 102(b) Report that, because of the CAA's focus on coverage of the Congress under private-sector laws, the Board's next priority should be to review the inapplicable provisions of the nine private-sector laws generally made applicable by the CAA. In December 1998 the Board set forth the results of that review in its second biennial report under Section 102(b) of the CAA (1998 Section 102(b) Report or 1998 Report).[3]

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[2]Section 102(b) Report: Review and Report of the Applicability to the Legislative Branch of Federal Law Relating to Terms and Conditions of Employment and Access to Public Services and Accommodations (Dec. 31,1996).

[3]Section 102(b) Report: Review and Report on the Applicability to the Legislative Branch of Federal Law Relating to Terms and Conditions of Employment and Access to Public Services

The 1998 Section 102(b) Report was divided into three parts. In Part I the Board reviewed laws enacted after the 1996 Section 102(b) Report, resubmitted the recommendations made in its 1996 Report, and made additional recommendations as to laws which should be made applicable to the legislative branch. In Part II the Board analyzed which provisions of the private-sector CAA laws do not apply to the legislative branch and recommended which should be made applicable. In Part III of the 1998 Report, although not required by section 102(b) of the CAA, the Board reviewed coverage of the General Accounting Office (GAO), the Government Printing Office (GPO) and the Library of Congress (the Library) under the laws made applicable by the CAA and made recommendations to Congress with respect to changing that coverage. The Board noted that the study mandated by Section 230 of the CAA which was submitted to Congress in 1996[4] did not include recommendations to Congress with respect to coverage of these three instrumentalities.[5] The Board concluded that the 1998 Section 102(b) Report, which focused on omissions in coverage of the legislative branch under the laws generally made applicable by the CAA, provided the opportunity for the Board to make recommendations to Congress regarding coverage of GAO, GPO and the Library under those laws.[6] As discussed in Section IV.C below, the Board Members identified three principal options for Congress to consider but were divided in their recommendation as to which option was preferable.

In the preparation of this 2000 Section 102(b) Report, the third biennial report issued under section 102(b) of the CAA, the Board has reviewed new statutes or statutory amendments enacted after the Board's 1998 Section 102(b) Report was prepared. The Board has also reviewed the Section 102(b) reports issued in 1996 and 1998 and the analysis and recommendations contained therein.

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and Accommodations (Dec. 31, 1998).

[4]Section 230 of the CAA mandated a study of the status of the application of the eleven CAA laws to GAO, GPO and the Library to "evaluate whether the rights, protections and procedures, including administrative and judicial relief, applicable to [these instrumentalities] ... are comprehensive and effective ... includ[ing] recommendations for any improvements in regulations or legislation." Originally, the Administrative Conference of the United States was charged with carrying out the study and making recommendations, but when the Conference lost its funding, the responsibility for the study was transferred to the Board.

[5]Section 230 Study: Study of Laws, Regulations, and Procedures at The General Accounting Office, The Government Printing Office and The Library of Congress (December 1996) (Section 230 Study).

[6]The Board also found that resolution of existing uncertainty as to whether GAO, GPO and Library employees alleging violations of sections 204-207 of the CAA may use CAA procedures was an additional reason to include recommendations about coverage.

II. Review of Laws Enacted after the 1998 Section 102(b) Report

After reviewing all federal laws and amendments relating to terms and conditions of employment or access to public accommodations and services passed since October 1998, the Board concludes that there are no new provisions of law which should be made applicable to the legislative branch. As in the two previous Section 102(b) reports, the Board excluded from consideration those laws that, although employment-related, (1) are specific to narrow or specialized industries or types of employment not found in the legislative branch (e.g., employment in fire protection activities, or the armed forces); (2) established government programs of research, data collection, advocacy, or training, but do not establish correlative rights and responsibilities for employees and employers (e.g., statutes authorizing health care research); (3) authorize, but do not require, that employers provide benefits to employees, (e.g., so-called "cafeteria plans"); or (4) are not applicable to public sector employment (e.g., an amendment clarifying the treatment of stock options under the FLSA).

III. 1996 Section 102(b) Report

In preparation for the first Section 102(b) Report, as noted earlier, the Board reviewed the entire United States Code to identify laws and associated regulations of general application that relate to terms and conditions of employment or access to public services and accommodations. Noting the underlying priorities of the Act itself, the Board chose to focus its 1996 Report on the identified provisions of law generally applicable in the private sector for which there was no similar coverage in the legislative branch. The Board has reviewed the 1996 Section 102(b) Report and the recommendations contained therein, as well as the additional discussion of those recommendations found in the 1998 Section 102(b) Report.

The Board of Directors again submits the following recommendations which were made in the 1996 Section 102(b) Report and resubmitted in the 1998 Section 102 (b) Report:

> **(A) Prohibition against discrimination on the basis of bankruptcy (11 U.S.C. § 525).** Section 525(a) provides that "a governmental unit" may not deny employment to, terminate the employment of, or discriminate with respect to employment against, a person that is or has been a debtor under the bankruptcy statutes. The provision currently does not apply to the legislative branch. For the reasons set forth in the 1996 Section 102(b) Report, the board has determined that the rights and protections against discrimination on this basis should be applied to the legislative branch.
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> **(B) Prohibition against discharge from employment by reason of garnishment (15 U.S.C. § 1674(a)).** Section 1674(a) prohibits discharge of any employee because his or her earnings "have been subject to garnishment for any one indebtedness." This section is limited to private employers, so it currently has no application to the legislative branch. For the reason set forth in the 1996 Section 102(b)

Report, the Board has determined that the rights and protections against discrimination on this basis should be applied to the legislative branch.

(C) Prohibition against discrimination on the basis of jury duty (28 U.S.C. § 1875). Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative-branch employment. For the reason set forth in the 1996 Section 102(b) Report, the Board has determined that the rights and protections against discrimination on this basis should be applied to the legislative branch.

(D) Titles II and III of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000a to 2000a-6, 2000b to 2000b-3). These titles prohibit discrimination or segregation on the basis of race, color, religion, or national origin regarding the goods, services, facilities, privileges, advantages, and accommodations of "any place of public accommodation" as defined in the Act. Although the CAA incorporated the protections of titles II and III of the ADA, which prohibit discrimination on the basis of disability with respect to access to public services and accommodations, it does not extend protection against discrimination based upon race, color, religion, or national origin with respect to access to such services and accommodations. For the reasons set forth in the 1996 Section 102(b) Report, the Board has determined that the rights and protections afforded by titles II and III of the Civil Rights Act of 1964 against discrimination with respect to places of public accommodation should be applied to the legislative branch.

IV. 1998 Section 102(b) Report.

A. Part I of the 1998 Report (new laws enacted and certain other inapplicable laws)

In the first part of the 1998 Section 102(b) Report, the Board noted the enactment of two new employment laws and concluded that no further action was needed because substantial provisions of each had been made applicable to the legislative branch. Next, as noted above, the Board discussed and resubmitted the recommendations made in the 1996 Section 102(b) Report. In addition, the Board made three new recommendations, one based upon further review and analysis of statutes discussed in the 1996 Section 102(b) Report and two others based upon experience gained by the Board in the administration and enforcement of the CAA.

The Board of Directors resubmits the three new recommendations made in Part I of the 1998 Section 102(b) Report:

(1) Employee protection provisions of environmental protection statutes (15 U.S.C. § 2622; 33 U.S.C. § 1367; 42 U.S.C. §§ 300J-9(i), 5851, 6971, 7622, 9610). These provisions generally protect an employee from discrimination in

employment because the employee commences proceedings under applicable statutes, testifies in any such proceeding, or assists or participates in any way in such a proceeding or in any other action to carry out the purposes of the statutes. For the reasons stated in the 1998 Section 102(b) Report, the Board believes that these provisions are applicable to the legislative branch. However, because it is possible to construe certain of these provisions as inapplicable, the Board has concluded that legislation should be adopted clarifying that the employee protection provisions in the environmental protection statutes apply to all entities within the legislative branch.

(2) Employee "whistleblower" protection. Civil service law[7] provides broad protection to "whistleblowers" in the executive branch and at GAO and GPO, but these provisions do not apply otherwise in the legislative branch. Employees subject to these provisions are generally protected against retaliation for having disclosed any information the employee reasonably believes evidences a violation of law or regulation, gross mismanagement or abuse of authority, or substantial danger to public health or safety. The Office has continued to receive a number of inquiries from legislative branch employees concerned about protection against possible retaliation by an employing office for the disclosure of what the employee perceives to be such information. For the reasons set forth in the 1998 Section 102(b) Report, the Board has determined that whistleblower protection comparable to that provided to executive branch employees under 5 U.S.C. § 2302(b)(8) should be provided to legislative branch employees.

(3) Coverage of special-purpose study commissions. Certain special-purpose study commissions that include members appointed by Congress or by officers of Congressional instrumentalities are not expressly listed in section 101(9) of the CAA in the definition of "employing offices" covered under the CAA. For the reasons set forth in the 1998 Section 102(b) Report, the Board recommends that Congress specifically state whether the CAA applies to special-purpose study commissions, both when it creates such commissions and for those already in existence.

[7]See, e.g., 5 U.S.C. § 2302(b)(8).

B. Part II of the 1998 Report (inapplicable private-sector provisions of CAA laws)

In the second part of the 1998 Section 102(b) Report, the Board considered the specific exceptions created by Congress from the nine private-sector laws made applicable by the CAA[8] and made a number of recommendations respecting the application of currently inapplicable provisions, "focusing on enforcement, the area in which Congress made the most significant departures from the private-sector provisions of the CAA laws".[9] The Board noted that it intended that those recommendations "should further a central goal of the CAA to create parity with the private sector so that employers and employees in the legislative branch would experience the benefits and burdens as the rest of the nation's citizens ".[10]

The Board of Directors has reviewed the 1998 Report and resubmits each of the following recommendations made in Part III of the 1998 Section 102(b) Report:

> **(1) Authority to investigate and prosecute violations of § 207 of the Act, which prohibits intimidation and reprisal.** Enforcement authority with respect to intimidation or reprisal is provided to the agencies that administer and enforce the CAA laws[11] in the private sector. For the reasons set forth in the 1998 Report, the Board has concluded that the Congress should grant the Office the same authority to investigate and prosecute allegations of intimidation or reprisal as each implementing Executive Branch agency has in the private sector.
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> **(2) Authority to seek a restraining order in district court in case of imminent danger to health or safety.** Section 215(b) of the CAA provides the remedy for a violation of the substantive provisions of the OSHAct made applicable by the CAA. Among other things, the OSHAct authorizes the Secretary of Labor to seek a temporary restraining order in district court in the case of imminent danger. The General Counsel of the Office, who enforces the OSHAct provisions as made applicable by the CAA, has concluded that Section 215(b) of the CAA gives him the same standing to petition the district court for a temporary restraining order. However, it has been suggested that the language of section 215(b) does not clearly provide that authority. For the reasons set forth in the 1998 Section 102(b) Report, the Board recommends that the CAA be amended to clarify that the General Counsel has the standing to seek a temporary

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[8]The private-sector laws made applicable by the CAA are listed in note 1, at page 1, above.

[9]1998 Section 102(b) Report at 16.

[10]Id. At 17.

[11]The only exception is the WARN Act which has no such authorities.

restraining order in federal district court and that the court has jurisdiction to issue the order.

(3) Record-keeping and notice-posting requirements. For the reasons set forth in the 1998 Section 102(b) Report, the Board has concluded that the Office should be granted the authority to require that records be kept and notices posted in the same manner as required by the agencies that enforce the provisions of law made applicable by the CAA in the private sector.

(4) Other enforcement authorities. For the reasons set forth in the 1998 Section 102(b) Report, the Board generally recommends that Congress grant the Office the remaining enforcement authorities that executive-branch agencies utilize to administer and enforce the provisions of law made applicable by the CAA in the private sector.

C. Part III of the 1998 Report (options for coverage of the three instrumentalities)

In the third part of the 1998 Report, the Board, building upon its extensive Section 230 Study, exhaustively re-examined the current coverage of GAO, GPO and the Library under the CAA laws, and identified and discussed three principal options for coverage of these instrumentalities:

(A) CAA Option - Coverage under the CAA, including the authority of the Office of Compliance as it administers and enforces the CAA. (The Board here took as its model the CAA as it would be modified by enactment of the recommendations made in Part II of its 1998 Report.)

(B) Federal-Sector Option - Coverage under the statutory and regulatory regime that applies generally in the federal sector, including the authority of executive-branch agencies as they administer and enforce the laws in the federal sector.

(C) Private-Sector Option - Coverage under the statutory and regulatory regimes that apply generally in the private sector, including the authority of the executive-branch agencies as they administer and enforce the laws in the private sector.

The Board noted that other hybrid models could be developed or, it could "be possible to leave the ‘patchwork’ of coverages and exemptions currently in place at the three instrumentalities and fill serious gaps in coverage on a piecemeal basis."[12]

The Board compared the three options against the current regimes at GAO, GPO and the Library, as well as against each other, and identified the significant effects of applying each option. The Board unanimously concluded that coverage under the private sector model was not the best of

[12] 1998 Section 102(b) Report at 27.

the options. However, the Board was divided as to which of the remaining options should be adopted. Two Board Members recommended that the three instrumentalities be covered under the CAA, with certain modifications, and two other Board Members recommended that the three instrumentalities be made fully subject to the laws and regulations generally applicable in the executive branch of the federal sector.[13]

A review of the analysis, discussion and recommendations contained in the Section 230 Study and Part III of the 1998 Section 102(b) Report demonstrates the complexity of the issues relating to coverage of GAO, GPO and the Library under the CAA laws. The current regime is an exceedingly complicated one, with differences evident both between and among instrumentalities and between and among the eleven CAA laws. Any proposals for changes in existing coverage must not only take into account the existing statutory regime, but also the practical effects of any recommended changes, as well as the mandates of the CAA, including Section 230. Indeed, the degree of the difficulties and challenges encountered in determining how the coverage of the instrumentalities might be modified is evidenced by the fact that after three years of study and experience, the Members of the Board in 1998 were unable to arrive at a consensus on the manner in which the CAA laws should be applied and enforced at GAO, GPO and the Library.

While the current Board Members are mindful of the institutional benefits of providing Congress with a clear recommendation as to coverage of the instrumentalities, the Board is of the view that further study and consideration of the questions presented is warranted in light of the complexity of the issues and the substantial impact that a modification would have on the instrumentalities and their employees.

The Board believes that Congress, and the instrumentalities and their employees, would derive greater benefit from a recommendation based upon further study, consideration and experience on the part of Board Members. Therefore, the Board has determined not to make any recommendations with respect to coverage of GAO, GPO and the Library under the CAA laws at this time.

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[13]In December 1998, at the time the 1998 Section 102(b) Report issued, there were four Board members; the fifth Board member's term had expired and a new appointee had not yet been named. Since the issuance of the 1998 Report the terms of the four Board members who participated in that Report have expired. At present, the five-Member Board of Directors is again at its full complement; three Members were appointed in October 1999 and two Members were appointed in May 2000.