

**Prepared Statement of Susan Tsui Grundmann,
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Mr. Chairman and Members of the Committee: On behalf of the Board of Directors and staff of the Congressional Office of Compliance (“OOC”), I thank you for this opportunity to participate in this Committee’s comprehensive review of the Congressional Accountability Act (“CAA”) and the protections that law offers legislative branch employees against harassment and discrimination in the congressional workplace.

More than thirty years ago, the U.S. Supreme Court held in the landmark case of *Meritor Savings Bank v. Vinson* that workplace harassment was an actionable form of discrimination prohibited by Title VII of the Civil Rights Act of 1964. Twenty years ago, Congress enacted the CAA, which extends the protections of Title VII, as well as 12 other federal workplace statutes, to over 30,000 employees of the United States Congress and its associated offices and agencies, including the United States Capitol Police, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, the Office of Congressional Accessibility Services, and the OOC. Recent events, however, show us that sadly, we still have far to go to eliminate discrimination, harassment and retaliation from the nation’s workplaces, including in the legislative branch. Workplace harassment on the basis of sex—as well as race, disability, age, ethnicity/national origin, color, and religion—remains a persistent problem.

I welcome the opportunity to provide this Committee with additional information about the CAA and the important role the OOC plays in educating the legislative branch on combatting workplace harassment and retaliation and providing victims a remedy when it occurs. I also appreciate the opportunity to discuss the Board’s views on possible amendments to the CAA to make Capitol Hill a model workplace environment free from the effects of unlawful discrimination.

Overview

The OOC administers the CAA and performs the job of multiple agencies in the executive branch, including the Equal Employment Opportunity Commission (“EEOC”), the Department of Justice, the Department of Labor, and the Federal Labor Relations Authority. The OOC is an independent, impartial, nonpartisan office comprised of approximately 20 executive and professional staff and has a 5-member, part-time Board of Directors. Board members are appointed by unanimous consent of the majority and minority leadership of both the House of Representatives and the Senate. All of our current Board members are attorneys in private practice who were chosen for their expertise in employment and labor law.

Among other functions, the OOC is responsible for carrying out a program to educate and inform Members of Congress, employing offices, and legislative branch employees of their rights and responsibilities under employment laws made applicable to them through the CAA, adjudicating workplace disputes, and recommending to Congress changes to the CAA to advance the workplace rights of legislative branch employees. Thus, section 102(b) of the CAA tasks the Board of Directors to report to every Congress on: first, whether or to what degree provisions of federal law relating to employment and access to public services and accommodations are applicable to the legislative branch; and second, with respect to provisions not currently applicable, whether such provisions should be made applicable to the legislative branch.

Consideration of possible changes to the CAA, including its dispute resolution procedures, is also a critical component of this Committee's comprehensive review. As I discuss below, the Board strongly recommends that, in conducting its review, the Committee consider existing models under comparable statutes in the federal government when deciding what changes should be made to the dispute resolution procedures under the CAA.

The Board's Views on Possible Changes to the General Provisions and Scope of the CAA

Mandatory Anti-Discrimination, Anti-Harassment, and Anti-Retaliation Training for All Congressional Employees and Managers

The Board has consistently recommended in its past biennial section 102(b) reports that Congress mandate anti-discrimination, anti-harassment, and anti-retaliation training for all Members, officers, employees and staff of the Congress and the other employing offices in the legislative branch; and that it adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA. We commend the House and the Senate for their recent votes to require all Members, Officers, employees, including interns, detailees, and fellows, to complete an anti-harassment and anti-discrimination training program, as well as the House's vote to also require the posting of a statement advising employees of their rights and protections under the CAA. We remind this Committee, however, that the CAA applies across the legislative branch, and that these mandates do not extend beyond the two houses of Congress. We therefore recommend that any statutory change to the CAA include these broader mandates for the congressional workforce at large.

The CAA is a unique law and its processes and programs are tailored to the legislative branch workforce. The OOC has both the statutory mandate from Congress and the practical experience develop and deliver a comprehensive program of education under the CAA for the entire legislative branch community. Indeed, after years of

delivering in-person training, informational videos, and multimedia campaigns to combat sexual harassment, the OOC has seen a recent and notable jump in requests for our help: a triple-digit percentage increase in the number of in-person anti-sexual harassment training requests by offices; a triple-digit percentage spike in the number of staffers enrolling in online training modules; twice as many visits to the OOC's online information on how to report sexual harassment; and a significant increase in those subscribing to OOC social media channels and e-Alerts (12 percent) to receive updates on sexual harassment issues.

Mandatory training across the legislative branch on the CAA will provide an opportunity to prevent workplace problems from occurring in the first place. The OOC's current training program is not confined to the legal definition of workplace harassment, but further examines workplace conduct which, while not "legally actionable" in itself, may set the stage for unlawful harassment if left unchecked. Our training directly impacts behavior; congressional employees who understand their legal responsibilities will act more responsibly. A comprehensive training program continues to be one of the most effective investments employing offices in the legislative branch can make in preventing harassment and discrimination, reducing complaints and creating a more productive workforce.

Workplace harassment exacts a steep cost from those who suffer its mental, physical, and economic harm. The many legislative staffers who are entering the workforce for the first time are a particularly vulnerable population in particular need of education and awareness on their workplace rights. But workplace harassment can also impact the larger workplace through decreased productivity, increased turnover, and reputational harm. In short, mandatory training on the CAA will benefit the entire legislative branch workplace.

Mandatory training will also greatly benefit managers, who will not only obtain vital information on their workplace responsibilities under the CAA, but will also learn about workplace "best practices" and how to effectively handle discrimination and retaliation issues. Employing offices must understand the importance of curtailing objectionable behavior at the outset. Training can and does accomplish this goal. Leadership and accountability in this regard are critical. Employing offices must dedicate sufficient resources to train middle-management and first-line supervisors on how to respond effectively to harassment that they observe, that is reported to them, or of which they have knowledge or information—even before such harassment reaches a legally-actionable level.

It is also essential that employing offices in the legislative branch adopt and maintain comprehensive anti-harassment and anti-retaliation policies. We stand ready to work with employing offices through employment counsel to ensure that such policies, including clear instruction on how to complain of harassment and how to report observed

harassment, are communicated effectively to all employees. Employing offices must also be alert to any possibility of retaliation against an employee who reports harassment and must immediately take steps to prevent it. At all levels, across all positions, employing offices must have systems in place that hold employees accountable to these standards. Accountability means that those who engage in harassment are held responsible in a meaningful, appropriate, and proportional manner, and that those whose job it is to prevent or respond to harassment are rewarded for doing that job well (or are penalized for failing to do so).

We need to have these conversations in offices all over Capitol Hill. We need to talk with managers about being vigilant, about nipping potential problems in the bud, about taking the time to investigate reports of offensive behavior, and about taking corrective action. It is a new day for combating sexual harassment. The OOC looks forward to working with employees, employing offices, and employment counsel to accomplish this important goal.

Although both the House and Senate have recently mandated discrimination and sexual harassment training, such training remains voluntary in other employing offices throughout the legislative branch. Much of the training done directly by employing offices fails to even mention the OOC as a resource for information or as the agency charged with resolving workplace disputes. To ensure universal awareness of workplace rights and responsibilities, the OOC recommends mandatory training on the CAA for every new employee and biennial update training for all employees and supervisory personnel. Mandatory training for all congressional employees and managers would go far in creating a model workplace free from harassment, discrimination and retaliation.

Congress also must devote sufficient resources to harassment prevention efforts to ensure that such efforts are effective, and to underscore its commitment to creating a workplace free of harassment. To meet this mandate, additional resources will be required, including additional trainers, a technical specialist to provide IT expertise and support, and an administrator to manage the increased demand in training for the 30,000 employees of the legislative branch.

*Require Notice-Posting of Congressional Workplace Rights in All
Employing Offices*

Workplace harassment too often goes unreported. Common responses by those who experience sex-based harassment are to avoid the harasser, deny or downplay the gravity of the situation, attempt to ignore, forget, or endure the behavior, or simply leave the workplace for another job. According to the EEOC, the least common response to harassment is to take some formal action—either to report the harassment internally or to file a formal legal complaint. The Board has long been concerned that employees in the

legislative branch may also be deterred from taking formal action simply due to a lack of awareness of their rights under the CAA.

The Board has therefore consistently recommended in its section 102(b) reports that Congress adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA. Although it commends the House for adopting resolutions requiring the posting of a notice advising employees of their rights and protections under the CAA, the Board recommends that the CAA be amended to require that all employing offices throughout the legislative branch post this notice of employee rights. Through permanent postings, current and new employees remain informed about their rights regardless of their location, employee turnover, or other changes in the workplace. The notices also serve as a reminder to employers about their workplace responsibilities and the legal ramifications of violating the law.

Although the CAA does require the OOC to distribute informational material “in a manner suitable for posting,” it does not mandate the actual posting of the notice. Exemption from notice-posting limits legislative branch employees’ access to a key source of information about their rights and remedies. Accordingly, the Board continues to recommend that Congress amend the CAA to adopt all notice-posting requirements that exist under the Federal anti-discrimination, anti-harassment, and other workplace rights laws covered under the CAA.

Name Change

The Board agrees with proposals to change the name of the OOC. The name “Office of Compliance” provides legislative branch employees no indication that it exists to protect their workplace rights through its programs of dispute resolution, education, and enforcement. As the Board advised Congress in 2014, changing the name of the office to “Office of Congressional Workplace Rights” would better reflect our mission, raise our public profile in assistance of our mandate to educate the legislative branch, and make it easier for employees to identify us for their needs.

Extending Coverage to Interns, Fellows, and Detailees

The Board supports proposals to extend the coverage and protections of the anti-discrimination, anti-harassment, and anti-retaliation provisions of the CAA to all staff, including interns, fellows and detailees working in any employing office in the legislative branch regardless of how or whether they are paid. Any amendment to the Act should ensure that these individuals are also covered by the anti-retaliation provision of section 207 of the Act – protections which are not reflected in pending House bills. (Unless otherwise noted, references in this statement to “employees” should be understood to refer to these unpaid individuals.)

Climate Survey

The Board supports the use of climate surveys to ensure that the congressional workforce is free of illegal harassment and discrimination. Because harassment and retaliation in the workplace is often underreported, official statistics underrepresent the extent of the problem. Many employing offices are working to address the problem of sexual harassment, but they lack the assessment tools to understand the scope or nature of the problem. Conducting climate surveys is a best-practice response to fill this gap in knowledge. These surveys can serve as a useful tool in assessing both the general knowledge of CAA workplace rights amongst legislative branch employees and the prevalence of discriminatory or harassing conduct in the workplace.

Climate surveys, however, must be carefully and professionally designed and implemented to be effective. The OOC currently does not have the staff, resources, or expertise to conduct such surveys. Although the OOC is certainly willing to provide its assistance should these surveys be mandated, such an undertaking by the Office would not be possible unless cooperation with the survey process is also mandated. In addition, the OOC would need to be provided with sufficient resources to contract with those who have the expertise to perform these tasks.

Whistleblower Protections

The Board has recommended in its section 102(b) reports, and continues to recommend, that Congress provide whistleblower reprisal protections to legislative branch employees comparable to that provided to executive branch employees under 5 U.S.C. 2302(b)(8), and 5 U.S.C. 1221. If the OOC is to be granted investigatory and prosecutorial authority over discrimination complaints (see below), the Board recommends that the Office also be granted investigatory and prosecutorial authority over whistleblower reprisal complaints, by incorporating into the CAA the authority granted to the Office of Special Counsel (“OSC”), which investigates and prosecutes claims of whistleblower reprisal in the executive branch.

The Board’s Views on Possible Changes to the Current Dispute Resolution Procedures under the CAA

As stated above, the Board strongly recommends that the Committee consider existing models under comparable statutes in the federal government in its review of potential change to the dispute resolution procedures under the CAA. To assist the Committee in this important work, I will briefly summarize our current dispute resolution procedures below and convey the Board’s considered views on suggested changes to them.

Current Procedures Under the CAA

Like most civil rights statutes, the CAA contains an administrative exhaustion requirement. Prior to filing a complaint with the OOC pursuant to section 405 of the Act or in the U.S. District Court pursuant to section 408, subchapter IV of the CAA currently requires that an employee satisfy two jurisdictional prerequisites: mandatory counseling and mandatory mediation. First, the employee must request counseling within 180 days of the date of the alleged violation of our statute. “Counseling” is a statutory term that equates to intake. The CAA also provides that “[t]he period for counseling shall be 30 days unless the employee and the Office agree to reduce the period.” Therefore, an employee can request to shorten the 30-day counseling period and is advised by our Office of that option. An employee may also waive confidentiality during the counseling period to permit the OOC to contact the employing office to seek an immediate solution to the employee’s concerns, but this is strictly up to the employee.

If a claim is not resolved during the counseling phase and the employee wishes to pursue the matter, the CAA currently requires the employee to file a request for mediation with the OOC. When a case proceeds to mediation, the employing office is notified about the claim and the parties attempt to settle the matter with the assistance of a trained neutral mediator appointed by the OOC. The CAA specifies that the mediation period “shall be 30 days,” which may be extended only upon the joint request of the parties.

The CAA currently does not grant the OOC General Counsel the authority to investigate claims alleging violations of the laws applied by subchapter II, part A of the Act, including claims of employment discrimination under Title VII of the Civil Rights Act of 1964. (See discussion below.) Therefore, if the parties fail to resolve their dispute in mediation, a covered employee may elect to proceed directly to the third step in the process, either by filing an administrative complaint with the OOC, in which case the complaint would be decided by an OOC Hearing Officer in a confidential setting, or by filing a lawsuit in a U.S. District Court, in which case the proceedings would be a matter of public record. By statute, this election—which is the employee’s alone—must occur not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. This statutory timing requirement creates a 30-day period—sometimes referred to as a “cooling off period”—before the employee can proceed.

A party dissatisfied with the decision of the Hearing Officer may file a petition for review with the OOC Board of Directors, and any decision of the Board may be appealed to the U.S. Court of Appeals for the Federal Circuit. If, instead of filing a request for an administrative hearing, the employee files a civil suit in Federal district court, an appeal of that decision would proceed under the rules of the appropriate U.S. Court of Appeals.

The Board's Views on Possible Changes to the Dispute Resolution Procedures under the CAA

Counseling and Mediation

Part of the Committee's review entails consideration of proposals that the CAA be amended, including proposals to eliminate counseling and mediation as jurisdictional prerequisites and instead make them optional. Other suggestions concern the confidential nature of those proceedings. To assist the Committee, the Board offers the following observations and recommendations:

The OOC Board is mindful of concerns that the CAA's mandatory counseling procedure may serve to delay the availability of statutory relief or to unduly complicate the administrative process. We nonetheless believe that voluntary OOC counseling can provide important benefits to many employees seeking relief through our office. OOC counselors often provide covered employees with their first opportunity to discuss their workplace concerns and to learn about their statutory protections under the CAA. Although we believe that counseling need not remain mandatory under the CAA, nor a jurisdictional requirement, we recommend against any amendment of the CAA that would eliminate the availability of counseling for those employees who voluntarily seek such assistance from our office.

The EEOC provides a valuable model. Although counseling is not mandatory under Title VII, the EEOC nonetheless offers analogous optional assistance to employees who want or need it. Thus, the EEOC's public website advises potential claimants that discussing their employment discrimination concerns with an EEOC staff member in an interview is the best way to assess how to address concerns and to determine whether filing a charge of discrimination is the appropriate path. Similarly, the Board believes that OOC counseling provides employees a valuable opportunity to discuss workplace concerns with an OOC staff member, to learn about their statutory rights and protections, and to gain assistance in processing their claims.

Under the CAA, the 180-day filing deadline is tolled by filing a request for counseling, not a formal complaint. If the CAA were amended to make counseling optional such that employee were not required to make a request for counseling, the CAA must be further amended to provide that the time limit for filing could also be tolled by filing a document similar to an EEOC charge. The EEOC requires that a claimant initiate the process by filing a formal charge. A charge of discrimination is a signed statement by an employee asserting that an employer engaged in employment discrimination. It is the formal request for the EEOC to take remedial action. An EEOC charge must be filed within the statutorily prescribed limit. A similar procedure could be incorporated into the CAA.

Further, the CAA, as amended, should expressly state that filing such a charging document is mandatory. A charging document facilitates framing the issues for subsequent proceedings, such as mediation, hearing, or investigation, should Congress provide the OOC General Counsel with investigative authority. See discussion below.

Moreover, requiring the filing of such a document with the OOC furthers the policy goal of parity between the laws made applicable to legislative branch employees through the CAA and the laws that apply in the private sector and executive branch. For example, in the private sector, an employee is required by statute to exhaust administrative remedies by filing a charge with the EEOC before filing a lawsuit under federal law alleging discrimination or retaliation. Similarly, under the Whistleblower Protection Act, individuals who allege that they experienced retaliation because of whistleblowing may seek corrective action in appeals to the Merit Systems Protection Board (“MSPB”) only after first filing a complaint seeking corrective action from OSC. The MSPB appeal may be filed only after OSC closes the matter or 120 days after the complaint is filed with OSC, if OSC has not notified the complainant that it will seek corrective action. Administrative exhaustion also can facilitate voluntary resolution of disputes by the parties themselves, and it can assist in identifying those cases lacking in merit, for example those where there is no jurisdiction under the CAA.

The Board also notes that under the CAA, only claims that are raised in counseling can be raised in an OOC administrative hearing or in a lawsuit in U.S. District Court. It can be difficult to determine which claims were raised in counseling because of the confidential nature of the counseling process, discussed below. The CAA could be amended to permit the OOC counselor to assist employees in the technical aspects of drafting the employees’ charging document, minimizing this problem in many cases. Granting OOC counselors this authority would also facilitate framing the legal issues and informing the Office of the matters to be investigated, should Congress provide the OOC General Counsel with investigative authority, as discussed below. Finally, granting OOC counselors this enhanced statutory role could serve to assist those employees who are unrepresented by legal counsel and who seek guidance and support in pursuing their legal claims.

The Board believes that the statutory term, “counseling,” has led to some public confusion on the nature of the OOC counseling process. For example, some have misunderstood the term “counseling” to entail a form of employee “therapy,”—thereby prompting the question why the CAA would require “counseling” for the victim of sexual harassment rather than for the harasser. “Counseling” in fact entails “providing the employee with all relevant information with respect to the[ir] rights” including information concerning the applicable provisions of the CAA. Therefore, the Board believes that consideration should be given to amending the CAA to refer to “claims counseling” or “statutory rights counseling.”

As with counseling, the Board supports the elimination of mediation as a mandatory jurisdictional prerequisite to asserting claims under the CAA. It nonetheless recommends that mediation be maintained as a valuable option available to those parties who mutually seek to settle their dispute. Again, the EEOC model provides useful guidance. After the EEOC notifies the employer of the filing of a formal charge, it offers eligible parties the option to participate in mediation. Both parties must agree to mediation, and unlike the CAA, the voluntary mediation process takes place *after* the administrative complaint, i.e., the charge, has been filed. A mediator does not impose a decision on the parties. Instead, the mediator helps the parties to agree on a mutually acceptable resolution. Resolving cases during mediation can save the parties from burdensome litigation, which can be expensive, time consuming, and a drain on resources and workplace productivity. Mediation also gives the parties an opportunity to explore resolving the dispute themselves without having a result imposed upon them. OOC mediators are highly skilled professionals who have the sensitivity, expertise and flexibility to customize the mediation process to meet the concerns of the parties. The OOC seeks to ensure that mediation proceedings are conducted in a manner that is respectful and sensitive to the concerns of the parties.

The effectiveness of mediation as a tool to resolve workplace disputes cannot be understated. Indeed, according to the EEOC, an independent survey showed that 96% of all respondents and 91% of all charging parties who used the EEOC mediation process would use it again if offered. Similarly, the OOC's experience over many years has been that a large percentage of controversies were successfully resolved without formal adversarial proceedings, due in large part to its mediation processes.

The Board is nonetheless aware of concerns that employees may find the mediation process intimidating—especially those who are legally unrepresented but who face an employing office represented by legal counsel. The Board also recognizes that mediation is most successful when both parties feel comfortable and adequately supported in the process. If the Committee determines that unrepresented employees would benefit from the presence of an advocate or ombudsman in a CAA mediation proceeding, the Board recommends that consideration be given to utilizing the OOC counselor or an employee from the OOC General Counsel's office to perform that role. In considering this option, the Committee should understand the protections already built into the OOC mediation process. Specifically, the CAA provides that mediation “shall involve meetings with the parties separately or jointly.” As with counseling, an employee may participate in mediation over the telephone, or by similar means, and the employee may be represented by a representative in the employee's absence. Contrary to some media accounts, there is no requirement that the employee be in the same room as the accused during mediation.

Confidentiality Concerns

The Board is aware of suggestions that the confidential nature of the counseling and mediation process be reconsidered. As to the confidential nature of the counseling process, the Board believes that no changes are required. Although counseling between the employee and the OOC is strictly confidential, this means that the employing office is not notified by the OOC that the employee has filed a request for counseling, and counseling between the employee and the OOC is strictly confidential. Thus, the confidentiality obligation is on the OOC, not the employee. An employee remains free to waive the confidentiality requirement in counseling, to permit the OOC to contact the employing office in an attempt to resolve the dispute. The employee also remains free to speak publicly about the underlying employment concern, and about the fact that he or she has filed a claim with our Office. In short, the confidential nature of the counseling process is intended to provide employees with the ability to contact the CAA regarding their statutory rights knowing that we the OOC will not disclose that contact to the employing office or anyone else.

The Board is also of the view that the limited confidentiality requirements associated with the mediation process serve important policy goals, are consistent with mediation models in the private and executive branch sectors, and should be maintained. At the outset of the mediation process, the parties sign an agreement to keep confidential all communications, statements, and documents that are prepared for the mediation. This confidentiality obligation concerns materials *prepared for the mediation process*. It does not prevent an employee from discussing underlying facts or allegations with others. The confidentiality obligation concerning materials prepared specifically for the mediation process encourages the parties to present their positions freely and candidly, which promotes and enhances the mediation process. The concept that information disclosed during mediation is confidential is an essential part of the process and is widely acknowledged. Indeed, under the EEOC model, all parties to voluntary mediation are also required to sign an agreement of confidentiality stating that information disclosed during mediation will not be revealed to anyone, including other EEOC investigative or legal staff.

Finally, with respect to the anti-discrimination and anti-harassment provisions of the CAA, the OOC was created to provide legislative branch employees with full, fair, and confidential proceedings to resolve their workplace disputes. These confidential proceedings are offered to employees as an alternative to the public legal proceedings of a United States courtroom. Many employees have chosen the private and confidential proceedings offered by the OOC precisely because the proceedings are private and confidential. Consequently, care must be taken before considering any proposal that would eliminate or weaken the confidentiality protections of the CAA, as such action may have the unintended effect of discouraging employees from reporting illegal conduct.

Settlement Agreements

The Board is aware of many articulated concerns regarding the confidential nature of certain settlement agreements regarding claims brought under the CAA. These are critical issues for the Committee to consider.

Under the CAA, it is for the parties to decide whether and how to settle a claim, and whether any settlement agreement should be confidential. Currently, the only statutory requirement for settlement agreements in the CAA is that they be in writing. The OOC does not have standardized language that parties are required to include in their settlement agreements. The OOC certainly does not require parties to include nondisclosure or confidentiality provisions in those agreements. The contents of settlement agreements—including any provisions governing disclosure—are solely determined by the parties and their representatives.

Some claimants may desire confidentiality because it protects them from unwanted publicity, whereas others may not because it could impede their ability to speak out against unlawful discrimination. Under no circumstances, however, should a confidentiality agreement be imposed on someone who does not want it. The Board stresses that, even if the parties agree to include a nondisclosure provision in their settlement agreement, that provision would be enforceable only to the extent that it is lawful and otherwise consistent with public policy. The Board is of the view, consistent with the EEOC, that a nondisclosure clause in a settlement agreement (as well as a non-disparagement agreement) cannot be interpreted or enforced to restrict an employee's ability to disclose information or communicate with relevant regulatory agencies, or to cooperate fully with such agencies in any investigation.

Finally, the CAA provides that settlement agreements shall not become effective unless they are approved by OOC Executive Director. Because the Act contains no substantive standards for approval, the OOC Executive Director's role in this process is largely ministerial. If Congress desires that the Executive Director conduct a more substantive review of settlement agreements as part of the approval process, the CAA would have to be amended to set forth substantive standards for review.

Amending the Complaint

We ask the Committee to consider reforming the CAA to allow for the amendment of employee complaints in a manner similar to that available to employees in the private sector and in the executive branch. If new events take place after an employee files an EEOC charge that the employee believes are discriminatory, the EEOC can add these new events to the initial charge by amending it. The EEOC then sends the amended charge to the employer and investigates the new events along with the rest.

The CAA does not currently provide for amending complaints in such a manner. If new events take place after an employee files a request for counseling with the OOC that she believes are unlawful—including alleged retaliation for filing the initial claim—she must file a new request for counseling, complete the mandatory counseling and mediation process again before filing a second formal complaint, and potentially consolidate the two complaints if the first complaint remains pending. The Board is of the view that the CAA should be amended to simplify this process by permitting the amendment of pending complaints to relate back to the initial filing in a manner similar to the process used by the EEOC.

Investigative and Prosecutorial Authority

Currently, the CAA only grants the OOC General Counsel the authority to investigate claims alleging violations of the Occupational Safety and Health Act of 1970, the Federal Service Labor Management Relations Statute, and the public access provisions of the Americans with Disabilities Act (“ADA”). The CAA does not authorize the OOC General Counsel to investigate claims concerning the laws applied by subchapter II, part A of the Act, including claims of employment discrimination under Title VII of the Civil Rights Act of 1964 or the ADA; the Rehabilitation Act of 1973; the Family and Medical Leave Act (“FMLA”); the Fair Labor Standards Act; the Age Discrimination in Employment Act; the Worker Adjustment and Retraining Notification Act; the Employee Polygraph Protection Act; and veterans’ employment and reemployment rights under chapter 43 of title 38 of the U.S. Code.

Unlike the OOC, when a private sector or executive branch charge is filed, the EEOC/OSC has statutory authority to investigate whether there is reasonable cause to believe discrimination occurred. As part of its investigation, the EEOC asks the employer to provide a written answer to the charge, called a Position Statement. It may also ask the employer to answer questions about the claims in the charge, interview witnesses and ask for documents. If an employer refuses to cooperate with an EEOC investigation, the EEOC can issue an administrative subpoena to obtain documents or testimony or to gain access to facilities.

The Board supports suggestions to grant the OOC General Counsel similar investigative authority. One suggested approach would be to grant the General Counsel investigatory authority mirroring that of the equivalent executive branch agencies – i.e., the EEOC for discrimination complaints and the OSC for whistleblower reprisal complaints. As discussed above, the mechanism for doing this already exists in the CAA: the General Counsel is granted selected parts of the authority of the Federal Labor Relations Authority for labor-management issues (CAA section 220(c)(2)) and of the Secretary of Labor for OSH issues (CAA section 215(c)(1), (c)(2), and (e)(1)). Amending the CAA in this manner with regard to workplace claims of discrimination, harassment and retaliation under the laws applied by subchapter II, part A of the CAA

would best achieve the Act's policy goal of making the legislative branch subject to the equivalent workplace laws and enforcement mechanisms as the executive branch and the private sector. Further, the Office would benefit from the body of law and expertise already developed by the EEOC and OSC in conducting its investigations.

Any legislation granting the OOC General Counsel investigatory authority should also specify that the Office has the ability to file a complaint if the General Counsel determines that violations have occurred, just as the CAA does with the Occupational Safety and Health Act and Federal Service Labor Management Relations Statute. Such legislation should also include administrative subpoena authority for dealing with employing offices or other parties who refuse to cooperate with the General Counsel's investigations. Empowering the OOC General Counsel to prosecute complaints of discrimination and harassment would address many recently expressed concerns regarding both the intimidation and the litigation challenges faced by employees seeking relief under the current statutory framework —especially those without the resources to retain legal counsel.

Several other important issues must be addressed. First, would the General Counsel's investigation be mandatory or optional on the part of the complaining party? Again, executive branch models should be considered. If, at the close of an EEOC investigation, it is not able to determine that the law was violated, the EEOC provides the complainant with a Notice of Right to Sue, which gives the complainant permission to file a lawsuit in court. However, complainants may also request a Notice of Right to Sue from the EEOC if they wish to file a lawsuit in court before the investigation is completed, which effectively makes the EEOC investigation optional. Other models in the federal government require administrative exhaustion. The OSC process for investigating claims of whistleblower reprisal, for example, requires a complainant to allow the agency a specified period of time to investigate a complaint and to issue a "closure letter" before the complainant has the right to independently litigate the case.

Second, if the employee elects an investigation and the investigation determines the law may have been violated, should the OOC General Counsel try to reach a voluntary settlement with the employing office, as the EEOC would with an employer in the private sector, or as the OSC would with a federal agency in investigating a whistleblower reprisal claim? Allowing the General Counsel to play this representative role on behalf of a covered employee may meet some of the concerns explored above regarding employee discomfort in the mediation process.

If a settlement is not reached, should the OOC General Counsel have the discretion to determine whether or not to file a formal complaint on the employee's behalf, similar to the discretion granted to the EEOC? Many, but not all of these details can be addressed in the regulatory process, which can take into consideration differences from the equivalent executive branch regulations as needed.

Investigating and Prosecuting Claims of Retaliation under the CAA

The Board has also recommended to Congress in its biennial section 102(b) reports that the Office of General Counsel be granted enforcement authority with respect to section 207, the anti-retaliation provision of the CAA, because of the strong institutional interests in protecting employees against intimidation or reprisal for the exercise of their statutory rights or for participation in the CAA's processes. Investigation and prosecution by the Office of General Counsel would more effectively vindicate those rights, dispel the chilling effect that intimidation and reprisal create, and protect the integrity of the Act and its processes. Enforcement authority with respect to intimidation or reprisal is provided to the agencies that administer and enforce the CAA laws in the private sector. In contrast, under the CAA, the rights and protections provided by section 207 are vindicated only if the employee, after counseling and mediation, pursues his or her claim before a hearing officer or in district court.

Experience in the administration and enforcement of the CAA argues that the Office should be granted comparable authority to that exercised by the executive branch agencies that implement the CAA laws in the private sector. Covered employees who have sought information from the Office respecting their substantive rights under the Act and the processes available for vindicating these rights have expressed concern about their exposure in coming forward to bring a claim, as well as a reluctance and an inability to shoulder the entire litigation burden without the support of agency investigation or prosecution. Moreover, employees who have already brought their original dispute to the counseling and mediation processes of the Office and then perceive a reprisal for that action may be more reluctant to use once again the very processes that led to the claimed reprisal.

Whatever the reasons a particular employee does not bring a claim of intimidation or reprisal, such unresolved claims threaten to undermine the efficacy of the CAA. Particularly detrimental is the chilling effect on other employees who may wish to bring a claim or who are potential witnesses in other actions under the CAA. Without effective enforcement against intimidation and reprisal, the promise of the CAA that congressional employees will have the same civil rights and social legislation that ensure fair treatment of workers in the private sector and the executive branch is rendered illusory. Therefore, in order to preserve confidence in the Act and to avoid discouraging legislative branch employees from exercising their rights or supporting others who do, the Board recommends that Congress grant the Office the authority to investigate and prosecute allegations of intimidation or reprisal as they would be investigated and prosecuted in the private sector and the executive branch by the implementing agency.

Under any circumstances, Congress would have to devote sufficient resources so that workplace investigations are prompt, objective, and thorough. Thus, the OOC would

need significant additional resources, including several more FTEs, if investigatory authority were granted.

Eliminating the “Cooling Off” Period

As discussed above, the CAA requires that employees not pursue a formal administrative complaint with the OOC or a lawsuit in a U.S. District Court until not later than 90 days, but not sooner than 30 days, after the end of the period of mediation. This statutory timing requirement creates a 30-day period—sometimes referred to as a “cooling off period”—before the employee can proceed. The Board recommends that the CAA be amended to eliminate this period and instead provide that the employee may proceed with an administrative or judicial complaint any time within 90 days of the issuance of the equivalent of a “right to sue” notice, as discussed above. That notice would be issued to the employee at the conclusion of voluntary counseling, voluntary mediation, the investigation, or at the request of the employee, as the case may be.

Other Recommendations for Improvements to the CAA

Library of Congress

Currently, only certain provisions of the CAA apply to employees of the Library of Congress (“LOC”). The Board supports the proposal contained in the current Senate legislative branch appropriations bill that would amend the CAA to include the LOC within the definition of “employing office,” thereby extending CAA protections to LOC employees for most purposes.

Adopt Recordkeeping Requirements under Federal Workplace Rights Laws

The Board, in several section 102(b) reports, has recommended and the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII. Although some employing offices in the legislative branch keep personnel records, there are no legal requirements under the CAA to do so.

Most federal workplace rights statutes that apply to private and public sector employers require the employer to retain personnel records in a certain manner and for a certain period of time. Title VII requires an employer to maintain certain personnel records, although no particular form of retention is specified. All personnel and employment records made or kept by an employer, including applications and records pertaining to hiring, promotion, demotion, transfer, layoff or termination, pay rates and other compensation terms, and training must be retained for 1 year from the date of making the record or the personnel action involved, whichever is later. Title VII further

requires that once a discrimination claim is filed, all personnel records relevant to the claim must be retained until final disposition of the charge or action.

Personnel records may be essential for congressional employees to effectively assert their rights under the CAA. Such records may also be critical evidence for employers to demonstrate that no violations of workplace rights laws occurred. Accordingly, the Board continues to recommend that Congress adopt all recordkeeping requirements under Federal workplace rights laws, including Title VII.

Approve the Board's Pending Regulations

In an effort to bring accountability to itself and its agencies, Congress passed the CAA, establishing the OOC to, among other roles, promulgate regulations implementing the CAA to keep Congress current and accountable to the workplace laws that apply to private and public employers. The Board is required to amend its regulations to achieve parity, unless there is good cause shown to deviate from the private sector or executive branch regulations. The Board recommended in its 2016 section 102(b) Report to the 115th Congress that it approve its pending regulations that would implement the FMLA, ADA Titles II and III, and USERRA in the legislative branch.

Apply the Wounded Warrior Federal Leave Act of 2015 to the Legislative Branch

In 2015, the 114th Congress unanimously voted to enact the Wounded Warrior Federal Leave Act. The law affords wounded warriors the flexibility to receive medical care as they transition to serving the nation in a new capacity. Specifically, new federal employees, who are also disabled veterans with a 30% or more disability, may receive 104 hours of “wounded warrior leave” during their first year in the federal workforce so that they may seek medical treatment for their service-connected disabilities without being forced to take unpaid leave or forego their medical appointments. The Act amends title 5 of the United States Code and was reportedly passed as a way to show gratitude and deep appreciation for the hardship and sacrifices of veterans and, in particular wounded warriors, in service to the United States. In its 2016 section 102(b) Report, the Board recommended the Congress extend the benefits of that Act to the legislative branch with enforcement and implementation under the provisions of the CAA.

Protect Employees Who Serve on Jury Duty (28 U.S.C. § 1875)

Section 1875 provides that no employer shall discharge, threaten to discharge, intimidate, or coerce any permanent employee by reason of such employee's jury service, or the attendance or scheduled attendance in connection with such service, in any court of the United States. This section currently does not cover legislative branch employment. For the reasons set forth in the 1996, 1998, 2000 and 2006 section 102(b) reports, the

Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the Legislative Branch.

*Protect Employees and Applicants Who Are Or Have Been In 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 because that person is or has been a debtor under the bankruptcy statutes. This provision currently does not apply to the legislative branch. For the reasons stated in the 1996, 1998, 2000 and 2006 section 102(b) reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

*Prohibit Discharge of Employees Who are or have been Subject to Garnishment
(15 U.S.C. § 1674(A))*

Section 1674(a) prohibits discharge of any employee because his or her earnings “have been subject to garnishment for any one indebtedness.” This section is limited to private employers, so it currently has no application to the legislative branch. For the reasons set forth in the 1996, 1998, 2000 and 2006 section 102(b) reports, the Board recommends that the rights and protections against discrimination on this basis should be applied to employing offices within the legislative branch.

Thank you for soliciting our views on these most important matters. The OOC stands ready to work with this Committee to ensure a workplace for legislative branch employees that is free from unlawful harassment, discrimination, and retaliation.