Written Testimony Of

Gloria J. Lett (Counsel, Office of House Employment Counsel)

Before the

Committee on House Administration

December 7, 2017

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Good morning Chairman Harper, Vice Chairman Davis, Ranking Member Brady, and Members of the Committee on House Administration.

My name is Gloria Lett and I am the Counsel for the Office of House Employment Counsel ("OHEC").

Thank you for inviting me to speak again and to provide input on the topic of examining reforms to the Congressional Accountability Act of 1995 ("CAA").

In offering these remarks, I wish to emphasize that my office is non-partisan in nature and has a separate attorney-client relationship with each House employing office. Accordingly, my office can offer its assessment of employment law issues and some of my comments may have to be more in the context of hypothetical scenarios.

1. Administrative and Judicial Dispute-Resolution Procedures under the CAA

As the Committee knows, the CAA establishes procedures by which individuals who believe they have been subjected to sexual harassment or other CAA violations may bring claims against the employing office alleged to have committed the violation. *See generally* 2 U.S.C. §§ 1401-1416. Because a number of questions have been raised about these procedures, I would like to begin by addressing this issue in depth.

The first step in the CAA process is for the individual – who may be an applicant or a current or former employee – to request counseling from the Office of Compliance. *Id.* § 1402. The individual can do this immediately after the alleged violation occurs, or the individual can wait for up to 180 days. ***The formal counseling period lasts for 30 days, but this timeframe may be reduced at the request of the individual.*** At this point, the office is not made aware of any inquiry or potential complaint.

After the counseling period has concluded, the individual may file a written request for mediation with the Office of Compliance. *Id.* § 1403. The mediation period lasts for 30 days unless both parties voluntarily agree to extend the period (e.g., because of scheduling conflicts).

In the experience of my office, the vast majority of CAA cases are successfully resolved by the end of the mediation stage and do not proceed to litigation. This reflects the consensus view of attorneys, managers, and alleged victims that settlement is almost always to everyone's benefit – including those employees who feel they are experiencing harassment and may be seeking a speedy resolution of the problem. The simple fact is that mediation is able to resolve employment disputes much faster than litigation. Indeed, recent federal court statistics reveal that civil cases that proceed to trial take a median of 26.3 months – or more than two years – to resolve. United States District Courts – National Judicial Caseload Profile, Federal Court Management Statistics,

http://www.uscourts.gov/sites/default/files/data_tables/fcms_na_distprofile0930.2017.pdf.[1] This period is substantially longer in the District of Columbia federal court, where most CAA cases are filed, and the median time for resolution of a complaint from filing to trial was 50.2 months as reflected in recently reported statistics. This more than four-year timeframe can be significantly lengthened if a case is appealed.

In contrast, under the CAA, the counseling and mediation process is typically completed within 60 days (unless the parties mutually agree to extend mediation), and cases handled by OHEC are usually resolved within this timeframe. This appears to be the experience of the Legislative Branch as a whole. The Office of Compliance states that a total of 65 cases went through the mediation process in Fiscal Year 2016 (including 42 new claims filed that year), and that 36 claims were resolved in mediation. FY 2016 Annual Report - State of the Congressional Workforce: A Report on Workplace Rights, Safety & Health, and Accessibility Under the Congressional Accountability Act, Office of Compliance, https://www.compliance.gov/publications/reports-issued-office-compliance/annual-reports.

In some instances, parties are unable to resolve a dispute at mediation. An employee may then choose to file a complaint with either the Office of Compliance or a federal court within 30 to 90 days of the conclusion of the mediation period. 2 U.S.C. § 1404. ***This means that an individual has the right to initiate litigation under the CAA as soon as 90 days after an alleged violation has occurred — a remarkably swift timeframe compared to what employees in the private sector or the Executive Branch typically face.***

For example, a private sector employee who brings a sexual harassment lawsuit under federal law generally must first obtain what is called a "Notice of Right to Sue" letter from the Equal Employment Opportunity Commission ("EEOC"). *See generally* What You Can Expect After You File a Charge, EEOC, https://www.eeoc.gov/employees/process.cfm.[2] Before an employee can obtain this right to sue letter, however, the employee is required to file a "charge" with the EEOC, which is supposed to investigate. EEOC may also attempt to resolve the charge through conciliation or litigation. The EEOC states that the average investigation in 2015 took ten months to complete. *Id.* Because this process can be so lengthy, many employees opt to forgo the EEOC process, and will instead file suit on their own in federal court. According to the EEOC, "[g]enerally, [the charging party] must allow EEOC 180 days to resolve [the] charge" before it will issue the mandatory right to sue letter. After You Have Filed a Charge, EEOC, https://www.eeoc.gov/employees/afterfiling.cfm. ***Thus, private sector employees generally must wait at least six months before they can file a harassment suit under federal law, and it may then take years for the case to actually be adjudicated to final judgment.***

The administrative process for federal civil service employees of the Executive Branch is much more complex than for Legislative Branch employees. *See generally* Overview of Federal

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1 Civil actions in U.S. district courts took a median of 9.9 months to resolve when they were disposed of prior to trial (e.g., summary judgment or settlement).

2 Depending on the jurisdiction, litigants may also be able to pursue administrative or judicial remedies under state or local law.

Sector EEO Complaint Process, U.S. Equal Employment Opportunity Commission EEOC), https://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm.[3] Like private sector employees, however, most federal civil service employees must wait 180 days (six months) before obtaining the right to file suit in federal court. Specifically, as under the CAA process, these employees generally must complete a mandatory 30-day counseling period. In most cases, the EEO Counselor at the agency where the employee works will give the employee an opportunity to participate in mediation or another alternative dispute resolution (ADR) program.

If the dispute is not settled through ADR, the employee may file a formal complaint with the agency's EEO Office. The agency then may dismiss the complaint on procedural grounds or conduct an investigation. The investigation process can take up to 180 days – or six months – to complete. When an investigation concludes, the employee may request a hearing before an EEOC Administrative Judge (AJ). When the hearing concludes, the AJ issues a decision – but this still is not the end of the process. According to the EEOC:

> When an AJ has issued a decision (either a dismissal, a summary judgment decision or a decision following a hearing), the agency must take final action on the complaint by issuing a final order within 40 days of receipt of the hearing file and the AJ's decision. The final order must notify the complainant whether or not the agency will fully implement the decision of the AJ, and shall contain notice of the complainant's right to appeal to EEOC or to file a civil action. If the final order does not fully implement the decision of the AJ, the agency must simultaneously file an appeal with EEOC and attach a copy of the appeal to the final order. 29 C.F.R. Section 1614.110(a).

Federal EEO Complaint Processing Procedures, EEOC, https://www.eeoc.gov/eeoc/publications/fedprocess.cfm. ***Alternatively, the employee may quit the EEOC process in some cases and file suit in federal court after 180 days (6 months) have passed from the date the original complaint was filed.***

As this brief summary highlights, the EEO process under the CAA is remarkably fast compared to the procedures available under other federal laws.[4] The CAA also gives employees the option of filing a complaint with the Office of Compliance rather than pursuing litigation in federal court – an alternative that private sector employees do not enjoy. In our experience, many Legislative Branch employees choose this option because the process is so much faster than federal court litigation. ***The option to go this route is solely at the employee's choosing.*** By statute, the administrative hearing must begin within 60 to 90 days of the date that the complaint is filed. 2 U.S.C. § 1405(d)(2). Therefore, considering the entire process from counseling to mediation to the administrative hearing stage, ***a Legislative Branch employee may***

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[3] The process may be different if the individual is a member of the military, the dispute is subject to a collective bargaining agreement, etc.

[4] The process will typically be much slower if the employee chooses to file suit in federal court, where the timing will be controlled by court rules and subject to the demands of each court's particular docket. *Supra* note 1 and accompanying text. The timing and procedures available under state and local laws vary from jurisdiction to jurisdiction.

realistically adjudicate a claim and obtain relief within approximately 180 days of the alleged CAA violation – a much shorter timeframe than other employees typically experience.

2. Settlement of CAA Claims Brought Against House Employing Offices

A second issue that has been the subject of recent public discussion concerns the payment of monetary settlements for alleged violations from the CAA's judgment fund. *Id.* § 1415(a). Therefore, I will spend some time explaining how this process works for House employing offices.

First, the parties involved in the dispute – that is, the employee and the employing office – must reach a mutually agreeable settlement agreement. This often occurs during the mediation period. *Id.* § 1403(c). With rare exceptions, employees are represented by their own counsel during mediation.

Second, my office, OHEC, submits a justification memorandum to this Committee. The justification memorandum discusses the results of an investigation of the underlying facts, the relevant law, the legal risk associated with litigating the case, and the potential monetary exposure. Based on this information, the Committee decides whether monetary settlement is appropriate under the circumstances. OHEC's justification memorandum does not disclose the identity of the parties involved in the dispute because of the statutory requirement that CAA matters at this stage "shall be strictly confidential." *Id.* § 1416. In addition, OHEC's practice of submitting generic memoranda to the Committee helps to ensure that personal, political, and other non-CAA factors do not enter into the approval process.

Third, the Chair and Ranking Minority Member of the Committee must jointly approve the amount of the settlement. *See* House Rule X, cl. 4(d)(2). House Rules do not specify a timeframe for the Committee's approval process to be completed, and no formal guidance has been issued to explain the criteria used by the Committee to evaluate settlement requests.

Finally, the Executive Director of the Office of Compliance must approve the parties' written settlement agreement. 2 U.S.C. § 1414. Once this occurs, the Office of Compliance administratively processes payments as required from the CAA judgment fund.

Beyond this publicly available information, I am limited in what I can say about the settlement process by the attorney-client privilege, as well as by the confidentiality provisions of the CAA and of most negotiated settlement agreements. ***However, I can say that the mere fact that an employing office may agree to settle a case does not mean that the office admits liability or other wrongdoing.*** On the contrary, most employing offices expressly deny liability, and they insist that language to this effect be included as a term of the parties' settlement agreement.

In addition, when a House employing office consults my office for advice regarding alleged CAA violations such as sexual harassment, the office is advised to internally investigate the matter, with OHEC's assistance, and to take action as needed to correct any problems. Depending on the circumstances, an office's investigation may involve interviewing the

applicant or employee who believes that a violation has occurred, the individual(s) alleged to be responsible for the violation, and any witnesses with knowledge of the matter. Offices may also review emails or other documents that shed light on the issue. ***In other words, this investigative process is not perfunctory in nature and, in my experience, is taken extremely seriously by House employers (as it is by the attorneys of my office).***

When an alleged violation involves actual or threatened litigation, OHEC makes an assessment of the legal risks and of the time, resources, and taxpayer dollars that will be spent defending the claim. We share our assessment with the employing office so that it can better determine whether settlement may be justified for legal or financial reasons – just as private sector employers routinely do every day.

The decision to settle belongs solely with the employing office based on privileged attorney-client discussions with OHEC. Although I cannot speak about specific settlement agreements, I can state that a variety of factors typically go into the decision-making process. These factors may include the following:

- The law may be unclear as to whether an office has or has not violated its legal obligations. For example, courts may have issued conflicting decisions regarding legal issues that have not been definitively settled by the Supreme Court. Some laws may also depend on a "reasonable person" standard that is impossible to quantify in precise scientific or mathematical terms.

- Often the facts are not clear even after an exhaustive investigation has occurred. Witnesses may offer wildly different factual accounts, and usually there is no "smoking gun" evidence of wrongdoing. Ultimately, in the American legal system, these kinds of factual disputes must be decided by jurors. This means that an office typically cannot know with certainty how a case that is litigated will be resolved – even when the office reasonably believes that it did not violate the law.

- In rare cases an office determines that misconduct has occurred, but its ability to take corrective action may be limited (e.g., if an aggrieved employee no longer works for the office).

- Many claims have little apparent legal or factual merit, but an office may still determine that defending the claim will result in the inefficient use of government resources. For example, litigation may require lengthy interviews of Members, employees, and other witnesses; depositions that may last a full day for each witness; and, if a case proceeds to trial, the testimony of those same witnesses. Offices must also devote significant staff time to responding to discovery requests, collecting relevant documents (which may require reviewing thousands and thousands of emails and other documents), and addressing other litigation matters.

- Litigation has a number of direct costs, including travel to district offices, deposition fees, expert witness fees, and the expense of conducting electronic

discovery in compliance with court rules. In my office's experience, direct ligation costs can range anywhere from several thousand dollars to well in excess of $50,000 per case – regardless of whether the case has any legal or factual merit. Offices must therefore weigh the often low cost of settling (e.g. $500) versus the known and unknown costs and risks of litigation.

- Litigation in the American legal system is an adversarial process that typically lasts for years and takes a toll on all parties involved – including the plaintiffs.

- Finally, as the Office of Compliance has observed, "The advantage of a mediated settlement is that it allows both parties in a dispute to take an active role in reaching a settlement rather than having a judgment imposed upon them by a hearing officer or judge." Dispute Resolution Process – Filing a Claim, Office of Compliance, https://www.compliance.gov/services/dispute-resolution-process.

For all of these reasons, House employing offices may conclude that settlement is justified even when the office's investigation has concluded that a claim is without merit. In short – and as the media has reported in the context of discussing private sector employment litigation – "It is often in the company's best interest to provide a settlement to the accuser, regardless of whether the case is valid or not." Why employers settle sexual harassment claims, CBS News (November 3, 2011), https://www.cbsnews.com/news/why-employers-settle-sexual-harassment-claims/.

3. Confidentiality of CAA Settlements

When lawsuits are settled in the American system, the parties often voluntarily agree to include non-disclosure and non-disparagement provisions in their written settlement agreements. These provisions are intended to protect the confidentiality of settlement terms and other details regarding the parties' dispute. Employers often insist on such protections because of a feared perception that settlement implies guilt. Members of Congress, in particular, sometimes fear that publicity will harm their reputations regardless of the claim's merits. Members and other employers may also fear that publication of settlements will engender copycat lawsuits that lack merit. Plaintiffs often demand confidentiality for other reasons. For example, they may fear that a prospective employer will be unlikely to hire them if it hears they have been involved in litigation against a former employer. A plaintiff may also find certain allegations embarrassing to discuss in public (as the litigation process requires).

For these and many other reasons, confidentiality is often a win-win proposition and essential to the settlement process. ***However, no alleged victim is ever forced to settle a CAA claim on confidential terms.*** Rather, this is an issue that every aggrieved employee may freely negotiate (or direct his or her counsel to negotiate). The CAA also gives all covered employees the right to file a public complaint in federal court once the Office of Compliance's administrative process has concluded. The suggestion that individuals are being prevented from publicly discussing allegations against their will is therefore false. As one attorney who has represented CAA plaintiffs explains, "The victims often desire that confidentiality because it protects them from the media frenzy that follows when members of Congress are the subject of

discrimination and harassment lawsuits. Confidentiality also helps those victims get their next jobs. . . ." Les Alderman, Why the 'fix' to Congress's sexual harassment policies could backfire, Politico (November 30, 2017), https://www.politico.com/agenda/story/2017/11/30/fix-to-congress-sexual-harassment-policies-could-backfire-000586.

Finally, House employees who are experiencing workplace issues have the ability to contact the Office of Congressional Ethics, the U.S. Capitol Police, the House's Office of Employee Assistance, and other resources if they feel that the CAA process cannot adequately remedy a problem.

4. Statistics Regarding Settlement of CAA Claims

On November 16, 2017, the Office of Compliance released a letter that details "award and settlement figures" paid from the CAA's judgment fund from Fiscal Year 1997 through Fiscal Year 2017. Office of Compliance, https://www.compliance.gov/sites/default/files/2017.11.16%20Awards%20And%20Settlements%20Appropriation.pdf. These figures indicate that the Legislative Branch has paid or settled a total of 264 claims over a 20-year period totaling $17,241,118. This equates to an average settlement or award of approximately $65,307 per case.

It is important to note that these figures do ***not*** cover sexual harassment claims specifically or Members of Congress specifically. As the Office of Compliance carefully explained, "[a] large portion of cases originate from employing offices in the legislative branch other than the House of Representatives or the Senate, and involve various statutory provisions incorporated by the CAA, such as the overtime provisions of the Fair Labor Standards Act, the Family and Medical Leave Act, and the Americans with Disabilities Act." *Id.*

On December 1, 2017, this Committee publicly released information obtained from the Office of Compliance on settlements involving "House Member led Offices" paid from the CAA's judgment fund. Updated Data on Harassment in the Congressional Workplace, Committee on House Administration, https://cha.house.gov/press-release/updated-data-harassment-congressional-workplace. ***This information reveals that, from Fiscal Year 2013 to the present, there have been six paid settlements involving offices led by one of the 435 Members of the House.*** Two of those claims involved allegations of sex discrimination, and one of these two sex discrimination claims involved specific allegations of sexual harassment. According to the Office of Compliance, "[t]he 1 claim that alleged sexual harassment was for $84,000," and "[t]he 1 claim that alleged discrimination because of sex and religion as well as FLSA violations and retaliation was for $7,000." The average settlement amount for all cases involving House Member led offices during this time period was approximately $59,908.

To help put these numbers into context, the Committee may find it helpful to consider the following statistics regarding the EEO process outside of the Legislative Branch:

- The EEOC resolved 97,443 charges in Fiscal Year 2016 through its conciliation and mediation programs or other means.[5] The agency reports that its "mediation program achieved a success rate of over 76 percent – saving resources for employers, workers, and the agency. Participants rate the mediation program highly, with 97 percent reporting that they would mediate future charges with the agency." *Id.*

- Legal scholars estimate that 70 percent of all employment disputes that end up in court settle prior to trial.[6] This figure reflects the consensus of employers, employees, and their attorneys that it is generally in everyone's best interest to resolve cases and avoid litigation (which, as noted, is a process that typically takes years to complete and can be costly).

- A detailed analysis of settlement outcomes in one federal district court found that the average employment lawsuit that settles does so for $55,000 (approximately $69,000 in today's dollars).[7]

- Another well-documented study found that the average jury verdict in federal court employment cases exceeds $490,000 (approximately $572,000 in today's dollars).[8]

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[5] What You Should Know: EEOC's Fiscal Year 2016 Highlights, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/2016_highlights.cfm.

[6] Mina J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 Washington & Lee Law Review 111 (2007) (analyzing data provided by the U.S. District Court for the Northern District of Illinois), http://law2.wlu.edu/deptimages/Law%20Review/64-1%20Kotkin%20Article.pdf.

[7] *Id.* Most settlements are confidential, making accurate statistics difficult to obtain. The cited study was able to overcome this obstacle by analyzing an anonymously coded dataset of 1,170 cases that were settled by magistrate judges in one federal district court over a six-year period ending in 2005. The adjusted figure provided by OHEC is based on the Bureau of Labor Statistics' Consumer Price Index Calculator available at http://www.bls.gov/data/inflation_calculator.htm.

[8] Elizabeth Erickson and Ira B. Mirsky, *Employers' Responsibilities When Making Settlements in Employment-Related Claims*, Bloomberg Law Report (2009). Notably, the figure cited here only accounts for compensatory damages. Depending on the case, a plaintiff may also be awarded liquidated damages, attorneys' fees, and other forms of monetary and equitable relief (such as reinstatement, a promotion, or a pay raise). The adjusted figure provided by OHEC is based on the Bureau of Labor Statistics' Consumer Price Index Calculator available at http://www.bls.gov/data/inflation_calculator.htm.

5. Questions about the CAA Dispute-Resolution Process

My office stands ready to answer questions about the current CAA dispute-resolution process. We are also available to offer a legal assessment of how proposed amendments to the process may impact the legal interests of House employing offices, including the following:

- Eliminating or making other changes to the CAA's successful mediation process.
- Eliminating the current 30-day "cooling off" period following mediation (a time when, in our experience, passions often cool and disputes are successfully resolved).
- Eliminating the ability of the parties to voluntarily settle on confidential terms (including an assessment of how such a change would dramatically deviate from American legal norms and potentially harm both Members and taxpayers, as well as alleged victims, by discouraging settlement).
- Restricting the ability to settle cases using public funds (e.g., by keeping employees on an office's payroll for a period of time so that they can continue to receive health insurance benefits and represent to prospective employers they are not unemployed, which may carry a perceived stigma).
- Addressing the problem of alleged "serial" harassers and other violators in a way that respects due process rights, the privacy rights of alleged victims, and the confidentiality of any settlement agreements that interested parties may have negotiated.

Finally, if requested, we can share our legal assessment regarding claims of victims' advocates that certain proposed amendments may have the unintended consequence of actually harming victims. *See, e.g.*, Les Alderman, Why the 'fix' to Congress's sexual harassment policies could backfire, Politico (November 30, 2017), https://www.politico.com/agenda/story/2017/11/30/fix-to-congress-sexual-harassment-policies-could-backfire-000586.[9]

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[9] Mr. Alderman – an attorney with experience representing CAA plaintiffs – opposes proposals "to publicize the names of lawmakers who reach any such settlements and to prohibit settlements from using taxpayer money. The change is pitched as a reform to bring transparency and accountability to a secretive process that lets perpetrators get away with bad behavior. But as a civil rights lawyer whose firm has represented numerous victims of discrimination and harassment, including victims employed by members of Congress, I can assure you that this proposal is dangerous. Whether intentional or not, the bill punishes victims of harassment who would come forward in the future and who have come forward in the past and would make it less likely that victims would come forward to make claims in the future."