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October 9, 2014

Barbara J. Sapin
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Room LA 200
John Adams Building
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Washington, D.C. 20540-1999

Re: Comments on the Notice of Proposed Rulemaking Implementing Section 210 of the Congressional Accountability Act (2 U.S.C. § 1331)

Dear Ms. Sapin:

The Committee on House Administration ("the Committee") is pleased to submit the following comments, questions, and suggestions, regarding the proposed substantive regulations implementing Titles II and III of the Americans with Disabilities Act ("ADA") as incorporated in the Congressional Accountability Act ("CAA").[1] The following comments are submitted in the Committee's capacity as a representative of House employing offices pursuant to 2 U.S.C. §1383(b).

[1] As House Member and Committee offices do not provide the transportation services contemplated in 49 C.F.R Parts 37 and 38, the Committee is withholding comment on these regulations and defers to entities that may be covered by such regulations for the purpose of providing commentary and suggestions.

INTRODUCTION

On September 9, 2014, the Board of Directors of the Office of Compliance ("the Board") submitted for publication in the Congressional Record a Notice of Proposed Rulemaking and Request for Comments from Interested Parties ("NPRM") regarding its proposed regulations for implementation of the ADA's public services and accommodations provisions as incorporated by the CAA ("Proposed Regulations").[2]

The language of the CAA adopting specific sections of the ADA requires the Board to issue regulations that are "the same as substantive regulations promulgated by the Attorney General and the Secretary of Transportation to implement the statutory provisions of [the public services and accommodation provisions of the ADA] . . . except to the extent that the Board may determine, for good cause shown and stated together with the regulation, that a modification of such regulations would be more effective for the implementation of the rights and protections" under the ADA. 2 U.S.C. § 1331(e)(2). Accordingly, in addition to the regulations that are specifically described in the NPRM, the Board incorporated by reference in its proposed regulations over 130 Executive Branch regulations for application to Legislative Branch entities. *See* Proposed Regulations 1.105(c), (d), and (e).

As discussed below, the Committee has several concerns about the basis for, and practical application of, a number of the Board's Proposed Regulations. The Committee is confident, however, that its concerns can and will be addressed through the Board's additional consideration of the current Proposed Regulations in light of these comments and those submitted by other affected entities.

GENERAL COMMENTS

Several themes emerge in the Proposed Regulations. First, there is significant redundancy and/or potential contradictory language in the regulations. Second, there are practical considerations regarding how a number of the regulations would be applied to Member offices. Third, the regulations propose a broad expansion of the powers of the OOC's General Counsel in investigating and prosecuting alleged violations of the ADA; such expansion not only raises questions about the source and need for such expansion, but it also raises safety and security issues based on the General Counsel's proposed new authority. In the following

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[2] 160 CONG. REC. H7623-02 (daily ed. Sep. 9, 2014).

pages, the Committee will first address these three themes, followed by a more detailed review of the specific regulations propounded by, and/or incorporated in, the NPRM.

1. Redundancy and Potential Contradictory Language in the Application of Title II *and* Title III Regulations to Individual Covered Entities

In the "Background" section of the Proposed Regulations, the Board states that "[t]he CAA is unique in that it applies both Title II and Title III provisions to covered public entities." NPRM at 16. Accordingly, the Board states that it created section 1.105(b) ("Rule of Interpretation") in an effort to implement its determination that Congress applied both Title II and Title III in order to provide a more expansive regulatory scheme than either Title provides individually. *Id.* Yet the Proposed Regulations seemingly provide no consideration for the fact that Title II and Title III of the ADA cover very divergent categories of public and private entities and the regulations developed by the Department of Justice ("DOJ") took such divergent structures and administrative concerns into consideration when crafting its regulations. Because the real world application of the ADA applies *either* Title II or Title III regulations to a specific entity based on whether it is public or private and what type of service it provides, the Board should employ the same analysis for legislative branch entities. As currently drafted, the proposed regulations raise a number of questions. For example, are the services provided by a Member district office in a rural location really the same as those provided in the cafeteria in the Longworth Building, or the screening room in the Capitol Visitor Center? Does the OOC have identical authority over the private landlord of the Member district office as it does over the AOC? These are questions that must be answered for the effective application of substantive regulations, and yet the answers are not found in the NPRM.

Instead of taking a more targeted approach, the Board apparently decided to superimpose two different sets of Executive Branch regulations on each Legislative Branch entity (without regard to the function and purpose of the separate entities). The Board also reconciles conflicting regulations under Title II and Title III by stating that, in the event of a conflict, "the regulation providing the most access

shall apply."[3] 1.105(b). Such a sweeping and simplistic solution ignores the fact that what is practical for a "Title II entity" might not be practical for a "Title III" entity and vice-versa. For example, Title II regulations state that the accessibility of a public entity's services, programs or activities are "viewed in [their] entirety" and, therefore, the entity is not necessarily required to "make each of its existing facilities accessible to and usable by individuals with a disability." 35.150(a). However, a separate Proposed Regulation, incorporated under Title III, specifically states that a "public accommodation shall remove architectural barriers in existing facilities. . ." unless it can "demonstrate" that barrier removal is not readily achievable. 36.304(a).

Finally, the Board's Proposed Regulation 1.105(e)[4] prohibits leasing space that does not meet the specific accessibility requirements *set forth within that specific regulation* (creating yet another set of standards an office must meet either through the direct language of the regulation or through incorporation by reference of other regulatory requirements not promulgated under the ADA). The conflict posed by these three standards exemplifies the problem of ignoring the differences between Title II entities and Title III entities and allowing one regulation to potentially completely nullify another. In our view the approach of picking the regulation with the broadest language does not provide well-reasoned and practical regulation of the covered entities. Indeed, the Board's effort to superimpose two sets of Executive Branch regulations on individual Legislative Offices is inefficient and confusing. Moreover, it does not serve the legislative goal of applying the laws incorporated by the CAA to the legislative branch in the same way they are applied to private sector, state, and local entities. In fact, intentionally ignoring the potentially contradictory language of the Proposed Regulations undermines the effort to fully implement the rights and protections of the ADA incorporated in the CAA. As a result, the Committee suggests that the Board conduct an analysis of

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[3] In addition to a number of internal conflicts in the Proposed Regulations, there are numerous redundancies ranging from definitions (e.g., the duplication of many of the definitions found in both 35.104 and 36.104) to specific requirements (the requirements for "Ticketing" found in both 35.138 and 36.302(f)). The existence of such redundancies is further evidence that the regulations were intended to apply to different classifications of entities and not intended to be superimposed on top of one another.

[4] Section 1.105(e) incorporates by reference 36 C.F.R. § 1190.34. The problems posed by adopting a regulation that has been specifically removed from the Code of Federal Regulations are discussed below.

which specific legislative branch entities are covered by Title II and which are covered by Title III and propose the appropriate regulations accordingly.

2. Practical Considerations Regarding How a Number of the Proposed Regulations Would Apply to House Member offices

In addition to burdens posed by conflicting or redundant regulations described above, there are a number of practical and administrative challenges posed by the Proposed Regulations as currently drafted. For example, the Title III regulation described above that requires legislative entities to "remove architectural barriers in existing facilities" clearly fails to consider that a House Member office may be prohibited from spending representational funds for capital improvements in leased facilities.[5] In fact, the majority of the examples of "steps to remove barriers" provided in 36.304(b) are simply not within the discretion of a Member office to undertake. The answer may be that a Member office would simply need to point out such administrative restrictions in order to "demonstrate" that barrier removal is not readily achievable under 36.305. If so, the Proposed Regulations should explicitly state this point. If not, the Regulations must take into account the aforementioned limitations placed on Member offices, in addition to others, so as not to conflict with House Rules and regulations limiting the expenditure of public funds on private construction efforts.

In addition, the unique nature of House Offices, in contrast to Senate offices and other legislative entities, poses a question of whether separate regulations should be considered for each of these entities. In the Background section of the NPRM, the Board states that it has identified no "good cause" for proposing different regulations to be applied to the House, the Senate, and other employing offices. Yet, the availability of accessible office space for a Member of the House in his or her home district may be vastly more curtailed than that of a Senator who can look state-wide to determine the location of his or her district offices.[6] The

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[5] See Members' Congressional Handbook (December 16, 2011) available at http://cha.house.gov/sites/republicans.cha.house.gov/files/documents/Members_Handbook%20113th.pdf.

[6] In its section-by-section analysis of its Title II regulations, DOJ acknowledges that "requiring that public entities only lease accessible space would significantly restrict the options of [covered public entities] in seeking leased space, which would

Board's response to this concern may be that the Proposed Regulations under Title II do not require *each* of an office's existing facilities to be accessible to and usable by individuals with a disability. But, based on the language of 1.105(b), and as described above, it is unclear whether the Title III regulation requiring barrier removal would "trump" this Title II regulation.

For all these reasons, the Committee reiterates its position that the regulations should be individually analyzed, taking into account the unique administrative restrictions and "real world" challenges facing the legislative branch entities covered by the Proposed Regulations.

3. Concerns Regarding The Broad Expansion of the powers of the OOC's General Counsel to Investigate and Prosecute Alleged Violations of the ADA

Under the CAA, when a "qualified individual with a disability" files a charge against a covered entity alleging a violation of the applicable sections of the ADA, the General Counsel "shall investigate the charge." 2 U.S.C. § 1331(d). In the event that the General Counsel believes that: 1) a violation of the applicable provisions of the ADA has occurred and, 2) that mediation may be "helpful in resolving the dispute," the General Counsel may request, but not participate in, mediation between the "charging individual and any entity responsible for correcting the alleged violation." *Id.* Only if mediation fails and the General Counsel believes that a violation occurred may the General Counsel then file a complaint with the Office of Compliance which is then submitted to a hearing officer under the statutory provisions of the CAA.

The Proposed Regulations, however, contemplate a vastly expanded role of the General Counsel prior to any complaint being filed. This expanded role seemingly includes what amounts to uninhibited and unchallengeable discovery by the General Counsel from the entity responsible for correcting the alleged violation. By way of example, the "Investigatory Methods" of the General Counsel (described as part of its "Investigatory Authority" in the Proposed Regulations) include unfettered and seemingly immediate access to "all physical areas subject to an inspection or investigation, individuals with relevant knowledge concerning the inspection or investigation who can be interviewed or questioned, and documents

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be particularly burdensome in rural or sparsely populated areas." 28 C.F.R. Pt. 35, App. B.

pertinent to the investigation." 2.103(a). Moreover, under the Proposed Regulations, instead of simply asking for position statements, the General Counsel can also demand of the parties "written answers to questions" (tantamount to interrogatories which cannot be objected to) and "any other information relating to a potential violation or demonstrating compliance." *Id.*

Glaringly absent from the NPRM is any legal basis for such heavy-handed authority, other than the Board's reliance on *Dow Chemical Co. v. United States*, 476 U.S. 227 (1986). Yet, even a cursory reading of *Dow Chemical* reveals that the Supreme Court decision authorizing the Environmental Protection Agency ("EPA") to conduct aerial surveillance of a chemical plant under its jurisdiction, was based on *specific statutory language* describing the "Authority of the [EPA] Administer or authorized persons" with regard to "Recordkeeping, inspections, monitoring, and entry." 42 U.S.C. § 7414. This statutory language contains detailed descriptions of the EPA Administrator's authority to require covered individuals to, *inter alia*, maintain specific records and reports, install equipment, and submit compliance certifications. 42 U.S.C. § 7414(a)(1). The General Counsel for the OOC does not have comparable statutory authority. Accordingly, the Board's reliance on *Dow Chemical* overreaches and is misplaced.

The Proposed Regulations addressing the authority of the General Counsel under the section of the CAA concerning periodic ADA inspections are equally as expansive – and again, without any basis in statute. Specifically, section 210(f) of the CAA requires the General Counsel to inspect the facilities of the covered legislative branch entities at least once per Congress. 2 U.S.C. §1331(f)(1). *That is the entirety of the statutory language concerning the General Counsel's inspection authority.* Yet, Proposed Regulation 3.103(a) states that the "General Counsel may receive requests for ADA inspections, including anonymous requests, and conduct inspections for compliance with Titles II and III of the ADA in the same manner that it receives and investigates requests for inspections" under Section 215(a)(1) of the CAA (Occupational Safety and Health Act ("OSHA") requirements).

Unfortunately, this language ignores the fundamental differences between the ADA and OSHA, has no basis in statute or even common law, and is impractical on its face. By way of example, because there is no way to verify the source of "anonymous requests" for an ADA "inspection," any individual making an anonymous request would not have to be a "qualified individual with a disability" (as required to file a charge under 2 U.S.C. 1331(d)(1)). This means that if an individual were to become inspired to disrupt the work of the office of a Member of Congress, or a Senator, or a House or Senate Committee, all he or she would have to

do is call the General Counsel's office and claim a violation of the ADA and request an inspection. Hopefully, the Board can see the fallacy and potential havoc that could be wrought if such a regulation is adopted.

In addition to questions about the basis of a need for such vast expansion of the General Counsel's authority, the Proposed Regulations also raise significant questions of safety and security. Under the proposed regulations, the General Counsel would arguably be able to appear at the door of any legislative branch entity – including those housed in a Sensitive Compartmented Information Facility ("SCIF") – and demand 1) immediate entry into the space, 2) access to all employees occupying the space for interview, and 3) production of any document it deems relevant to its inspection. Again, the Committee believes the Board should recognize that such scenarios are simply not appropriate, given the nature of the work of many of the legislative entities covered by the Proposed Regulations. In urging the Board to revisit its position regarding the vast expansion of the General Counsel's authority, the Committee also defers to other appropriate entities, such as the U.S. Capitol Police, to address additional safety and security concerns posed by the Board's Proposed Regulations.

Finally, in addition to these general thematic concerns, as discussed below, there are a number of other recurring issues that result from the wholesale incorporation by reference of the Executive Branch regulations rather than a more thorough review and tailoring of each regulation to Legislative Branch entities. Examples of these issues include:

- References to inapplicable state and local laws.
- References to employment issues that are covered under Title I of the ADA, as incorporated by the CAA.
- Discussion of authority over landlords that the OOC does not have.
- Incorporation of posting and record-keeping requirements that were specifically excluded in the adoption of the CAA.

The comments and suggestions for the specific regulations are set forth below.

COMMENTS TO PROPOSED REGULATIONS

Part 1 – Matters of General Applicability to All Regulations Promulgated Under Section 210 of the Congressional Accountability Act of 1995

Section 1.101 – Purpose and Scope

(a) When possible and practicable, the language of the regulations should be narrowly tailored so that it is consistent with the relevant statutory language. Accordingly, we suggest amending this section so that it reads "Enacted into law on January 23, 1995, the Congressional Accountability Act ("CAA") in Section 210(b) provides that *the rights and protections against discrimination in the provision of public services and accommodations established by sections 201 through 230, 302, 303, and 309 of the Americans with Disabilities Act of 1990* . . . shall apply to . . ."

Similarly, and consistent with the actual language of the statute, the first sentence of the second paragraph should read "Title II of the ADA *provides that no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.*" The description of Title III should also reflect the actual language of the statute. Thus, "Title III of the ADA *provides that no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.*"

The third paragraph of this section describes the requirements of Section 210(d) of the CAA, but there is no mention of *mediation.* Such an omission seems incongruous with the important role mediation plays in the language of section 201(d). The fact and availability of mediation should be included in this regulation. At a minimum, the language should reflect that the General Counsel may file a complaint if the mediation is not successful (i.e., it should state "If the General Counsel believes that a violation may have occurred, *and the mediation is not successful,* the General Counsel may file with the Office a complaint against any entity responsible for correcting the violation").

Section 1.102 – Definitions

(b) Although the definition of "ADA" is consistent with those sections adopted by the CAA, this definition differs from the definition of the "Act" adopted "by reference" in 35.104, *infra*. This provides yet another example of how a review of those regulations adopted "by reference" should be conducted to avoid unnecessary conflict and/or redundancy.

(c) There is no discussion in this regulation, or in the "Background" section of the NPRM regarding how the General Counsel will determine which covered entities "operate[] a place of public accommodation" for purposes of application of Title II and/or Title III regulations.[7] The extension of the definition of "private entity" to include "covered entities" means that the Board apparently plans to treat every legislative entity covered by the CAA as *both* a Title II and a Title III entity. Yet, there is no analysis of why the Board has reached such a conclusion and how this interpretation would work in practice. Tellingly, a state agency covered by Title II of the ADA is not covered by the same regulations as a privately-owned movie theater, so why would Member district offices be viewed in the same service-provider category as the cafeterias and gift shops found on Capitol Hill? The Committee requests that the Board clarify how it concluded that all legislative entities are equivalent for purposes of applying Title II *and* Title III of ADA as adopted by the CAA.

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[7] In its 1996 Notice of Proposed Regulations, a prior Board agreed with the reasoning in *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063 (5th Cir. 1995) in determining what constitutes "operation" of a place of public accommodation for the purpose of the application of ADA regulations to the Legislative Branch. The 1996 Board concluded that "for the purposes of determining responsibility under Title III, an entity 'operates' a place of public accommodation if it superintends, directly controls, or directs the function of or manages the specific aspects of the public accommodation that constitute an architectural barrier or a communication barrier that is structural in nature or that otherwise forms the basis for a violation of section 302 of the ADA, as applied by section 210(b) of the CAA." 142 CONG. REC. at H10682. Furthermore, that Board went on to clarify that "[w]here the entity exercises no authority with respect to the modification of the specific aspects of the facilities, programs, activities, or other features of the places of public accommodation that make them inaccessible within the meaning of section 302 of the CAA, the proposed regulation states that the entity does not operate the place of public accommodation within the meaning of these regulations." *Id.* Unfortunately, there is no equivalent consideration in the current NPRM.

Section 1.104 – Method for identifying the entity responsible for correction of violations of section 210.

(a) The two times the phrase "this section" is used in this paragraph refers to the *statutory language* in the first instance and the *regulatory language* in the second. The language should be clarified to avoid confusion. In addition, "this section", describes how the regulations will determine the "allocat[ion]" of responsibility for purposes of correcting violations of Section 210(b) of the CAA. Yet, Section 210(e)(3) refers to *identifying* the entity responsible for correction of a violation, not *allocating* responsibility. While this may seem like mere semantics, if a landlord of a Member district office does not comply with its lease requirements despite the efforts of a Member office, surely it is not the intent of the Board to convey that the General Counsel's office would take the position that the correct course of action would be to "allocate" responsibility between the Member office and the landlord in an effort to exert legal authority over the landlord.

(b) To clarify the scope of the Title II and Title III regulations, we recommend amending the language of this section to state that "A covered entity may violate Section 210(b) if it discriminates against a qualified individual with a disability within the meaning of Title II or Title III of the ADA *as incorporated in the CAA.*"

(d) The reference to the term "order" is unclear. Does it, for example, mean an "order" from a Hearing Officer? The Committee suggests that the Board clarify what is meant by the term "order" as referenced in this proposed regulation.

Section 1.105 – Regulations incorporated by reference.

(a) Technical and Nomenclature Changes to Regulations Incorporated by Reference.

(4) This section states that exceptions in the regulations for "historic" properties refer to those properties, buildings, or facilities designated

as an historic or heritage asset by the Office of the Architect of the Capitol ("AOC"). While this addresses such potential issues as may exist on Capitol Hill, it obviates the specific consideration for "State or local law" as enumerated in the definition of "Historic Properties" stated in 35.104 (also incorporated by reference by these Proposed Regulations). In other words, if a Member office leases space in its district and the building is designated as "historic" under *state or local* law and the private owner of the building is restricted with regard to construction or renovation efforts, would the exceptions for "historic" properties apply to such circumstances? If not, why not? We also question what authority the Board possesses to make such a determination for the private landlord? The Committee recommends an expansion of the historic properties definition to consider those buildings designated as such under state and local law.

(b) As described in the "General Themes" section above, the Committee recommends that in lieu of the Board's sweeping position that, in the event of a conflict within the regulations, "the regulation providing the most access shall apply," the Board conduct the appropriate analysis of all of the regulations "incorporated by reference" and reconcile any conflicts.

(c) Incorporated Regulations from 28 C.F.R. Parts 35 and 36.

35.103 – Relationship to Other Laws: Section (a) of this regulation discusses "regulations issued by Federal agencies pursuant to title V of the Rehabilitation Act, which refers to "Employment of Individuals with Disabilities" in federal agencies. The Committee recommends deleting this section because employment discrimination issues with regard to individuals with disabilities is incorporated elsewhere in the CAA. Section (b) of this section refers to "remedies, rights, and procedures of other Federal laws, or State of local laws (including State common law). . . ." Because such laws do not apply to legislative branch entities, we recommend deleting this specific language from the proposed regulation.

35.104 – Definitions: The Committee recommends that the Board review the terms in this section for the purpose of eliminating irrelevant, duplicative, or otherwise inapplicable terms. For example, the definition of "Complete complaint" includes a discussion of complaints filed "on behalf of classes or third parties." Such class or third-party complaints are not contemplated by Section 210(d) of the CAA.

35.105 – Self-Evaluation and 35.106 – Notice: Section 35.105 is vague in how the initial "self-evaluation" requirement would be monitored. For example, do the proposed regulations contemplate Member offices reporting their findings to the OOC? This section also requires offices to keep, maintain, and make public (post) certain documents. Yet, as recognized in prior NPRMs concerning substantive regulations under the CAA, the Board "may not impose such requirements on employing offices," because to do so would extend the Board's authority beyond that contemplated by the CAA.[8] Thus, a requirement that the employing offices maintain certain records under the guise of compliance with the ADA would be inconsistent with the CAA and the Board's previous position on the matter of recordkeeping. We suggest that any reference to self-evaluation, recordkeeping, and posting requirements for employing offices in this section, and throughout the proposed regulations, be deleted.

35.107 – Designation of responsible employee and adoption of grievance procedures: This section is redundant with the requirements of the mediation, complaint, and hearing processes incorporated within the ADA provisions of the CAA (see section 210(d)). This section also includes recordkeeping and posting requirements that are inapplicable, as described in section 35.105, above.

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[8] 141 CONG. REC. S17603-02, S17604 (daily ed. Nov. 28, 1995).

35.131 – Illegal use of drugs: Section (c) of this regulation allows for public entities to drug test individuals (presumably those requesting services from the entity) for current illegal use of drugs. In addition to the impracticalities of this section of the proposed regulations as applied to Member offices, there is no evidence that the Board has conducted any analysis of the Fourth Amendment implications that would be associated with the requirements of this section. Thus, the Committee recommends striking section (c) of this regulation.

35.133 – Maintenance of accessible features: Section (a) includes requirements of covered entities with regard to the proper maintenance of certain "features of facilities and equipment" to be readily accessible to and usable by persons with disabilities. This language is overly broad in terms of the amount of control a Member office has over the hallways and restrooms in House office buildings and/or spaces leased from private or public landlords in their districts. We recommend amending the language to read "A public entity shall maintain in operable working condition those features of facilities and equipment *within its direct care and control* that are required to be readily accessible to and usable by persons with disabilities by the Act or this part."

35.137 – Mobility devices: Much like the discussion in section 35.133 above, this section fails to address the requirement for Member offices to comply with the rules and regulations set forth by other entities that have direct control over the daily operation of Congressional facilities (the AOC, the US Capitol Police, etc.) as well as district office facilities under the direct control of private or public landlords regarding such matters as mobility devices. We recommend that this section address and clarify what role these entities play with respect to "allocation of responsibility" for compliance with these proposed regulations.

35.150 – Existing Facilities: As described in the General Comments section, *supra*, this regulation demonstrates the problems associated

with the Board's adoption of contradictory regulations. This section contemplates the importance of accessible participation in programs and activities by qualified persons with disabilities and the delivery of accessible services by covered entities. Specifically the emphasis is on the accessibility of the service, program, and/or activity provided by the covered entity, rather than the accessibility of the physical office of the covered entity. Yet, the Board's proposed adoption of regulation 1.105(e)) requires the covered entity to *lease only office space meeting specific physical standards*, without consideration for the alternate means of providing the services, programs, and activities by the covered entity. Such contradiction must be resolved in a manner that takes into consideration not only the practicalities and nature of the covered entity, but any legal and administrative constraints placed on the covered entity. In addition, section (d) of this section requires the development of a "transition plan" which, like other proposed regulations described above, impermissibly imposes recordkeeping requirements not contemplated by the CAA.

35.160 – Communications – General: Section (b)(2) of this section states that in "determining what types of auxiliary aids and services are necessary, a public entity shall give primary consideration to the request of individuals with disabilities." Yet, section 36.303(c)(1)(ii), also incorporated by reference in the Proposed Regulations, states that "a public accommodation should consult with individuals with disabilities whenever possible to determine what type of auxiliary aid is needed to ensure effective communication, but the ultimate decision as to what measures to take rests with the public accommodation, provided that the method chosen results in effective communication." As phrased, there is an inherent contradiction in these two proposed regulations that must be analyzed and reconciled by the Board. These regulations, while inconsistent when applied *on top of one another*, are clearly meant to address the differences in the nature of a Title II "covered entity" in contrast to the Title III "covered entity." As stated in the General Comments, above, it is the Board's duty to analyze and reconcile such differences, rather than simply proposing the adoption of a "one size fits all" approach to legislative branch entities.

35.163 – Information and Signage: Section (b) of this proposed regulation again demonstrates the problem of not recognizing the limitation of Member offices over such items as signage. For example, while a Member district office may control signage within its own office space, it most likely does not have authority over signage in the hallways and lobby, as those areas are typically controlled by the landlord (either public or private). But this proposed regulation does not account for such limitations. If the Board contemplates that the "allocation of responsibility" would dictate that the entity making the rules for the building in question is the "responsible party" for purposes of correcting a potential violation, we recommend that the Board state this explicitly in the language of this section.

36.101 – Purpose: We suggest clarifying that the purpose of the proposed regulations "is to implement *those sections of* title III of the Americans with Disabilities Act of 1990 *incorporated by the CAA.*"

36.103 – Relationship to Other Laws: Section (a) of this proposed regulation refers to "regulations issued by Federal agencies pursuant to title V of the Rehabilitation Act", which, in turn, refers to "Employment of Individuals with Disabilities" in federal agencies. The Committee recommends deleting this section because employment discrimination issues with regard to individuals with disabilities is incorporated elsewhere in the CAA. Section (b) of this section discusses the application of Section 504 of the Rehabilitation Act (29 U.S.C. § 794). Yet, this section has not been adopted by the CAA and reference to it is not relevant for purposes of the application of Title II or Title III provisions of the ADA to legislative branch entities. Finally, section (c) references the "remedies, rights, and procedures of any other Federal laws, or state or local laws (including State common law). . . ." Because such laws do not apply to legislative entities, we recommend deleting this part of the proposed regulation.

36.104 – Definitions: The Committee recommends that the Board review the terms in this section for the purpose of eliminating

irrelevant, duplicative, or otherwise inapplicable terms. For example, this section defines the term "public entity." Yet, this term – to the extent it describes the entities covered by these regulations – is also defined in Proposed Regulations 1.101(a) and 1.102(c), as well as in the statutory language of the CAA itself at 2 U.S.C. § 1331(a). This duplication is unnecessary and would potentially create confusion. Moreover, the term "undue burden" as used in the proposed regulation seemingly does not contemplate the application of House Rules and administrative regulations that affect a Member office's ability to expend public funds on capital improvement of private property.

36.209 – Illegal use of drugs: Section (c) of this proposed regulation allows for public entities to drug test individuals (presumably those requesting services from the entity) for current illegal use of drugs. In addition to the impracticalities of this section as applied to Member offices, there is no evidence that the Board has conducted any analysis of the Fourth Amendment implications associated with this proposed language. Thus, the Committee recommends striking section (c) of this regulation. Moreover, the fact that this recommendation of the Committee is identical to that for Proposed Regulation 35.131, above, exemplifies the problem of the Board's failure to carefully consider and refine the Title II and Title III regulations in their proposed application to the legislative branch.

36.211 – Maintenance of accessible features: Section (a) includes requirements for covered entities with regard to the proper maintenance of certain "features of facilities and equipment." This proposed language is overly broad and seemingly does not contemplate the limited amount of control a Member office has over, for example, the hallways and restrooms in House office buildings, or in spaces leased from private or public landlords in their districts. We recommend amending the language to read "A public entity shall maintain in operable working condition those features of facilities and equipment *within its direct care and control* that are required to be readily accessible to and usable by persons with disabilities by the Act of this part." Moreover, the fact that this recommendation of the

Board is identical to that for Proposed Regulation 35.133, above, exemplifies the problem of the Board's failure to carefully consider and refine the Title II and Title III regulations, as applied to the legislative branch.

36.303 – Auxiliary aids and service; Section (c) – Effective communication: The inconsistency between the requirements of this section with that of 35.160 – which is also addresses communication issues – demonstrates the problem with the Board's decision to superimpose the requirements of two sets of Executive Branch regulations (Title II and Title III regulations) without exploring the differences between the entities covered by each Title. These differences must not only be acknowledged, but reconciled within the Proposed Regulations to avoid redundant, contradictory, or simply impractical requirements for legislative branch entities. As stated above, a "one size fits all" approach to the adoption and implementation of substantive regulations is not workable.

36.304 – Removal of barriers: As stated in the General Comments section and in the discussion of 36.104, above, this proposed regulation seemingly fails to contemplate the application of House Rules and administrative regulations that affect a Member office's ability to expend public funds on capital improvement of private property. Indeed, many of the examples of "steps to remove barriers" are simply not within the discretion of a Member office to undertake. Moreover, it is unclear whether the Board is taking the position that the General Counsel's office has authority over the private and public landlords of Member district offices for purposes of enforcing this regulation. If that is indeed the Board's position, we request that the Board make explicit from what statutory source is such authority derived.

36.402 – Alterations;

36.403 – Alterations: Path of travel;

36.404 – Alterations: Elevator exemption;

36.405 – Alternations: Historic preservation;

36.406 – Standards for new construction and alterations

As with several other regulations above, this series of regulations seemingly fails to consider the limitations on Member offices to control or even affect capital improvement and alteration to the buildings in which they are housed. In addition, there is no discussion in these regulations of how these regulations contemplate the role of the private or public landlord in the Member office's compliance with the Title II and Title III regulations. In addition, as discussed in section 1.105, above, the definition of "historic" facilities in Proposed Regulation 36.405 conflicts with the limited definition adopted in Proposed Regulation 1.105(a)(4). The Committee recommends that the Board evaluate how state and local laws applicable to the private facilities in which many Member district offices are located affect the application of the Proposed Regulations.

Section 1.105(e) – Incorporated Regulation from 36. C.F.R. Part 1190.

1190.34 – Accessible buildings and facilities: Leased. The Board's proposed adoption of this section is puzzling at best. Section 1.105(e) states that the purpose of this section is to incorporate by reference 1190.34, as "published in the Code of Federal Regulations on the effective date of [the Board's Proposed Regulations]." Yet, this code section is *not* currently in the Code of Federal Regulations. In fact, the Architectural and Transportation Barriers Compliance Board published a notice in the Federal Register stating that the regulation was being removed from the Code of Federal Regulations. *See* Americans with Disabilities Act (ADA) Accessibility Guidelines for Buildings and Facilities; Architectural Barriers Act (ABA) Accessibility Guidelines, 69 Fed. Reg. 44084, 44151 (July 23, 2004) (this document is also available on Westlaw at 2004 WL 1634471, at *44151). For this reason, and for the reasons described above regarding how this

proposed regulation conflicts with others proposed herein, the Committee recommends striking this section.

Part 2 – Matters Pertaining to Investigation and Prosecution of Charges of Discrimination

Section 2.101 – Purpose and Scope: This Proposed Regulation states that the General Counsel or the OOC may further "*describe* how the General Counsel will exercise the statutory authority provided by Section 210" through policy or procedural rule (emphasis supplied). Yet, the statutory authority of the General Counsel as described in 210 is much more limited than that *assumed* in both these substantive regulations, as well as in the Board's proposed revisions to the OOC's Procedural Rules. The Committee recommends that the Board provide information about the analysis it conducted to support the vast expansion of the General Counsel's authority for the "investigation and prosecution" of alleged violations of Titles II and III of the ADA, as incorporated by the CAA.

Section 2.102 – Definitions: Section (b) of this proposed regulation states that the term "file a charge" means providing a charge to the General Counsel either in person, by mail, and by electronic transmission. It also allows charges to be filed "by any other means used by the General Counsel to receive documents." It is unclear what this phrase means. For example, could the General Counsel initiate an investigation based on a newspaper article or other press communication? What means does a covered entity have to challenge whether a charge has been properly filed if there is no clear definition of how the General Counsel is to receive a charge? The Committee suggests that the Board specifically define all methods by which a charge may be filed with the General Counsel. In addition, section (c) of this proposed regulation states that the occurrence of the alleged violation is defined as, inter alia, "the last date on which the service, activity, program or public accommodation described by the charged party was operated in a way that denied access in a manner alleged by the charge party." Yet, on its face, this definition presumes that the covered entity actually *denied access* to the charging party, when there has yet to be any investigation, mediation, or

complaint process to determine if there was any violation of the ADA. The Committee suggests that the language defining the "occurrence" of the alleged violation correlate only to the factual allegations of the particular charging party.

Section 2.103 – Investigatory Authority: As discussed in the General Comments, the Committee is concerned by the absence from the NPRM of the legal basis for the expansion of the General Counsel's authority, other than the Board's sweeping reliance on *Dow Chemical Co. v. United States*, especially given that the Board's reliance on *Dow Chemical* appears misplaced. The Committee requests that the Board provide information about the analysis conducted to support the vast expansion of the General Counsel's authority for the "investigation and prosecution" of alleged violations of Titles II and III of the ADA, as incorporated by the CAA.

2.107(a)(2) – Remedy; Compensatory Damages: In its "Background" section of the Proposed Regulations, the Board relies on the Supreme Court's ruling in *Barnes v. Gorman*, 526 U.S. 181 (2002) for its assertion that compensatory damages are available as a remedy for a violation of Title II of the ADA. The Supreme Court's *Gorman* decision relies upon the language of section 505 of the Rehabilitation Act as the source of the availability of compensatory damages to the plaintiff in that case. Yet, another Supreme Court case, *Lane v. Pena*, 518 U.S. 187 (1996) specifically held that section 505 of the Rehabilitation Act could *not* be used to secure compensatory damages against a federal agency (in that case, the Department of Transportation). The *Lane* decision includes a detailed analysis of the limited waiver of sovereign immunity in the Rehabilitation Act. Accordingly, the Committee requests that the Board provide its analysis of and reconciliation of the *Barnes* and *Lane* cases in light of the limited waiver of sovereign immunity in the CAA.

Part 3 – Matters Pertaining to Periodic Inspections and Reporting.

3.101 – Purpose and Scope: Similar to the concerns described in section 2.101, above, the Committee is concerned about the presumptive authority described in this proposed regulation regarding the authority of the General Counsel. Section 210 of the CAA is very narrow in its description of the authority of the General Counsel to conduct investigations. And the statutory language certainly does not contemplate the expansion of such authority through the OOC's "procedural rule or policy." The Committee recommends that the Board provide information about the analysis it conducted to support the dramatic expansion of the General Counsel's authority for the inspection of covered entities under section 210(f) of the CAA.

3.102 – Definitions: Section (a) of this regulation defines "facilities of a covered entity" to include "all facilities where covered entities provide public programs, activities, services, or accommodations." But the practical application of this broad definition would mean that the General Counsel's office would have the authority to inspect the entire building in which a Member district office resides, rather than just the office space to which the Member office has actual access *and* control. Furthermore, section (b) defines a "violation" as a barrier to "*access* caused by noncompliance with applicable standards." This definition underscores the problem with superimposing conflicting standards on covered entities (as described in the General Comments) and then directing the covered entities to reconcile such conflicts by picking whichever regulation provides broader access. For example, in this definition, does "access" mean access to programs and activities, or access to a public bathroom in the building in which a Member office is housed? As discussed in the General Comments and in multiple proposed regulations, above, the Committee requests that the Board conduct a detailed review and analysis of the Proposed Regulations to identify and eliminate conflicting and duplicative regulations.

3.103 – Inspection Authority: The Committee's significant concerns with this proposed regulation are described in the General Comments section. The

Committee is concerned that the Board's regulations reveal an effort to infuse and combine the General Counsel's ability to *investigate* a charge filed by a qualified individual with a disability with that of the General Counsel's authority to *inspect* the covered entities during its biennial inspections. In addition, the Proposed Regulations seemingly attempt to expand the General Counsel's inspection authority under Section 215 of the CAA (incorporating specific sections of the OSHAct) to its inspection authority under Section 210. Yet, there is no statutory support for this expansion of authority. Accordingly, the Committee suggests a revision of the entirety of this proposed regulation so that it is consistent with the specific language of the CAA.

The Committee greatly appreciates the Office's enormous efforts on these proposed ADA regulations. As you reconsider the regulations in light of our and others' comments, we urge you to work more closely with all stakeholders to ensure the process can proceed as efficiently as possible.

Sincerely,

Candice S. Miller
Chairman

Robert A. Brady
Ranking Member