

## REPORT OF EXPENDITURES FOR OFFICIAL FOREIGN TRAVEL, DANIEL MURPHY, HOUSE OF REPRESENTATIVES, EXPENDED BETWEEN FEB. 16 AND FEB. 21, 2008

Name of Member or employee	Date		Country	Per diem <sup>1</sup>		Transportation		Other purposes		Total	
	Arrival	Departure		Foreign currency	U.S. dollar equivalent or U.S. currency <sup>2</sup>	Foreign currency	U.S. dollar equivalent or U.S. currency <sup>2</sup>	Foreign currency	U.S. dollar equivalent or U.S. currency <sup>2</sup>	Foreign currency	U.S. dollar equivalent or U.S. currency <sup>2</sup>
Daniel Murphy .....	2/16	2/16	Portugal .....		1,600.00		6,845.60				8,445.60
	2/16	2/21	Cape Verde .....								
Committee total .....					1,600.00		6,845.60				8,445.60

<sup>1</sup> Per diem constitutes lodging and meals.<sup>2</sup> If foreign currency is used, enter U.S. dollar equivalent; if U.S. currency is used, enter amount expended.

DANIEL MURPHY, Mar. 10, 2008.

## REPORT OF EXPENDITURES FOR OFFICIAL FOREIGN TRAVEL, COMMITTEE ON HOMELAND SECURITY, HOUSE OF REPRESENTATIVES, EXPENDED BETWEEN SEPT. 1 AND DEC. 31, 2007

Name of Member or employee	Date		Country	Per diem <sup>1</sup>		Transportation		Other purposes		Total	
	Arrival	Departure		Foreign currency	U.S. dollar equivalent or U.S. currency <sup>2</sup>	Foreign currency	U.S. dollar equivalent or U.S. currency <sup>2</sup>	Foreign currency	U.S. dollar equivalent or U.S. currency <sup>2</sup>	Foreign currency	U.S. dollar equivalent or U.S. currency <sup>2</sup>
Hon. Ed Perlmutter .....	11/30	12/2	Jordan .....		139.65		6815.13		174.00		7128.78
	12/2	12/4	Iraq .....		9.63		4432.90		5.00		4447.53
Hon. Yvette Clarke .....	11/24	12/26	Italy .....		954.00		( <sup>3</sup> )				954.00
	11/27	11/27	Chad .....		286.00		( <sup>3</sup> )				286.00
	11/28	11/30	Ethiopia .....		610.00		( <sup>3</sup> )				610.00
	12/1	12/2	Belgium .....		452.00		( <sup>3</sup> )				452.00
Committee total .....					2,451.28		11,248.03		179.00		13,878.31

<sup>1</sup> Per diem constitutes lodging and meals.<sup>2</sup> If foreign currency is used, enter U.S. dollar equivalent; if U.S. currency is used, enter amount expended.<sup>3</sup> Military air transportation.

BENNIE G. THOMPSON, Chairman.

## OFFICE OF COMPLIANCE NOTICE OF ADOPTION OF SUBSTANTIVE REGULATIONS AND SUBMISSION FOR CONGRESSIONAL APPROVAL

U.S. CONGRESS,  
OFFICE OF COMPLIANCE,  
Washington, DC, March 21, 2008.

Hon. NANCY J. PELOSI,  
Speaker, House of Representatives,  
Washington, DC.

DEAR MADAM SPEAKER: On March 14, 2008, The Board of Directors of the Office of Compliance sent to your office the Text of Adopted Veterans' Employment Opportunities Regulations and a Notice of Adoption of Substantive Regulations and Submission for Congressional Approval. We have been advised that there are a few typographical errors in the Text of the Regulations and in the Notice and Submission. Please accept the attached documents and disc as the corrected versions of both the Text of the Regulations and the Notice and Submission.

The Notice and Submission has been corrected to show that it is in Section 1.118(c), rather than Section 1.117(c) that the Board has clarified that an applicant's request for information must be made in writing. In addition, the Notice and Submission has been corrected to show that it is Section 1.118(d), rather than Section 1.118(e) that has been revised to provide that employing offices are expected to answer applicant questions concerning the employing office's veterans' preference policies and practices only if such questions are "relevant and non-confidential."

The Text of the Regulations has also been corrected to be consistent with the Notice and Submission and modifies Section 1.108(b) to require employing offices to consider veterans' preference as "an affirmative factor in the employing office's determination of who will be appointed from among qualified applicants."

The Board requests that the accompanying corrected Notice be published in both the House and Senate versions of the Congressional Record on the first day on which both Houses are in session following receipt of this transmittal. The Board also requests that Congress approve the proposed Regulations, as corrected and further specified in the accompanying Notice.

An inquiries regarding the accompanying Notice should be addressed to Tamara E. Chrisler, Executive Director of the Office of Compliance, 110 2nd Street, SE., Room LA-200, Washington, DC. 20540; 202-724-9250, TDD 202-426-1912.

Sincerely,

SUSAN S. ROBFOGEL,  
Chair.

## ADOPTION OF THE OFFICE OF COMPLIANCE REGULATIONS IMPLEMENTING CERTAIN SUBSTANTIVE EMPLOYMENT RIGHTS AND PROTECTIONS FOR VETERANS, AS REQUIRED BY 2 U.S.C. 1316a, THE CONGRESSIONAL ACCOUNTABILITY ACT OF 1995, AS AMENDED (CAA)

## PROCEDURAL SUMMARY

## Issuance of the board's initial notice of proposed rulemaking

On February 28, 2000, and March 9, 2000, the Office of Compliance published an Advanced Notice of Proposed Rulemaking ("ANPR") in the Congressional Record (144 Cong. Rec. S862 (daily ed., Feb. 28, 2000), H916 (daily ed., March 9, 2000)). On December 6, 2001, upon consideration of the comments to the ANPR, the Office published a Notice of Proposed Rulemaking ("NPR") in the Congressional Record (147 Cong. Rec. S12539 (daily ed. Dec. 6, 2001), H9065 (daily ed. Dec. 6, 2001)). The Board took no action on those earlier Notices and instead, after extensive consultation with stakeholders, issued a subsequent Notice on December 1, 2001.

Why did the Board propose these new Regulations? Section 4(c) of the CAA, 2 U.S.C. 1316a (4), requires that the Board of Directors propose substantive regulations implementing the rights and protections relating to veterans' employment which are "the same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions . . . except insofar as 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 this section."

What procedure followed the Board's December 1, 2001 Notice of Proposed Rulemaking? The December 1, 2001 Notice of Pro-

posed Rulemaking included a thirty day comment period, which began on December 2, 2001. A number of comments to the proposed substantive regulations were received by the Office of Compliance from interested parties. The Board of Directors has reviewed the comments from interested parties, engaged in extensive discussions with stakeholders to obtain input and suggestions into the drafting of the regulations, made a number of changes to the proposed substantive regulations in response to comments, and has adopted the amended regulations.

What is the effect of the Board's "adoption" of these proposed substantive regulations? Adoption of these substantive regulations by the Board of Directors does not complete the promulgation process. Pursuant to section 304 of the CAA, 2 U.S.C. 1384, the procedure for promulgating such substantive regulations requires that:

(1) the Board of Directors issue proposed substantive regulations and publish a general notice of proposed rulemaking in the Congressional Record (the December 1 Notice);

(2) there be a comment period of at least 30 days after the date of publication of the general notice of proposed rulemaking; and

(3) after consideration of comments by the Board of Directors, that the Board adopt regulations and transmit notice of such action together with the regulations and a recommendation regarding the method for Congressional approval of the regulations to the Speaker of the House and President pro tempore of the Senate for publication in the Congressional Record.

This Notice of Adoption of Substantive Regulations and Submission for Congressional Approval completes the third step described above.

What are the next steps in the process of promulgation of these regulations? Pursuant to section 304(b)(4) of the CAA, 2 U.S.C. 1384(b)(4), the Board of Directors is required to "include a recommendation in the general notice of proposed rulemaking and in the regulations as to whether the regulations should be approved by resolution of the Senate, by resolution of the House of Representatives, by concurrent resolution, or by joint resolution." The Board of Directors recommends that the House of Representatives

adopt the "H" version of the regulations by resolution; that the Senate adopt the "S" version of the regulations by resolution; and that the House and Senate adopt the "C" version of the regulations applied to the other employing offices by a concurrent resolution.

Are there regulations covering veterans' rights currently in force under the CAA? No.

#### ADDITIONAL GENERAL INFORMATION

Why are there substantive differences in the proposed regulations for the House of Representatives, the Senate, and the other employing offices? Because the Board of Directors has identified "good cause" to modify the executive branch regulations to implement more effectively the rights and protections for veterans, there are some differences in other parts of the proposed regulations applicable to the Senate, the House of Representatives, and the other employing offices.

Are these proposed regulations also recommended by the Office of Compliance's Executive Director, the Deputy Executive Director for the Senate, and the Deputy Executive Director for the House of Representatives? Yes, as required by section 304(b)(1) of the CAA, 2 U.S.C. 1384(b)(1), the substance of these regulations have also been recommended by the Executive Director and Deputy Executive Directors of the Office of Compliance.

Are these proposed CAA regulations available to persons with disabilities in an alternate format? This Notice of Adoption of Substantive Regulations, and Submission for Congressional Approval is available on the Office of Compliance web site, [www.compliance.gov](http://www.compliance.gov), which is compliant with section 508 of the Rehabilitation Act of 1973 as amended, 29 U.S.C. 794d. This Notice can also be made available in large print or Braille. Requests for this Notice in an alternate format should be made to: Annie Leftwood, Executive Assistant, Office of Compliance, 110 2nd Street, S.E., Room LA-200, Washington, DC 20540; 202-724-9250; TDD: 202-426-1912; FAX: 202-426-1913.

Supplementary Information: The Congressional Accountability Act of 1995 (CAA), PL 104-1, was enacted into law on January 23, 1995. The CAA applies the rights and protections of 12 federal labor and employment statutes to federal employees and employing offices within the Legislative Branch of Government. Section 301 of the CAA (2 U.S.C. 1381) establishes the Office of Compliance as an independent office within the Legislative Branch.

#### THE BOARD'S RESPONSES TO COMMENTS

##### *Summary of major comments*

##### *Covered employees*

Section 1.102 sets forth general definitions that apply throughout the Board's veterans' preference regulations. The Committee on House Administration expressed the concern that readers might find the definitions that determine coverage of the regulations confusing. The definition of "covered employee" in Section 1.102(f) traces the definition of the same term in the Congressional Accountability Act, and then applies the differently worded and potentially more limited exception to that term as provided in the VEOA. Because these two aspects of the definition in Section 1.102(f) are based on statutory language, we have not revised the definition itself. However, the final regulations include a new Section 1.101(c) entitled "Scope of Regulations" that contains a clear statement that the regulations shall not apply to an employing office that only employs individuals excluded from the definition of "covered employee" under the VEOA, including employees whose appointment is made by a

member of Congress or by a Committee or Subcommittee of either House of Congress or a Joint Committee of the House of Representatives and the Senate.

In view of the selection process for certain Senate employees, the words "or directed" have been added to the definition of "covered employee" to include any employee who is hired at the direction of a Senator, but whose appointment form is signed by an officer of either House of Congress. Including the words "or directed" in the definition has the effect of excluding such employees from the definition of "covered employee" for purposes of the veterans' preference provisions in the regulations to be made applicable to the Senate. A reference to 2 U.S.C. §43d(a) also has been added to the definition of "covered employee". Including the reference to 2 U.S.C. §43d(a) has the effect of excluding employees whose appointment is allowed under that statutory provision from the definition of "covered employee" in the regulations to be made applicable to the Senate. These changes will give full effect to the exclusion in 2 U.S.C. §1316(5)(B).

Similar additions were not made in the definition of "covered employee" that appears in the regulations to be made applicable to the House of Representatives. It appears that this language would be overreaching for the House. As the House has different methods of making appointments and selections, this language appears to be unnecessary and may create confusion given the practices of the House. Employees of members' offices are excluded from coverage, and section 1.101(c) of the draft regulations provides a number of additional exceptions to coverage that otherwise are applicable to the House:

- (1) whose appointment is made by the President with the advice and consent of the Senate;
- (2) whose appointment is made by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate; or
- (3) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of Section 3132(a)(2) of title 5, United States Code).

We believe the exceptions to coverage listed above will exclude from coverage all employees of the House who by statute were not meant to be covered under the VEOA provisions, without creating unintended exceptions due to the selection procedures under HEPCA.

The "or directed" language has not been made to the definition of "covered employee" in the regulations to be made applicable to the other employing offices. Employees of those other employing offices are included in the definition of "covered employee" even if their appointment form is signed or subject to final approval by a Member or Members of Congress.

##### *Definition of "appointment"*

Section 1.102(d) defines the term "appointment". As initially proposed the term excluded "inservice placement actions such as promotions". This exclusion was derived from OMB regulations applicable in the executive branch. See 5 CFR 211.102(c). Senate stakeholders noted that the term "inservice placement actions" is not commonly used in the legislative branch and questioned whether the veterans' preference would apply in any post-employment decisions other than reductions in force as that term is defined in these regulations. In the executive branch, the preference afforded to preference eligibles in the appointment process only applies to original appointments in the competitive service. See 5 U.S.C. §3309. It is possible,

therefore, for an executive branch employee who has initially been employed in a position that is not within the competitive service to later seek appointment to a position in the competitive service. The employing offices within the legislative branch do not have a "competitive service" and therefore do not recognize the notion that an initial appointment to the competitive service could be made by an employee holding a position that is not in the competitive service. For these reasons, the Board agreed that use of the phrase "inservice placement actions" was confusing and possibly misleading. In the final regulations, the definition of "appointment" has been modified to exclude "any personnel action that an employing office takes with regard to an existing employee of the employing office".

##### *Definition of employing office*

In addition to the changes discussed above, technical corrections were made to the definition of "employing office", to clarify that the term includes the Capitol Police Board.

##### *Veterans' preference in appointments to restricted positions*

Section 1.107 addresses the application of veterans' preference in appointments to the restricted positions of custodian, elevator operator, guard and messenger. As proposed, Section 1.107 provided that, for these positions, the employing office "shall restrict competition to preference eligibles as long as preference eligibles are available." The Committee on House Administration suggested that the requirement of an absolute preference for veterans (and other preference eligibles) to fill guard positions without regard to experience, quality of work or employment references would undermine the efforts of various congressional entities to provide the most secure environment possible for the employees of and visitors to the Congressional office buildings. For this reason, the Committee requested that the Board find "good cause" for deviating from the executive branch regulations and exclude the position of guard from Section 1.107.

Section 1.107 derives from statutory language made applicable to the legislative branch by the VEOA. Removing one of the four restricted positions from the regulations would represent a significant deviation from the VEOA's goal of applying the veterans' preference principles currently applicable in the executive branch in the legislative branch. However, the Board agrees that employing offices should not be required to appoint individuals who are not qualified to perform the role of a guard, particularly where unique security concerns are present, simply because the individual is preference eligible. Accordingly, the final regulation clarifies that with respect to the four statutory restricted positions, the employing office "shall restrict competition to preference eligible applicants as long as qualified preference eligible applicants are available." This reference to "qualified ... applicants" is intended to refer to the definition of "qualified applicant" in Section 1.102(q). Section 1.102(q) defines the term as an applicant for a covered position whom an employing office deems to satisfy the requisite minimum job-related requirements of the position. Employing offices are provided flexibility in devising the minimum job-related requirements for a particular covered position. The unique security concerns on Capitol Hill may result in additional or more stringent requirements for the position of guard. Accordingly, we have revised Section 1.107 to clarify that preference eligibles must be qualified to be considered for any restricted position, be it that of custodian, elevator operator, guard, or messenger.

Senate Employment Counsel noted that the definitions of three of the four listed restricted positions include the limiting words "primary duty," and suggested that the definition of "guard" also include the primary duty limitation. We agree that this is important given that the definition of guard includes those who "make observations for detection of fire, trespass, unauthorized removal of public property or hazards to federal personnel or property" and any manager responsible for insuring a safe work environment may engage in these activities. Accordingly, we have included the limiting words "primary duty" in the definition of guard.

*Veterans' preference in appointments to non-restricted covered positions*

Section 1.108(a) requires employing offices who use numerical examination or rating systems to add points to the ratings of preference eligibles in a manner that is comparable to the points added in accordance with the provisions of 5 U.S.C. §3309. Comments submitted by the Committee on House Administration express the concern that a "numerical examination or rating system" may be interpreted to apply whenever one interviewer "rates" or gives numerical "grades" to interviewees even though other interviewers and decision makers are not using a similar system. To address this concern, Section 1.108(a) has been revised to provide that the addition of veterans' preference points is required only when the employing office has "duly adopted a policy requiring the numerical scoring or rating of applicants for covered positions. . . ."

As proposed, Section 1.108(b) would have required employing offices to consider veterans' preference eligibility as an affirmative factor that would be "given weight in a manner proportionately comparable to the points prescribed in 5 U.S.C. §3309 in the employing office's determination of who will be appointed from among qualified applicants." Several commenters expressed concern with respect to the manner in which Section 1.108(b)'s requirements would be administered. For example, some expressed the concern that application of a factor "proportionately comparable" to a point system would, in itself, require the adoption of a point system to ensure compliance. Others expressed concern with respect to when the preference should be afforded to qualified applicants, and suggested that Section 1.108(b) simply require that the preference be the deciding factor if all other factors among the applicants considered most qualified were equal. After careful consideration, the Board has modified Section 1.108(b) to require employing offices to consider veterans' preference eligibility as "an affirmative factor in the employing office's determination of who will be appointed". This change has been adopted to confirm that these regulations are not intended to require employing offices that do not use point-based rating systems to adopt them simply to be able to comply with their VEOA obligations. The Board reiterates that, because Section 1.108(b) is derived from the statutory provisions in 5 U.S.C. §3309, veterans' preference will not be the only factor, and, depending upon the relative merits of the candidates, may not be the most important factor in the employing office's appointment decision. Section 3309 affords preference eligibles 5 or 10 points when a 100-point rating scale is used, and employing offices are not required to afford any greater weight to veterans' preference in their appointment decisions. The Board notes that all preference eligibles who are found by the employing office to be "qualified applicants" must be afforded the preference. The Board expects that in cases where all other factors are relatively equal,

consideration of the preference as an affirmative factor may result in the preference eligible being appointed. In other cases, consideration of the preference as an affirmative factor may boost the applicant further along in the appointment process but ultimately not be sufficient to overcome the other favorable attributes of the final candidate or even of the others within a final pool of candidates.

*Waiver of physical requirements in appointments to covered positions*

As proposed, Section 1.110(b) required an employing office to notify an otherwise qualified preference eligible applicant who has a compensable service-connected disability of 30% or more if the employing office determines that the applicant is not able to fulfill the physical requirements of the position. The employing office must inform the applicant of the reasons for the employing office's determination and allow the applicant 15 days to respond and submit additional information to the employing office. Thereafter, the "highest level" of the employing office must consider any response and additional information supplied by the applicant and notify the applicant of its findings regarding the applicant's ability to perform the duties of the position.

The Committee on House Administration inquired whether an employing office must engage in the prescribed dialogue if the applicant is clearly not the most qualified applicant for the position. A concern regarding the timing of the required dialogue was also raised in the comments received from the Senate Employment Counsel. In those comments, Counsel raised the concern that engaging in the required dialogue before a conditional offer of employment is made would conflict with the provisions of the Americans with Disabilities Act regarding pre-employment disability-related inquiries. Section 1.110 does not require or allow employing offices to engage in any inquiries that would be unlawful under the Americans with Disabilities Act. In accordance with 5 U.S.C. §3312, Section 1.110(a)(2) requires an employing office to waive physical requirements on the basis of "the evidence before it", including any recommendation of an accredited physician submitted by the preference eligible applicant. It is presumed that such evidence will come before the employing office through means allowed under the Americans with Disabilities Act, whether this occurs through an applicant's request for accommodation or through lawful pre-employment inquiries. Similarly, Section 1.110(b) does not require an employing office to make a determination regarding preference eligible applicants' physical ability to perform the duties of the position, but only describes the procedures that must be followed if and when such a determination is made.

The Committee on House Administration also expressed the concern that a 15-day response period would impair an employing office's operations if there is a need to fill a particular covered position quickly. To respond to this concern, the final regulation includes the statement, "The director of the employing office may, by providing written notice to the preference eligible applicant, shorten the period for submitting a response with respect to an appointment to a particular covered position, if necessary because of a need to fill the covered position immediately."

The Committee on House Administration inquired about the definition of the "highest level" within the employing office. Consistent with the Committee's suggestions, the final regulation refers to the "highest ranking individual or group of individuals with authority to make employment decisions on behalf of the employing office."

Comments submitted by the Capitol Police inquired about the definition of "accredited physician" as used in Section 1.110(a)(2). The final regulations contain a definition of this term at Section 1.102(a).

*Definitions applicable in reductions in force*

Senate Employment Counsel raised a concern with respect to the proposed Section 1.111(b) provision that the "minimum competitive area" be a department or subdivision of the employing office "under separate administration." Counsel raised the concern that this definition could be interpreted in a manner inconsistent with the definition of "competitive area" as "that portion of the employing office's organizational structure, as determined by the employing office, in which covered employees compete for retention." Counsel notes that certain employing offices, such as the Sergeant-At-Arms and the Secretary of the Senate, have multiple departments that are headed by different individuals, but some personnel decisions may be centralized with the executive office of the employing office. To address this concern, the final regulation deletes the reference to "separate administration" such that the minimum competitive area is a "department or subdivision of the employing office within the local commuting area."

In addition, Senate Employment Counsel suggested that the definition of "reduction in force" in Section 1.111(e) is broader in scope than the regulations applicable to the executive branch. In this respect, Counsel suggested that the executive branch regulations in 5 C.F.R. §351.201(a)(2) exclude any layoff or other personnel action that might otherwise be considered a "reduction in force" if at least 180 days prior notice is given. However, the executive branch regulations apply the 180-day exception only to "the reclassification of an employee's position due to erosion of duties when such action will take effect after an agency has formally announced a reduction in force in the employee's competitive area and when the reduction in force will take effect within 180 days." As a result, the Board does not consider Section 1.111(e) to be broader in scope than the executive branch regulations.

The Board also considered the application of a veterans' preference in connection with terminations and other reductions attributable to a change in party leadership or majority party status within the House of Congress in which a covered employee is employed. The Board has determined that positions affected by such changes are subject to the same considerations applicable to positions in which appointment is made or directed by a Member of Congress. The Board therefore has excluded terminations and reductions attributable to such changes from the definition of reduction in force in Section 1.111(e) in the regulations applicable to the House and Senate, in order to give full effect to the exclusion in 2 U.S.C. §1316(5)(B). These changes have not been made to the definition of "reduction in force" contained in the regulations applicable to the other employing offices.

The Committee on House Administration suggested that the requirement of "objectively quantifiable evidence" be stricken from the definition of "undue interruption" in Section 1.111(f). The concept of "undue interruption" is used in Section 1.111(c) in determining whether various covered positions must be included within a particular position classification or job classification. Section 1.111(c) states that position classifications or job classifications "shall refer to all covered positions within a competitive area that are in the same grade, occupational level or classification, and which are similar enough in duties, qualification requirements, pay schedules, tenure (type of

employment) and working conditions so that an employing office may reassign the incumbent of one position to any of the other positions in the position classification without undue interruption." The Committee noted that the definition of "undue interruption" in Section 1.111(f) allows an employing office to consider quality of work when assessing whether an employee transferred into the position would need more than 90 days to complete required work, and expressed concern with the requirement in the proposed regulation that an employing office prove "undue interruption" by "objectively quantifiable evidence." In this respect, the Committee noted that quality of work is often a subjective determination which, by its nature, cannot always be proven by "objectively quantifiable evidence." The Board agrees that the proposed "objectively quantifiable evidence" requirement could create unnecessary confusion with respect to the burden of proof applicable in a claim brought under the VEOA and has, therefore, deleted the reference to "objectively quantifiable evidence" in the final regulations.

The Committee also questioned Section 1.111(f)'s reference to "work programs." Although the Committee requested that the Board provide a definition of "work program," the Board considered it more prudent to make this provision consistent with other references in Section 1.111(f) to "work" as opposed to "work programs."

The Committee on House Administration also inquired whether the definition of reduction in force in Section 1.111(e) applies to temporary employees. The final regulation clarifies that the term "reduction in force" does not encompass a termination or other personnel action "involving an employee who is employed by the employing office on a temporary basis."

#### *Application of preference in reductions in force*

Section 1.112 makes veterans' preference the controlling factor in retention decisions if the preference eligible's performance has not been rated unacceptable. As noted by Senate Employment Counsel, the Board's proposed regulation is based upon 5 U.S.C. § 3502(c), which provides that an employee is entitled to such preference if the employee's "performance has not been rated unacceptable under a performance appraisal system implemented under Chapter 43 of this Title. . . ." The Supreme Court has interpreted analogous language in the predecessor legislation to mean that preference eligible veterans have preference over all non-preference eligible employees, without regard to tenure, length of service, or efficiency of performance. *Hilton v. Sullivan*, 334 U.S. 323, 335 (1948). Counsel notes that the Senate is not subject to the performance appraisal system set forth in Chapter 43 of Title 5 and asserts that it is improper to use 5 U.S.C. 3502(c) as the basis for a regulation requiring the retention of veterans over non-veterans in all cases. Counsel suggests that the regulation should be based on 5 U.S.C. § 3502(a), which requires that any implementing regulation give "due effect" to tenure of employment, military preference (subject to § 3501(a)(3)), length of service and efficiency or performance ratings. The Board has carefully considered these comments and continues to believe that because the VEOA makes 5 U.S.C. § 3502(c) applicable to the legislative branch, the absolute veterans' preference embodied in that section also must be made applicable to the legislative branch. The Board notes that the Supreme Court's finding in *Hilton* was not based on the unique elements and attributes of the performance appraisal system implemented under Chapter 43 of Title 5, but on its understanding that "Congress

passed the bill with full knowledge that the long standing absolute retention preference of veterans would be embodied in the Act." *Hilton*, 334 U.S. at 339. The Board considers its task in devising these regulations to implement veterans' preference in the legislative branch in a manner that mirrors, as closely as possible, the veterans' preference principles applicable in the executive branch. Accordingly, the final regulation retains Section 1.112 in substantially the form proposed, because the primary purpose of 5 U.S.C. § 3502(c) is to make veteran's preference the controlling factor in retention decisions. An additional concern was expressed that use of the term "rated" in Section 1.112 suggests that employing offices must adopt formal rating systems in order to comply with the regulation. The Board agrees that the term may lead to confusion and has modified the provisions in Section 1.112 so that the veterans' preference will apply only if the preference eligible employee's performance has not been "determined to be" unacceptable.

#### *Good cause for requirements in subpart E*

The regulations in Subpart E contain various informational requirements. Section 1.116 requires an employing office with covered employees to adopt a written veterans' preference policy. Section 1.117 requires employers to retain certain information regarding their veterans' preference decisions for specified periods of time. Sections 1.118 and 1.119 address the dissemination of information to applicants for covered positions. Section 1.120 addresses the dissemination of information to covered employees generally, and Section 1.121 describes the notice that must be given before a reduction in force.

Senate Employment Counsel and the Capitol Police note that no corresponding executive branch regulation would require either the adoption of a written policy or the other informational and record keeping requirements in Subpart E. These commenters express the concern that the regulations in Subpart E are not consistent with the directive in Section 4(c)(4)(B) of the VEOA, which states in relevant part, "The regulations issued . . . shall be the same as the most relevant substantive regulations (applicable with respect to the executive branch) promulgated to implement the statutory provisions . . . except insofar as 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 this section."

The Board has carefully considered these concerns and reaffirms its previous determination that there is good cause for adopting the requirements described in Subpart E of the regulations. We note first that the very structure of the statutory provisions made applicable to the legislative branch by the VEOA presumes that uniformly applicable policies and procedures will be used in applying veterans' preference in hiring and retention decisions. We also continue to believe that the requirements in Subpart E of the regulations are a necessary counterpart to the approach reflected in the veterans' preference regulations, which affords employing offices with significant discretion and flexibility in implementing their own veterans' preference policies and procedures. For example, the regulations do not mandate a particular policy or practice in implementing veterans' preference, such that applicants cannot turn to published regulations to fully determine their rights. Further, since the regulations do not mandate the maintenance of retention registers, covered employees will not be able to inspect such registers to determine their retention

status vis-à-vis other employees. Because OPM-like regulations will not be adopted, the Board has determined that the creation of a policy, dissemination of information and record keeping are necessary to insure the effective implementation of the rights and protections provided under the VEOA. This approach meets the requirements of Section 4(c)(4)(B) of the VEOA and is also consistent with the purposes of the Congressional Accountability Act (see Section 301(h) of the Act, 2 U.S.C. § 1381(h), which charges the Office of Compliance with carrying out a program of education ". . . to inform individuals of their rights under laws made applicable to the legislative branch of the Federal Government").

#### *Adoption of Veterans' Preference Policy*

Senate Employment Counsel and other commenters suggest that, as proposed, Section 1.116 was overbroad to the extent that it would require employing offices to make their veterans' preference policies available to the public upon request. Senate Employment Counsel notes that "unlike executive branch agencies, Senate employing offices are not subject to the Freedom of Information Act and therefore have no duty to make available to the public any records regarding their employment practices." (Citing 5 U.S.C. § 551, which defines "agency" as excluding the Congress.) The Board agrees that effective implementation of the rights and protections under the VEOA only requires dissemination of information regarding an employing office's veterans' preference policies to covered employees and applicants for covered positions. Accordingly, the final Section 1.116 has deleted the requirement that these policies be made available to the public upon request.

#### *Record keeping*

Senate Employment Counsel suggests that the record retention period described in Section 1.117 be shortened from one year to nine months or perhaps 275 days, given the deadlines by which an employee must request counseling and mediation under Sections 402 and 403 of the Congressional Accountability Act, 2 U.S.C. § 1402 and § 1403. In this respect, Counsel suggests that an employing office will always be informed about a possible claim within 8 months or approximately 240 days after notice of hiring or a reduction in force is provided to the employee. Counsel has not suggested that the requirement that applicable records be retained for one year, or 90 to 120 days longer than may be required given the CAA deadlines, will work a significant hardship on employing offices, and the Board finds it prudent to allow additional time from the date on which the employing office is formally notified of a claim for that notice to reach the individual representatives of the employing office who have maintained records relative to the claim.

#### *Dissemination of veterans' preference policies to applicants for covered positions*

As proposed, Section 1.118 required that employing offices disseminate their veterans' preference policies and procedures to "all qualified applicants" for a covered position. Several of the commenters expressed concern with the burden and cost attendant to such a requirement. The final regulation, in Section 1.118(c), requires that the described information be provided "upon request" from an applicant for a covered position, and does not require dissemination to "all qualified applicants." In Section 1.118(c) of the final regulations, the Board has also clarified that an applicant's request for information must be made in writing. To ensure that preference eligible applicants will know that they may request information from an employing office, we have added

Section 1.118(b)(3), which requires that invitations to self-identify oneself as veterans' preference eligible applicants "state clearly that applicants may request information about the employing office's veterans' preference policies as they relate to appointments to covered positions and . . . describe the employing office's procedures for making such requests."

The Committee on House Administration also suggested that Section 1.118(d) be modified to provide that employing offices are expected to answer applicant questions concerning the employing office's veterans' preference policies and practices only if such questions are "relevant and non-confidential." The Board agrees and has revised Section 1.118(d) as suggested.

*Dissemination of veterans' preference policies to covered employees*

Several comments were received regarding Sections 1.119 (dissemination of veterans' preference policies to covered employees), 1.120 (written notice prior to a reduction in force), and 1.121 (informational requirements regarding veterans' preference determinations). In the final regulations, these provisions have been modified in several ways. Requirements regarding information that must be provided to preference eligible applicants as a result of appointment determinations have been moved from Section 1.121(a) and now appear in Section 1.119.

Section 1.119 of the final regulations addresses requests for information by applicants for a covered position. The requirements of this Section have been limited to providing the employing office's veterans' preference policy or a summary of the policy as it relates to appointments to covered positions, a statement of whether the applicant is preference eligible and, if the applicant is not preference eligible, the reasons for the employing office's determination that the applicant is not preference eligible. After further consideration, the Board removed from the final regulations the requirements that the employing office provide additional information about its appointment decision. As noted previously, these regulations are intended to implement veterans' preference in the legislative branch in a manner that mirrors as closely as possible the veterans' preference principles applicable in the executive branch. The Board has removed the additional informational requirements because they exceeded OPM requirements and were not deemed critical to the implementation and enforcement of the veterans' preference principles made applicable to the legislative branch by the VEOA.

Section 1.120 of the final regulations addresses the dissemination of veterans' preference policies to covered employees. For the reasons addressed above, Section 1.120(c) limits an employing office's responsibility to answer questions from covered employees to those questions that are "relevant and non-confidential" concerning the employing office's veterans' preference policies and practices.

Section 1.121 of the final regulations addresses the written notice required prior to a reduction in force. Under Section 1.121(b)(6)(A) and (B) of the final regulations, the written notice must include a list of all covered employees in the covered employee's position classification or job classification and competitive area who will be retained by the employing office, identifying those employees by job title only and stating whether each such employee is preference eligible, and a list of all covered employees in the covered employee's position classification or job classification and competitive area who will not be retained by the employing office, identifying those employees by job title only

and stating whether each such employee is preference eligible. Along with the information required under Section 1.121(b)(4) (the covered employee's competitive area) and Section 1.121(b)(5) (the covered employee's eligibility for the veterans' preference in retention and how that status was determined) of the final regulations, these lists are intended to replace the provisions in 5 U.S.C. §3502(d)(2)(D), which require that the notice include "the employee's ranking relative to other competing employees, and how that ranking was determined." Because this information will be provided in the notice required before a reduction in force, the Board has determined that it is unnecessary to require that additional information be provided to employees affected by a reduction in force, as had been contemplated by Section 1.121(b) of the proposed regulations.

The changes in Sections 1.118, 1.119, 1.120 and 1.121 of the final regulations are intended to reduce the burden and cost to employing offices in providing information to applicants for covered positions, and to reduce the burden and cost to employing offices in providing information to covered employees in the event of a reduction in force.

**TEXT OF ADOPTED VETERANS' EMPLOYMENT OPPORTUNITIES REGULATIONS**

When approved by the House of Representatives for the House of Representatives, these regulations will have the prefix "H." When approved by the Senate for the Senate, these regulations will have the prefix "S." When approved by Congress for the other employing offices covered by the CAA, these regulations will have the prefix "C."

In this draft, "H&S Regs" denotes the provisions that would be included in the regulations applicable to be made applicable to the House and Senate, and "C Reg" denotes the provisions that would be included in the regulations to be made applicable to other employing offices.

PART 1—Extension of Rights and Protections Relating to Veterans' Preference Under Title 5, United States Code, to Covered Employees of the Legislative Branch (section 4(c) of the Veterans Employment Opportunities Act of 1998)

**Subpart A—Matters of General Applicability to All Regulations Promulgated under Section 4 of the VEOA**

Sec.

1.101 Purpose and scope.

1.102 Definitions.

1.103 Adoption of regulations.

1.104 Coordination with section 225 of the Congressional Accountability Act.

**SEC. 1.101. PURPOSE AND SCOPE.**

(a) Section 4(c) of the VEOA. The Veterans Employment Opportunities Act (VEOA) applies the rights and protections of sections 2108, 3309 through 3312, and subchapter I of chapter 35 of title 5 U.S.C., to certain covered employees within the Legislative branch.

(b) Purpose of regulations. The regulations set forth herein are the substantive regulations that the Board of Directors of the Office of Compliance has promulgated pursuant to section 4(c)(4) of the VEOA, in accordance with the rulemaking procedure set forth in section 304 of the CAA (2 U.S.C. §1384). The purpose of subparts B, C and D of these regulations is to define veterans' preference and the administration of veterans' preference as applicable to Federal employment in the Legislative branch. (5 U.S.C. §2108, as applied by the VEOA). The purpose of subpart E of these regulations is to ensure that the principles of the veterans' preference laws are integrated into the existing employment and retention policies and processes of those em-

ploying offices with employees covered by the VEOA, and to provide for transparency in the application of veterans' preference in covered appointment and retention decisions. Provided, nothing in these regulations shall be construed so as to require an employing office to reduce any existing veterans' preference rights and protections that it may afford to preference eligible individuals.

H Regs: (c) Scope of Regulations. The definition of "covered employee" in Section 4(c) of the VEOA limits the scope of the statute's applicability within the Legislative branch. The term "covered employee" excludes any employee: (1) whose appointment is made by the President with the advice and consent of the Senate; (2) whose appointment is made by a Member of Congress within an employing office, as defined by Sec. 101 (9)(A-C) of the CAA, 2 U.S.C. §1301 (9)(A-C) or; (3) whose appointment is made by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate; (4) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code). Accordingly, these regulations shall not apply to any employing office that only employs individuals excluded from the definition of covered employee.

S Regs: (c) Scope of Regulations. The definition of "covered employee" in Section 4(c) of the VEOA limits the scope of the statute's applicability within the Legislative branch. The term "covered employee" excludes any employee: (1) whose appointment is made by the President with the advice and consent of the Senate; (2) whose appointment is made or directed by a Member of Congress within an employing office, as defined by Sec. 101(9)(A-C) of the CAA, 2 U.S.C. §1301 (9)(A-C) or; (3) whose appointment is made by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate; (4) who is appointed pursuant to 2 U.S.C. §43d(a); or (5) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code). Accordingly, these regulations shall not apply to any employing office that only employs individuals excluded from the definition of covered employee.

C Reg: (c) Scope of Regulations. The definition of "covered employee" in Section 4(c) of the VEOA limits the scope of the statute's applicability within the Legislative branch. The term "covered employee" excludes any employee: (1) whose appointment is made by the President with the advice and consent of the Senate; (2) whose appointment is made by a Member of Congress or by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate; or (3) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code). Accordingly, these regulations shall not apply to any employing office that only employs individuals excluded from the definition of covered employee.

**SEC. 1.102. DEFINITIONS.**

Except as otherwise provided in these regulations, as used in these regulations:

(a) Accredited physician means a doctor of medicine or osteopathy who is authorized to practice medicine or surgery (as appropriate) by the State in which the doctor practices. The phrase "authorized to practice by the State" as used in this section means that the provider must be authorized to diagnose and

treat physical or mental health conditions without supervision by a doctor or other health care provider.

(b) Act or CAA means the Congressional Accountability Act of 1995, as amended (Pub. L. 104-1, §§109 Stat. 3, 2 U.S.C. §§1301-1438).

(c) Active duty or active military duty means full-time duty with military pay and allowances in the armed forces, except (1) for training or for determining physical fitness and (2) for service in the Reserves or National Guard.

(d) Appointment means an individual's appointment to employment in a covered position, but does not include any personnel action that an employing office takes with regard to an existing employee of the employing office.

(e) Armed forces means the United States Army, Navy, Air Force, Marine Corps, and Coast Guard.

(f) Board means the Board of Directors of the Office of Compliance.

H Regs: (g) Covered employee means any employee of (1) the House of Representatives; and (2) the Senate; (3) the Capitol Guide Board; (4) the Capitol Police Board; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; and (8) the Office of Compliance, but does not include an employee (aa) whose appointment is made by the President with the advice and consent of the Senate; (bb) whose appointment is made by a Member of Congress; (cc) whose appointment is made by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate; or (dd) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code). The term covered employee includes an applicant for employment in a covered position and a former covered employee.

S. Regs: (g) Covered employee means any employee of (1) the House of Representatives; and (2) the Senate; (3) the Capitol Guide Board; (4) the Capitol Police Board; (5) the Congressional Budget Office; (6) the Office of the Architect of the Capitol; (7) the Office of the Attending Physician; and (8) the Office of Compliance, but does not include an employee (aa) whose appointment is made by the President with the advice and consent of the Senate; (bb) whose appointment is made or directed by a Member of Congress; (cc) whose appointment is made by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate; (dd) who is appointed pursuant to 2 U.S.C. §43d(a); or (ee) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code). The term covered employee includes an applicant for employment in a covered position and a former covered employee.

C Reg: (g) Covered employee means any employee of (1) the Capitol Guide Service; (2) the Capitol Police; (3) the Congressional Budget Office; (4) the Office of the Architect of the Capitol; (5) the Office of the Attending Physician; or (6) the Office of Compliance, but does not include an employee: (aa) whose appointment is made by the President with the advice and consent of the Senate; or (bb) whose appointment is made by a Member of Congress or by a committee or subcommittee of either House of Congress or a joint committee of the House of Representatives and the Senate; or (cc) who is appointed to a position, the duties of which are equivalent to those of a Senior Executive Service position (within the meaning of section 3132(a)(2) of title 5, United States Code).

The term covered employee includes an applicant for employment in a covered position and a former covered employee.

(h) Covered position means any position that is or will be held by a covered employee.

(i) Disabled veteran means a person who was separated under honorable conditions from active duty in the armed forces performed at any time and who has established the present existence of a service-connected disability or is receiving compensation, disability retirement benefits, or pensions because of a public statute administered by the Department of Veterans Affairs or a military department.

(j) Employee of the Office of the Architect of the Capitol includes any employee of the Office of the Architect of the Capitol, the Botanic Gardens, or the Senate Restaurants.

(k) Employee of the Capitol Police Board includes any member or officer of the Capitol Police.

(l) Employee of the House of Representatives includes an individual occupying a position the pay of which is disbursed by the Clerk of the House of Representatives, or another official designated by the House of Representatives, or any employment position in an entity that is paid with funds derived from the clerk-hire allowance of the House of Representatives but not any such individual employed by any entity listed in subparagraphs (3) through (8) of paragraph (g) above nor any individual described in subparagraphs (aa) through (dd) of paragraph (g) above.

(m) Employee of the Senate includes any employee whose pay is disbursed by the Secretary of the Senate, but not any such individual employed by any entity listed in subparagraphs (3) through (8) of paragraph (g) above nor any individual described in subparagraphs (aa) through (ee) of paragraph (g) above.

H Regs: (n) Employing office means: (1) the personal office of a Member of the House of Representatives; (2) a committee of the House of Representatives or a joint committee of the House of Representatives and the Senate; or (3) any other office headed by a person with the final authority to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate.

S Regs: (n) Employing office means: (1) the personal office of a Senator; (2) a committee of the Senate or a joint committee of the House of Representatives and the Senate; or (3) any other office headed by a person with the final authority to appoint, or be directed by a Member of Congress to appoint, hire, discharge, and set the terms, conditions, or privileges of the employment of an employee of the House of Representatives or the Senate.

C Reg: (n) Employing office means: the Capitol Guide Board, the Capitol Police Board, the Congressional Budget Office, the Office of the Architect of the Capitol, the Office of the Attending Physician, and the Office of Compliance.

(o) Office means the Office of Compliance.

(p) Preference eligible means veterans, spouses, widows, widowers or mothers who meet the definition of "preference eligible" in 5 U.S.C. §2108(3)(A)-(G).

(q) Qualified applicant means an applicant for a covered position whom an employing office deems to satisfy the requisite minimum job-related requirements of the position. Where the employing office uses an entrance examination or evaluation for a covered position that is numerically scored, the term "qualified applicant" shall mean that the applicant has received a passing score on the examination or evaluation.

(r) Separated under honorable conditions means either an honorable or a general dis-

charge from the armed forces. The Department of Defense is responsible for administering and defining military discharges.

(s) Uniformed services means the armed forces, the commissioned corps of the Public Health Service, and the commissioned corps of the National Oceanic and Atmospheric Administration.

(t) VEOA means the Veterans Employment Opportunities Act of 1998 (Pub. L. 105-339, 112 Stat. 3182).

(u) Veterans means persons as defined in 5 U.S.C. §2108(1), or any superseding legislation.

#### SEC. 1.103. ADOPTION OF REGULATIONS.

(a) Adoption of regulations. Section 4(c)(4)(A) of the VEOA generally authorizes the Board to issue regulations to implement section 4(c). In addition, section 4(c)(4)(B) of the VEOA directs the Board to promulgate regulations that are "the same as the most relevant substantive regulations (applicable with respect to the Executive branch) promulgated to implement the statutory provisions referred to in paragraph (2)" of section 4(c) of the VEOA. Those statutory provisions are section 2108, sections 3309 through 3312, and subchapter I of chapter 35, of title 5, United States Code. The regulations issued by the Board herein are on all matters for which section 4(c)(4)(B) of the VEOA requires a regulation to be issued. Specifically, it is the Board's considered judgment based on the information available to it at the time of promulgation of these regulations, that, with the exception of the regulations adopted and set forth herein, there are no other "substantive regulations (applicable with respect to the Executive branch) promulgated to implement the statutory provisions referred to in paragraph (2)" of section 4(c) of the VEOA that need be adopted.

(b) Modification of substantive regulations. As a qualification to the statutory obligation to issue regulations that are "the same as the most substantive regulations (applicable with respect to the Executive branch)", section 4(c)(4)(B) of the VEOA authorizes the Board to "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" section 4(c) of the VEOA.

(c) Rationale for Departure from the Most Relevant Executive Branch Regulations. The Board concludes that it must promulgate regulations accommodating the human resource systems existing in the Legislative branch; and that such regulations must take into account the fact that the Board does not possess the statutory and Executive Order based government-wide policy making authority underlying OPM's counterpart VEOA regulations governing the Executive branch. OPM's regulations are designed for the competitive service (defined in 5 U.S.C. §2102(a)(2)), which does not exist in the employing offices subject to this regulation. Therefore, to follow the OPM regulations would create detailed and complex rules and procedures for a workforce that does not exist in the Legislative branch, while providing no VEOA protections to the covered Legislative branch employees. We have chosen to propose specially tailored regulations, rather than simply to adopt those promulgated by OPM, so that we may effectuate Congress' intent in extending the principles of the veterans' preference laws to the Legislative branch through the VEOA.

#### SEC. 1.104. COORDINATION WITH SECTION 225 OF THE CONGRESSIONAL ACCOUNTABILITY ACT.

Statutory directive. Section 4(c)(4)(C) of the VEOA requires that promulgated regulations must be consistent with section 225 of

the CAA. Among the relevant provisions of section 225 are subsection (f)(1), which prescribes as a rule of construction that definitions and exemptions in the laws made applicable by the CAA shall apply under the CAA, and subsection (f)(3), which states that the CAA shall not be considered to authorize enforcement of the CAA by the Executive branch.

#### **Subpart B—Veterans' Preference—General Provisions**

- Sec.  
1.105 Responsibility for administration of veterans' preference.  
1.106 Procedures for bringing claims under the VEOA.

#### **SEC. 1.105. RESPONSIBILITY FOR ADMINISTRATION OF VETERANS' PREFERENCE.**

Subject to section 1.106, employing offices with covered employees or covered positions are responsible for making all veterans' preference determinations, consistent with the VEOA.

#### **SEC. 1.106. PROCEDURES FOR BRINGING CLAIMS UNDER THE VEOA.**

Applicants for appointment to a covered position and covered employees may contest adverse veterans' preference determinations, including any determination that a preference eligible applicant is not a qualified applicant, pursuant to sections 401–416 of the CAA, 2 U.S.C. §§1401–1416, and provisions of law referred to therein; 206a(3) of the CAA, 2 U.S.C. §§1401, 1316a(3); and the Office's Procedural Rules.

#### **Subpart C—Veterans' Preference in Appointments**

- Sec.  
1.107 Veterans' preference in appointments to restricted covered positions.  
1.108 Veterans' preference in appointments to non-restricted covered positions.  
1.109 Crediting experience in appointments to covered positions.  
1.110 Waiver of physical requirements in appointments to covered positions.

#### **SEC. 1.107. VETERANS' PREFERENCE IN APPOINTMENTS TO RESTRICTED POSITIONS.**

In each appointment action for the positions of custodian, elevator operator, guard, and messenger (as defined below and collectively referred to in these regulations as restricted covered positions) employing offices shall restrict competition to preference eligible applicants as long as qualified preference eligible applicants are available. The provisions of sections 1.109 and 1.110 below shall apply to the appointment of a preference eligible applicant to a restricted covered position. The provisions of section 1.108 shall apply to the appointment of a preference eligible applicant to a restricted covered position, in the event that there is more than one preference eligible applicant for the position.

**Custodian**—One whose primary duty is the performance of cleaning or other ordinary routine maintenance duties in or about a government building or a building under Federal control, park, monument, or other Federal reservation.

**Elevator operator**—One whose primary duty is the running of freight or passenger elevators. The work includes opening and closing elevator gates and doors, working elevator controls, loading and unloading the elevator, giving information and directions to passengers such as on the location of offices, and reporting problems in running the elevator.

**Guard**—One whose primary duty is the assignment to a station, beat, or patrol area in a Federal building or a building under Federal control to prevent illegal entry of per-

sons or property; or required to stand watch at or to patrol a Federal reservation, industrial area, or other area designated by Federal authority, in order to protect life and property; make observations for detection of fire, trespass, unauthorized removal of public property or hazards to Federal personnel or property. The term guard does not include law enforcement officer positions of the Capitol Police Board.

**Messenger**—One whose primary duty is the supervision or performance of general messenger work (such as running errands, delivering messages, and answering call bells).

#### **SEC. 1.108. VETERANS' PREFERENCE IN APPOINTMENTS TO NON-RESTRICTED COVERED POSITIONS.**

(a) Where an employing office has duly adopted a policy requiring the numerical scoring or rating of applicants for covered positions, the employing office shall add points to the earned ratings of those preference eligible applicants who receive passing scores in an entrance examination, in a manner that is proportionately comparable to the points prescribed in 5 U.S.C. 3309. For example, five preference points shall be granted to preference eligible applicants in a 100-point system, one point shall be granted in a 20-point system, and so on.

(b) In all other situations involving appointment to a covered position, employing offices shall consider veterans' preference eligibility as an affirmative factor in the employing office's determination of who will be appointed from among qualified applicants.

#### **SEC. 1.109. CREDITING EXPERIENCE IN APPOINTMENTS TO COVERED POSITIONS.**

When considering applicants for covered positions in which experience is an element of qualification, employing offices shall provide preference eligible applicants with credit:

(a) for time spent in the military service (1) as an extension of time spent in the position in which the applicant was employed immediately before his/her entrance into the military service, or (2) on the basis of actual duties performed in the military service, or (3) as a combination of both methods. Employing offices shall credit time spent in the military service according to the method that will be of most benefit to the preference eligible applicant.

(b) for all experience material to the position for which the applicant is being considered, including experience gained in religious, civic, welfare, service, and organizational activities, regardless of whether he/she received pay therefor.

#### **SEC. 1.110. WAIVER OF PHYSICAL REQUIREMENTS IN APPOINTMENTS TO COVERED POSITIONS.**

(a) Subject to (c) below, in determining qualifications of a preference eligible for appointment, an employing office shall waive:

(1) with respect to a preference eligible applicant, requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and

(2) with respect to a preference eligible applicant to whom it has made a conditional offer of employment, physical requirements if, in the opinion of the employing office, on the basis of evidence before it, including any recommendation of an accredited physician submitted by the preference eligible applicant, the preference eligible applicant is physically able to perform efficiently the duties of the position;

(b) Subject to (c) below, if an employing office determines, on the basis of evidence before it, including any recommendation of an accredited physician submitted by the preference eligible applicant, that an applicant to whom it has made a conditional offer of employment is preference eligible as a dis-

abled veteran as described in 5 U.S.C. §2108(3)(c) and who has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of the covered position, the employing office shall notify the preference eligible applicant of the reasons for the determination and of the right to respond and to submit additional information to the employing office, within 15 days of the date of the notification. The director of the employing office may, by providing written notice to the preference eligible applicant, shorten the period for submitting a response with respect to an appointment to a particular covered position, if necessary because of a need to fill the covered position immediately. Should the preference eligible applicant make a timely response, the highest ranking individual or group of individuals with authority to make employment decisions on behalf of the employing office shall render a final determination of the physical ability of the preference eligible applicant to perform the duties of the position, taking into account the response and any additional information provided by the preference eligible applicant. When the employing office has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the preference eligible applicant.

(c) Nothing in this section shall relieve an employing office of any obligations it may have pursuant to the Americans with Disabilities Act (42 U.S.C. §12101 et seq.) as applied by section 102(a)(3) of the Act, 2 U.S.C. §1302(a)(3).

#### **Subpart D—Veterans' preference in reductions in force**

- Sec.  
1.111 Definitions applicable in reductions in force.  
1.112 Application of preference in reductions in force.  
1.113 Crediting experience in reductions in force.  
1.114 Waiver of physical requirements in reductions in force.  
1.115 Transfer of functions.

#### **SEC. 1.111. DEFINITIONS APPLICABLE IN REDUCTIONS IN FORCE.**

(a) Competing covered employees are the covered employees within a particular position or job classification, at or within a particular competitive area, as those terms are defined below.

(b) Competitive area is that portion of the employing office's organizational structure, as determined by the employing office, in which covered employees compete for retention. A competitive area must be defined solely in terms of the employing office's organizational unit(s) and geographical location, and it must include all employees within the competitive area so defined. A competitive area may consist of all or part of an employing office. The minimum competitive area is a department or subdivision of the employing office within the local commuting area.

(c) Position classifications or job classifications are determined by the employing office, and shall refer to all covered positions within a competitive area that are in the same grade, occupational level or classification, and which are similar enough in duties, qualification requirements, pay schedules, tenure (type of appointment) and working conditions so that an employing office may reassign the incumbent of one position to any of the other positions in the position classification without undue interruption.

(d) Preference Eligibles. For the purpose of applying veterans' preference in reductions in force, except with respect to the application of section 1.114 of these regulations regarding the waiver of physical requirements, the following shall apply:

(1) "active service" has the meaning given it by section 101 of title 37;

(2) "a retired member of a uniformed service" means a member or former member of a uniformed service who is entitled, under statute, to retired, retirement, or retainer pay on account of his/her service as such a member; and

(3) a preference eligible covered employee who is a retired member of a uniformed service is considered a preference eligible only if (A) his/her retirement was based on disability—

(I) resulting from injury or disease received in line of duty as a direct result of armed conflict; or

(ii) caused by an instrumentality of war and incurred in the line of duty during a period of war as defined by sections 101 and 1101 of title 38;

(B) his/her service does not include twenty or more years of full-time active service, regardless of when performed but not including periods of active duty for training; or

(C) on November 30, 1964, he/she was employed in a position to which this subchapter applies and thereafter he/she continued to be so employed without a break in service of more than 30 days.

The definition of "preference eligible" as set forth in 5 U.S.C. 2108 and section 1.102(o) of these regulations shall apply to waivers of physical requirements in determining an employee's qualifications for retention under section 1.114 of these regulations.

H&S Regs: (e) Reduction in force is any termination of a covered employee's employment or the reduction in pay and/or position grade of a covered employee for more than 30 days and that may be required for budgetary or workload reasons, changes resulting from reorganization, or the need to make room for an employee with reemployment or restoration rights. The term "reduction in force" does not encompass a termination or other personnel action: (1) predicated upon performance, conduct or other grounds attributable to an employee, or (2) involving an employee who is employed by the employing office on a temporary basis, or (3) attributable to a change in party leadership or majority party status within the House of Congress where the employee is employed.

C Reg: (e) Reduction in force is any termination of a covered employee's employment or the reduction in pay and/or position grade of a covered employee for more than 30 days and that may be required for budgetary or workload reasons, changes resulting from reorganization, or the need to make room for an employee with reemployment or restoration rights. The term "reduction in force" does not encompass a termination or other personnel action: (1) predicated upon performance, conduct or other grounds attributable to an employee, or (2) involving an employee who is employed by the employing office on a temporary basis.

(f) Undue interruption is a degree of interruption that would prevent the completion of required work by a covered employee 90 days after the employee has been placed in a different position under this part. The 90-day standard should be considered within the allowable limits of time and quality, taking into account the pressures of priorities, deadlines, and other demands. However, work generally would not be considered to be unduly interrupted if a covered employee needs more than 90 days after the reduction in force to perform the optimum quality or quantity of work. The 90-day standard may be extended if placement is made under this part to a program accorded low priority by the employing office, or to a vacant position.

#### SEC. 1.112. APPLICATION OF PREFERENCE IN REDUCTIONS IN FORCE.

Prior to carrying out a reduction in force that will affect covered employees, employ-

ing offices shall determine which, if any, covered employees within a particular group of competing covered employees are entitled to veterans' preference eligibility status in accordance with these regulations. In determining which covered employees will be retained, employing offices will treat veterans' preference as the controlling factor in retention decisions among such competing covered employees, regardless of length of service or performance, provided that the preference eligible employee's performance has not been determined to be unacceptable. Provided, a preference eligible employee who is a "disabled veteran" under section 1.102(h) above who has a compensable service-connected disability of 30 percent or more and whose performance has not been determined to be unacceptable by an employing office is entitled to be retained in preference to other preference eligible employees. Provided, this section does not relieve an employing office of any greater obligation it may be subject to pursuant to the Worker Adjustment and Retraining Notification Act (29 U.S.C. § 2101 et seq.) as applied by section 102(a)(9) of the CAA, 2 U.S.C. § 1302(a)(9).

#### SEC. 1.113. CREDITING EXPERIENCE IN REDUCTIONS IN FORCE.

In computing length of service in connection with a reduction in force, the employing office shall provide credit to preference eligible covered employees as follows:

(a) a preference eligible covered employee who is not a retired member of a uniformed service is entitled to credit for the total length of time in active service in the armed forces;

(b) a preference eligible covered employee who is a retired member of a uniformed service is entitled to credit for:

(1) the length of time in active service in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(2) the total length of time in active service in the armed forces if he is included under 5 U.S.C. § 3501(a)(3)(A), (B), or (C); and

(c) a preference eligible covered employee is entitled to credit for:

(1) service rendered as an employee of a county committee established pursuant to section 8(b) of the Soil Conservation and Allotment Act or of a committee or association of producers described in section 10(b) of the Agricultural Adjustment Act; and

(2) service rendered as an employee described in 5 U.S.C. § 2105(c) if such employee moves or has moved, on or after January 1, 1966, without a break in service of more than 3 days, from a position in a nonappropriated fund instrumentality of the Department of Defense or the Coast Guard to a position in the Department of Defense or the Coast Guard, respectively, that is not described in 5 U.S.C. § 2105(c).

#### SEC. 1.114. WAIVER OF PHYSICAL REQUIREMENTS IN REDUCTIONS IN FORCE.

(a) If an employing office determines, on the basis of evidence before it, that a covered employee is preference eligible, the employing office shall waive, in determining the covered employee's retention status in a reduction in force:

(1) requirements as to age, height, and weight, unless the requirement is essential to the performance of the duties of the position; and

(2) physical requirements if, in the opinion of the employing office, on the basis of evidence before it, including any recommendation of an accredited physician submitted by the employee, the preference eligible covered employee is physically able to perform efficiently the duties of the position.

(b) If an employing office determines that a covered employee who is a preference eligi-

ble as a disabled veteran as described in 5 U.S.C. § 2108(3)(c) and has a compensable service-connected disability of 30 percent or more is not able to fulfill the physical requirements of the covered position, the employing office shall notify the preference eligible covered employee of the reasons for the determination and of the right to respond and to submit additional information to the employing office within 15 days of the date of the notification. Should the preference eligible covered employee make a timely response, the highest ranking individual or group of individuals with authority to make employment decisions on behalf of the employing office, shall render a final determination of the physical ability of the preference eligible covered employee to perform the duties of the covered position, taking into account the evidence before it, including the response and any additional information provided by the preference eligible. When the employing office has completed its review of the proposed disqualification on the basis of physical disability, it shall send its findings to the preference eligible covered employee.

(c) Nothing in this section shall relieve an employing office of any obligation it may have pursuant to the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) as applied by section 102(a)(3) of the CAA, 2 U.S.C. § 1302(a)(3).

#### SEC. 1.115. TRANSFER OF FUNCTIONS.

(a) When a function is transferred from one employing office to another employing office, each covered employee in the affected position classifications or job classifications in the function that is to be transferred shall be transferred to the receiving employing office for employment in a covered position for which he/she is qualified before the receiving employing office may make an appointment from another source to that position.

(b) When one employing office is replaced by another employing office, each covered employee in the affected position classifications or job classifications in the employing office to be replaced shall be transferred to the replacing employing office for employment in a covered position for which he/she is qualified before the replacing employing office may make an appointment from another source to that position.

#### Subpart E—Adoption of Veterans' preference policies, recordkeeping & informational requirements.

Sec.

1.116 Adoption of veterans' preference policy.

1.117 Preservation of records made or kept.

1.118 Dissemination of veterans' preference policies to applicants for covered positions.

1.119 Information regarding veterans' preference determinations in appointments.

1.120 Dissemination of veterans' preference policies to covered employees.

1.121 Written notice prior to a reduction in force.

#### SEC. § 1.116. ADOPTION OF VETERANS' PREFERENCE POLICY.

No later than 120 calendar days following Congressional approval of this regulation, each employing office that employs one or more covered employees or that seeks applicants for a covered position shall adopt its written policy specifying how it has integrated the veterans' preference requirements of the Veterans Employment Opportunities Act of 1998 and these regulations into its employment and retention processes. Upon timely request and the demonstration of good cause, the Executive Director, in his/her discretion, may grant such an employing office additional time for preparing its policy. Each such employing office will make

its policies available to applicants for appointment to a covered position and to covered employees in accordance with these regulations. The act of adopting a veterans' preference policy shall not relieve any employing office of any other responsibility or requirement of the Veterans Employment Opportunity Act of 1998 or these regulations. An employing office may amend or replace its veterans' preference policies as it deems necessary or appropriate, so long as the resulting policies are consistent with the VEOA and these regulations.

**SEC. 1.117. PRESERVATION OF RECORDS MADE OR KEPT.**

An employing office that employs one or more covered employees or that seeks applicants for a covered position shall maintain any records relating to the application of its veterans' preference policy to applicants for covered positions and to workforce adjustment decisions affecting covered employees for a period of at least one year from the date of the making of the record or the date of the personnel action involved or, if later, one year from the date on which the applicant or covered employee is notified of the personnel action. Where a claim has been brought under section 401 of the CAA against an employing office under the VEOA, the respondent employing office shall preserve all personnel records relevant to the claim until final disposition of the claim. The term "personnel records relevant to the claim", for example, would include records relating to the veterans' preference determination regarding the person bringing the claim and records relating to any veterans' preference determinations regarding other applicants for the covered position the person sought, or records relating to the veterans' preference determinations regarding other covered employees in the person's position or job classification. The date of final disposition of the charge or the action means the latest of the date of expiration of the statutory period within which the aggrieved person may file a complaint with the Office or in a U.S. District Court or, where an action is brought against an employing office by the aggrieved person, the date on which such litigation is terminated.

**SEC. 1.118. DISSEMINATION OF VETERANS' PREFERENCE POLICIES TO APPLICANTS FOR COVERED POSITIONS.**

(a) An employing office shall state in any announcements and advertisements it makes concerning vacancies in covered positions that the staffing action is governed by the VEOA.

(b) An employing office shall invite applicants for a covered position to identify themselves as veterans' preference eligible applicants, provided that in doing so:

(1) the employing office shall state clearly on any written application or questionnaire used for this purpose or make clear orally, if a written application or questionnaire is not used, that the requested information is intended for use solely in connection with the employing office's obligations and efforts to provide veterans' preference to preference eligible applicants in accordance with the VEOA; and

(2) the employing office shall state clearly that disabled veteran status is requested on a voluntary basis, that it will be kept confidential in accordance with the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) as applied by section 102(a)(3) of the CAA, 2 U.S.C. § 1302(a)(3), that refusal to provide it will not subject the individual to any adverse treatment except the possibility of an adverse determination regarding the individual's status as a preference eligible applicant as a disabled veteran under the VEOA, and that any information obtained in accordance with this section concerning the medical

condition or history of an individual will be collected, maintained and used only in accordance with the Americans with Disabilities Act (42 U.S.C. § 12101 et seq.) as applied by section 102(a)(3) of the CAA, 2 U.S.C. § 1302(a)(3).

(3) the employing office shall state clearly that applicants may request information about the employing office's veterans' preference policies as they relate to appointments to covered positions, and shall describe the employing office's procedures for making such requests.

(c) Upon written request by an applicant for a covered position, an employing office shall provide the following information in writing:

(1) the VEOA definition of veterans' "preference eligible" as set forth in 5 U.S.C. 2108 or any superseding legislation, providing the actual, current definition in a manner designed to be understood by applicants, along with the statutory citation;

(2) the employing office's veterans' preference policy or a summary description of the employing office's veterans' preference policy as it relates to appointments to covered positions, including any procedures the employing office shall use to identify preference eligible employees;

(3) the employing office may provide other information to applicants regarding its veterans' preference policies and practices, but is not required to do so by these regulations.

(d) Employing offices are also expected to answer questions from applicants for covered positions that are relevant and non-confidential concerning the employing office's veterans' preference policies and practices.

**SEC. 1.119. INFORMATION REGARDING VETERANS' PREFERENCE DETERMINATIONS IN APPOINTMENTS.**

Upon written request by an applicant for a covered position, the employing office shall promptly provide a written explanation of the manner in which veterans' preference was applied in the employing office's appointment decision regarding that applicant. Such explanation shall include at a minimum:

(a) the employing office's veterans' preference policy or a summary description of the employing office's veterans' preference policy as it relates to appointments to covered positions; and

(b) a statement as to whether the applicant is preference eligible and, if not, a brief statement of the reasons for the employing office's determination that the applicant is not preference eligible.

**SEC. 1.120. DISSEMINATION OF VETERANS' PREFERENCE POLICIES TO COVERED EMPLOYEES.**

(a) If an employing office that employs one or more covered employees provides any written guidance to such employees concerning employee rights generally or reductions in force more specifically, such as in a written employee policy, manual or handbook, such guidance must include information concerning veterans' preference under the VEOA, as set forth in subsection (b) of this regulation.

(b) Written guidances described in subsection (a) above shall include, at a minimum:

(1) the VEOA definition of veterans' "preference eligible" as set forth in 5 U.S.C. 2108 or any superseding legislation, providing the actual, current definition along with the statutory citation;

(2) the employing office's veterans' preference policy or a summary description of the employing office's veterans' preference policy as it relates to reductions in force, including the procedures the employing office shall take to identify preference eligible employees.

(3) the employing office may provide other information in its guidances regarding its veterans' preference policies and practices, but is not required to do so by these regulations.

(c) Employing offices are also expected to answer questions from covered employees that are relevant and non-confidential concerning the employing office's veterans' preference policies and practices.

**SEC. 1.121. WRITTEN NOTICE PRIOR TO A REDUCTION IN FORCE.**

(a) Except as provided under subsection (c), a covered employee may not be released due to a reduction in force, unless the covered employee and the covered employee's exclusive representative for collective-bargaining purposes (if any) are given written notice, in conformance with the requirements of paragraph (b), at least 60 days before the covered employee is so released.

(b) Any notice under paragraph (a) shall include -

(1) the personnel action to be taken with respect to the covered employee involved;

(2) the effective date of the action;

(3) a description of the procedures applicable in identifying employees for release;

(4) the covered employee's competitive area;

(5) the covered employee's eligibility for veterans' preference in retention and how that preference eligibility was determined;

(6) the retention status and preference eligibility of the other employees in the affected position classifications or job classifications within the covered employee's competitive area, by providing:

(A) a list of all covered employee(s) in the covered employee's position classification or job classification and competitive area who will be retained by the employing office, identifying those employees by job title only and stating whether each such employee is preference eligible, and

(B) a list of all covered employee(s) in the covered employee's position classification or job classification and competitive area who will not be retained by the employing office, identifying those employees by job title only and stating whether each such employee is preference eligible.

(7) a description of any appeal or other rights which may be available.

(c) The director of the employing office may, in writing, shorten the period of advance notice required under subsection (a), with respect to a particular reduction in force, if necessary because of circumstances not reasonably foreseeable.

(d) No notice period may be shortened to less than 30 days under this subsection.

**EXECUTIVE COMMUNICATIONS, ETC.**

Under clause 8 of rule XII, executive communications were taken from the Speaker's table and referred as follows:

5728. A letter from the Comptroller, Department of Defense, transmitting a report of a violation of the Antideficiency Act by the Department of the Navy, Case Number 07-09, pursuant to 31 U.S.C. 1351; to the Committee on Appropriations.

5729. A letter from the Comptroller, Department of Defense, transmitting a report of a violation of the Antideficiency Act by the Department of the Navy, Case Number 07-08, pursuant to 31 U.S.C. 1517(b); to the Committee on Appropriations.

5730. A letter from the Comptroller, Department of Defense, transmitting a report of a violation of the Antideficiency Act by the Department of the Navy, Case Number 07-06, pursuant to 31 U.S.C. 1351; to the Committee on Appropriations.