

The PRESIDING OFFICER. The clerk will call the roll.

The assistant legislative clerk proceeded to call the roll.

Mr. SESSION. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER (Mr. AL-LARD). Without objection, it is so ordered.

#### NATIONAL PEACE OFFICERS MEMORIAL DAY

Mr. SESSIONS. Mr. President, I ask unanimous consent that the Senate proceed to the immediate consideration of Senate Resolution 79.

The PRESIDING OFFICER. The clerk will report.

The bill clerk read as follows:

A resolution (S. Res. 79) to commemorate the 1997 National Peace Officers Memorial Day.

The PRESIDING OFFICER. Is there objection to the immediate consideration of the resolution?

There being no objection, the Senate proceeded to consider the resolution.

Mr. SESSIONS. Mr. President, I ask unanimous consent that the resolution be agreed to, the preamble be agreed to, the motion to reconsider be laid upon the table, and that any statements relating to the resolution appear at the appropriate place in the RECORD.

The PRESIDING OFFICER. Without objection, it is so ordered.

The resolution (S. Res. 79) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, is as follows:

#### S. RES. 79

Whereas, the well-being of all citizens of this country is preserved and enhanced as a direct result of the vigilance and dedication of law enforcement personnel;

Whereas, more than 500,000 men and women, at great risk to their personal safety, presently serve their fellow citizens in their capacity as guardians of the peace;

Whereas, peace officers are the front line in preserving our children's right to receive an education in a crime-free environment that is all too often threatened by the insidious fear caused by violence in schools;

Whereas, 117 peace officers lost their lives in the performance of their duty in 1996, and a total of 13,692 men and women have now made that supreme sacrifice;

Whereas, every year 1 in 9 officers is assaulted, 1 in 25 is injured, and 1 in 4,000 is killed in the line of duty;

Whereas, on May 15, 1997, more than 15,000 peace officers are expected to gather in our Nation's Capital to join with the families of their recently fallen comrades to honor them and all others before them: Now, therefore, be it

*Resolved by the Senate of the United States of America in Congress assembled, That May 15, 1997, is hereby designated as "National Peace Officers Memorial Day" for the purpose of recognizing all peace officers slain in the line of duty. The President is authorized and requested to issue a proclamation calling upon the people of the United States to observe this day with the appropriate ceremonies and respect.*

#### SUPPLEMENTAL APPROPRIATIONS AND RESCISSIONS ACT OF 1997

Mr. SESSIONS. Mr. President, I ask unanimous consent that the Senate resume consideration of S. 672.

The PRESIDING OFFICER. Without objection, it is so ordered. The clerk will report the bill.

The bill clerk read as follows:

A bill (S. 672) making supplemental appropriations and rescissions for the fiscal year ending September 30, 1997, and for other purposes.

The Senate continued with the consideration of the bill.

#### CLOTURE MOTION

Mr. SESSIONS. Mr. President, I send a cloture motion to the desk.

The PRESIDING OFFICER. The cloture motion having been presented under rule XXII, the Chair directs the clerk to read the motion.

The bill clerk read as follows:

#### CLOTURE MOTION

We the undersigned Senators, in accordance with the provisions of rule XXII of the Standing Rules of the Senate, do hereby move to bring to a close debate on S. 672, the supplemental appropriations bill:

Trent Lott, Ted Stevens, Mike DeWine, Bob Bennett, Tim Hutchinson, Richard G. Lugar, Pete Domenici, Pat Roberts, Connie Mack, Frank H. Murkowski, Richard Shelby, Craig Thomas, Chuck Grassley, Christopher S. Bond, Michael B. Enzi, Jeff Sessions.

#### MORNING BUSINESS

Mr. SESSIONS. Mr. President, I ask unanimous consent that there now be a period of morning business.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### NOTICE OF ADOPTION OF AMENDMENTS TO PROCEDURAL RULES

Mr. THURMOND. Mr. President, pursuant to section 303 of the Congressional Accountability Act of 1995 (2 U.S.C. 1383), a notice of adoption of amendments to procedural rules was submitted by the Office of Compliance, U.S. Congress. The notice publishes amendments to the rules governing the procedures for the Office of Compliance under the Congressional Accountability Act. The amendments to the procedural rules have been approved by the Board of Directors, Office of Compliance.

Section 304(b) requires this notice to be printed in the CONGRESSIONAL RECORD, therefore I ask unanimous consent that the notice be printed in the RECORD.

There being no objection, the material was ordered to be printed in the RECORD, as follows:

#### OFFICE OF COMPLIANCE

The Congressional Accountability Act of 1995: Amendments to Procedural Rules

#### NOTICE OF ADOPTION OF AMENDMENTS TO PROCEDURAL RULES

*Summary:* After considering the comments to the Notice of Proposed Rulemaking pub-

lished January 7, 1997 in the CONGRESSIONAL RECORD, the Executive Director has adopted and is publishing amendments to the rules governing the procedures for the Office of Compliance under the Congressional Accountability Act of 1995 (P.L. 104-1, 109 Stat. 3). The amendments to the procedural rules have been approved by the Board of Directors, Office of Compliance.

*For Further Information Contact:* Executive Director, Office of Compliance, Room LA 200, 110 Second Street, S.E., Washington, D.C. 20540-1999. Telephone No. 202-724-9250. TDD/TTY: 202-426-1912.

#### SUPPLEMENTARY INFORMATION

##### I. Background

The Congressional Accountability Act of 1995 ("CAA" or "Act") was enacted into law on January 23, 1995. In general, the CAA applies the rights and protections of eleven federal labor and employment law statutes to covered employees and employing offices within the Legislative Branch. Section 303 of the CAA directs that the Executive Director of the Office of Compliance ("Office") shall, subject to the approval of the Board of Directors ("Board") of the Office, adopt rules governing the procedures for the Office, and may amend those rules in the same manner. The procedural rules currently in effect, approved by the Board and adopted by the Executive Director, were published December 22, 1995 in the CONGRESSIONAL RECORD (141 Cong. R. S19239 (daily ed., Dec. 22, 1995)). Amendments to these rules, approved by the Board and adopted by the Executive Director, were published September 19, 1996 in the CONGRESSIONAL RECORD (142 Cong. R. H10672 and S10980 (daily ed., Sept. 19, 1996)). The revisions and additions that follow establish procedures for consideration of matters arising under Parts B and C of title II of the CAA, which became generally effective January 1, 1997.

Pursuant to section 303(b) of the CAA, the Executive Director published for comment a Notice of Proposed Rulemaking ("NPR") in the CONGRESSIONAL RECORD on January 7, 1997 (143 Cong. R. S25-S30 (daily ed., Jan. 7, 1997)) inviting comments regarding the proposed amendments to the procedural rules. Four comments were received in response to the NPR: three from Congressional offices and one from a labor organization. After full consideration of the comments received, the Executive Director has, with the approval of the Board, adopted these amendments to the procedural rules.

##### II. Consideration of Comments and Conclusions Regarding Amendments to Existing Rules

###### A. Section 1.04(d)—Final Decisions

One commenter noted that, although section 1.04(d) provides that the Board will make public final decisions in favor of a complaining covered employee, or charging party under section 210 of the CAA, as well as those that reverse a Hearing Officer's decision in favor of a complaining employee or charging party, section 1.04(d) does not specifically provide that decisions in favor of an employing office will be made public. Rather, such decisions may be made public in the discretion of the Board. The commenter suggested that the rules should provide either that all or none of the decisions be made public, asserting that, if section 1.04(d) were not so modified, there would be "inconsistent access" to decisions and "the impression that the Board's procedures are weighted against employing offices." Proposed section 1.04(d) is identical to section 416(f) of the CAA, and its language, therefore, should not and will not be altered, whatever the Board's ultimate practice with respect to the publication of decisions in favor of employing offices.

*B. Section 1.07(a)*

One commenter suggested that, if section 1.04(d) were not modified to provide for publication of all decisions, the term "certain final decisions" in section 1.07(a) should be defined and procedures should be established to challenge Board determinations regarding the publication of decisions. Section 1.07(a) has been modified to make it clear that the referenced final decisions are those described in section 416(f) of the CAA. As section 416(f) of the CAA makes clear which final decisions must be made public and grants the Board complete discretion as to publication of other final decisions, procedures for challenging determinations regarding publication are not warranted.

*C. Section 5.01—Complaints*

For the reasons set forth in Section III.C.10., *infra*, section 5.01(b)(2) will not be modified to require the General Counsel to conduct a follow-up inspection as a prerequisite to filing a complaint under section 215 of the CAA, as requested by a commenter.

*D. Section 5.04—Confidentiality*

One commenter suggested that section 5.04 be modified to clarify that proceedings before Hearing Officers and the Board are not confidential. However, with certain exceptions, pursuant to section 416(c) of the CAA, such proceedings are confidential and, therefore, the proposed rule cannot be modified as suggested by the commenter. However, the rule will be clarified to note the statutory exceptions to the confidentiality requirement. In addition, at the suggestion of another commenter, the rule will be modified to cross-reference sections 1.06, 1.07 and 7.12 of the procedural rules, which also relate to confidentiality.

*III. Consideration of Comments and Conclusions Regarding Section 215 Procedures*

*A. Promulgation of the proposed amendments as substantive regulations under section 304*

Two commenters restated objections to the Board's decision in promulgating its substantive section 215 regulations (143 Cong. R. S61, S63 (daily ed., Jan. 7, 1997)) not to adopt the Secretary's rules of practice and procedure for variances under the OSHAct (part 1905, 29 C.F.R.), and the Secretary's regulations relating to the procedure for conducting inspections, and for issuing and contesting citations and proposed penalties under the OSHAct (part 1903, 29 C.F.R.) as regulations under section 215(d)(2) of the CAA. The arguments offered by the commenters are substantially the same as those rejected by the Board in its rulemaking on this issue (143 Cong. R. at S63). The Board has fully explained its decision not to adopt Parts 1903 and 1905, 29 C.F.R., as regulations under section 215(d) of the CAA, and for rejecting the arguments made by the commenters. The Board did not consider the Secretary's regulations governing inspections, citations, and variances to be outside the scope of rulemaking under section 304 because they were "procedural" as opposed to "substantive." Instead, the Board did not adopt these regulations because they were promulgated to implement sections 8, 9, and 10 of the OSHAct, statutory provisions which are not "referred to in subsection (a)" of section 215. Accordingly, these regulations were not within the scope of the Board's rulemaking authority under section 215(d)(2). 143 Cong. R. at S63-64. Thus, the question whether the proposed regulations should have been issued under section 304 of the CAA cannot be addressed by the Executive Director in the context of this rulemaking.

Because the Board has determined that regulations covering variances, citations,

and notices cannot be issued under section 215(d), the question is whether such regulations may be issued by the Executive Director under section 303. The essence of the commenters' argument in this rulemaking is that the Executive Director cannot do so because the procedures affect substantive rights of the parties. The commenters' position is based on the substance-procedure distinction that they believe demarcates the boundary between rulemaking under sections 215(d) and 304 and rulemaking under section 303.

As noted above, the Board did not exclude the subjects of variances, citations, and notices from its rulemaking based on a substance/procedure distinction, but because the Secretary's regulations covering these subjects were not within the scope of section 215(d). Similarly, the Executive Director is not barred from promulgating rules governing the procedures of the Office simply because those procedures might affect the substantive rights of the parties.

Contrary to the commenters' argument, the Board's earlier statement (in the context of its rulemaking under section 220(d) of the CAA) that rules governing procedures can be substantive regulations is not controlling with respect to the present issue. In its rulemaking proceeding under section 220(d), the Board determined that the subject matter of the Federal Labor Relations Authority's regulations, including certain regulations purporting to govern procedures of the Authority, were within the plain language setting forth the scope of rulemaking under section 220(d). The question raised by the commenters in that rulemaking was whether regulations falling within the scope of section 220(d) were nevertheless excluded because of their procedural label or character. The Board decided that they were not so excluded, and its statement that procedural rules can be considered substantive regulations was made in that context. See 142 Cong. R. S5070, 5072 (daily ed., May 15, 1996). Conversely, in its rulemaking under section 215(d), the Board determined that certain regulations were *not* within the scope of rulemaking under section 215(d), and it rejected the argument that regulations not falling within the scope of section 215(d) should nevertheless be included because of their substantive label or character. Thus, contrary to the commenters' arguments, there is no inconsistency in the underlying rationale of the Board in these two rulemakings. The Board's preamble remarks as part of the section 220(d) rulemaking seized upon by the commenters, when read in context, do not control the question here.

The question whether these rules can be promulgated under section 303 must begin and end with the language of the statute. Section 303(a) provides that "[t]he Executive Director shall, subject to approval of the Board, adopt rules governing the procedures of the Office, including the procedures of hearing officers, which shall be submitted for publication in the Congressional RECORD." 2 U.S.C. §1383(a). The regulations in issue plainly meet these criteria. So long as the Executive Director's regulations meet these criteria, the regulations may be promulgated under this authority, whether they affect substantive rights or not.

Given the Board's decision not to promulgate regulations governing the subject of variances, citations, and notices under section 215(d), if the Executive Director accepted the commenters' arguments and did not issue these rules under section 303, it would mean, for example, that no procedures would exist by which variances may be considered by the Board. The Executive Director believes that such a procedure should be provided employing offices. Because promulga-

tion of such procedures is within the scope of the Executive Director's rulemaking under section 303, there is no basis upon which the Executive Director should refuse to address these matters under section 303.

*B. References to the General Counsel's designees*

Two commenters argued that references in the regulations to "designees of the General Counsel" are inappropriate on the theory that the CAA does not authorize the General Counsel to delegate his duties. To the extent that the commenters are arguing that the General Counsel is prohibited from assigning or designating others to perform the inspections and other responsibilities under section 215 of the CAA, such an argument is refuted by section 302(c)(4) of the CAA, which expressly authorizes the General Counsel to "appoint . . . such additional attorneys as may be necessary to enable the General Counsel to perform the General Counsel's duties." 2 U.S.C. §1382(c)(4). Similarly, 215(c) of the CAA provides that the General Counsel exercises the "authorities granted to the Secretary of Labor" by subsections (a), (d), (e), and (f) of section 8 of the OSHAct, and sections 9 and 10 of the OSHAct. Those sections in turn recognize that the Secretary may act personally or through an "authorized representative" with respect to many of these functions. See 29 U.S.C. §§657(e), (f), and 658(a). Thus, the proposed regulation is not inconsistent with section 215 or the provisions of the OSHAct incorporated thereunder.

One of the commenters also argued that the General Counsel may not utilize detailees or consultants in carrying out his duties, because section 302 of the CAA gives the Executive Director the authority to secure the use of detailees. However, section 302 does not limit the functions to which these detailees may be assigned within the Office. Similarly, although the Executive Director may procure the temporary services of consultants "[i]n carrying out the functions of the Office," nothing in the CAA suggests that the Executive Director is barred from obtaining and approving the services of consultants to assist the General Counsel in performing his duties. Indeed, the comprehensive inspections of Legislative Branch facilities were performed in large part through the use of detailees and consultants assisting the General Counsel. The commenters were aware of this use of consultants for this purpose. No claim was made that such inspections could not be conducted with the assistance of consultants.

More to the point, the General Counsel is statutorily responsible for exercising the authorities and performing the duties of the General Counsel as specified in section 215 and is accountable for decisions made therein. The proposed regulatory sections do not purport to delegate the General Counsel's statutory responsibilities to others. The regulations simply recognize that the General Counsel may utilize others to enable him to perform certain functions within those responsibilities (such as assisting in conducting investigations and inspections).

The commenters' implicit argument that the CAA requires the General Counsel to *solely* and personally perform those functions is, quite simply, wrong. It is clear that "those legally responsible for a decision must in fact make it, but that their method of doing so—their thought processes, their reliance on their staffs—is largely beyond judicial scrutiny." (*Yellow Freight System, Inc. v. Martin*, 983 F.2d 1195, 1201 (2d Cir. 1993), quoting *KFC National Management Corp. v. NLRB*, 497 F.2d 298 (2d Cir. 1974), cert. denied,

423 U.S. 1087 (1976). Thus, the decision to assign or designate others (such as other attorneys in the Office, detailees or others) to perform functions related to the General Counsel's ultimate decisions under section 215 (e.g., whether to issue a citation, a notice and/or a complaint in a particular case) is not prohibited by the CAA or subject to review by individual employing offices, as argued by the commenters.

One of the commenters argued that employing offices should have an opportunity to pass upon the qualifications of individuals chosen by the General Counsel to conduct inspections through a specified process. Nothing in the CAA or the OSHAct authorizes adoption of such a procedure, and such a provision would interfere unduly with the General Counsel's enforcement responsibilities. Adoption of procedures to micro-manage the General Counsel's operations in this area would be improper in the absence of any statutory authority.

#### C. Inspections, Citations, and Complaints

1. Objection to inspection, entry not a waiver, advance notice of inspection, requirement of *ex parte* administrative inspection warrants (sections 4.04, 4.05, and 4.06)

Three commenters requested that the Executive Director issue regulations requiring the General Counsel to provide advance notice of an inspection to employing offices or to seek a warrant before conducting a non-consensual search of employing offices. One commenter argued that the Supreme Court's decision in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), which held that the Fourth Amendment's protection against unreasonable searches and seizures applies to non-consensual inspection of private commercial property, applies to administrative inspections of legislative branch employing offices by another legislative branch entity; the commenter further argued that the rules should require that the General Counsel first notify the employing office of the intent to inspect, obtain written consent prior to inspections, and schedule an appointment with employing offices for such inspections. The other commenter argued that, regardless of whether the Fourth Amendment's protection applies equally to congressional offices, similar privacy interests apply to employing offices to enable them to conduct their legislative business free from unreasonable searches. These commenters asked that the procedural rules include provisions similar to those of section 1903.4 of the Secretary's rules, which were amended to authorize the Secretary to secure an *ex parte* administrative warrant upon refusal to consent to a search in response to the *Barlow's* decision. See 45 Fed. Reg. 65916 (Oct. 3, 1980) (Final rule amending section 1903.4, 29 C.F.R.). The third commenter also requested that the final regulations include the compulsory process/*ex parte* administrative warrants provisions of section 1903.4, but did not explain how inclusion of such a provision would be authorized by section 215 of the CAA.

It is not entirely clear that the Fourth Amendment's protections that bar the warrantless search of commercial premises apply (or apply with equal force) to inspections of a legislative branch office by another legislative branch entity, albeit an independent one. The protections of the Fourth Amendment were designed to protect privacy interests against intrusion by the government; it is, therefore, not obvious that they apply to prohibit one legislative branch enforcement entity (the General Counsel) from conducting an investigation of another legislative branch entity (an individual employing office). To be sure, there may be portions of an employing office to which individual persons' expectations of

privacy may attach. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709 (1987) (expectation of privacy in public employee's desk, files, and areas within his exclusive control); *Schwengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1335 (9th Cir. 1987) (reasonable expectation of privacy found to exist in areas of government property given over to an employee's exclusive control). But it is questionable whether an employing office, as a covered entity (as distinguished from the individuals holding positions within the office or working there), would be found to possess a privacy right to be free from administrative inquiries authorized by a statute duly enacted by Congress. Moreover, section 215(f)'s requirement that the General Counsel conduct a comprehensive inspection of all covered employing offices and other covered facilities on a regular basis and at least once each Congress may well defeat an otherwise reasonable expectation of privacy in such offices and other facilities. See, e.g., *United States v. Bunkers*, 521 F.2d 1217, 1219-20 (9th Cir.) (search of postal worker's locker authorized by regulation), *cert. denied*, 423 U.S. 989 (1975); *United States v. Taketa*, 923 F.2d 665, 672 (9th Cir. 1991) (valid regulation may defeat an otherwise reasonable expectation of workplace privacy); see also *Donovan v. Dewey*, 452 U.S. 593 (1981) (legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment).

In any event, whether *Barlow's* and its progeny apply in the context of the CAA is a question that need not be decided here. Section 215 does not provide a mechanism by which warrants may be issued. Section 215 contemplates the assignment of hearing officers, but only after a complaint has been filed by the General Counsel. See 2 U.S.C. §1341(c)(3). Moreover, there is no provision in the CAA that would allow such applications to be heard by federal judges. Compare 2 U.S.C. §1405(f)(3) (authorizing federal district court to issue orders requiring persons to appear before the hearing officer to give testimony and produce records). Thus, there is no statutory basis upon which such a procedure could be adopted by the Executive Director.

The commenters incorrectly assume that, absent a warrant procedure, the General Counsel would nevertheless enter a workspace over the objection of the employing office/s with jurisdiction over the area or control of the space involved. Just as it would be improper to assume that employing offices would engage in a wholesale refusal to allow inspections, it cannot be assumed that the General Counsel will attempt to force inspectors into work areas over the employing office's objection. See 29 U.S.C. §657(a)(2) (Secretary authorized "to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner . . ."). In the typical case, the General Counsel can be expected to ascertain the reason for the refusal and attempt to secure voluntary consent to conduct the inspection. If the employing office continues to refuse an inspection, there are options presently available to the General Counsel to secure access to the space. These options would include, among others, seeking such consent from the relevant committee(s) of the Congress that have responsibilities for the office space or work area involved, and seeking consent from the Architect of the Capitol and/or other entities that have superintendence or other responsibility for and authority over the facility and access to and/or control of the space involved. If such options are unavailing, the General Counsel could simply note the refusal of the employing office to allow the inspection in, for example, the inspection report submitted to the Congress.

Of course, the Office assumes that employing offices will not withhold their consent.

The commenters also argued that advance notice should be given by the General Counsel to conform to protections recognized in the private sector context. One of the commenters specifically requested that the rules require the General Counsel to first schedule an appointment with an employing office prior to an inspection. Although the commenters argued that such notice is consistent with practice under the OSHAct, advance notice of inspections is the *exception*, not the rule, at OSHA. See 29 C.F.R. §1903.6; OSHAct section 17(f). Moreover, in enacting the CAA, the Congress understood that its incorporation of the rights and protections of the OSHAct included the standard practice and procedure at OSHA that advance notice would not be given. See 142 Cong. R. S 625 (daily ed., Jan. 9, 1995) (section-by-section analysis of the CAA submitted by Senator GRASSLEY) ("[T]he act does not provide that employing offices are to receive notice of the inspections."). Thus, the commenters' argument that advance notice of inspections is required by OSHA regulations and practice, or by the CAA, is not supported by the statute. Indeed, as one of the commenters acknowledged, its proposal requiring advance notice would require a re-writing of the inspection authority of section 8(a) of the OSHAct, applied by section 215, to read that the General Counsel is authorized "upon the notice and consent of the employing office to enter [without delay and] at reasonable times . . ." Adoption of a such a rule, which is plainly at odds with the underlying statute, would be improper.

One of the commenters argued alternatively that proposed section 4.06 be modified to include the provisions of section 1903.6, which authorizes advance notice in certain specified circumstances. The provisions of section 1903.6, with appropriate modifications, will be included as part of the final regulations, since such an enforcement policy is not deemed to add to or alter any substantive provision in the underlying statute.

This commenter also requested that section 4.06 be modified to require the General Counsel to issue a written statement explaining why advance notice was not provided to the employing office. Nothing under the CAA or the OSHAct authorizes or suggests such a requirement, nor would any purpose of the CAA be served. Thus, no such modification will be made.

Finally, section 4.05 (Entry not a waiver) will be modified to specifically refer to section 215 of the CAA, as requested by a commenter.

#### 2. References to recordkeeping requirements (sections 4.02 and 4.07)

Two commenters objected to references in proposed section 4.02 of the regulations to "records required by the CAA and regulations promulgated thereunder," and a similar reference in section 4.07, on the theory that no recordkeeping requirements, even those that are inextricably intertwined with the substantive health and safety standards of Parts 1910 and 1926, 29 C.F.R., may be imposed on employing offices under the CAA. The commenters presented no different arguments than those fully considered and rejected by the Board in promulgating its substantive section 215 regulations. See 142 Cong. R. at S63. Because the Board has adopted substantive health and safety standards which impose limited recordkeeping requirements on employing offices (e.g., rules relating to employee exposure records), such records are subject to review during an inspection. The Executive Director thus has no basis for the proposed deletion.

### 3. Security clearances (section 4.02)

Two commenters suggested that section 4.02 of the proposed regulation be amended to provide that the General Counsel or other person conducting a work site inspection obtain an appropriate security clearance before inspecting areas that contain classified information. The General Counsel reports that he is in the process of obtaining, through the appropriate security division of the United States Capitol Police, security clearances for the General Counsel and the General Counsel's inspection personnel to enable them to have access to such areas, if access is required as part of a section 215 inspection. Section 4.02, and other sections as appropriate, will be amended to state that the General Counsel and/or any inspection personnel will be required to either have or obtain appropriate security clearance, if such clearance is required for access to the workspaces inspected.

### 4. Requests for inspections by employing office (section 4.03)

One commenter noted that, although section 4.03(b) provides that employing office requests for inspections must be reduced to writing on a form provided by the Office, there is no requirement in section 4.03(a) that employee requests be submitted on an Office-provided form. Section 4.03(a) will be modified to provide that employee requests be reduced in writing on an Office-provided form. The commenter has asked that any form developed be submitted for review and comment from employing offices prior to its approval. Since the form is merely an investigative tool of the General Counsel, there is no reason to require that it be "approved" by the Board prior to issuance. Inspection forms and other similar documents relating to the General Counsel's enforcement procedures are available from the General Counsel.

### 5. Scope and nature of inspection (sections 4.03 and 4.08)

One commenter has asked that section 4.03(2) be modified to provide that inspections will be limited to matters included in the notice of violation. Section 4.03(2) is based on virtually identical provisions of the Secretary's regulations, 29 C.F.R. §1903.11. Nothing in section 215 or the provisions of the OSHAct incorporated thereunder would authorize placing a limitation on the General Counsel's inspection authority, as proposed by the commenter.

Similarly, section 8(e) of the OSHAct, 29 U.S.C. §657(e), and proposed section 4.08 provide that a representative of the employer and a representative authorized by the employees shall be given an opportunity to accompany the inspector, and section 4.08 will not be modified to provide that parties be given the opportunity to seek immediate review of the General Counsel's determinations regarding authorized representatives, or to provide specific standards by which the General Counsel may deny the right of accompaniment, or that parties have a "fair" opportunity to accompany the General Counsel's designee during the inspection, as suggested by two commenters. As with the proposed modifications of section 4.03, nothing in section 215, the OSHAct, or the Secretary's rules and practice under the OSHAct, would authorize placing these limitations on the General Counsel's enforcement authorities. On the contrary, such a modification provides parties with a tool for delay, allowing an office to forestall prompt inspection and abatement of hazards while the parties litigate the issue of whether an employing office was denied a "fair" opportunity for accompaniment or whether a representative of employees is an appropriately authorized representative. Nothing in the

OSHAct, as applied by section 215 of the CAA, would sanction such a rule.

### 6. Inspector compliance with health and safety requirements (section 4.07)

Two commenters requested that section 4.07 of the proposed regulations add the provisions of 29 C.F.R. §1903.7(c), which provide that health and safety inspectors take reasonable safety precautions to ensure that their inspection practices are not hazardous and comply with the employer's safety and health rules at the work site. This enforcement policy will be included within the final regulations.

### 7. Consultation with employees (section 4.09)

Section 4.09 tracks the provisions of section 1903.10 of the Secretary's regulations, which provide that inspectors may consult with employees concerning health and safety and other matters deemed necessary for an effective and thorough inspection, and that afford employees an opportunity to bring violations to the attention of the inspectors during the course of an inspection. A commenter has requested that section 4.09 be modified to require specific limits on the time, place, and manner of such consultations, and that employees be required to first put in writing violations that they intend to bring to the attention of inspectors during the course of an inspection. Nothing in section 215 of the CAA or the provisions of the OSHAct incorporated thereunder requires or permits the modifications requested by the commenter.

### 8. Inspection not warranted; informal review (section 4.10)

A commenter requested that proposed section 4.10(a) be revised to state that, after conducting informal conferences to review a decision not to conduct an inspection of a work site, the General Counsel "shall" (rather than "may") affirm, modify or reverse the decision. The final regulations will include the change suggested by the commenter.

A second commenter requested that the final regulations include the provisions of 29 C.F.R. §1903.12(a), which permit parties to make written submissions as part of the informal conference. The final regulations will include these provisions, as suggested by the commenter.

### 9. Citations (section 4.11)

Two commenters requested that section 4.11 of the final regulations include the language of 29 C.F.R. §1903.14(a) that "No citation may be issued under this section after the expiration of six months following the occurrence of any violation." The commenters argued that the proposed regulations "omit this important substantive right" under section 9(c) of the OSHAct. Section 9(c) of the OSHAct is a temporal limitation on the ability of the Secretary to issue a citation and thus is included within the scope of section 215(c). It applies regardless of whether or not a procedural regulation "implements" it. Nevertheless, because the proposed provision simply tracks the clear and unambiguous statutory provision of section 9(c) of the OSHAct and does not purport to create or modify any substantive right, it will be included in section 4.11 of the final regulations.

One commenter requested that section 4.11(a), which authorizes the General Counsel to issue citations or notices even if the employing office immediately abates, or initiates steps to abate the violation, be deleted. However, this provision tracks the language of section 1903.14(a) and is consistent with section 215 of the CAA. Thus, it will not be modified as requested by the commenter.

### 10. *De minimis* violations (sections 4.11 and 4.13)

Two commenters argued that the Executive Director should adopt provisions regard-

ing "*de minimis*" violations, consistent with section 9(a) of the OSHAct and 29 C.F.R. §§1903.14 and 1903.16. Section 9(a) of the OSHAct provides, in relevant part, that "[t]he Secretary may prescribe procedures for the issuance of a notice in lieu of a citation with respect to *de minimis* violations which have no direct or immediate relationship to safety or health." Although OSHA formerly required inspectors to issue citations on *de minimis* violations under this provision, the practice has been abandoned. OSHA Field Inspection Reference Manual ch. III.C.2.g. (1994) ("*De Minimis* violations . . . shall not be included in citations. . . . The employer should be verbally notified of the violation and the [Compliance Safety and Health Officer] should note it in the inspection case file."). Thus, a provision enabling the General Counsel to issue notices for *de minimis* violations is of little practical utility under section 215. However, the text of section 215(c)(2)(A) authorizes the General Counsel to issue a "citation or notice," which reasonably would include a notice of *de minimis* violations. Including such a provision in these regulations is consistent with the CAA, and does not create a substantive requirement. Thus, sections 4.11 and 4.13 will be modified to provide that the General Counsel may issue notices of *de minimis* violations in appropriate cases, as requested by the commenters.

### 11. Failure to correct a violation for which a citation has been issued; notice of failure to correct a violation; complaint (section 4.14)

Section 4.14(a) of the proposed regulations provide that, "if the General Counsel determines" that an employing office has failed to correct timely an alleged violation, he or she "may" issue a notification of such failure before filing a complaint against the office. Two commenters argued that the proposed regulations are contrary to section 215(c)(2)(B) of the CAA because they do not require the General Counsel to issue a notification before filing a complaint. Similarly, these commenters argued that section 5.01 be modified to require the General Counsel to conduct a follow-up inspection as a prerequisite to filing a complaint under section 215. Nothing in section 215(c)(2)(B) requires the General Counsel to issue a notification or to conduct a follow-up inspection prior to filing a complaint. Instead, section 215 grants the General Counsel the authority to file a complaint after issuing "a citation or notification," if the General Counsel determines that a violation has not been corrected. 2 U.S.C. §1341(c)(3).

The section-by-section analysis of the CAA explains the basis for section 215(c)(2)'s language authorizing the General Counsel to issue a citation or a notice. It makes clear that section 215 does not require the General Counsel to issue a notification prior to filing a complaint where an employing office has failed to abate a hazard outlined in the citation: [Under section 215] the general counsel can issue a citation and proceed to file a complaint if the violation remains unabated. Or the general counsel may file a notification after the citation is not complied with, and then file a complaint. The general counsel may not file a notification without having first filed a citation which has not been honored. The choice whether to follow a citation with a complaint once it is evident that there has not been compliance, or to file a notification before the filing of the complaint, will normally turn on whether the general counsel believes that good faith efforts are being undertaken to comply with

the citation, but the time period for complete remediation of the citation period has expired." 141 Cong. R. S621, S625 (daily ed. Jan. 9, 1995) (section-by-section analysis). Therefore, because the commenters' requested change is contrary to the statutory procedure outlined in section 215, it may not be adopted as a procedure of the Office under section 303.

#### 2. Informal conferences (section 4.15)

One commenter requested that section 4.15 be modified to require the General Counsel to allow participation in an informal conference by persons other than the requesting party (complaining employee or employing office). Section 4.15, which states that such participation is "at the discretion of the General Counsel," tracks section 1903.19 of the Secretary's regulations and is consistent with section 215 of the CAA. Thus, it will not be modified as requested by the commenter. However, as requested by the commenter, section 4.15 will be revised to clarify that any settlement entered into between the parties to such a conference shall be subject to the approval of the Executive Director, to conform to section 414 of the CAA.

#### 13. Notice of contest

A commenter argued that the procedural regulations should provide a procedure for filing notices of contest, as outlined in 29 C.F.R. §1903.17 and consistent with section 9(a) of the OSHAct. However, the changes proposed by the commenter would flatly contradict the statutory procedures outlined in section 215. As the Board noted in its rulemaking under section 215, the statutory enforcement scheme under section 215 differs significantly from the comparable statutory provisions of the OSHAct.

The enforcement procedures of the OSHAct are set forth in sections 8, 9, 10, and 11 of the OSHAct, 29 U.S.C. §§657-660. Section 8(a) of the OSHAct authorizes the Secretary's inspectors to conduct reasonable safety and health inspections at places of employment. 29 U.S.C. §657(a). If a violation is discovered, the inspector may issue a citation to the employer under section 9(a) of the OSHAct, specifically describing the violation, fixing a reasonable time for its abatement and, in his or her discretion, proposing a civil monetary penalty. 29 U.S.C. §§658, 659. Section 8(c) permits an employer to notify the Secretary that it intends to contest the citation. 29 U.S.C. §659(c). If the employer does not contest the citation within 15 working days, it becomes a final abatement order and is "not subject to review by any court or agency." 29 U.S.C. §659(b). Section 10(c) of the OSHAct also gives an employee or representative of employees a right to contest the period of time fixed in the citation for abatement of the violation. In either event, the Occupational Safety and Health Review Commission must afford the employer and/or the employee "an opportunity for a hearing." 29 U.S.C. §659(c). Section 10(c) also requires the Commission to provide affected employees or their representatives "an opportunity to participate as parties to hearings under this subsection." *Id.*

Rather than either incorporating by reference the statutory enforcement procedures of the OSHAct described above or adopting them in *haec verba* in section 215, the CAA provides a detailed statutory enforcement scheme which departs from the OSHAct in several significant respects. Section 215(c) makes reference to sections 8(a), 8(d), 8(e), 8(f), 9, and 10 of the OSHAct, but only to the extent of granting the General Counsel the "authorities of the Secretary" contained in those sections to "inspect and investigate places of employment" and to "issue a citation or notice . . . or a notification" to employing offices. Section 215(c)(1), (2). Other

portions of sections 8, 9, and 10 of the OSHAct that do not relate to the Secretary's authority to conduct inspections or to issue citations or notices are not incorporated into sections 215(c). Instead, section 215(c) provides a detailed procedure regarding inspections and citations which, although modeled on sections 8, 9, and 10 of the OSHAct, differs in several significant respects from the OSHAct enforcement scheme.

For example, under section 10 of the OSHAct, the employer must initiate a contest within 15 days of receipt to prevent the citation from becoming final; under section 215(c), the General Counsel must initiate a complaint to obtain a final order against an employing office that fails or refuses to abate a hazard outlined in the citation. Section 10(c) of the OSHAct gives employees and representatives of employees a right to participate as parties before the Occupational Safety and Health Appeals Review Board; section 215(c)(5) does not provide such party participation rights to employees and suggests that only the General Counsel and the employing office may participate in any review of decisions issued under section 215.

Section 215(c) of the CAA outlines the specific procedures regarding variances, citations, notifications and hearings under section 215. Any procedural regulations adopted by the Executive Director under section 303 of the CAA cannot conflict with these statutorily-mandated procedures. See *United States v. Fausto*, 108 S.Ct. 668, 677 (1988) (the provision of detailed review procedures provides strong evidence that Congress intended such procedures to be exclusive); *Block v. Community Nutrition Institute*, 467 U.S. 340, 345-48 (1984) (omission of review procedures for consumers affected by milk market orders, coupled with the provision of such procedures for milk handlers so affected, was strong evidence that Congress intended to preclude consumers from obtaining judicial review); *Whitney Nat. Bank v. Bank of New Orleans & Tr. Co.*, 85 S.Ct. 551, 557 (1965) (where Congress has provided statutory review procedures, such procedures are to be exclusive).

Given the fact that section 215(c) sets forth a detailed enforcement procedure which is significantly different than the procedures of the OSHAct, it is reasonable to conclude that Congress did not intend the Board to presume that the regulations regarding such procedures would be "the same" as the Secretary's procedures, as they generally must be if they fall within the Board's substantive rulemaking authority under section 215(d)(2). See *Lorillard v. Pons*, 434 U.S. 575 (1978) (manner in which Congress employed incorporation by reference evidenced an intent on the part of Congress to assimilate the remedies and procedures of the FLSA into the ADEA, except in those cases where, in the ADEA itself, Congress made plain its decision to follow a different course than that provided for in the FLSA). Thus, the commenters' interpretation is not supported by section 215.

Here, there is no statutory authority for the filing and determination of notices of contest by employing offices. The only way in which a safety and health issue can be presented to a hearing officer is in connection with a complaint filed by the General Counsel. These procedural regulations cannot be used to engraft provisions not provided for in the statute and, more importantly, which conflict with the procedures expressly set forth therein. For the same reasons, there is no statutory basis upon which to create a procedure allowing an employing office to petition for modification of abatement dates (29 C.F.R. §1903.14a), as requested by this commenter.

#### 14. Trade secrets

A commenter requested that the regulations include the provisions of section 1903.7, 29 C.F.R., relating to protection of trade secrets information. Section 1903.7 implements section 15 of the OSHAct, which provides that information obtained by the Secretary in connection with any inspection or proceeding under the OSHAct "which might reveal a trade secret referred to in section 1905 of title 18 of the United States Code" shall be considered confidential. It is not clear that section 15 of the OSHAct applies to proceedings under section 215 of the CAA. However, the current procedural rules attempt to protect privileged or otherwise confidential information from disclosure in CAA proceedings. If any employing office possessed information that constituted a "trade secret" within the meaning of section 15, the Office's procedures recognize that confidential or privileged materials or other information should be protected from disclosure in appropriate circumstances. See section 6.01 (c)(3) and (d) of the Procedural Rules (authorizing hearing officers to issue any order to prevent discovery or disclosure of confidential or privileged materials or information, and dealing with claims of privilege). If employing offices maintain information that would constitute "trade secrets" within the meaning of section 15 of the OSHAct, protection against disclosure of such information should be extended to inspections and other information gathering under section 215. Accordingly, the final rules will include, with appropriate modification, the provisions of section 1903.7 as section 4.07(g).

#### D. Variances

##### 1. Publication of variance determinations and notices (sections 4.23, 4.25, 4.26, and 4.28)

Two commenters requested that sections 4.23, 4.25, 4.26, and 4.28 specify the manner in which the Board's final determinations and other notices will be made public, either by publication in the CONGRESSIONAL RECORD or its equivalent. The regulations will be amended to provide that the Board shall transmit a copy of the final decision to the Speaker of the House and President pro tempore of the Senate with a request that the order be published in the CONGRESSIONAL RECORD. Since the CAA does not require publication of such orders in the CONGRESSIONAL RECORD, the decision to publish in the CONGRESSIONAL RECORD is solely within the discretion of Congress.

##### Hearings (sections 4.25 and 4.26)

Two commenters have suggested that the provisions regarding referral of matters appropriate for hearing to hearing officers in sections 4.25 and 4.26 of the proposed regulations be revised to replace "may" with "shall" to conform to the language of section 215. They further suggest that the references in section 4.25 and 4.26 requiring applicants to include a request for a hearing be deleted as unnecessary. After considering these comments and the statutory language, the regulations will be amended to provide for referral to hearing officers.

#### E. Enforcement policy regarding employee rescue activities

Two commenters argued that the regulations should include the provisions of subsection (f) of 29 C.F.R. §1903.14, which provides that, with certain exceptions, no citations may be issued to an employer because of rescue activity undertaken by an employee. However, this provision was adopted by the Secretary as "a general statement of agency policy" and is "an exercise of OSHA's prosecutorial discretion in carrying out its enforcement responsibilities" under the OSHAct. See "Policy on Employee Rescue Efforts," 59 Fed. Reg. 66612 (Dec. 27, 1994)

(amending 29 C.F.R. pt. 1903 to add section 1903.7; noting that rule is effective immediately upon publication because "the rescue policy simply states OSHA's enforcement policy" regarding citations involving employee rescue activities). Because it is an enforcement policy, the Secretary reserves the right to modify it "in specific circumstances where the Secretary or his designee determines that an alternative course of action would better serve the objectives of the Act." 29 C.F.R. §1903.1. The General Counsel has stated his intention to follow, where not inconsistent with the CAA, the enforcement policies of the Secretary, which would include the policy on employee rescue activities. Thus, this policy will be expressly stated as part of the final procedural regulations at section 4.11(f), as requested by the commenters. However, so that such policies are consistent with the Secretary's part 1903 regulations, the final regulations will add the proviso of section 1903.1, 29 C.F.R., that, to the extent statements in these regulations at section 4.01 set forth general enforcement policies they may be modified in specific circumstances by the General Counsel on the same terms as similar enforcement policies of the Secretary.

*F. Regulations governing inspections, citations, and notices in the case of Member retirement, defeat, and office moves*

A commenter has requested regulations that would specify the employing office to whom the General Counsel should issue citations and notices in cases where circumstances have changed since the time of the alleged violation, such as when a Member dies, retires, or is not reelected, or when an employing office moves from one office to another. After considering the matter, the Executive Director has determined that it would be inappropriate to issue procedural rules governing these issues. The hypothetical situations posited by the commenter are better addressed by the General Counsel and ultimately, the Board, in the context of actual cases. When and if the situations hypothesized by the commenter occur, the General Counsel and the Board are better positioned to make determinations based on the facts presented. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294-95 (1974) (use of adjudication rather than rulemaking within agency discretion).

*G. Technical and nomenclature changes*

Commenters have suggested a number of technical and nomenclature corrections in the language of the proposed regulations. The Executive Director has considered all of these suggestions and, as appropriate, has adopted them.

*H. Additional comments*

One of the commenters requested that the Executive Director review several proposed changes in procedural rules suggested by commenters in response to the earlier July 11, 1996 Notice of Proposed Rulemaking and either promulgate regulations to address these issues or supply a written response as to why such regulations are not necessary. These suggestions included: (1) changes in the special procedures for the Architect of the Capitol and Capitol Police; (2) a rule allowing parties to negotiate changes to the Agreement to Mediate; (3) a procedure by which the parties, instead of the Executive Director, would select Hearing Officers; (4) procedures by which the Office would notify employing offices of various matters; (5) additional requirements for the filing of a complaint; (6) changes in counseling procedures; and (7) a procedure which would allow parties to petition for the recusal of individual Board members.

As stated in the preamble of the Notice of Adoption of Amendments to Procedural

Rules, such comments and suggestions were not the subject of or germane to the proposals made in that rulemaking. 142 Cong. R. H10672, H10674 and S10980, S10981 (daily ed., Sept. 19, 1996). Nor are they here. The Notice of this rulemaking clearly stated that the proposed revisions and additions to the procedural rules were intended to provide for the implementation of Parts B and C of title II of the CAA, which were generally effective on January 1, 1997, and to establish procedures for consideration of matters arising under those parts.

As stated in the September 19, 1996 Notice of Adoption of Amendments, the Office, like most agencies, reviews its policies and procedures on an ongoing basis. Where its experience suggests that additional or amended procedures are needed, it will modify its policies and propose amendments to its procedures, to the extent appropriate under the CAA.

Signed at Washington, D.C. on this 18th day of April, 1997.

RICKY SILBERMAN,  
Executive Director,  
Office of Compliance.

*IV. Text of adopted amendments to procedural rules.*

*§1.01 Scope and Policy*

These rules of the Office of Compliance govern the procedures for consideration and resolution of alleged violations of the laws made applicable under Parts A, B, C, and D of title II of the Congressional Accountability Act of 1995. The rules include procedures for counseling, mediation, and for electing between filing a complaint with the Office of Compliance and filing a civil action in a district court of the United States. The rules also address the procedures for variances and compliance, investigation and enforcement under Part C of title II and procedures for the conduct of hearings held as a result of the filing of a complaint and for appeals to the Board of Directors of the Office of Compliance from Hearing Officer decisions, as well as other matters of general applicability to the dispute resolution process and to the operations of the Office of Compliance. It is the policy of the Office that these rules shall be applied with due regard to the rights of all parties and in a manner that expedites the resolution of disputes.

*§1.02(i)*

(i) *Party.* The term "party" means: (1) an employee or employing office in a proceeding under Part A of title II of the Act; (2) a charging individual, an entity alleged to be responsible for correcting a violation, or the General Counsel in a proceeding under Part B of title II of the Act; (3) an employee, employing office, or as appropriate, the General Counsel in a proceeding under Part C of title II of the Act; or (4) a labor organization, individual employing office or employing activity, or, as appropriate, the General Counsel in a proceeding under Part D of title II of the Act.

*§1.03(a)(3)*

(3) *Faxing documents.* Documents transmitted by FAX machine will be deemed filed on the date received at the Office at 202-426-1913, or, in the case of any document to be filed or submitted to the General Counsel, on the date received at the Office of the General Counsel at 202-426-1663. A FAX filing will be timely only if the document is received no later than 5:00 PM Eastern Time on the last day of the applicable filing period. Any party using a FAX machine to file a document bears the responsibility for ensuring both that the document is timely and accurately transmitted and confirming that the Office has received a facsimile of the document. The party or individual filing the document

may rely on its FAX status report sheet to show that it filed the document in a timely manner, provided that the status report indicates the date of the FAX, the receiver's FAX number, the number of pages included in the FAX, and that transmission was completed.

*§1.04(d)*

(d) *Final decisions.* Pursuant to section 416(f) of the Act, a final decision entered by a Hearing Officer or by the Board under section 405(g) or 406(e) of the Act, which is in favor of the complaining covered employee, or in favor of the charging party under section 210 of the Act, or reverses a Hearing Officer's decision in favor of a complaining covered employee or charging party, shall be made public, except as otherwise ordered by the Board. The Board may make public any other decision at its discretion.

*§1.05(a)*

(a) An employee, other charging individual or party, a witness, a labor organization, an employing office, or an entity alleged to be responsible for correcting a violation wishing to be represented by another individual must file with the Office a written notice of designation of representative. The representative may be, but is not required to be, an attorney.

*§1.07(a)*

(a) *In General.* Section 416(a) of the CAA provides that counseling under section 402 shall be strictly confidential, except that the Office and a covered employee may agree to notify the employing office of the allegations. Section 416(b) provides that all mediation shall be strictly confidential. Section 416(c) provides that all proceedings and deliberations of hearing officers and the Board, including any related records shall be confidential, except for release of records necessary for judicial actions, access by certain committees of Congress, and, in accordance with section 416(f), publication of certain final decisions. Section 416(c) does not apply to proceedings under section 215 of the Act, but does apply to the deliberations of hearing officers and the Board under section 215. See also sections 1.06, 5.04 and 7.12 of these rules.

Subpart D—Compliance, Investigation, Enforcement and Variance Procedures Under Section 215 of the CAA (Occupational Safety and Health Act of 1970)

*Inspections, Citations, and Complaints*

Sec.

- 4.01 Purpose and scope
  - 4.02 Authority for inspection
  - 4.03 Request for inspections by employees and employing offices
  - 4.04 Objection to inspection
  - 4.05 Entry not a waiver
  - 4.06 Advance notice of inspection
  - 4.07 Conduct of inspections
  - 4.08 Representatives of employing offices and employees
  - 4.09 Consultation with employees
  - 4.10 Inspection not warranted; informal review
  - 4.11 Citations
  - 4.12 Imminent danger
  - 4.13 Posting of citations
  - 4.14 Failure to correct a violation for which a citation has been issued; notice of failure to correct violation; complaint
  - 4.15 Informal conferences
- Rules of Practice for Variances, Limitations, Variations, Tolerances, and Exemptions*
- 4.20 Purpose and scope
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- 4.25 Applications for temporary variances and other relief
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- 4.28 Action on applications
- 4.29 Consolidation of proceedings
- 4.30 Consent findings and rules or orders
- 4.31 Order of proceedings and burden of proof

*Inspections, Citations and Complaints*

*§ 4.01 Purpose and scope*

The purpose of sections 4.01 through 4.15 of this subpart is to prescribe rules and procedures for enforcement of the inspection and citation provisions of section 215(c)(1) through (3) of the CAA. For the purpose of sections 4.01 through 4.15, references to the "General Counsel" include any authorized representative of the General Counsel. In situations where sections 4.01 through 4.15 set forth general enforcement policies rather than substantive or procedural rules, such policies may be modified in specific circumstances where the General Counsel or the General Counsel's designee determines that an alternative course of action would better serve the objectives of section 215 of the CAA.

*§ 4.02 Authority for Inspection*

(a) Under section 215(c)(1) of the CAA, upon written request of any employing office or covered employee, the General Counsel is authorized to enter without delay and at reasonable times any place of employment under the jurisdiction of an employing office; to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner, any such place of employment, and all pertinent conditions, structures, machines, apparatus, devices, equipment and materials therein; to question privately any employing office, operator, agent or employee; and to review records required by the CAA and regulations promulgated thereunder, and other records which are directly related to the purpose of the inspection.

(b) Prior to inspecting areas containing information which is classified by an agency of the United States Government (and/or by any congressional committee or other authorized entity within the Legislative Branch) in the interest of national security, and for which security clearance is required as a condition for access to the area(s) to be inspected, the individual(s) conducting the inspection shall have obtained the appropriate security clearance.

*§ 4.03 Requests for inspections by employees and covered employing offices*

*(a) By covered employees and representatives.*

(1) Any covered employee or representative of covered employees who believes that a violation of section 215 of the CAA exists in any place of employment under the jurisdiction of employing offices may request an inspection of such place of employment by giving notice of the alleged violation to the General Counsel. Any such notice shall be reduced to writing on a form available from the Office, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employee or the representative of the employees. A copy shall be provided to the employing office or its agent by the General Counsel or the General Counsel's designee no later than at the time of inspection, except that, upon the written request of the person giving such notice, his or her name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available by the General Counsel.

(2) If upon receipt of such notification the General Counsel's designee determines that

the notice meets the requirements set forth in subparagraph (1) of this section, and that there are reasonable grounds to believe that the alleged violation exists, he or she shall cause an inspection to be made as soon as practicable, to determine if such alleged violation exists. Inspections under this section shall not be limited to matters referred to in the notice.

(3) Prior to or during any inspection of a place of employment, any covered employee or representative of employees may notify the General Counsel's designee, in writing, of any violation of section 215 of the CAA which he or she has reason to believe exists in such place of employment. Any such notice shall comply with the requirements of subparagraph (1) of this section.

(b) *By employing offices.* Upon written request of any employing office, the General Counsel or the General Counsel's designee shall inspect and investigate places of employment under the jurisdiction of employing offices under section 215(c)(1) of the CAA. Any such requests shall be reduced to writing on a form available from the Office.

*§ 4.04 Objection to inspection*

Upon a refusal to permit the General Counsel's designee, in exercise of his or her official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employing office, operator, agent, or employee, in accordance with section 4.02 or to permit a representative of employees to accompany the General Counsel's designee during the physical inspection of any workplace in accordance with section 4.07, the General Counsel's designee shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The General Counsel's designee shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to the General Counsel, who shall take appropriate action.

*§ 4.05 Entry not a waiver*

Any permission to enter, inspect, review records, or question any person, shall not imply or be conditioned upon a waiver of any cause of action or citation under section 215 of the CAA.

*§ 4.06 Advance notice of inspections*

(a) Advance notice of inspections may not be given, except in the following situations: (1) in cases of apparent imminent danger, to enable the employing office to abate the danger as quickly as possible; (2) in circumstances where the inspection can most effectively be conducted after regular business hours or where special preparations are necessary for an inspection; (3) where necessary to assure the presence of representatives of the employing office and employees or the appropriate personnel needed to aid in the inspection; and (4) in other circumstances where the General Counsel determines that the giving of advance notice would enhance the probability of an effective and thorough inspection.

(b) In the situations described in paragraph (a) of this section, advance notice of inspections may be given only if authorized by the General Counsel, except that in cases of apparent imminent danger, advance notice may be given by the General Counsel's designee without such authorization if the General Counsel is not immediately available. When advance notice is given, it shall be the employing office's responsibility promptly to notify the authorized representative of employees, if the identity of such representative is known to the employing office. (See

section 4.08(b) as to situations where there is no authorized representative of employees.) Upon the request of the employing office, the General Counsel will inform the authorized representative of employees of the inspection, provided that the employing office furnishes the General Counsel's designee with the identity of such representative and with such other information as is necessary to enable him promptly to inform such representative of the inspection. Advance notice in any of the situations described in paragraph (a) of this section shall not be given more than 24 hours before the inspection is scheduled to be conducted, except in apparent imminent danger situations and in other unusual circumstances.

*§ 4.07 Conduct of inspections*

(a) Subject to the provisions of section 4.02, inspections shall take place at such times and in such places of employment as the General Counsel may direct. At the beginning of an inspection, the General Counsel's designee shall present his or her credentials to the operator of the facility or the management employee in charge at the place of employment to be inspected; explain the nature and purpose of the inspection; and indicate generally the scope of the inspection and the records specified in section 4.02 which he or she wishes to review. However, such designation of records shall not preclude access to additional records specified in section 4.02.

(b) The General Counsel's designee shall have authority to take environmental samples and to take or obtain photographs related to the purpose of the inspection, employ other reasonable investigative techniques, and question privately, any employing office, operator, agent or employee of a covered facility. As used herein, the term "employ other reasonable investigative techniques" includes, but is not limited to, the use of devices to measure employee exposures and the attachment of personal sampling equipment such as dosimeters, pumps, badges and other similar devices to employees in order to monitor their exposures.

(c) In taking photographs and samples, the General Counsel's designees shall take reasonable precautions to insure that such actions with flash, spark-producing, or other equipment would not be hazardous. The General Counsel's designees shall comply with all employing office safety and health rules and practices at the workplace or location being inspected, and they shall wear and use appropriate protective clothing and equipment.

(d) The conduct of inspections shall be such as to preclude unreasonable disruption of the operations of the employing office.

(e) At the conclusion of an inspection, the General Counsel's designee shall confer with the employing office or its representative and informally advise it of any apparent safety or health violations disclosed by the inspection. During such conference, the employing office shall be afforded an opportunity to bring to the attention of the General Counsel's designee any pertinent information regarding conditions in the workplace.

(f) Inspections shall be conducted in accordance with the requirements of this subpart.

*(g) Trade Secrets.*

(1) At the commencement of an inspection, the employing office may identify areas in the establishment which contain or which might reveal a trade secret as referred to in section 15 of the OSHA Act and section 1905 of title 18 of the United States Code. If the General Counsel's designee has no clear reason to question such identification, information contained in such areas, including all negatives and prints of photographs, and environmental samples, shall be labeled "confidential—trade secret" and shall not be disclosed

by the General Counsel and/or his designees, except that such information may be disclosed to other officers or employees concerned with carrying out section 215 of the CAA or when relevant in any proceeding under section 215. In any such proceeding the hearing officer or the Board shall issue such orders as may be appropriate to protect the confidentiality of trade secrets.

(2) Upon the request of an employing office, any authorized representative of employees under section 4.08 in an area containing trade secrets shall be an employee in that area or an employee authorized by the employing office to enter that area. Where there is no such representative or employee, the General Counsel's designee shall consult with a reasonable number of employees who work in that area concerning matters of safety and health.

#### *§4.08 Representatives of employing offices and employees*

(a) The General Counsel's designee shall be in charge of inspections and questioning of persons. A representative of the employing office and a representative authorized by its employees shall be given an opportunity to accompany the General Counsel's designee during the physical inspection of any workplace for the purpose of aiding such inspection. The General Counsel's designee may permit additional employing office representatives and additional representatives authorized by employees to accompany the designee where he or she determines that such additional representatives will further aid the inspection. A different employing office and employee representative may accompany the General Counsel's designee during each different phase of an inspection if this will not interfere with the conduct of the inspection.

(b) The General Counsel's designee shall have authority to resolve all disputes as to who is the representative authorized by the employing office and employees for the purpose of this section. If there is no authorized representative of employees, or if the General Counsel's designee is unable to determine with reasonable certainty who is such representative, he or she shall consult with a reasonable number of employees concerning matters of safety and health in the workplace.

(c) The representative(s) authorized by employees shall be an employee(s) of the employing office. However, if in the judgment of the General Counsel's designee, good cause has been shown why accompaniment by a third party who is not an employee of the employing office (such as an industrial hygienist or a safety engineer) is reasonably necessary to the conduct of an effective and thorough physical inspection of the workplace, such third party may accompany the General Counsel's designee during the inspection.

(d) The General Counsel's designee may deny the right of accompaniment under this section to any person whose conduct interferes with a fair and orderly inspection. With regard to information classified by an agency of the U.S. Government (and/or by any congressional committee or other authorized entity within the Legislative Branch) in the interest of national security, only persons authorized to have access to such information may accompany the General Counsel's designee in areas containing such information.

#### *§4.09 Consultation with employees*

The General Counsel's designee may consult with employees concerning matters of occupational safety and health to the extent he or she deems necessary for the conduct of an effective and thorough inspection. During the course of an inspection, any employee

shall be afforded an opportunity to bring any violation of section 215 of the CAA which he or she has reason to believe exists in the workplace to the attention of the General Counsel's designee.

#### *§4.10 Inspection not warranted; informal review*

(a) If the General Counsel's designee determines that an inspection is not warranted because there are no reasonable grounds to believe that a violation or danger exists with respect to a notice of violation under section 4.03(a), he or she shall notify the party giving the notice in writing of such determination. The complaining party may obtain review of such determination by submitting a written statement of position with the General Counsel and, at the same time, providing the employing office with a copy of such statement by certified mail. The employing office may submit an opposing written statement of position with the General Counsel and, at the same time, providing the complaining party with a copy of such statement by certified mail. Upon the request of the complaining party or the employing office, the General Counsel, at his or her discretion, may hold an informal conference in which the complaining party and the employing office may orally present their views. After considering all written and oral views presented, the General Counsel shall affirm, modify, or reverse the designee's determination and furnish the complaining party and the employing office with written notification of this decision and the reasons therefor. The decision of the General Counsel shall be final and not reviewable.

(b) If the General Counsel's designee determines that an inspection is not warranted because the requirements of section 4.03(a)(1) have not been met, he or she shall notify the complaining party in writing of such determination. Such determination shall be without prejudice to the filing of a new notice of alleged violation meeting the requirements of section 4.03(a)(1).

#### *§4.11 Citations*

(a) If, on the basis of the inspection, the General Counsel believes that a violation of any requirement of section 215 of the CAA, or of any standard, rule or order promulgated pursuant to section 215 of the CAA, has occurred, he or she shall issue a citation to the employing office responsible for correction of the violation, as determined under section 1.106 of the Board's regulations implementing section 215 of the CAA, either a citation or a notice of de minimis violations that have no direct or immediate relationship to safety or health. An appropriate citation or notice of de minimis violations shall be issued even though after being informed of an alleged violation by the General Counsel, the employing office immediately abates, or initiates steps to abate, such alleged violation. Any citation shall be issued with reasonable promptness after termination of the inspection. No citation may be issued under this section after the expiration of 6 months following the occurrence of any alleged violation.

(b) Any citation shall describe with particularity the nature of the alleged violation, including a reference to the provision(s) of the CAA, standard, rule, regulation, or order alleged to have been violated. Any citation shall also fix a reasonable time or times for the abatement of the alleged violation.

(c) If a citation or notice of de minimis violations is issued for a violation alleged in a request for inspection under section 4.03(a)(1), or a notification of violation under section 4.03(a)(3), a copy of the citation or notice of de minimis violations shall also be sent to the employee or representative of employees who made such request or notification.

(d) After an inspection, if the General Counsel determines that a citation is not warranted with respect to a danger or violation alleged to exist in a request for inspection under section 4.03(a)(1) or a notification of violation under section 4.03(a)(3), the informal review procedures prescribed in 4.15 shall be applicable. After considering all views presented, the General Counsel shall affirm the previous determination, order a reinspection, or issue a citation if he or she believes that the inspection disclosed a violation. The General Counsel shall furnish the party that submitted the notice and the employing office with written notification of the determination and the reasons therefor. The determination of the General Counsel shall be final and not reviewable.

(e) Every citation shall state that the issuance of a citation does not constitute a finding that a violation of section 215 has occurred.

(f) No citation may be issued to an employing office because of a rescue activity undertaken by an employee of that employing office with respect to an individual in imminent danger unless:

(1)(i) Such employee is designated or assigned by the employing office to have responsibility to perform or assist in rescue operations, and

(ii) The employing office fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

(2)(i) Such employee is directed by the employing office to perform rescue activities in the course of carrying out the employee's job duties, and

(ii) The employing office fails to provide protection of the safety and health of such employee, including failing to provide appropriate training and rescue equipment; or

(3)(i) Such employee is employed in a workplace that requires the employee to carry out duties that are directly related to a workplace operation where the likelihood of life-threatening accidents is foreseeable, such as a workplace operation where employees are located in confined spaces or trenches, handle hazardous waste, respond to emergency situations, perform excavations, or perform construction over water; and

(ii) Such employee has not been designated or assigned to perform or assist in rescue operations and voluntarily elects to rescue such an individual; and

(iii) The employing office has failed to instruct employees not designated or assigned to perform or assist in rescue operations of the arrangements for rescue, not to attempt rescue, and of the hazards of attempting rescue without adequate training or equipment.

(4) For the purpose of this policy, the term "imminent danger" means the existence of any condition or practice that could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

#### *§4.12 Imminent danger*

(a) Whenever and as soon as a designee of the General Counsel concludes on the basis of an inspection that conditions or practices exist in any place of employment which could reasonably be expected to cause death or serious physical harm immediately or before the imminence of such danger can be eliminated through the enforcement procedures otherwise provided for by section 215(c), he or she shall inform the affected employees and employing offices of the danger and that he or she is recommending the filing of a petition to restrain such conditions or practices and for other appropriate relief in accordance with section 13(a) of the OSHAct, as applied by section 215(b) of the CAA. Appropriate citations may be issued

with respect to an imminent danger even though, after being informed of such danger by the General Counsel's designee, the employing office immediately eliminates the imminence of the danger and initiates steps to abate such danger.

#### *§ 4.13 Posting of citations*

(a) Upon receipt of any citation under section 215 of the CAA, the employing office shall immediately post such citation, or a copy thereof, unedited, at or near each place an alleged violation referred to in the citation occurred, except as provided below. Where, because of the nature of the employing office's operations, it is not practicable to post the citation at or near each place of alleged violation, such citation shall be posted, unedited, in a prominent place where it will be readily observable by all affected employees. For example, where employing offices are engaged in activities which are physically dispersed, the citation may be posted at the location to which employees report each day. Where employees do not primarily work at or report to a single location, the citation may be posted at the location from which the employees operate to carry out their activities. The employing office shall take steps to ensure that the citation is not altered, defaced, or covered by other material. Notices of de minimis violations need not be posted.

(b) Each citation, or a copy thereof, shall remain posted until the violation has been abated, or for 3 working days, whichever is later. The pendency of any proceedings regarding the citation shall not affect its posting responsibility under this section unless and until the Board issues a final order vacating the citation.

(c) An employing office to whom a citation has been issued may post a notice in the same location where such citation is posted indicating that the citation is being contested before the Board, and such notice may explain the reasons for such contest. The employing office may also indicate that specified steps have been taken to abate the violation.

#### *§ 4.14 Failure to correct a violation for which a citation has been issued; notice of failure to correct violation; complaint*

(a) If the General Counsel determines that an employing office has failed to correct an alleged violation for which a citation has been issued within the period permitted for its correction, he or she may issue a notification to the employing office of such failure prior to filing a complaint against the employing office under section 215(c)(3) of the CAA. Such notification shall fix a reasonable time or times for abatement of the alleged violation for which the citation was issued and shall be posted in accordance with section 4.13 of these rules. Nothing in these rules shall require the General Counsel to issue such a notification as a prerequisite to filing a complaint under section 215(c)(3) of the CAA.

(b) If after issuing a citation or notification, the General Counsel believes that a violation has not been corrected, the General Counsel may file a complaint with the Office against the employing office named in the citation or notification pursuant to section 215(c)(3) of the CAA. The complaint shall be submitted to a hearing officer for decision pursuant to subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406. The procedures of sections 7.01 through 7.16 of these rules govern complaint proceedings under this section.

#### *§ 4.15 Informal conferences*

At the request of an affected employing office, employee, or representative of employ-

ees, the General Counsel may hold an informal conference for the purpose of discussing any issues raised by an inspection, citation, or notice issued by the General Counsel. Any settlement entered into by the parties at such conference shall be subject to the approval of the Executive Director under section 414 of the CAA and section 9.05 of these rules. If the conference is requested by the employing office, an affected employee or the employee's representative shall be afforded an opportunity to participate, at the discretion of the General Counsel. If the conference is requested by an employee or representative of employees, the employing office shall be afforded an opportunity to participate, at the discretion of the General Counsel. Any party may be represented by counsel at such conference.

#### **RULES OF PRACTICE FOR VARIANCES, LIMITATIONS, VARIATIONS, TOLERANCES, AND EXEMPTIONS**

#### *§ 4.20 Purpose and scope*

Sections 4.20 through 4.31 contain rules of practice for administrative proceedings to grant variances and other relief under sections 6(b)(6)(A) and 6(d) of the Williams-Steiger Occupational Safety and Health Act of 1970, as applied by section 215(c)(4) of the CAA.

#### *§ 4.21 Definitions*

As used in sections 4.20 through 4.31, unless the context clearly requires otherwise—

(a) *OSHA Act* means the Williams-Steiger Occupational Safety and Health Act of 1970, as applied to covered employees and employing offices under section 215 of the CAA.

(b) *Party* means a person admitted to participate in a hearing conducted in accordance with this subpart. An applicant for relief and any affected employee shall be entitled to be named parties. The General Counsel shall be deemed a party without the necessity of being named.

(c) *Affected employee* means an employee who would be affected by the grant or denial of a variance, limitation, variation, tolerance, or exemption, or any one of the employee's authorized representatives, such as the employee's collective bargaining agent.

#### *§ 4.22 Effect of variances*

All variances granted pursuant to this part shall have only future effect. In its discretion, the Board may decline to entertain an application for a variance on a subject or issue concerning which a citation has been issued to the employing office involved and a proceeding on the citation or a related issue concerning a proposed period of abatement is pending before the General Counsel, a hearing officer, or the Board until the completion of such proceeding.

#### *§ 4.23 Public notice of a granted variance, limitation, variation, tolerance, or exemption*

The Board will transmit every final action granting a variance, limitation, variation, tolerance, or exemption under this part to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that such final action be published in the Congressional record. Every such final action shall specify the alternative to the standard involved which the particular variance permits.

#### *§ 4.24 Form of documents*

(a) Any applications for variances and other papers which are filed in proceedings under sections 4.20 through 4.31 of these rules shall be written or typed. All applications for variances and other papers filed in variance proceedings shall be signed by the applying employing office, by its attorney or other authorized representative, and shall contain the information required by sections 4.25 or 4.26 of these rules, as applicable.

#### *§ 4.25 Applications for temporary variances and other relief*

(a) *Application for variance.* Any employing office, or class of employing offices, desiring a variance from a standard, or portion thereof, authorized by section 6(b)(6)(A) of the OSHA Act, as applied by section 215 of the CAA, may file a written application containing the information specified in paragraph (b) of this section with the Board. Pursuant to section 215(c)(4) of the CAA, the Board shall refer any matter appropriate for hearing to a hearing officer under subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406. The procedures set forth at sections 7.01 through 7.16 of these rules shall govern hearings under this subpart.

(b) *Contents.* An application filed pursuant to paragraph (a) of this section shall include:

- (1) The name and address of the applicant;
- (2) The address of the place or places of employment involved;
- (3) A specification of the standard or portion thereof from which the applicant seeks a variance;
- (4) A representation by the applicant, supported by representations from qualified persons having first-hand knowledge of the facts represented, that the applicant is unable to comply with the standard or portion thereof by its effective date and a detailed statement of the reasons therefor;

(5) A statement of the steps the applicant has taken and will take, with specific dates where appropriate, to protect employees against the hazard covered by the standard;

(6) A statement of when the applicant expects to be able to comply with the standard and of what steps the applicant has taken and will take, with specific dates where appropriate, to come into compliance with the standard;

(7) A statement of the facts the applicant would show to establish that (i) the applicant is unable to comply with a standard by its effective date because of unavailability of professional or technical personnel or of materials and equipment needed to come into compliance with the standard or because necessary construction or alteration of facilities cannot be completed by the effective date; (ii) the applicant is taking all available steps to safeguard its employees against the hazards covered by the standard; and (iii) the applicant has an effective program for coming into compliance with the standard as quickly as practicable;

(8) A statement that the applicant has informed its affected employees of the application by giving a copy thereof to their authorized representative, posting a statement, giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted, and by other appropriate means; and

(9) A description of how affected employees have been informed of the application and of their right to petition the Board for a hearing.

(c) *Interim order*—(1) *Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The hearing officer to whom the Board has referred the application may rule ex parte upon the application.

(2) *Notice of denial of application.* If an application filed pursuant to paragraph (c)(1) of this section is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the grant of an interim order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties and the terms of the order shall be transmitted by the Board to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record. It shall be a condition of the order that the affected employing office shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

**§ 4.26 Applications for permanent variances and other relief**

(a) *Application for variance.* Any employing office, or class of employing offices, desiring a variance authorized by section 6(d) of the OSHAct, as applied by section 215 of the CAA, may file a written application containing the information specified in paragraph (b) of this section, with the Board. Pursuant to section 215(c)(4) of the CAA, the Board shall refer any matter appropriate for hearing to a hearing officer under subsections (b) through (h) of section 405, subject to review by the Board pursuant to section 406.

(b) *Contents.* An application filed pursuant to paragraph (a) of this section shall include:

(1) The name and address of the applicant;  
 (2) The address of the place or places of employment involved;  
 (3) A description of the conditions, practices, means, methods, operations, or processes used or proposed to be used by the applicant;

(4) A statement showing how the conditions, practices, means, methods, operations, or processes used or proposed to be used would provide employment and places of employment to employees which are as safe and healthful as those required by the standard from which a variance is sought;

(5) A certification that the applicant has informed its employees of the application by (i) giving a copy thereof to their authorized representative; (ii) posting a statement giving a summary of the application and specifying where a copy may be examined, at the place or places where notices to employees are normally posted (or in lieu of such summary, the posting of the application itself); and (iii) by other appropriate means; and

(6) A description of how employees have been informed of the application and of their right to petition the Board for a hearing.

(c) *Interim order—(1) Application.* An application may also be made for an interim order to be effective until a decision is rendered on the application for the variance filed previously or concurrently. An application for an interim order may include statements of fact and arguments as to why the order should be granted. The hearing officer to whom the Board has referred the application may rule ex parte upon the application.

(2) *Notice of denial of application.* If an application filed pursuant to paragraph (c)(1) of this section is denied, the applicant shall be given prompt notice of the denial, which shall include, or be accompanied by, a brief statement of the grounds therefor.

(3) *Notice of the grant of an interim order.* If an interim order is granted, a copy of the order shall be served upon the applicant for the order and other parties, and the terms of the order shall be transmitted by the Board to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record. It shall be a condition of the order that the affected employing office shall give notice thereof to affected employees by the same means to be used to inform them of an application for a variance.

**§ 4.27 Modification or revocation of orders**

(a) *Modification or revocation.* An affected employing office or an affected employee may apply in writing to the Board for a modification or revocation of an order issued under section 6(b)(6)(A), or 6(d) of the OSHAct, as applied by section 215 of the CAA. The application shall contain:

(i) The name and address of the applicant;  
 (ii) A description of the relief which is sought;

(iii) A statement setting forth with particularity the grounds for relief;

(iv) If the applicant is an employing office, a certification that the applicant has informed its affected employees of the application by:

a. Giving a copy thereof to their authorized representative;

b. Posting at the place or places where notices to employees are normally posted, a statement giving a summary of the application and specifying where a copy of the full application may be examined (or, in lieu of the summary, posting the application itself); and

c. Other appropriate means.

(v) If the applicant is an affected employee, a certification that a copy of the application has been furnished to the employing office; and

(vi) Any request for a hearing, as provided in this part.

(b) *Renewal.* Any final order issued under section 6(b)(6)(A) of the OSHAct, as applied by section 215 of the CAA, may be renewed or extended as permitted by the applicable section and in the manner prescribed for its issuance.

**§ 4.28 Action on applications**

(a) *Defective applications.* (1) If an application filed pursuant to sections 4.25(a), 4.26(a), or 4.27 does not conform to the applicable section, the hearing officer or the Board, as applicable, may deny the application.

(2) Prompt notice of the denial of an application shall be given to the applicant.

(3) A notice of denial shall include, or be accompanied by, a brief statement of the grounds for the denial.

(4) A denial of an application pursuant to this paragraph shall be without prejudice to the filing of another application.

(b) *Adequate applications.* (1) If an application has not been denied pursuant to paragraph (a) of this section, the Office shall cause to be published a notice of the filing of the application, which the Board will transmit to the Speaker of the House of Representatives and the President pro tempore of the Senate with a request that the order be published in the Congressional Record.

(2) A notice of the filing of an application shall include:

(i) The terms, or an accurate summary, of the application;

(ii) a reference to the section of the OSHAct applied by section 215 of the CAA under which the application has been filed;

(iii) an invitation to interested persons to submit within a stated period of time written data, views, or arguments regarding the application; and

(iv) information to affected employing offices, employees, and appropriate authority having jurisdiction over employment or places of employment covered in the application of any right to request a hearing on the application.

**§ 4.29 Consolidation of proceedings**

On the motion of the hearing officer or the Board or that of any party, the hearing officer or the Board may consolidate or contemporaneously consider two or more proceedings which involve the same or closely related issues.

**§ 4.30 Consent findings and rules or orders**

(a) *General.* At any time before the reception of evidence in any hearing, or during any hearing a reasonable opportunity may be afforded to permit negotiation by the parties of an agreement containing consent findings and a rule or order disposing of the whole or any part of the proceeding. The allowance of such opportunity and the duration thereof shall be in the discretion of the hearing officer, after consideration of the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of an agreement which will result in a just disposition of the issues involved.

(b) *Contents.* Any agreement containing consent findings and rule or order disposing of a proceeding shall also provide:

(1) That the rule or order shall have the same force and effect as if made after a full hearing;

(2) That the entire record on which any rule or order may be based shall consist solely of the application and the agreement;

(3) A waiver of any further procedural steps before the hearing officer and the Board; and

(4) A waiver of any right to challenge or contest the validity of the findings and of the rule or order made in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

(1) Submit the proposed agreement to the hearing officer for his or her consideration; or

(2) Inform the hearing officer that agreement cannot be reached.

(d) *Disposition.* In the event an agreement containing consent findings and rule or order is submitted within the time allowed therefor, the hearing officer may accept such agreement by issuing his or her decision based upon the agreed findings.

**§ 4.31 Order of Proceedings and Burden of Proof**

(a) *Order of proceeding.* Except as may be ordered otherwise by the hearing officer, the party applicant for relief shall proceed first at a hearing.

(b) *Burden of proof.* The party applicant shall have the burden of proof.

**§ 5.01(a)(2)**

(a)(2) The General Counsel may file a complaint alleging a violation of section 210, 215 or 220 of the Act.

**§ 5.01(b)(2)**

(b)(2) A complaint may be filed by the General Counsel

(i) after the investigation of a charge filed under section 210 or 220 of the Act, or

(ii) after the issuance of a citation or notification under section 215 of the Act.

**§ 5.01(c)(2)**

(c)(2) *Complaints filed by the General Counsel.* A complaint filed by the General Counsel shall be in writing, signed by the General Counsel or his designee and shall contain the following information:

(i) the name, address and telephone number of, as applicable, (A) each entity responsible for correction of an alleged violation of section 210(b), (B) each employing office alleged to have violated section 215, or (C) each employing office and/or labor organization alleged to have violated section 220, against which complaint is brought;

(ii) notice of the charge filed alleging a violation of section 210 or 220 and/or issuance of a citation or notification under section 215;

(iii) a description of the acts and conduct that are alleged to be violations of the Act, including all relevant dates and places and

the names and titles of the responsible individuals; and

(iv) a statement of the relief or remedy sought.

*§ 5.01(d)*

(d) Amendments to the complaint may be permitted by the Office or, after assignment, by a Hearing Officer, on the following conditions: that all parties to the proceeding have adequate notice to prepare to meet the new allegations; that the amendments, as appropriate, relate to the violations for which the employee has completed counseling and mediation, or relate to the charge(s) investigated and/or the citation or notification issued by the General Counsel; and that permitting such amendments will not unduly prejudice the rights of the employing office, the labor organization, or other parties, unduly delay the completion of the hearing or otherwise interfere with or impede the proceedings.

*§ 5.04 Confidentiality*

Pursuant to section 416(c) of the Act, except as provided in sub-sections 416(d), (e) and (f), all proceedings and deliberations of Hearing Officers and the Board, including any related records, shall be confidential. Section 416(c) does not apply to proceedings under section 215 of the Act, but does apply to the deliberations of Hearing Officers and the Board under section 215. A violation of the confidentiality requirements of the Act and these rules could result in the imposition of sanctions. Nothing in these rules shall prevent the Executive Director from reporting statistical information to the Senate and House of Representatives, so long as that statistical information does not reveal the identity of the employees involved or of employing offices that are the subject of a matter. See also sections 1.06, 1.07 and 7.12 of these rules.

*§ 7.07(f)*

(f) If the Hearing Officer concludes that a representative of an employee, a witness, a charging party, a labor organization, an employing office, or an entity alleged to be responsible for correcting a violation has a conflict of interest, he or she may, after giving the representative an opportunity to respond, disqualify the representative. In that event, within the time limits for hearing and decision established by the Act, the affected party shall be afforded reasonable time to retain other representation.

*§ 7.12*

Pursuant to section 416 of the Act, all proceedings and deliberations of Hearing Officers and the Board, including the transcripts of hearings and any related records, shall be confidential, except as specified in section 416(d), (e), and (f) of the Act. All parties to the proceeding and their representatives, and witnesses who appear at the hearing, will be advised of the importance of confidentiality in this process and of their obligations, subject to sanctions, to maintain it. This provision shall not apply to proceedings under section 215 of the Act, but shall apply to the deliberations of Hearing Officers and the Board under that section.

*§ 8.03(a)*

(a) Unless the Board has, in its discretion, stayed the final decision of the Office during the pendency of an appeal pursuant to section 407 of the Act, and except as provided in sections 210(d)(5) and 215(c)(6), a party required to take any action under the terms of a final decision of the Office shall carry out its terms promptly, and shall within 30 days after the decision or order becomes final and goes into effect by its terms, provide the Office and all other parties to the proceedings with a compliance report specifying the

manner in which compliance with the provisions of the decision or order has been accomplished. If complete compliance has not been accomplished within 30 days, the party required to take any such action shall submit a compliance report specifying why compliance with any provision of the decision or order has not yet been fully accomplished, the steps being taken to assure full compliance, and the anticipated date by which full compliance will be achieved.

*§ 8.04 Judicial Review*

Pursuant to section 407 of the Act,

(a) the United States Court of Appeals for the Federal Circuit shall have jurisdiction over any proceeding commenced by a petition of:

(1) a party aggrieved by a final decision of the Board under section 406(e) in cases arising under part A of title II;

(2) a charging individual or respondent before the Board who files a petition under section 210(d)(4);

(3) the General Counsel or a respondent before the Board who files a petition under section 215(c)(5); or

(4) the General Counsel or a respondent before the Board who files a petition under section 220(c)(3) of the Act.

(b) The U.S. Court of Appeals for the Federal Circuit shall have jurisdiction over any petition of the General Counsel, filed in the name of the Office and at the direction of the Board, to enforce a final decision under section 405(g) or 406(e) with respect to a violation of part A, B, C, or D of title II of the Act.

(c) The party filing a petition for review shall serve a copy on the opposing party or parties or their representative(s).

REPORT ON THE U.S. COMPREHENSIVE PREPAREDNESS PROGRAM—MESSAGE FROM THE PRESIDENT—PM 32

The PRESIDING OFFICER laid before the Senate the following message from the President of the United States, together with an accompanying report; which was referred to the Committee on Armed Services:

*To the Congress of the United States:*

The National Defense Authorization Act for Fiscal Year 1997 (Public Law 104-201), title XIV, section 1443 (Defense Against Weapons of Mass Destruction), requires the President to transmit a report to the Congress that describes the United States comprehensive readiness program for countering proliferation of weapons of mass destruction. In accordance with this provision, I enclose the attached report.

WILLIAM J. CLINTON.

THE WHITE HOUSE, May 2, 1997.

MESSAGES FROM THE HOUSE RECEIVED DURING ADJOURNMENT

Under the authority of the order of the Senate of January 7, 1997, the Secretary of Senate, on May 1, 1997, during the adjournment of the Senate, received a message from the House of Representatives announcing that the Speaker has signed the following enrolled bills:

S. 305. An act to authorize the President to award a gold medal on behalf of the Congress to Francis Albert "Frank" Sinatra in recognition of his outstanding and enduring

contributions through his entertainment career and humanitarian activities, and for other purposes.

H.R. 1001. An act to extend the term of appointment of certain members of the Prospective Payment Assessment Commission and the Physician Payment Review Commission.

Under the authority of the order of the Senate of January 7, 1997, the enrolled bills were signed on May 1, 1997, during the adjournment of the Senate by the President pro tempore [Mr. THURMOND].

ENROLLED BILL PRESENTED

The Secretary of the Senate reported that on May 2, 1997, he had presented to the President of the United States, the following enrolled bill:

S. 305. An act to authorize the President to award a gold medal on behalf of the Congress to Francis Albert "Frank" Sinatra in recognition of his outstanding and enduring contributions through his entertainment career and humanitarian activities, and for other purposes.

EXECUTIVE AND OTHER COMMUNICATIONS

The following communications were laid before the Senate, together with accompanying papers, reports, and documents, which were referred as indicated:

EC-1786. A communication from the Secretary of Defense, transmitting, pursuant to law, notice of a retirement; to the Committee on Armed Services.

EC-1787. A communication from the General Counsel of the Navy, transmitting a draft of proposed legislation relative to the Chief of Chaplains, United States Navy; to the Committee on Armed Services.

EC-1788. A communication from the Chairman of the Federal Election Commission, transmitting, pursuant to law, proposed regulations relative to civil monetary penalties; to the Committee on Rules and Administration.

EC-1789. A communication from the Assistant Attorney General, Office of Legislative Affairs, Department of Justice, transmitting, pursuant to law, a report on the fabrication of bombs and others weapons of mass destruction; to the Committee on the Judiciary.

EC-1790. A communication from the Assistant Attorney General, Office of Legislative Affairs, Department of Justice, transmitting, pursuant to law, a report on the activities and operations the Public Integrity Section for calendar year 1995; to the Committee on the Judiciary.

EC-1791. A communication from the Executive Director the Federal Labor Relations Authority, transmitting, pursuant to law, the report for public information requests for calendar year 1996; to the Committee on the Judiciary.

EC-1792. A communication from the Director of the Administrative Office of the United States Courts, transmitting, pursuant to law, the wiretap report for calendar year 1996; to the Committee on the Judiciary.

INTRODUCTION OF BILLS AND JOINT RESOLUTIONS

The following bills and joint resolutions were introduced, read the first