[BILLING CODE 7545-01]

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101, 102, 103

RIN 3142-AA08

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Notice of proposed rulemaking .

SUMMARY: As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The Board believes that the proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation. The proposed amendments would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of regional directors' pre- and post-election determinations into a single, post-election request. The proposed amendments would allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election.

DATES: Comments regarding this proposed rule must be received by the Board on or before **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE**

FEDERAL REGISTER]. Comments replying to comments submitted during the initial comment period must be received by the Board on or before **[INSERT DATE 67 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

The Board intends to issue a notice of public hearing to be held in Washington, D.C., during the reply comment period, at which interested persons would be invited to share their views on the proposed amendments and to make any other proposals concerning the Board's representation case procedures.

ADDRESSES: The Board has established a docket for this action under Docket ID No. NLRB-2011-0002. All documents in the docket are listed on the *http://www.regulations.gov* Web site. You may submit comments identified by Docket ID No. NLRB-2011-0002 only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov*. To locate the proposed rule, search using the Docket ID No. NLRB-2011-0002. Follow the instructions for submitting comments.

Delivery—Comments should be sent by mail or hand delivery to: Gary Shinners, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Washington, DC 20570. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with regulations.gov. If you send comments, the Board recommends that

you confirm receipt of your delivered comments by contacting (202) 273-3737 (this is not a toll-free number). Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD).

Only comments submitted through *http://www.regulations.gov*, hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at *http://www.regulations.gov* and during normal business hours (8:30 a.m. to 5 p.m. EST) at the above address.

The Board will post, as soon as practicable, all comments received on *http://www.regulations.gov* without making any changes to the comments, including any personal information provided. The Web site *http://www.regulations.gov* is the Federal eRulemaking portal, and all comments posted there are available and accessible to the public. The Board requests that comments include full citations or internet links to any authority relied upon. The Board cautions commenters not to include personal information such as Social Security numbers, personal addresses, telephone numbers, and e-mail addresses in their comments, as such submitted information will become viewable by the public via the *http://www.regulations.gov* Web site. It is the commenter's responsibility to safeguard his or her information. Comments submitted through *http://www.regulations.gov* will not include the commenter's e-mail address unless the commenter chooses to include that information as part of his or her comment.

FOR FURTHER INFORMATION CONTACT:

Gary Shinners, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Washington, DC 20570, (202) 273-3737 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Introduction

The National Labor Relations Board (Board or NLRB) is proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The Board is proposing a number of changes to remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation, to increase transparency and uniformity across regions, to provide parties with clearer guidance concerning representation case procedure, to eliminate unnecessary litigation, and to modernize the Board's representation procedures.

The present proposal is, in essence, a reissuance of the proposed rule of June 22, 2011. 76 FR 36812. The Board is again proposing the same changes which were proposed in 2011, and asking for any comments the public may have on whether or how the Board should act on these proposals.

In 2011, the Board accepted public comments on these proposals for 60 days, and reply comments for an additional 14 days. The Board received 65,958 written comments, tens of thousands supporting the proposals and tens of thousands opposing them. The Board Members also conducted two full days of hearing, during which 66 individuals representing diverse organizations and groups gave oral statements and answered questions asked by the Board members, resulting in 438 transcript pages of oral

testimony. As described below, the Board also issued a final rule on December 22, 2011, which was set aside by the district court on procedural grounds relating to the voting process used by the Board for that rule. 76 FR 80138.

The Board is incorporating by reference into this docket the complete administrative record in the 2011 proceeding. This includes all testimony and comments, as well as the final rule, and separate statements by Board Members in the federal register. All of these documents are publically available on the *http://www.regulations.gov* Web site at docket ID No. NLRB-2011-0002. This extensive record contains numerous arguments both for and against the proposals. All of this material will be fully considered by the Board in deciding whether to issue any final rule.

Because the 65,958 written comments and 438 transcript pages of oral testimony are part of this NPRM's docket and will be fully considered by the Board in deciding whether to issue a final rule, it is not necessary for any person or organization to resubmit any comment or repeat any argument that has already been made. However, the Board invites the submission of new information and argument, not previously submitted, during the comment period.

As indicated above, the proposals here were first contemplated by the Board in a notice of proposed rulemaking on June 22, 2011. 76 FR 36812. Following a period of public comment, on December 22, 2011, the Board issued a final rule, which adopted a limited number of the proposed amendments and deferred others for further consideration. 76 FR 80138-89.

The final rule was immediately challenged in federal district court. See *Chamber of Commerce of the U.S. v. NLRB*, 879 F. Supp. 2d 18, 21, 24 (D.D.C. 2012). The court

struck down the rule on only one ground: that the Board lacked a quorum when it issued the final rule because Member Hayes was "absent" from the vote—rather than "abstaining" from the vote, as the Board asserted. *Id.* at 28-30. Nonetheless, the court expressly stated:

> "In [setting aside the rule], however, the Court emphasizes that its ruling need not necessarily spell the end of the final rule for all time. The Court does not reach—and expresses no opinion on—Plaintiffs' other procedural and substantive challenges to the rule, but it may well be that, had a quorum participated in its promulgation, the final rule would have been found perfectly lawful. As a result, nothing appears to prevent a properly constituted quorum of the Board from voting to adopt the rule if it has the desire to do so. In the meantime, though, representation elections will have to continue under the old procedures."

Id. at 30.

Thus, though the rule was struck down, the court invited the Board to reapply itself to the proposals contemplated in 2011. By the present proposal, the Board is undertaking to do just that, and inviting the public to comment.

The discussion below is reprinted almost verbatim from the June 2011 notice of proposed rulemaking, but the statistics have been updated, and a dissent by Members Miscimarra and Johnson and a response by the Board majority has been substituted for former Member Hayes' dissent and the Board majority's response from the June 22, 2011 NPRM. A more specific request for comments on employee privacy issues has been added in connection with the voter list proposals.

II. Background

Section 7 of the National Labor Relations Act (the Act or the NLRA), 29 U.S.C. 157, vests in employees the right "to bargain collectively through representatives of their own choosing . . . and to refrain from . . . such activity." The Act vests in the National Labor Relations Board (the Board) a central role in the effectuation of that right when employers, employees, and labor organizations are unable to agree on whether the employer should recognize a labor organization as the representative of the employees. Section 9 of the Act, 29 U.S.C. 159, gives the Board authority to determine if such a "question of representation" exists and, if so, to resolve the question by conducting "an election by secret ballot."

Congress left the procedures for determining if a question of representation exists and for conducting secret ballot elections almost entirely within the discretion of the Board. The Supreme Court has repeatedly recognized that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees." *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *NLRB v. Waterman S.S. Co.*, 309 U.S. 206, 226 (1940); see also *Southern S.S. Co. v. NLRB*, 316 U.S. 31, 37 (1942).

Since 1935, the Board has exercised its discretion to establish standard procedures in representation cases largely through promulgation and revision of rules and regulations or internal policies.[1] Thus, 29 CFR part 102, subpart C sets forth the Board's Rules and

[1] The Board's failure to rely on rulemaking in other areas has met widespread scholarly criticism. See R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB*, 5 FIU L. Rev. 347, 351-52 (2010);

Regulations governing "Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act." Subparts D and E set forth related rules and regulations governing "Procedures for Unfair Labor Practice and Representation Cases Under Section 8(b)(7) and 9(c) of the Act" and "Procedure for Referendum Under Section 9(e) of the Act." 29 CFR part 101, subparts C, D and E set forth the Board's Statements of Procedures in the same three types of cases. The Board's Casehandling Manual at Sections 11000 through 11886 describes procedures in representation cases in greater detail, including the mechanics of elections.[2]

Congress intended that the Board adopt procedures that permit questions concerning representation to be resolved both quickly and fairly. As the Supreme Court has noted, "[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily." *A.J.*

Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act*, 79 YALE L.J. 571 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB*, 5 FIU L. Rev. 411, 414-17, 435 (Spring 2010); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication*, 21 UCLA L. REV. 63 (1973); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?*, 24 SAN DIEGO L. REV. 9 (1987); Cornelius Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board*, 70 YALE L.J. 729 (1961); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making*, 117 U. PA. L. REV. 254 (1968); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction,* 25 LAB. L.J. 607 (1974); and Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units*, 32 LAB. L.J. 105 (1981).

[2] The Casehandling Manual is prepared by the Board's General Counsel and is not binding on the Board. *Hempstead Lincoln*, 349 NLRB 552, 552 n.4 (2007); *Pacific Grain Products*, 309 NLRB 690, 691 n.5 (1992).

Tower Co., 329 U.S. at 330-31. The Board has repeatedly recognized "the Act's policy of expeditiously resolving questions concerning representation."[3] "In . . . representation proceedings under Section 9," the Board has observed, "time is of the essence if Board processes are to be effective."[4] Indeed, the Board's Casehandling Manual stresses that "[t]he expeditious processing of petitions filed pursuant to the Act represents one of the most significant aspects of the Agency's operations."[5]

Expeditious resolution of questions concerning representation is central to the statutory design because Congress found that "refusal by some employers to accept the procedure of collective bargaining lead[s] to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening and obstructing commerce."[6] Thus, Congress found that the Board's expeditious processing of representation petitions and, when appropriate, conduct of elections would "safeguard[] commerce from injury, impairment or interruption."[7]

One of the primary purposes of the original Wagner Act was to avoid "the long delays in the procedure . . . resulting from applications to the federal appellate courts for review of orders for elections." *AFL v. NLRB*, 308 U.S. 401, 409 (1940). The Senate Committee Report explained that one of the "weaknesses in existing law" was "that the Government can be delayed indefinitely before it takes the first step toward industrial

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[3] See, e.g., *Northeastern University*, 261 NLRB 1001, 1002 (1982).

[4] *Tropicana Products, Inc.*, 122 NLRB 121, 123 (1958).

[5] Pt. 2, Representation Proceedings, Section 11000.

[6] 29 U.S.C. 151.

[7] *Id.*

peace" by conducting an election.[8] For this reason, Congress did not provide for direct judicial review of either interlocutory orders or final certifications or dismissals in representation proceedings conducted under section 9 of the Act. Rather, in order to insure that elections were conducted promptly, judicial review was permitted only after issuance of an order under section 10 relying, in part, on the Board's certification under section 9.

A. Evolution of Board Regulation of Representation Case Procedures

1. Legislative and Administrative Delegation of Authority To Process Petitions in Order To Expedite Resolution of Questions Concerning Representation

The Board initially exercised its discretion over the conduct of representation elections through a procedure under which, in the event the parties could not agree concerning the conduct of an election, an employee of one of the Board's regional offices would develop a record at a pre-election hearing.[9] At the close of the hearing, the record was forwarded to the Board in Washington, DC, which either directed an election or made some other disposition of the matter.[10] However, requiring the Board itself to address all of the myriad disputes arising out of the thousands of representation petitions filed annually resulted in significant delays.

Accordingly, in 1959, as part of the amendments of the NLRA effected by the Labor-Management Reporting and Disclosure Act, Congress revised Section 3(b) of the

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[8] S. Rep. No. 573, 74th Cong., 1st Sess. pp. 5-6. See also H. Rep. No. 1147, 74th Cong., 1st Sess. p. 6.

[9] 29 CFR 102.63 and 102.64 (1959).

[10] 29 CFR 102.67 and 102.68 (1959).

Act to authorize the Board to delegate its election-related duties to the directors of the Board's regional offices, subject to discretionary Board review.[11] Section 3(b) provides:

> The Board is . . . authorized to delegate to its regional directors its powers under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof, except that upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a regional director delegated to him under this paragraph, but such a review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

As Senator Goldwater, a member of the Conference Committee which added the new section to the amendments, explained, "[Section 3(b)] is a new provision, not in either the House or Senate bills, designed to expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination. . . . This authority to delegate to the regional directors is designed, as indicated, to speed the work of the Board."[12]

Soon after the authorizing amendment was adopted in 1959, the Board made the permitted delegation to its regional directors by amending its rules and regulations.[13] Since the delegation, the Board's regional directors have resolved pre-election disputes and directed elections, subject to a procedure through which aggrieved parties can seek Board review of regional directors' pre-election decisions.[14] The Board's amended rules

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[11] Pub. L. No. 86-257 (codified as amended in 29 U.S.C. 153(b)).

[12] 105 Cong. Rec. 19770.

[13] 26 FR 3885 (May 4, 1961).

[14] 29 CFR 102.67 (1961).

made such review discretionary, only to be granted in compelling circumstances, and that process was subsequently upheld by the Supreme Court.[15]

As intended by Congress, the implementation of the new procedure led to a significant decrease in the time it took to conduct representation elections. Immediately following the Board's amendment of its rules in 1961, the median number of days necessary to process election petitions to a decision and direction of election was roughly cut in half.[16] By 1975, the Board was conducting elections in a median of 50 days from the filing of an election petition.[17]

The Board's next major improvement in the efficiency of its election procedures came in 1977. After a decade and a half of experience with the request for review procedure, the Board again amended its rules to reduce delay in elections after the Board granted review of a regional director's decision and direction of election or a preliminary ruling.[18] Specifically, the Board established a procedure whereby the regional directors would proceed to conduct elections as directed, notwithstanding the Board's decision to grant review, unless the Board ordered otherwise. Under this procedure, the regional director impounds the ballots at the conclusion of the election, and delays tallying them

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[15] *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971).

[16] See NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 1961-1962) (reporting that the "median average" number of days from petition to a decision and direction of election was reduced from 82 days in 1960 to 43 days in 1962).

[17] See U.S. DEP'T OF LABOR & U.S. DEP'T OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT, 68, 82 (1994) ("Dunlop Commission Fact Finding").

[18] See 42 FR 41117 (Aug. 15, 1977); Chairman's Task Force on the NLRB for 1976, Volume 1, Board Action on Recommendations of the Chairman's Task Force Memorandum to the Task Force, 3 (May 25, 1977); Chairman's Task Force, Volume 7, Task Force Report Memorandum to the Board, 10-15 (January 28, 1977).

until the Board issues its decision. Although this change did not have a significant effect on the overall median number of days from petition to election, it substantially decreased the time it took to conduct elections in the small number of cases in which the Board granted review.[19] These procedures remain in place today.

The Board continued to focus on processing representation petitions expeditiously in the years following implementation of the vote and impound procedure. As a result, more than 90 percent of elections were conducted within 56 days of the filing of a petition during the last decade, with a median time of 37-39 days between petition and election.[20]

Notably, however, the nature of the Board's review of regional directors' decisions varies, depending on whether the decision was issued before or after the election.[21] As described above, the Board has exercised its authority to delegate to its regional directors the task of processing petitions through the conduct of an election subject only to discretionary Board review. In contrast, the current rules provide that any party, unless it has waived the right in a pre-election agreement, may in most cases obtain

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[19] See Dunlop Commission Fact Finding, 82. Comparing the change in figures from 1975 to 1985 demonstrates that the percentage of total elections conducted more than 60 days from the filing of a petition decreased from 20.1 percent to 16.5 percent, and the percentage of total elections conducted more than 90 days from the filing of a petition decreased from 11 percent to 4.1 percent.

[20] See NLRB Office of the General Counsel, Summary of Operations (Fiscal Years 2004-2012); Percentage of Elections Conducted in 56 Days in FY 13 and Median Days from Petition to Election, *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections*.

[21] This is the case even when the issue addressed by the regional director is precisely the same one as, for example, when an eligibility issue is raised, litigated and decided pre-election and when the same issue is raised through a challenge and litigated and decided post-election.

Board review of a regional director's resolution of any post-election dispute, whether concerning challenges to the eligibility of a voter or objections to the conduct of the election or conduct affecting the results of an election. The right to review of regional directors' post-election decisions has caused extended delay of final certification of election results in many instances.[22]

2. Limiting the Pre-Election Hearing to Issues Genuinely in Dispute and Material to Determining if a Question Concerning Representation Exists

a. Identification and Joinder of Issues

Other than the petition, the parties to a representation proceeding under section 9 of the Act are not required to file any other form of pleading. The current regulations do not provide for any form of responsive pleading, in the nature of an answer, through which non-petitioning parties are required to give notice of the issues they intend to raise at a hearing. As a consequence, the petitioner is not required to join any such issues.

The Board has, nevertheless, developed administrative practices in an effort to identify and narrow the issues in dispute before or at a pre-election hearing. The regional director's initial letter to an employer following the filing of a petition asks the employer to state its position "as to the appropriateness of the unit described in the petition."[23] In some cases, regions will conduct pre-hearing conferences either face-to-face or by telephone in an effort to identify and narrow the issues in dispute. Further, section 11217 of the Casehandling Manual provides, "Prior to the presentation of evidence or witnesses, parties to the hearing should succinctly state on the record their positions as to the issues

[22] See, e.g., *Manhattan Crowne Plaza*, 341 NLRB 619 (2004) (exceptions concerning alleged threat contained in single, written memorandum pending before the Board for almost three years).

[23] Casehandling Manual section 11009.1(e).

to be heard." However, none of these practices is mandatory, and they are not uniformly followed in the regions.

In *Bennett Industries, Inc*., 313 NLRB 1363, 1363 (1994), the Board observed, "in order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute." In *Bennett*, the Board sustained a hearing officer's ruling preventing an employer from introducing evidence relevant to the supervisory status of two classes of employees and included employees in the two classes in the unit without further factual inquiry when the employer refused to take a position concerning whether the employees were supervisors. The Board reasoned:

> The Board's duty to ensure due process for the parties in the conduct of the Board proceedings requires that the Board provide parties with the opportunity to present evidence and advance arguments concerning relevant issues. However, the Board also has an affirmative duty to protect the integrity of the Board's processes against unwarranted burdening of the record and unnecessary delay. Thus, while the hearing is to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case (NLRB Statement of Procedure Sec. 101.20(c)), hearings are intended to afford parties "full opportunity to present their respective *positions* and to produce the significant facts in support of their contentions." (emphasis added).

Id.

In *Allen Health Care Services*, 332 NLRB 1308 (2000), however, the Board held that even when an employer refuses to take a position on the appropriateness of a petitioned-for unit, the regional director must nevertheless take evidence on the issue unless the unit is presumptively appropriate. The Board held that, "absent a stipulated agreement, presumption, or rule, the Board must be able to find—based on some record evidence – that the proposed unit is an appropriate one for bargaining before directing an election in that unit." *Id*. at 1309. The Board did not make clear in *Allen* whether a party

that refuses to take a position on the appropriateness of a petitioned-for unit must nevertheless be permitted to introduce evidence relevant to the issue. The Casehandling Manual provides that parties should be given the following, equivocal notice in such circumstances: "If a party refuses to state its position on an issue and no controversy exists, the party should be advised that it may be foreclosed from presenting evidence on that issue." Section 11217.

b. Identification of Genuine Disputes as to Material Facts

The current regulations also do not expressly provide for any form of summary judgment or offer-of-proof procedures through which the hearing officer can determine if there are genuine disputes as to any material facts, the resolution of which requires the introduction of evidence at a pre-election hearing.

The Board has developed such a procedure in reviewing post-election objections to the conduct of an election or conduct affecting the results of an election. The current regulations provide that any party filing such objections shall also file, within seven days, "the evidence available to it to support the objections." 29 CFR 102.69(a). Casehandling Manual section 1132.6 further specifies, "In addition to identifying the nature of the misconduct on which the objections are based, this submission should include a list of the witnesses and a brief description of the testimony of each." If an objecting party fails to file such an offer of proof or if the offer fails to describe evidence which, if introduced at a hearing, could require the election results to be overturned, the regional director dismisses the objection without a hearing. In the post-election context, the courts of appeals have uniformly endorsed the Board's refusal to hold a hearing when no party has created a genuine dispute as to any material fact. See, e.g., *NLRB v. Bata Shoe Co*., 377

F.2d 821, 826 (4th Cir. 1967), *cert. denied*, 389 U.S. 917 (1967); *NLRB v. Air Control Products of St. Petersburg, Inc*., 335 F.2d 245, 249 (5th Cir. 1964).

The Board has also endorsed an offer-of-proof procedure in pre-election hearings when the petitioned-for unit is presumptively appropriate. See, e.g., *Laurel Associates, Inc*., 325 NLRB 603 (1998); *Mariah, Inc*., 322 NLRB 586, 587 (1996). In such circumstances, the Board has sustained a hearing officer's refusal to hear evidence after an employer has either refused to make an offer of proof or offered proof not sufficient to create a genuine dispute as to facts material to the question of whether the presumption of appropriateness can be rebutted.

Because the current regulations do not describe a procedure for identifying genuine disputes as to material facts, there has been continuing uncertainty concerning the circumstances under which an evidentiary hearing is necessary. In *Angelica Healthcare Services Group, Inc*., 315 NLRB 1320 (1995), for example, the Board reversed the decision of an acting regional director to direct an election without a hearing when an incumbent union contended there was no question concerning representation because its collective-bargaining agreement with the employer barred an election. The Board stated, "We find that the language of Section 9(c)(1) of the Act and Section 102.63(a) of the Board's Rules required the Acting Regional Director to provide 'an appropriate hearing' prior to finding that a question concerning representation existed and directing an election." *Id*. at 1321. But the Board noted expressly, "[W]e find it unnecessary to decide in this case the type of hearing that would be necessary to satisfy the Act's 'appropriate hearing' requirement." *Id*. at 1321 n. 6.

c. Deferral of Litigation and Resolution of Issues Not Relevant to the Determination of Whether a Question Concerning Representation Exists

Section 9(c) of the Act provides that, after the filing of a petition,

> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, it shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

The statutory purpose of a pre-election hearing is thus to determine if a question concerning representation exists. If such a question exists, the Board conducts an election in order to answer the question.

Whether individual employees are eligible to vote may or may not affect the outcome of an election, but it is not ordinarily relevant to the preliminary issue of whether a question concerning representation exists that an election is needed to answer. For that reason, the Board has consistently sustained regional directors' decisions to defer resolving questions of individual employees' eligibility to vote until after an election (in which the disputed employees may cast challenged ballots). In *Northeast Iowa Telephone Co.*, 341 NLRB 670, 671 (2004), the Board characterized this procedure as the "tried-and-true 'vote under challenge procedure.'" See also *HeartShare Human Services of New York, Inc.*, 320 NLRB 1 (1995). The Eighth Circuit has stated that "deferring the question of voter eligibility until after an election is an accepted NLRB practice." *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994). Even when a regional director resolves such a dispute pre-election, the Board, when a request for review is filed, often defers review of the resolution, permitting the disputed individuals to vote subject to challenge. See, e.g., *Medlar Elec., Inc*., 337 NLRB 796, 796 (2002); *Interstate Warehousing of Ohio, LLC*, 333 NLRB 682, 682-83 (2001); *American Standard, Inc*., 237 NLRB 45, 45 (1978).

In *Barre-National, Inc.*, 316 NLRB 877 (1995), however, the Board considered whether a regional director had acted properly when he deferred *both* litigation and a decision concerning the eligibility of 24 line and group leaders (constituting eight to nine percent of the unit) until after an election, over the objection of the employer contending that the leaders were supervisors. Quoting both section 102.66(a) and 101.20(c) of the existing regulations, the Board held that the two sections "entitle parties at [pre-election] hearings to present witnesses and documentary evidence in support of their positions." *Id.* at 878. For that reason, the Board held that the regional director had erred by deferring the taking of the employer's testimony until after the election. But the Board did not hold in *Barre-National* that the disputed issue had to be resolved before the regional director directed an election. In fact, the Board expressly noted, "[O]ur ruling concerns only the entitlement to a preelection hearing, which is distinct from any claim of entitlement to a final Agency decision on any issue raised in such a hearing." *Id.* at 879 n. 9. The Board further noted that "reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election." *Id.*

3. Provision of a List of Eligible Voters

In elections conducted under Section 9 of the Act, there is no list of employees or potentially eligible voters generally available to interested parties other than the employer and, typically, an incumbent representative. The Board addressed this issue in *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), where it held:

> [W]ithin 7 days after the Regional Director has approved a consent-election agreement . . . or after the Regional Director or the Board has directed an election . . ., the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case.

> Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Although several Justices of the Supreme Court expressed the view that the requirement to produce what has become known as an "*Excelsior* list" should have been imposed through rulemaking rather than adjudication, the Court upheld the substantive requirement in *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 768 (1969).

In *Excelsior*, the Board explained the primary rationale for requiring production of an eligibility list:

> As a practical matter, an employer, through his possession of employee names and home addresses as well as his ability to communicate with employees on plant premises, is assured of the continuing opportunity to inform the entire electorate of his views with respect to union representation. On the other hand, without a list of employee names and addresses, a labor organization, whose organizers normally have no right of access to plant premises, has no method by which it can be certain of reaching all the employees with its arguments in favor of representation, and, as a result, employees are often completely unaware of that point of view. This is not, of course, to deny the existence of various means by which a party *might* be able to communicate with a substantial portion of the electorate even without possessing their names and addresses. It is rather to say what seems to us obvious--that the access of *all* employees to such communications can be insured only if all parties have the names and addresses of all the voters.

156 NLRB at 1240-41 (footnote omitted). The Supreme Court endorsed this rationale in *Wyman-Gordon*, 394 U.S. at 767, "The disclosure requirement furthers this objective [to ensure the fair and free choice of bargaining representatives] by encouraging an informed employee electorate and by allowing unions the right of access to employees that management already possesses."

The Board also articulated a second reason for requiring production of an eligibility list in *Excelsior*:

> The [voter] list, when made available, not infrequently contains the names of employees unknown to the union and even to its employee supporters. The

> reasons for this are, in large part, the same as those that make it difficult for a union to obtain, other than from the employer, the names of all employees; i.e., large plants with many employees unknown to their fellows, employees on layoff status, sick leave, military leave, etc. With little time (and no home addresses) with which to satisfy itself as to the eligibility of the "unknowns," the union is forced either to challenge all those who appear at the polls whom it does not know or risk having ineligible employees vote. The effect of putting the union to this choice, we have found, is to increase the number of challenges, as well as the likelihood that the challenges will be determinative of the election, thus requiring investigation and resolution by the Regional Director or the Board. Prompt disclosure of employee names as well as addresses will, we are convinced, eliminate the necessity for challenges based solely on lack of knowledge as to the voter's identity. Furthermore, bona fide disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election when the significance of a single vote is apt to loom large in the parties' calculations. Thus the requirement of prompt disclosure of employee names and addresses will further the public interest in the speedy resolution of questions of representation.

156 NLRB at 1242-43.

Since *Excelsior* was decided, almost 50 years ago, the Board has not significantly altered its requirements despite significant changes in communications technology, including that used in representation election campaigns, and identification of avoidable problems in administering the requirement, for example, delays in the regional offices' transmission of the eligibility list to the parties.

B. Evolution of the Board's Electronic Filing and Service Requirements

The Board's effort to promote expeditious case processing under the NLRA by utilizing advances in communications technology is nearly a decade old. The Board first began a pilot project in 2003, permitting the electronic filing of documents with the Agency.[24] Thereafter, the use and scope of electronic filing by parties to NLRB

[24] See 74 FR 5618, 5619 (Jan. 30, 2009), revising § 102.114 of the Board's Rules and Regulations, corrected 74 FR 8214 (Feb. 24, 2009).

proceedings expanded significantly. By January 2009, more than 12,000 documents had been filed electronically with the Board and its regional offices.[25] The number of electronic filings has steadily increased in recent years, reaching a high of 38,147 in Fiscal Year 2013. The Board currently permits most documents in both unfair labor practice and representation proceedings to be filed electronically with only a limited number of expressly specified exceptions.[26] The NLRB public Web site sets out instructions for the Agency's E-filing procedures in order to facilitate their use, and the instructions "strongly encourage parties or other persons to use the Agency's E-filing program."[27] However, included among documents that may not currently be filed electronically are representation petitions.[28]

In 2008, the Board initiated another pilot project to test the ability of the Agency to electronically issue its decisions and those of its administrative law judges.[29] Parties who register for electronic service of decisions in their cases receive an e-mail constituting formal notice of the decision and an electronic link to the decision. The NLRB public Web site sets out instructions for signing up for the Agency's electronic issuance program.[30]

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[25] *Id*., 74 FR at 5619.

[26] See NLRB Rules and Regulations Section 102.114(i); *http://www.nlrb.gov*, under Cases & Decisions/File Case Documents/E-file.

[27] See *http://www.nlrb.gov*, under E-filing Rules.

[28] See *http://www.nlrb.gov*, under What Documents Can I E-file?

[29] See 74 FR at 5619.

[30] See *http://www.nlrb.gov*, under What is E-Service?

In 2009, the Board revised its regulations to require that service of e-filed documents on other parties to a proceeding be effectuated by e-mail whenever possible, which aligned Board service procedures more closely with those in the federal courts, and acknowledged the widely accepted use of e-mail for legal and official communications.[31]

In 2010, the Board took further notice of the spread of electronic communications in its decision in *J. Piccini Flooring*, 356 NLRB No. 9 (2010), to require that respondents in unfair labor practice cases distribute remedial notices electronically when that is their customary means of communicating with employees. The Board recognized that the use of e-mail, internal and external websites, and other electronic communication tools, is now the norm for the transaction of business in many workplaces, among unions, and by the government and the public it serves. The Board concluded that its "responsibility to adapt the Act to changing patterns of industrial life"[32] required it to align its remedial requirements with "the revolution in communications technology that has reshaped our economy and society." *J. Piccini Flooring*, slip op. at 4.

C. Purposes of the Proposed Amendments

The Board now proposes to revise its rules and regulations to better insure "that employees' votes may be recorded accurately, efficiently and speedily" and to further "the Act's policy of expeditiously resolving questions concerning representation."[33]

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[31] See 74 FR 8214 (Feb. 24, 2009), correcting 74 FR 5618; NLRB Rules & Regulations § 102.114(a) and (i).

[32] *NLRB v. Weingarten*, 420 U.S. 251, 266 (1975).

[33] *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 331 (1946); *Northeastern University*, 261 NLRB 1001, 1002 (1982).

The proposed amendments would remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation. In addition to making the Board processes more efficient, the proposed amendments are intended to simplify the procedures, to increase transparency and uniformity across regions, and to provide parties with clearer guidance concerning the representation case procedure.

The proposed amendments would provide for more timely and complete disclosure of information needed by both the Board and the parties to promptly resolve matters in dispute. The proposed amendments are also intended to eliminate unnecessary litigation concerning issues that may be, and often are, rendered moot by election results. In addition, the proposed amendments would consolidate Board review of regional directors' determinations in representation cases in a single, post-election proceeding and would make review discretionary after an election as it currently is before an election. The Board anticipates that the proposed amendments would leave a higher percentage of final decisions about disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service. Finally, the proposed amendments are intended to modernize the Board's representation procedures, in particular, through use of electronic communications technology to speed communication among the parties, and between the parties and the Board, and to facilitate communication with voters.

Given the variation in the number and complexity of issues that may arise in a representation proceeding, the amendments do not establish inflexible time deadlines or mandate that elections be conducted a set number of days after the filing of a petition. Rather, the amendments seek to avoid unnecessary litigation and establish standard and

fully transparent practices while leaving discretion with the regional directors to depart from those practices under special circumstances.

Consistent with Executive Order 13563, Improving Regulation and Regulatory Review, section 6(a) (January 18, 2011), the proposed amendments would eliminate redundant and outmoded regulations.[34] The proposed amendments would eliminate one entire section of the Board's current regulations and consolidate the regulations setting forth procedures under section 9 of the Act, currently spread across three separate parts of the regulations, into a single part. The Board anticipates that, if the proposed amendments are adopted, the cost of invoking and participating in the Board's representation case procedures would be reduced for parties, and public expenditure in administering section 9 of the Act would be similarly reduced.

While the proposed amendments are designed to eliminate unnecessary barriers to the speedy processing of representation cases, the proposed amendments, like previous congressional and administrative reforms aimed at expediting the conduct of elections, do not in any manner alter existing regulation of parties' campaign conduct or restrict any party's freedom of speech.

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[34] While the Executive Order is not binding on the Board as an independent agency, the Board has, as requested by the Office of Management and Budget, given "consideration to all of its provisions." Office of Management and Budget, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies: Executive Order 13563, "Improving Regulation and Regulatory Review" 11-12 (Feb. 2, 2011), *www.whitehouse.gov/omb/memoranda*. In regard to section 2(c) of the Order, concerning seeking the views of those who are likely to be affected prior to publication of a notice of proposed rulemaking, the Board determined that public participation would be more orderly and meaningful if it was based on the specific proposals described herein and thus the Board has provided for the comment and reply periods and public hearing described above. As noted, the Board has also incorporated into the docket for this NPRM all comments and oral testimony submitted in response to the June 22, 2011 NPRM.

The Board invites comments on each of the proposed rule changes described below.[35]

D. Summary of Current Representation Case Procedures

Every year, thousands of election petitions are filed in NLRB regional offices by employees, unions, and employers to determine if employees wish to be represented by a labor organization for purposes of collective bargaining with their employer.[36] A lesser number are filed by employees to determine whether the Board should decertify an existing representative.[37] Under current procedures, the petitioner is not required to serve the petition on other interested parties. For example, a labor organization is not required to serve a petition through which it seeks to be certified as the representative of a unit of employees on the employees' employer. Rather, that task is imposed on the regional office. In addition, the petitioner is not required, at the time of filing, to supply evidence of the type customarily required by the Board to process the petition. For example, a labor organization is not required to file, along with its petition, evidence that a

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[35] The Board has provided for an initial 60-day comment period followed by a 7-day reply comment period. In addition, the Board intends to issue a notice of public hearing to be held in Washington, D.C., during the reply comment period in order to receive oral comments on the proposed amendments. As noted, the Board will also consider all comments and oral testimony submitted in response to the June 22, 2011 NPRM, in deciding whether to issue a final rule, and the comments and oral testimony have been incorporated into this docket. The Board believes that all persons interested in the proposed amendments--including those best able to provide informed comment on the details of the Board's representation case procedures, the attorneys and other practitioners who regularly participate in representation proceedings--will have ample time and opportunities to do so within the comment periods.

[36] In 2013, 2,035 such petitions were filed. See Representation Petitions - RC and Employer-Filed Petitions - RM, *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections*.

[37] In 2013, 472 such petitions were filed. See Decertification Petitions - RD, *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections*.

substantial number of employees support the petition (the "showing of interest"). Rather, the petitioner is permitted to file such evidence within 48 hours of the filing of the petition.

After a petition is filed, the regional director serves the petition on the parties and also submits additional requests to the employer. The regional director serves on the employer a generic notice of employees' rights,[38] with a request that the employer post the notice, and a commerce questionnaire, seeking information relevant to the Board's jurisdiction to process the petition,[39] which the employer is requested to complete. The regional director also asks the employer to provide a list of the names of employees in the unit described in the petition, together with their job classifications, for the payroll period immediately preceding the filing of the petition. Finally, the regional director solicits the employer's position on the appropriateness of the unit described in the petition.

After the filing of a petition, Board agents conduct an ex parte, administrative investigation to determine if the petition is supported by the required form of showing. In the case of a petition seeking representation or seeking to decertify an existing representative, for example, this showing would be that 30 percent of employees in the unit support the petition.

Shortly after a petition is filed, the regional director serves a notice on the parties named in the petition setting a pre-election hearing. In many cases, the parties, often with Board agent assistance, are able to reach agreement regarding the composition of the unit and the date, time, place, and other mechanics of the election, thereby eliminating the

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[38] Form NLRB-5492, Notice to Employees.

[39] Form NLRB-5081.

need for a hearing and a formal decision and direction of election by the regional director.[40] Parties may enter into three types of pre-election agreements: a "consent-election agreement followed by a regional director's determination of representatives," providing for final resolution of post-election disputes by the regional director; a "stipulated election-agreement followed by a Board determination," providing for resolution of post-election disputes by the Board; and a "full consent-election agreement," providing for final resolution of both pre- and post-election disputes by the regional director.[41] In cases in which parties are unable to reach agreement, a Board agent conducts a hearing at which the parties may introduce evidence on issues including: (1) whether the Board has jurisdiction to conduct an election; (2) whether there are any bars to an election in the form of existing contracts or prior elections; (3) whether the election is sought in an appropriate unit of employees; and (4) the eligibility of particular employees in the unit to vote. Parties can file briefs with the regional director within one week after the close of the hearing.

After the hearing's close, the regional director will issue a decision either dismissing the petition or directing an election in an appropriate unit. The regional director may defer the resolution of whether certain employees are eligible to vote until after the election, and those employees will be permitted to vote under challenge.

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[40] In the last decade, between 89 and 92 percent of representation elections have been conducted pursuant to either a consent agreement or stipulation. NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2004-2012); Percentage of Elections Conducted Pursuant to Election Agreements in FY13, *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections*.

[41] See 29 CFR 101.19.

Parties have a right to request Board review of a regional director's decision and direction of election within 14 days after it issues. Neither the filing nor grant of a request for review operates as a stay of the direction of election unless the Board orders otherwise. If the Board does not rule on the request before the election, the ballots are impounded pending a Board ruling. Consistent with the Board's current Statements of Procedures, the regional director "will normally not schedule an election until a date between the 25th and 30th day after the date of the decisions, to permit the Board to rule on any request for review which may be filed."[42]

Within seven days after the regional director's decision issues, the employer must file a list of employees in the bargaining unit and their home addresses with the regional director. The regional director, in turn, makes the list available to all other parties in order to allow all parties to communicate with eligible employees about the upcoming election and to reduce the necessity for election-day challenges based solely on the parties' lack of knowledge of voters' identities. The non-employer parties must have this list at least ten days before the date of the election unless they waive that right.

The regional director has discretion to set the dates, times, and location of the election. The regional director typically exercises that discretion after consultation with the parties and solicitation of their positions on the election details.

Once the regional director sets the dates, times, and locations of the election, the regional office prepares a notice of election to inform eligible voters of those details.[43]

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[42] 29 CFR 101.21(d).

[43] Form NLRB-707 or Form NLRB-4910 (in the case of a mail ballot election).

The regional director serves the notice on the employer, which is responsible for posting the notice in the workplace for at least three days before the election.

If a manual election is held, each party to the election may be represented at the polling site by an equal number of observers who are typically employees of the employer. Observers have the right to challenge the eligibility of any voter for cause, and the Board agent conducting the election must challenge any voter whose name is not on the eligibility list. Ballots of challenged voters, including any voters whose eligibility was disputed at the pre-election hearing but not resolved by the regional director, are segregated from the other ballots in a manner that will not disclose the voter's identity.

Representatives of all parties may choose to be present when ballots are counted. Elections are decided by a majority of votes cast. Challenges may be resolved by agreement before the tally. If the number of unresolved challenged ballots is insufficient to affect the results of an election in which employees voted to be represented, the unit placement of any individuals whose status was not resolved may be resolved by the parties in collective bargaining or determined by the Board if a petition for unit clarification is filed. If the number of unresolved challenged ballots is insufficient to affect the results of an election in which employees voted not to be represented, the results are certified unless objections are filed.

Within one week after the tally of ballots has been prepared, parties may file with the regional director objections to the conduct of the election or to conduct affecting the results of the election. A party filing objections has an additional week to file a summary of the evidence supporting the objections.

The regional director may initiate an investigation of any such objections and unresolved, potentially outcome-determinative challenges, and notice a hearing only if they raise substantial and material factual issues. If they do not, the regional director will issue a supplemental decision or a report disposing of the challenges or objections. If there are material factual issues that must be resolved, the regional director will notice a post-election hearing before a hearing officer to give the parties an opportunity to present evidence concerning the objections or challenges. After the hearing's close, the hearing officer will issue a report resolving any credibility issues and containing findings of fact and recommendations. Depending upon the type of election, a party may file exceptions to the hearing officer's report either with the regional director or the Board, whereupon the regional director or the Board will issue a decision. If the right is not waived in a pre-election agreement, a party may appeal a regional director's disposition of election objections or challenges by filing exceptions with the Board.

III. Authority

Section 6 of the NLRA, 29 U.S.C. 156, provides, "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act, 5 U.S.C. 553], such rules and regulations as may be necessary to carry out the provisions of this Act." The Board interprets Section 6 as authorizing the proposed amendments to its existing rules.

The Board believes that the proposed amendments relate almost entirely to "rules of agency organization, procedure or practice" and are therefore exempt from the Administrative Procedure Act's notice and comment requirements under 5 U.S.C.

553(b)(A), but the Board has decided nevertheless to issue this Notice of Proposed Rulemaking and seek public comments.

IV. Overview of the Amendments

Part 101, Subparts C-E

The Board's current regulations are divided into part 102, denominated Rules and Regulations, and part 101, denominated Statement of Procedures. Because the regulations in part 102 are procedural, however, the two sets of provisions governing representation proceedings in §§ 102.60-102.88 and 101.17-101.30 are almost entirely redundant. Describing the same representation procedures in two separate parts of the regulations may create confusion.

Section 101.1 states that part 101 is a statement of "the general course and method by which the Board's functions are channeled and determined" and is issued pursuant to 5 U.S.C. 552(a)(1)(B). The Board believes that such a description of procedures would better serve the statutory purpose of informing the public concerning Agency procedures and practices if it were incorporated into the Board's procedural rules in part 102. The proposed amendments would thus eliminate those sections of part 101 related to representation cases, §§ 101.17 through 101.30, and incorporate into part 102 the few provisions of current part 101 that are not redundant or superfluous.

A separate statement of "the general course and method by which the Board's functions are channeled and determined" in representation proceedings is also set forth in section I(D) above. To the extent any amendments are adopted by the Board, the preamble of the final rule will contain a statement of the general course and method by which the Board's functions will be channeled and determined under the amendments.

Moreover, the Board will continue to publish and update its detailed Casehandling Manual, Part Two of which describes the Board's representation case procedures. The Manual is currently available on the Board's Web site.

Part 102, Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees And for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

Sec. 102.60 Petitions

The proposed amendments would permit parties to file petitions electronically. In conformity with ordinary judicial and administrative practice, the amendments also require that the petitioner serve a copy of the petition on all other interested parties. For example, a labor organization filing a petition seeking to become the representative of a unit of employees is required to serve the petition on the employer of the employees. This will insure that the earliest possible notice of the pendency of a petition is given to all parties.

The proposed amendments would also require service of two additional documents that would be available to petitioners in the regional offices and on the Board's public Web site. The first document, which would substitute for and be an expanded version of the Board's Form 4812, would inform interested parties of their rights and obligations in relation to the representation proceeding. The second document the petitioner would serve along with the petition would be a Statement of Position form, which would substitute for NLRB form 5081, the Questionnaire on Commerce Information. The contents and purpose of the proposed Statement of Position form is described further below in relation to § 102.63.

Sec. 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification

Section 102.61 describes the contents of the various forms of petitions that may be filed to initiate a representation proceeding under section 9 of the Act. The Board would continue to make each form of petition available at the Board's regional offices and on its Web site. The proposed amendments would add to the contents of the petitions in two respects. First, the revised petition would contain the allegation required in section 9. In the case of a petition seeking representation, for example, the petition would contain a statement that "a substantial number of employees . . . wish to be represented for collective bargaining." 29 U.S.C. 159(c)(1)(a)(i). Second, the petitioner would be required to designate, in the revised petition, the individual who will serve as the petitioner's representative in the proceeding, including for purposes of service of papers.

The proposed amendments would also require that the petitioner file with the petition whatever form of evidence is an administrative predicate of the Board's processing of the petition rather than permitting an additional 48 hours after filing to supply the evidence. When filing a petition seeking to be certified as the representative of a unit of employees, for example, petitioners would be required simultaneously to file the showing of interest supporting the petition. The Board's preliminary view is that parties should not file petitions without whatever form of evidence is ordinarily necessary for the Board to process the petition. However, the proposed amendments are not intended to prevent a petitioner from supplementing its showing of interest, consistent with existing practice, so long as the supplemental filing is timely. Also consistent with existing practice, the amendments do not require that such a showing be served on other

parties. The amendments are not intended to change the Board's longstanding policy of not permitting the adequacy of the showing of interest to be litigated. See, e.g., *Plains Cooperative Oil Mill*, 123 NLRB 1709, 1711 (1959) ("[T]he Board has long held that the sufficiency of a petitioner's showing of interest is an administrative matter not subject to litigation."); *O.D. Jennings & Co*., 68 NLRB 516 (1946). Nor are the proposed amendments intended to alter the Board's current internal standards for determining what constitutes an adequate showing of interest.[44]

The proposed amendments are not intended to permit or proscribe the use of electronic signatures to support a showing of interest under § 102.61(a)(7) and (c)(8) as well as under § 102.84. The Board continues to study the use of such signatures for these purposes. See Government Paperwork Elimination Act, Public Law 105-277 section 1704(2) (1998) (providing that Office of Management and Budget shall ensure that, commencing not later than five years after the date of enactment of the Act, executive agencies provide "for the use and acceptance of electronic signatures, when practicable"); OMB, Implementation of the Government Paperwork Elimination Act, available at *http://www.whitehouse.gov/omb/fedreg_gpea2/*; Electronic Signatures in Global and National Commerce Act, P.L. 106-229 sections 104(b)(1) and (2) (2000). The Board specifically seeks comments on the question of whether the proposed regulations should expressly permit or proscribe the use of electronic signatures for these purposes.

Sec. 102.62 Election agreements; voter list

Existing § 102.62 describes the three types of agreements parties may enter into following the filing of a petition. The proposed amendments would not in any manner

[44] See Casehandling Manual section 11023.1.

limit parties' ability to enter into such agreements, including the two forms of agreement that entirely eliminate the need for a pre-election hearing. In fact, the Board anticipates that the proposed amendments would facilitate parties' entry into these forms of election agreements through an earlier and more complete identification of disputes and disclosure of relevant information. The proposed amendments explain the common designations used to refer to each type of agreement in current § 101.19 in order to more clearly inform the public what each form of agreement provides. The proposed amendments would revise the second type of agreement, described in § 102.62(b) (the so-called stipulated election agreement), to eliminate parties' ability to agree to have post-election disputes resolved by the Board and to provide instead that the parties may agree that Board review of a regional director's resolution of such disputes may be sought through a request for review. This is consistent with the changes proposed in §§ 102.65 and 102.67 eliminating the authority of regional directors to transfer cases to the Board at any time and making Board review of regional directors' disposition of post-election disputes discretionary in cases where the parties have not addressed the matter in a pre-election agreement.

The proposed amendments (in § 102.62 as well as in § 102.67(j)) would codify and revise the requirement created in *Excelsior Underwear, Inc*., 156 NLRB 1236 (1966), and approved by the Supreme Court in *NLRB v. Wyman-Gordon Co*., 394 U.S. 759, 768 (1969), for production and service of a list of eligible voters. The proposed amendments would require that both telephone numbers and, where available, e-mail addresses be included along with each unit employee's name and address on the eligibility list. The proposed amendments would further require that the list include each employee's work

location, shift, and classification. The changes in the existing requirement for provision of a list of eligible voters embodied in the proposed amendments are intended to better advance the two objectives articulated by the Board in *Excelsior*.

The provision of only a physical address no longer serves the primary purpose of the *Excelsior* list. Communications technology and campaign communications have evolved far beyond the face-to-face conversation on the doorstep imagined by the Board in *Excelsior*. As Justice Kennedy observed in *Denver Area Educational Telecommunications Consortium, Inc. v. FTC*, 518 U.S. 727, 802-803 (1996) (Kennedy, J., dissenting):

> Minds are not changed in streets and parks as they once were. To an increasing degree, the most significant interchanges of ideas and shaping of public consciousness occur in mass and electronic media. The extent of public entitlement to participate in those means of communication may be changed as technologies change.

Similarly, in *J. Picini Flooring*, 356 NLRB No. 9 at 2-3 (2010) (footnotes omitted), the Board recently observed,

> While . . . traditional means of communication remain in use, email, postings on internal and external websites, and other electronic communication tools are overtaking, if they have not already overtaken, bulletin boards as the primary means of communicating a uniform message to employees and union members. Electronic communications are now the norm in many workplaces, and it is reasonable to expect that the number of employers communicating with their employees through electronic methods will continue to increase. Indeed, the Board and most other government agencies routinely and sometimes exclusively rely on electronic posting or email to communicate information to their employees. In short, "[t]oday's workplace is becoming increasingly electronic."

The same evolution is taking place in pre-election campaign communication. The Board's experience with campaigns preceding elections conducted under section 9 of the Act indicates that employers are, with increasing frequency, using e-mail to communicate with employees about the vote. See, e.g., *Humane Society for Seattle*, 356 NLRB No. 13,

slip op. at 4 (2010) ("On September 27, the Employer's CEO, Brenda Barnette, sent an email to employees asking that they consider whether ACOG was the way to make changes at SHS. On September 29, HR Director Leader e-mailed employees a link to a third-party article regarding 'KCACC Guild's petition and reasons the Guild would be bad for SHS."); *Research Foundation of the State University of New York at Buffalo*, 355 NLRB No. 170, slip op. at 19 (2010) ("On January 12, Scuto sent the first in a series of email's [sic] to all Employer postdoctoral associates concerning the Petitioner's efforts to form a Union at the Employer[,] . . . . explaining the Employer's position on unionization . . . ."); *Black Entertainment Television*, 2009 WL 1574462, at *1 (NLRB Div. of Judges June 5, 2009) (employer notified several employees by e-mail to attend a meeting in which senior vice-president spoke one-on-one with the employees regarding the election scheduled for the following day). For these reasons, the proposed rule would require that both telephone numbers and, where available, e-mail addresses be included on the *Excelsior* list.[45]

In addition, the list currently required under *Excelsior* does little to further the second purpose for requiring its production--to identify issues concerning eligibility and, if possible, to resolve them without the necessity of a challenge. In many cases, the names on the list are unknown to the parties. The parties may not know where the listed individuals work or what they do. Only through further factual investigation, for

[45] In *Trustees of Columbia University*, 350 NLRB 574, 576 (2007), the Board rejected an objection based on an employer's refusal to include e-mail addresses in the *Excelsior* list of employees on board a ship that was at sea for most of the pre-election period. In so doing, the Board held only that, "given the Employer's undisputed compliance with its *Excelsior* obligations as they stood as of the date of the Union's request, we are unwilling, on the facts of this case, to characterize that compliance as objectionable conduct." *Id*. at 576.

example, consulting other employees who may work with the listed, unknown employees or contacting the unknown employees themselves at their home addresses, can the parties potentially discover the facts needed to assess eligibility. It would further the purpose of narrowing the issues in dispute--and thereby avoid unnecessary challenges and litigation--if the list also contained work location, shift, and classification.

The proposed amendments would further require that the eligibility list be provided in electronic form unless the employer certifies that it does not possess the capacity to produce the list in the required form. In 1966, most employers maintained employee lists only on paper. Today, many, if not most, employers maintain electronic records. Yet when producing an *Excelsior* list, employers are still permitted to print out a copy of their electronic records and provide a paper list to the regional office which, in turn, mails or faxes a copy to the other parties. Requiring production of the list in electronic form would further both purposes of the *Excelsior* requirement.

The proposed amendments would require that the employer serve the eligibility list on the other parties electronically at the same time it is filed with the regional office. The Board's existing rule, as announced in *Excelsior*, requires only that the employer file the list with the regional director. 156 NLRB at 1240 (1966). *Excelsior* further provides that the regional director shall make the list available to all parties. It is the Board's experience in administering elections that this two-step process has caused needless administrative burden, avoidable delay in receipt of the list, and unnecessary litigation when the regional office, for a variety of reasons, has not promptly made the list available to all parties. See, e.g., *Special Citizens Futures Unlimited*, 331 NLRB 160, 160-62 (2000); *Alcohol & Drug Dependency Services,* 326 NLRB 519, 520 (1998); *Red Carpet*

Bldg. Maintenance Corp., 263 NLRB 1285, 1286 (1982); *Sprayking, Inc.*, 226 NLRB 1044, 1044 (1976). If adopted, the proposed amendments would eliminate this unnecessary administrative burden—as well as potential source of delay and resulting litigation—by providing for direct service of the list by the employer on all other parties. The regional office would make the list available upon request to the parties.

The proposed amendments would also shorten the time for production of the eligibility list from the current seven days to two days, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction. The Board's preliminary view is that advances in electronic recordkeeping and retrieval, combined with the provision of a preliminary list as described below in relation to § 102.63, render the full seven-day period unnecessary. This conclusion is also supported by the fact that the median size of units ranged between 23 and 28 employees from 2004 to 2013.[46]

Finally, the Board recognizes that the voter list proposals may implicate concerns about individual privacy and the dissemination of personal information. Accordingly, it has proposed an amendment that would impose a restriction on use of the eligibility list, barring parties from using it for any purposes other than the representation and related proceedings. The Board specifically seeks comments regarding this restriction and whether other restrictions, either alternatively or in addition to the above, should be imposed. Comments are also invited concerning whether, and in what circumstances, employees should be afforded the opportunity to choose whether and how any personal information might be disclosed, and whether giving such an option to employees would be inconsistent with the *Excelsior* Board's judgment that a fair election requires that all

[46] See Median Size of Bargaining Units in Elections, *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections*.

parties to a representation case proceeding have access to communicate with all the voters. Comments could discuss possible alternatives to disclosure, such as the desirability and feasibility of the Agency hosting protected communications portals (e.g., sealed-off email systems) to facilitate electronic communication between the nonemployer parties and employees without those parties receiving employee email addresses. Any such comments should also consider the costs which might be imposed by these various possibilities, both on the agency and on private parties, and how the Agency should balance employees' privacy interests with the public interests in fair and free elections and in the expeditious resolution of questions concerning representation. In sum, the Board is interested in constructive suggestions on these matters.

Sec. 102.63 Investigation of petition by regional director; notice of hearing; service of notice; Initial Notice to Employees of Election; Statement of Position form; withdrawal of notice

The proposed amendments provide that, absent special circumstances, the regional director would set the hearing to begin seven days after service of the notice of hearing. This provision reflects the current practice of some regions, but would make the practice explicit and uniform, thereby rendering Board procedures more transparent and predictable. Under the proposed amendments, parties served with a petition and description of representation procedures, as described above in relation to § 102.60, will thus be able to predict with a high degree of certainty when the hearing will commence even before service of the notice. The Board intends that the proposed amendments would be implemented consistent with the Board's decision in *Croft Metal, Inc*., 337 NLRB 688, 688 (2002), requiring that, "absent unusual circumstances or clear waiver by the parties," parties "receive notice of a hearing not less than 5 days prior to the hearing,

excluding intervening weekends and holidays." The proposed amendments would thus not require any party to prepare for a hearing in a shorter time than permitted under current law. Rather, as the Board held in *Croft Metal*, 337 NLRB at 688, "By providing parties with at least 5 working days' notice, we make certain that parties to representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all." The Board specifically seeks comments on the feasibility and fairness of this time period and all other such periods proposed in this Notice as well as the wording and scope of the exceptions thereto.

The proposed amendments provide that, with the notice of hearing, the regional director would serve a revised version of the Board's Form 5492, currently headed Notice to Employees. Under the proposed amendments, the revised form would bear the heading Initial Notice to Employees of Election, would specify that a petition has been filed as well as the type of petition, the proposed unit, and the name of the petitioner, and would briefly describe the procedures that will follow. The Board anticipates that the Initial Notice would also provide employees with the regional office's Web site address, through which they can obtain further information about the processing of the petition, including obtaining a copy of any direction of election and Final Notice to Employees of Election as soon as they issue. Employers would be required to post the revised Initial Notice to Employees of Election unlike current Form 5492.

The proposed amendments further provide that the regional director would serve the petition, the description of procedures in representation cases, and the Statement of Position form on all non-petitioning parties.

The proposed amendments would further require that the regional director specify in the notice of hearing the due date for Statements of Position. The Statements of Position would be due no later than the date of the hearing. In relation to small units, the regional director may choose to make the Statements of Position due on the date of the hearing and they may be completed at that time with the assistance of the hearing officer.

The Statement of Position form would replace NLRB Form 5081, the Questionnaire on Commerce Information. Under the proposed rules, its completion would be mandatory only insofar as failure to state a position would preclude a party from raising certain issues and participating in their litigation. The statement of position requirement is modeled on the mandatory disclosures described in Fed. R. Civ. P. 26(a) as well as on contention interrogatories commonly propounded in civil litigation.

The Board anticipates that early receipt of the Statement of Position form will assist parties in identifying issues that must be resolved at a pre-election hearing and thereby facilitate entry into election agreements. Parties who enter into one of the forms of election agreement described in § 102.62 would not be required to complete a Statement of Position under the proposed amendments.

The Statement of Position form would solicit the parties' position on the Board's jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing. In those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis

of the contention and identify the most similar unit it concedes is appropriate.[47] In those cases in which a party intends to contest at the pre-election hearing the eligibility of individuals occupying classifications in the proposed unit, the party would be required to both identify the individuals (by name and classification) and state the basis of the proposed exclusion, for example, because the identified individuals are supervisors. Finally, parallel to the amendment to the contents of petitions described in relation to § 102.61 above, the non-petitioning parties would be required to designate, in their Statement of Position, the individual who will serve as the party's representative in the proceeding, including for service of papers.

The Board believes that the Statement of Position form would ask parties to do no more than they currently do in preparing for a pre-election hearing. In addition, the Board's preliminary belief is that, by guiding such preparation, the proposed Statement of Position form would reduce the time and other resources expended in preparing to participate in representation proceedings.

In *Bennett Industries, Inc*., 313 NLRB 1363, 1363 (1994), the Board observed, "[I]n order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute." The Board's regional offices currently attempt to identify and narrow the issues through a number of procedures. In some cases, regions will conduct pre-hearing conferences either face-to-face or by telephone in an effort to identify and narrow the issues in dispute. Further, section 11217 of the Casehandling

[47] This requirement would codify parties' existing practice where they contend that the petitioned-for unit is not appropriate because the smallest appropriate unit includes additional classifications or facilities. See, e.g., *Westinghouse Electric Corp.*, 137 NLRB 332 (1962).

Manual provides, "Prior to the presentation of evidence or witnesses, parties to the hearing should succinctly state on the record their positions as to the issues to be heard." The proposed amendments would incorporate the principles underlying these commendable practices, but would give all parties clear, advance notice of their obligations, both in the rules themselves and in the statement of procedures and Statement of Position form. The amendments are not intended to preclude any other formal or informal methods used by the regional offices to identify and narrow the issues in dispute prior to or at pre-election hearings.

The proposed amendments provide that, as part of its Statement of Position, the employer would be required to provide a list of all individuals employed by the employer in the petitioned-for unit. The list would include the same information described above in relation to § 102.62 except that the list served on other parties would not include contact information.

As explained above in section I(A)(3) and in relation to § 102.62, a central purpose of requiring the employer to prepare and file an eligibility list is to insure that all parties have access to the information they need to evaluate whether individuals should be in the unit and are otherwise eligible to vote, so that the parties can attempt to resolve disputes concerning eligibility rather than prolong them "based solely on lack of knowledge." *Excelsior*, 156 NLRB at 1243. The Board further observed in *Excelsior* that "bona fide disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election." But that purpose is not well served

by provision of the list of eligible voters seven days after a decision and direction of election. It is prior to and during the hearing that the parties are most actively engaged in attempting to resolve such disputes. For this reason, the proposed amendments would require filing and service of a list of individuals providing services to the employer in the petitioned-for unit by a date no later than the opening of the pre-election hearing.

For the same reasons, the proposed amendments further provide that, if the employer contends that the petitioned-for unit is not appropriate, the employer also would be required to file and serve a similar list of individuals in the most similar unit that the employer concedes is appropriate.

Under the proposed amendments, the list filed with the regional office, but not the list served on other parties, would contain available e-mail addresses, telephone numbers, and home addresses. The regional office could then use this additional information to begin preparing the electronic distribution of the Final Notice of Election discussed below in relation to § 102.67.

Sec. 102.64 Conduct of Hearing

The proposed amendments to § 102.64 are intended to insure that the hearing is conducted efficiently and is no longer than necessary to serve the statutory purpose of determining if there is a question concerning representation. Congress instructed the Board to conduct a pre-election hearing to determine if there is a question concerning representation that should be resolved through an election. But Congress did not intend the hearing to be used by any party to delay the conduct of such an election. The proposed amendments would make clear that, ordinarily, resolution of disputes concerning the eligibility or inclusion of individual employees is not necessary in order to

determine if a question of representation exists and, therefore, that such disputes will be resolved, if necessary, post-election. The proposed amendments would also make clear that the duty of the hearing officers is to create an evidentiary record concerning only genuine disputes as to material facts. Finally, the proposed amendments would provide that the hearing shall continue from day to day until completed absent extraordinary circumstances.

Sec. 102.65 Motions; Interventions

Consistent with the effort to avoid piecemeal appeal to the Board, as discussed below in relation to § 102.67, the proposed amendments to § 102.65 would narrow the circumstances under which a request for special permission to appeal will be granted. The proposed amendments provide that such an appeal would only be granted under extraordinary circumstances when it appears that the issue will otherwise evade review. To further discourage piecemeal appeal, the amendments provide that a party need not seek special permission to appeal in order to preserve an issue for review post-election. Finally, consistent with current practice, the amendments provide that neither the filing of a request for special permission to appeal nor the grant of such a request will stay an election or any other action or require impounding of ballots unless specifically ordered by the Board.

The proposed amendments provide that any intervenors, like the original non-petitioning parties, would be required to file or make a Statement of Position.

The proposed amendments also make clear that neither a regional director nor the Board will automatically delay any decision or action during the time permitted for filing motions for reconsideration, rehearing, and to reopen the record.

Sec. 102.66 Introduction of Evidence; Rights of Parties at Hearing; Subpoenas

The proposed amendments to § 102.66 are intended to limit the evidence offered at hearings to that evidence which is relevant to a genuine dispute as to a fact material to an issue in dispute. The amendments would thus give parties the right to introduce evidence "relevant to any genuine dispute as to any material fact." This standard was derived from Rule 56 of the Federal Rules of Civil Procedure. The proposed amendments would not prevent any party from presenting evidence concerning any relevant issue if there is a genuine dispute as to any material fact. In other words, the proposed amendments would accord parties full due process of law consistent with that accorded in the federal courts.

The amendments would further describe a process to be followed by the hearing officer to identify issues in dispute and determine if there are genuine disputes as to facts material to those issues. The hearing officer would open the hearing by reviewing, or assisting the non-petitioning parties to make, Statements of Position. The petitioner would then be required to respond to any issues raised in the non-petitioning parties' Statements of Position, thereby joining the issues. No party would be permitted to offer evidence or cross-examine witnesses concerning an issue it did not raise in its Statement of Position or did not join in response to another party's Statement of Position. However, any party would be permitted to present evidence as to statutory jurisdiction,[48] and the petitioner would be permitted to present evidence as to the appropriateness of the

[48] Under the proposed amendments, the Board will continue its longstanding practice of presuming that an employer satisfies the Board's discretionary jurisdictional standards when the employer refuses to voluntarily provide information requested by the Board in order to apply those standards. See, e.g., *Seaboard Warehouse Terminals, Inc.*, 123 NLRB 378, 382-83 (1959); *Tropicana Products, Inc.*, 122 NLRB 121, 123-24 (1958).

unit if the nonpetitioning parties decline to take a position on that issue. In addition, the hearing officer would retain discretion to permit parties to amend their Statements of Position and responses for good cause, such as newly discovered evidence.

Consistent with the amendment's intent to defer both litigation and consideration of disputes concerning the eligibility or inclusion of individual employees until after the election, no party would be precluded from challenging the eligibility or inclusion of any voter during the election on the grounds that no party raised the issue in a Statement of Position or response thereto.

The proposed amendments would implement the decision in *Bennett Industries, Inc*., 313 NLRB 1363 (1994). The proposed amendments would also be consistent with *Allen Health Care Services*, 332 NLRB 1308 (2000), in which the Board held that even when an employer refuses to take a position on the appropriateness of a petitioned-for unit, the regional director must nevertheless take evidence on the issue unless the unit is presumptively appropriate. The proposed amendments would thus permit the petitioner to offer evidence in such circumstances and merely preclude non-petitioners, which have refused to take a position on the issue, from offering evidence or cross-examining witnesses.

Consistent with both *Bennett Industries* and *Allen Health Care*, the proposed amendments would preclude any party from subsequently raising an issue or offering evidence or cross-examining witnesses at the pre-election hearing related to an issue (other than statutory jurisdiction) it did not raise or join in a Statement of Position or response thereto. In the case of exclusions from the proposed unit, for example, if no party timely asserts that an individual should be excluded, the Board would include the

individual subject to challenge during the election, as explained above. If no party objects to a proposed exclusion, the Board would exclude the individual. In relation to the appropriateness of the unit, if all parties agree the unit is appropriate, the Board would so find unless it appears on its face to be a statutorily inappropriate unit or to be inconsistent with settled Board policy. If any party refuses to take a position on the appropriateness of the unit, that party would be precluded from contesting the appropriateness and offering evidence relating to the appropriateness of the unit. Such preclusion is consistent with existing precedent and clarifies parties' rights under *Allen Health Care*.

Under the proposed amendments, after the issues are properly joined, the hearing officer would require the parties to make an offer of proof concerning any relevant issue in dispute and would not proceed to take evidence unless the parties' offers create a genuine issue of material fact. An offer of proof may take the form of an oral or written statement of the party or its counsel identifying the witnesses it would call to testify and summarizing their testimony. The requirement of an offer of proof is thus similar to that which exists under current procedures for a party filing objections post-election.[49] The requirement is also consistent with existing practice in relation to a presumptively appropriate unit. See, e.g., *Laurel Associates, Inc*., 325 NLRB 603 (1998); *Mariah, Inc*., 322 NLRB 586, 587 (1996). The proposed amendments thus adopt standard practice in the federal and state courts and before other agencies. See, e.g., Fed. R. Civ. P. 56. The proposed amendments rest on the proposition that, if no disputed issues are identified or

[49] See Casehandling Manual section 1132.6 ("In addition to identifying the nature of the misconduct on which the objections are based, this submission should include a list of the witnesses and a brief description of the testimony of each.")

there are no disputed facts material to such issues, there is no need for an evidentiary hearing.

The Board's preliminary view is that "an appropriate hearing" does not mean an evidentiary hearing when either no issues are in dispute or no party has been able to make an offer of proof creating a genuine dispute as to any material fact. As Judge Learned Hand observed in 1949,

> Neither the statute, nor the Constitution, gives a hearing where there is no issue to decide. . . . The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests. Every summary judgment denies a trial upon issues formally valid. Where, as here, the evidence on one side is unanswerable, and the other side offers nothing to match or qualify it, the denial of a trial invades no constitutional privilege. These considerations are particularly appropriate when we consider that the Board must conduct its duties in a summary way; not, we hasten to add, without observing all the essentials of fair administration, but with as much dispatch as is consistent with those.

Fay v. Douds, 172 F.2d 720, 725 (2d Cir. 1949).[50]

The common type of joinder of issues and offer-of-proof procedures set forth in the proposed amendments, which parallel even more common pleading and summary judgment procedures in the federal and state courts, are fully consistent with the statutory requirement of "an appropriate hearing" and all parties' rights to due process of law.

The proposed amendments would make clear that, although the Statement of Position form asks the non-petitioning parties to state their positions on the type, dates, times, and location of the election, and the eligibility period, and that the hearing officer

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[50] Although Judge Hand's analysis of the issue discussed in the text remains sound, the jurisdictional basis for *Fay* being heard in federal court prior to a final order in an unfair labor practice case has been "effectively discarded by all circuits" in subsequent decisions. Robert A. Gorman & Matthew W. Finkin, Labor Law: Unionization and Collective Bargaining § 4.11 (2d ed. 2004). See, e.g., *NLRB v. Interstate Dress Carriers, Inc.*, 610 F.2d 99, 107 (3d Cir. 1979); *Squillacote v. International Bhd. of Teamsters, Local 344*, 561 F.2d 31, 39 (7th Cir. 1977) (collecting cases).

should solicit all parties' positions on these issues, consistent with existing practice, the resolution of these issues remains within the discretion of the regional director, and the hearing officer shall not permit them to be litigated.

The proposed amendments would provide that, if, at any time during the hearing, the hearing officer determines that the only genuine issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer will close the hearing.

Congress specified that a hearing take place before an election in order to insure that the Board determine that a question concerning representation exists prior to directing that an election be held in order to resolve the question. Thus, Section 9(c) provides that, after the filing of a petition,

> the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists, it shall provide for an appropriate hearing upon due notice. . . . If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Congress did not, however, direct that every disputed issue related to the conduct of an election be litigated in the pre-election hearing or resolved prior to the conduct of the election.

Litigation and resolution of individual eligibility issues prior to elections is not the norm within our political system. In Board-supervised elections, it often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated and decided even when their votes end up not affecting the outcome of the election. If a majority of employees vote against representation, even assuming all the disputed votes were cast in favor of representation, the disputed

eligibility questions become moot. If, on the other hand, a majority of employees choose to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board.[51] As the Eighth Circuit observed, "The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue." *Bituma Corp. v. NLRB*, 23 F.3d 1432, 1436 (8th Cir. 1994). The Sixth Circuit similarly found that "[s]uch a practice enables the Board to conduct an immediate election." *Medical Center at Bowling Green v. NLRB*, 712 F.2d 1091, 1093 (6th Cir. 1983).

The proposed revision of this section of the rules together with the elimination of section 101.20(c) removes the basis for the Board's holding in *Barre-National, Inc*., 316 NLRB 877 (1995), that the hearing officer must permit full litigation of all eligibility issues in dispute prior to the direction of an election, absent consent of all parties to defer litigation of the issues. Congress specified that a hearing must be held to determine if "a question concerning representation exists." Adjudication of the eligibility of the 24 individuals at issue in *Barre-National* was not necessary to determine whether a question concerning representation existed. Moreover, the Board did not hold in *Barre-National* that the disputed issue had to be resolved before the regional director directed and conducted an election. In fact, the Board expressly noted, "our ruling concerns only the entitlement to a preelection hearing, which is distinct from any claim of entitlement to a

[51] See *New York Law Publishing Co.*, 326 NLRB No. 93, slip op. at 2 (2001) ("The parties may agree through the course of collective bargaining on whether the classification should be included or excluded. Alternatively, in the absence of such an agreement, the matter can be resolved in a timely invoked unit clarification petition.")

final agency decision on any issue raised in such a hearing." *Id*. at 878 n. 9. The Board further noted that "reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election." *Id.* As observed above, the Board has frequently deferred final adjudication of such issues until after election, permitting disputed individuals to vote subject to challenge. Thus, the Board's holding in *Barre-National* required that an evidentiary hearing be held on the eligibility issue, potentially delaying the conduct of the election for a significant period of time, but the Board both in that case and in many others has permitted resolution of the issue to be deferred until after the election. Such an outcome serves no apparent purpose. Therefore, the proposed amendments would revise the regulations that formed the basis of the holding in *Barre-National* to permit deferral of both litigation and resolution of disputes that need not be resolved in order to determine that a question of representation exists.

The unit's scope must be established and found to be appropriate prior to the election. But the Board is not required to and should not decide all questions concerning the eligibility or inclusion of individual employees prior to an election. The Board's preliminary view is that deferring both the litigation and resolution of eligibility and inclusion questions affecting no more than 20 percent of eligible voters represents a reasonable balance of the public's and parties' interest in prompt resolution of questions concerning representation and employees' interest in knowing precisely who will be in the unit should they choose to be represented.

The proposed amendments are consistent with, but seek to improve, the Board's current practice concerning post-election rulings on eligibility and inclusion. In a variety

of circumstances, most typically when the Board has granted a pre-election request for review concerning the scope of the unit or employee eligibility, but not ruled on the merits until after the election, the Board has addressed the question of when a post-election change in the unit described in the notice of election requires a new election. The Board has uniformly held that a change representing no more than 20 percent of the unit does not require a new election. See, e.g., *Morgan Manor Nursing and Rehabilitation Center*, 319 NLRB 552 (1995) (20 percent); *Toledo Hospital*, 315 NLRB 594 (1994) (19.5 percent). In *Morgan Manor*, the Board stated that "the exclusion of one classification from a facilitywide service and maintenance unit comprised of employees in nine other specifically named classifications, represents a numerical change which we . . . do not view as signifying a sufficient change in unit size to warrant setting aside of the election." 319 NLRB at 553. Similarly, in *Toledo Hospital*, the Board found, "We do not view the change in the size of the unit here (19.5 percent . . .) as signifying a sufficiently significant change in character and scope to warrant setting aside the election." 315 NLRB at 594. In a small number of cases,[52] courts of appeals have reversed the Board's conclusion that a new election was not necessary when the size of the unit was altered by less than 20 percent.[53] These courts have based their holdings on the particular nature of the change in the unit, concluding that it significantly altered the scope or character of the original unit. More importantly, these courts found that, by informing employees that they were voting to be represented in one unit and then

[52] The Board has identified only two such cases, cited in the following footnote.

[53] See *NLRB v. Beverly Health and Rehabilitation Services*, 120 F.3d 262 (4th Cir. 1997) (per curiam) (unpublished) (reversing *Morgan Manor*, cited in text, involving a 20 percent reduction in size of unit); *NLRB v. Parsons School of Design*, 793 F.2d 503 (2d Cir. 1986) (involving a less than 10 percent reduction in size of unit).

changing the scope and character of the unit after the election, the Board was "misleading the voters as to the scope of the unit." *NLRB v. Lorimar Productions, Inc.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (involving approximately 35 percent reduction in size of unit); see also *NLRB v. Beverly Health and Rehabilitation Services,*, 120 F.3d 262 (4th Cir. 1977)(per curiam)(unpublished) ("Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character . . . , the employees have effectively been denied the right to make an informed choice in the representation election.")

The Board's preliminary view is that adoption of a bright-line numerical rule requiring that questions concerning the eligibility or inclusion of individuals constituting no more than 20 percent of all potentially eligible voters be litigated and resolved, if necessary, post-election, best serves the interests of the parties and employees as well as the public interest in efficient administration of the representation case process.[54] In order to insure that prospective voters are in no way misled as to the scope of the unit, under the proposed amendments, if resolution of eligibility or inclusion disputes is deferred, the Final Notice to Employees of Election would so inform employees (including an explanation of how the dispute will be resolved) and the disputed employees would be permitted to vote subject to challenge as explained below in relation to § 102.67.

[54] The Board has permitted regional directors to defer resolution of the eligibility of an even higher percentage of potential voters. See, e.g., *Northeast Iowa Telephone*, 341 NLRB 670, 671 (2004) ("While we recognize that allowing 25 percent of the electorate to vote subject to challenge is not optimal, the Employer's opportunity to raise its supervisory issues remains preserved through appropriate challenges and objections to the election or through a subsequent unit clarification petition.")

Consistent with existing practice, the proposed amendments also provide that a party that has been served with a subpoena may be required to file or orally present a motion to quash prior to the five days provided in section 11(1) of the Act. Both the Board and federal courts have construed the five days provided in the Act as a maximum, not a minimum. The Casehandling Manual provides:

> There is case authority which holds that the 5-day period is a maximum and not a minimum. Absent a showing of prejudice, the subpoenaed party may be required to file and argue its petition to revoke and, if ordered by the Administrative Law Judge or hearing officer, produce subpoenaed testimony and documents at hearing in less than 5 days from receipt of the subpoena. See *Packaging Techniques, Inc.,* 317 NLRB 1252, 1253–54 (1995) and *NLRB v. Strickland,* 220 F.Supp. 661, 665–66 (D.C.W. Tenn., 1962), affd. 321 F.2d 811, 813 (6th Cir. 1963).

Section 11782.4; see also *Brennan's French Restaurant*, 129 NLRB 52, 54 n.2 (1960) (judge's ruling found moot by Board). The proposed amendments would codify existing practice vesting discretion in the hearing office to determine how much time a party served with a subpoena should be accorded to move to quash up to the statutory maximum of five days. As the judge reasoned in *Packaging Techniques*, 317 NLRB at 1254, "the case law suggests a common sense application of the rule."

Finally, the proposed amendments provide that at the close of the hearing, parties would be permitted to make oral arguments on the record. Parties would be permitted to file briefs only with the permission of the hearing officer and within the time permitted by and subject to any other limitations imposed by the hearing officer. Given the recurring and often uncomplicated legal and factual issues arising in pre-election hearings, it is the Board's preliminary view that briefs are not needed in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions.

Sec. 102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Review of Action by the Regional Director; Statement in Opposition to Appeal; Final Notice of Election; Voter List

Consistent with the proposed amendment to § 102.66, the proposed amendments to § 102.67 would provide that if the regional director finds at any time that the only issues remaining in dispute concern the eligibility or inclusion of employees who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the regional director shall direct that those individuals be permitted to vote subject to challenge. The proposed amendments would further provide that the Final Notice to Employees of Election shall explain that such individuals are being permitted to vote subject to challenge and the procedures through which their eligibility will be resolved.

The proposed amendments would give the regional director discretion to issue a direction of election with a decision to follow no later than the time of the tally of votes. Because the proposed amendments would defer the parties' right to request Board review of pre-election rulings until after the election, in order to avoid delaying the conduct of the election, regional directors may exercise their discretion to defer issuance of the decision up to the time of the tally without prejudice to any party.

Because the parties will have fully stated their positions on the type, dates, times, and locations of the election either in their Statements of Position or at the hearing, under the proposed amendments the regional director would address these election details in the direction of election and issue the Final Notice to Employees of Election with the direction. Consistent with both the statutory purpose for conducting elections and existing practice, the proposed amendments would provide that the regional director shall set the election for the earliest date practicable.

Both the decision and direction of election and the Final Notice to Employees of Election would be electronically transmitted to all parties when they have provided e-mail addresses to the regional office. When the parties have provided e-mail addresses of affected employees, the regional office would also transmit the notice electronically to those employees.[55] In addition, the employer would be required to post the Final Notice to Employees of Election in those places where it customarily posts notices to employees as well as electronically if the employer customarily uses electronic means to communicate with its employees. Because of the potential unfairness of conclusively presuming that the employer received the notice if it does not inform the region to the contrary within five work days, the proposed amendments would also eliminate the provision in § 103.20 creating such a conclusive presumption.

Because of the provision of a mandatory and more detailed initial notice of election, as described in relation to § 102.60 above, for manual and electronic posting of the final notice by employers, and for electronic transmission of the final notice of election to individual, eligible voters, in all cases where such notice is feasible, the proposed rules would also reduce the minimum time between the posting of the final notice and the election from three to two work days.

The Board anticipates that continuing advances in electronic communications and continuing expanded use of e-mail may, in the near future, enable regional offices in virtually all cases to transmit the final notice of election directly to all eligible voters,

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[55] The proposed rules provide in §§ 102.62, 102.63, and 102.67 that both the preliminary and final eligibility lists include telephone numbers as well as e-mail addresses (when available) both to facilitate use of the final list for the purposes described in *Excelsior* and to permit the regions potentially to test the use of automated phone calls for the purpose of providing prompt notice of the election to each eligible voter.

rendering employer posting of the final notice of election unnecessary. The Board similarly anticipates that the proposed amendments' adoption of dual notice procedures will be an interim measure. During this interim period, while the employer remains obligated to post the final notice of election, the Board does not intend that the failure of a regional office to provide electronic notice to any eligible voter would be the basis for overturning the results of an election under the proposed amendments.

The proposed amendments would make the same changes in the form, content, and service of the list of eligible voters that the employer must file after a direction of election as were described above in relation to § 102.62 after entry into any form of consent or stipulated election agreement. In addition, because of advances in recordkeeping technology and because in most cases the employer will have provided a preliminary list of employees in the proposed or alternative units as described in relation to § 102.63 above, the proposed amendments would also reduce the time during which the list must be filed and served from seven days to two work days. Consistent with existing practice, reflected in *Mod Interiors, Inc*., 324 NLRB 164 (1997), and Casehandling Manual section 11302.1, an election shall not be scheduled for a date earlier than ten days after the date by which the eligibility list must be filed and served, unless this requirement is waived by the petitioner and any other parties whose names will appear on the ballot.

The proposed amendments would eliminate the regional director's authority to transfer a case at any time to the Board for decision. This authority has rarely been used and, when it has been used, has led to extended delays in the disposition of petitions. See, e.g., *Centurion Auto Transport, Inc.*, 329 NLRB 394 (1999) (transferred December

1994, decided September 1999); *Roadway Package System, Inc.*, 326 NLRB 842 (1998) (transferred May 1995, decided August 1998); *PECO Energy Co.*, 322 NLRB 1074 (1997) (transferred Sept 1995, decided February 1997); *Johnson Controls, Inc.*, 322 NLRB 669 (1996) (transferred June 1994, decided December 1996).

As under the current rules, if the regional director dismisses the petition, parties would be permitted to file a request for review with the Board. If the regional director directs an election, however, the proposed amendments would defer all parties' right to request Board review until after the election. The proposed amendments would retain the provisions for a request for special permission to appeal a determination by the regional director, modified as described above in relation to § 102.65 above.

The Board's current Statements of Procedures provide that elections "normally" are delayed for a period of at least 25 days after the regional director directs that an election should be conducted, in order to provide the parties an opportunity to request Board review of the regional director's determinations.

> The parties have the right to request review of any final decision of the Regional Director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. Any such request for review must be a self-contained document permitting the Board to rule on the basis of its contents without the necessity of recourse to the record, and must meet the other requirements of the Board's Rules and Regulations as to its contents. The Regional Director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary arrangements for an election, including the issuance of a notice of election. However, unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th days after the date of the decision, to permit the Board to rule on any request for review which may be filed.

29 CFR 101.21(d).

Thus, while the rules provide for discretionary review and expressly provide that requesting such review shall not operate as a stay of the election, the Statements of Procedures suggest that there should normally be a waiting period of 25-30 days. This is the case even though such requests are filed in a small percentage of cases, are granted in an even smaller percentage,[56] and result in orders staying the conduct of elections in virtually no cases at all. For these reasons, such a waiting period appears to serve little purpose even under the existing rules permitting a pre-election request for review.

The proposed amendments would eliminate the pre-election request for review and the accompanying waiting period. All pre-election rulings would remain subject to review post-election if they have not been rendered moot.

The Board anticipates that the proposed amendments would eliminate unnecessary litigation concerning issues that may be and often are rendered moot by the election results and thereby reduce the expense of participating in representation proceedings for the parties as well as the government. Similarly, by consolidating all Board review post-election, the proposed rules would relieve parties of the burden of petitioning for pre-election review in order to preserve issues that may be rendered moot by the election results and, even if that is not the case, would allow parties to raise all issues in a single petition and thereby preserve both private and public resources. In other words, the Board anticipates that the proposed amendments would not simply shift

[56] A comparison of the total number of elections to the total number of grants of review (including grants of review after petitions were dismissed) during the period 2004 to 2013 reveals that review was granted in less than 1 percent of all representation cases in which an election was conducted and in approximately 15 percent of those cases in which a request was filed. See NLRB Annual Reports (Fiscal Years 2004-2009) and NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2004-2012). Data for 2010-2013, after publication of the Annual Reports was discontinued, was produced from the NLRB's electronic filing system.

litigation from before to after elections, but would significantly reduce the total amount of litigation.

Sec. 102.68 Record; What Constitutes; Transmission to Board

The proposed amendments to this section would conform its contents to the amendments to other sections.

Sec. 102.69 Election Procedure; Tally of Ballots; Objections; Requests for Review of Directions of Elections, Hearings; Hearing Officer Reports on Objections and Challenges; Exceptions to Hearing Officer Reports; Requests for Review of Regional Director Reports or Decisions in Stipulated or Directed Elections.

The proposed amendments to § 102.69 would maintain the current time period (seven days after the tally) for the filing of objections to the conduct of the election or to conduct affecting the results of the election. The current rules provide a filing party with an additional seven days to file an offer of proof. The proposed amendments would require that a party filing objections simultaneously file a written offer of proof supporting the objections as described above in relation to § 102.66(b). The proposed change is based on the view that objections to a secret-ballot election should not be filed by any party lacking factual support for the objections and, therefore, that a filing party should be able to describe the facts supporting its objections at the time of filing. The proposed amendments codify existing practice permitting parties to file, but not serve, evidence in support of objections.

The proposed amendments would also codify existing practice permitting the regional director to investigate the objections by examining evidence offered in support thereof to determine if a hearing is warranted. Thus, if there are potentially determinative challenges or the regional director determines that objections together with an accompanying offer of proof raise a genuine issue of material fact, the proposed

amendments would require that the regional director serve a notice of hearing setting the matters for hearing within 14 days of the tally or as soon thereafter as practicable. If the resolution of questions concerning the eligibility of individuals in the unit was deferred by the hearing officer, as described in § 102.66 above, and the votes of such individuals are potentially outcome determinative, the deferred questions would be addressed in the post-election hearing. The proposed amendments would further provide that any such hearing would open with the parties stating their positions on any challenges and objections, followed by offers of proof as described above in relation to § 102.66.

The proposed amendments would provide that if no potentially determinative challenges exist and no objections are filed, any party may file a request for review of the regional director's decision and direction of election within 14 days of the tally. If there are potentially determinative challenges or objections, a request for review of the regional director's decision and direction of election may be filed within 14 days of the regional director's disposition of the post-election disputes and may be consolidated with any request for review of post-election rulings.

The proposed amendments would create a uniform procedure in those cases in which there are potentially outcome determinative challenges or the regional director determines that objections together with an accompanying offer of proof raise genuine issues of material fact that must be resolved. Adopting the procedure currently contained in §§ 102.69(d) and (e), the proposed amendments would provide that, in such cases, the regional director shall provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations as to the disposition of the issues. Within 14 days after issuance of such a report, any party may file exceptions with the

regional director. Finally, consistent with the proposed changes described above in relation to § 102.62, the proposed amendments would make Board review of a regional director's resolution of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections.[57] The Board anticipates that this proposed change would leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service.

Subparts D and E, §§ 102.73 through 102.88, Procedures for Unfair Labor Practice and Representation Cases Under Section 8(b)(7) and 9(c) of the Act and Procedures for Referendum Under Section 9(e) of the Act

The proposed amendments in these two subparts are intended solely to conform their provisions to the amendments in Subpart C described above.

Subpart I—Service and Filing of Papers

Sec. 102.112 Date of Service; Date of Filing

The proposed amendments would correct an omission concerning the effective date of service by electronic mail.

Sec. 102.113 Methods of Service of Process and Papers by the Agency; Proof of Service

[57] The Board anticipates that permitting it to deny review of regional directors' resolution of post-election disputes--when a party's request raises no compelling grounds for granting such review--would eliminate the most significant source of administrative delay in the finality of election results. Together with simultaneous filing of objections and offers of proof and prompt scheduling of post-election hearings, when they are necessary, the Board anticipates that the proposed amendments would reduce the period of time between the tally of votes and certification of the results. Such an outcome would reduce the time during which employers are uncertain about their legal obligations because, after a tally showing a majority vote in favor of representation, employers violate the duty to bargain by unilaterally changing the status quo only if a representative is ultimately certified. See *Mike O'Conner Chevrolet*, 209 NLRB 701, 703 (1974).

The proposed amendments would add electronic mail as an approved method of service of Board papers other than complaints, compliance specifications, final decisions and orders in unfair labor practice cases, and subpoenas. The existing rules include regular mail, private delivery service and facsimile transmission (with consent), along with personal service and certified and registered mail. Section 102.114 has provided for service of parties' papers by electronic mail since 2009.

Sec. 102.114 Filing and Service of Papers; Form of Papers; Manner and Proof of Filing and Service; lectronic filings

The proposed amendments to this section are intended solely to conform its provisions to the amendments in Subpart C described above.

Part 103, Subpart B—Election Procedures

Sec. 103.20 Posting of Election Notices

The proposed amendments eliminate this section, the only section of part 103 of the regulations governing procedures in representation proceedings, and integrate its contents into part 102, modified as explained above in relation to § 102.67.

Request for Comment Regarding Blocking Charges

Just as the Board seeks through the proposed amendments to prevent any party from using the hearing process established under section 9 of the Act to delay the conduct of an election though unnecessary litigation, the Board also believes that no party should use the unfair labor practice procedures established under sections 8 and 10 to unnecessarily delay the conduct of an election. As set forth in the Casehandling Manual, "The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an

election, were one to be conducted." Section 11730. This "blocking charge" policy is not set forth or implemented in the current rules, but it has been applied by the Board in the course of adjudication.[58]

The Board therefore specifically invites comment on whether any final amendments should include changes in the current blocking charge policy as described in sections 11730 to 11734 of the Casehandling Manual or whether any changes in that policy should be made by the Board through means other than amendment of the rules. The Board further specifically invites interested parties to comment on whether the Board should provide that (1) any party to a representation proceeding that files an unfair labor practice charge together with a request that it block the processing of the petition shall simultaneously file an offer of proof of the type described in relation to §§ 102.66(b) and 102.69(a); (2) if the regional director finds that the party's offer of proof does not describe evidence that, if introduced at a hearing, would require that the processing of the petition be held in abeyance, the regional director shall continue to process the petition; (3) the party seeking to block the processing of a petition shall immediately make the witnesses identified in its offer of proof available to the regional director so that the regional director can promptly investigate the charge as required by section 11740.2(c) of the Casehandling Manual; (4) unless the regional director finds that there is probable cause to believe that an unfair labor practice was committed that requires that the processing of the petition be held in abeyance, the regional director shall continue to process the petition; (5) if the Regional Director is unable to make such a determination

[58] See, e.g., *Bally's Atlantic City*, 338 NLRB 443 (2002). See generally Berton B. Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?*, 39 LAB. L.J. 651 (1988).

prior to the date of the election, the election shall be conducted and the ballots impounded; (6) if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require that the processing of the petition be held in abeyance under current policy, the regional director shall instead conduct the election and impound the ballots; (7) if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require that the petition be dismissed under section 11730.3 of the Casehandling Manual, the regional director shall instead conduct the election and impound the ballots; (8) the blocking charge policy is eliminated, but the parties may continue to object to conduct that was previously grounds for holding the processing of a petition in abeyance and the objections may be grounds for both overturning the elections results and dismissing the petition when appropriate; or (9) the blocking charge policy should be altered in any other respect.

V. Response to Dissent

The comments of our dissenting colleagues, set forth below, make clear that the Board is unanimous in its goal to improve the Board's representation case procedures. We acknowledge, and share, our colleagues' commitment to a constructive dialogue about the important issues involved in this rulemaking. The dissent presents arguments concerning both the process followed by the Board in issuing this NPRM and the content of the proposed amendments. We address here the process-related points, and some of the broader issues raised by the dissent concerning the substance of the proposals. These latter issues, along with the more specific points made in the dissent concerning particular aspects of the proposed reforms, will be examined carefully in the course of the Board's

consideration of the NPRM. We look forward to further exchanges of ideas among the Board members on these issues, especially in light of the public comments.

First, our decision to issue the NPRM in its original form, which the dissent specifically criticizes, reflects our judgment that such re-issuance is the most efficient and effective rulemaking process to follow at this time. The NPRM presents a range of possible changes to the Board's representation case procedures aimed at more effectively administering the Act. We believe that the original NPRM still frames the issues well and raises the appropriate concerns and questions for public comment; that relevant circumstances have not changed in any significant way since the NPRM first issued in June of 2011; and that its re-issuance is the most efficient and fair mechanism to elicit broad and detailed public input. All Board Members have had the opportunity to consider the matters presented, and a majority has decided that the proposal issued in 2011 deserves full consideration by the Board at this time.

Contrary to the dissent's implication, the proposal does not in any way suggest the Board's prejudgment of the merits of the proposals and, likewise, does not imply rejection of any of the matters raised in prior comments. The NPRM is simply a mechanism for examining possible changes to the Board's election procedures and soliciting public participation, not a declaration that the Board has committed itself to adopting all the proposals. In our view, the function of a *proposed* rule is to raise—not resolve—issues that should be considered. This is consistent with the APA's notice-and-comment process, which is fundamentally predicated on the rulemaking agency's open mind: we are in no way "unduly tether[ed]" to the proposal.

Indeed, the NPRM is being re-issued precisely for the purpose of providing a legally appropriate, administratively efficient, and demonstrably fair process for considering all the issues and comments raised in the prior proceeding, while giving an opportunity for any additional commentary. This allows all the material submitted to be carefully considered in a single consolidated proceeding. Over 65,000 comments were filed in response to the original NPRM, and over 400 pages of transcript were added to the record from the public hearing held in July, 2011. Reissuing the proposal is a procedurally appropriate mechanism for the Board to consider all of the previous submissions while also inviting comments regarding any new issues that may have arisen, so that all may be considered when making a determination whether or how to change the representation case procedures. Many members of the public devoted a substantial amount of time to addressing these issues in response to the original NPRM, and we believe they should not be required to duplicate prior efforts in order to have their views considered by the Board.

We also believe that circumstances have not significantly changed since June 22, 2011, when the NPRM was initially issued. While the Board adopted a limited set of the proposed amendments on December 22, 2011, those changes were effective for less than a month before the United States District Court for the District of Columbia struck down the rule and held that "representation elections will have to continue under the old procedures." The Board then immediately suspended processing cases under the December 2011 amendments and returned to its previously existing rules.

Likewise, neither the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB No. 83 (2011), affd sub. nom, *Kindred Nursing Centers*

East, LLC v. NLRB, 727 F.3d 552 (6th Cir. 2013), nor the General Counsel's Section 10(j) initiative against discriminatory discharges during election campaigns has had, or is likely to have, a significant impact on representation case processing by the Board. Accordingly, neither development undermines the premises of the NPRM. *Specialty Healthcare* held (slip op. 14) in relevant part that "the traditional community of interest test . . . will apply as the starting point for unit determinations in all cases not governed by the Board's Health Care Rule," and sets forth a clear test—using a formulation drawn from Board precedent and endorsed by the District of Columbia Circuit—for those cases in which an employer contends that a proposed bargaining unit is inappropriate because additional groups of employees are excluded from the bargaining unit. These issues are not addressed by the NPRM, which does not affect the appropriateness of bargaining units. Likewise, *Specialty Healthcare* does not implicate representation-case procedures, which are addressed by the NPRM. Before *Specialty Healthcare*, regional directors were required to determine whether the petitioned-for unit was appropriate prior to directing an election but were not required to resolve all individual eligibility issues in the pre-election decision, and both remain true after *Specialty Healthcare*.

As for the General Counsel's 2010 Section 10(j) initiative, the proposals contained in the NPRM are not designed to deter, minimize, or counteract unfair labor practices by either employers or unions during representation campaigns. Rather, the NPRM proposals concern representation case procedures. Limiting unfair labor practices is beyond the scope of this rulemaking, and, contrary to the dissent's implication, the NPRM is not designed to shorten the time it takes to conduct an election in order to

reduce the opportunity for unlawful restraint and coercion of employees. The extensive commentary by the dissent on this issue is beside the point.[59]

Secondly, the NPRM does not "contradict specific provisions in the Act" as the dissent claims in arguing that all voter eligibility issues must be litigated and resolved in a pre-election hearing. The only issue required by Section 9(c)(1) to be resolved at the pre-election hearing is "whether a question of representation exists." The proposed rule requires that such a hearing be conducted and provides an orderly and efficient process for resolving this issue, absent the parties voluntarily entering into an election agreement. It ensures that a pre-election hearing will provide a record upon which the regional director can determine the scope and appropriateness of the voting unit. This determination would be made prior to the election, and a written unit description would be provided to the employees in the notice of election. The dissent does not claim otherwise. As to voter eligibility issues, Section 9 of the Act neither grants parties the right to litigate all individual eligibility issues at a pre-election evidentiary hearing, nor does it mandate the pre-election resolution of all voter eligibility issues. Current practice already defers resolution of voter eligibility issues in certain circumstances. Indeed, the traditional election-day challenge procedure results in the resolution of eligibility issues after the election has taken place. These long-standing procedures are not inconsistent with the Act and do not violate any congressional command. Under the NPRM, the resolution of issues affecting voter eligibility would be deferred until after the election in those circumstances where the issues do not affect enough voters to justify delaying the

[59] Nevertheless, we agree with the dissent that the Act deserves to be enforced vigorously in all contexts, and look forward to working with our colleagues on ways we can enforce the unfair labor practice provisions of the Act more effectively.

election, and the resolution of the issues is unnecessary to determine whether the proposed unit is appropriate or to ensure compliance with other statutory provisions, such as Section 9(b)(1). Nothing in the NPRM would alter the fact that other voter eligibility issues can and will be resolved prior to the election.

The only remaining question is what purpose it serves to take evidence at the pre-election hearing on issues which will not be resolved before the election. The dissent urges that ALL eligibility issues – even those whose resolution has historically been deferred until after the election – be litigated in the pre-election hearing. It serves no statutory purpose to litigate every individual eligibility issue at the pre-election hearing, and we do not believe, at least at this preliminary stage of the rulemaking process, that the Board should oblige the parties and the regional offices to incur the cost of litigating issues that are likely to be mooted by the results of the election itself. In like manner, the hearing process is further managed in the NPRM through procedures designed to avoid the litigation of issues which are irrelevant to whether there is a question of representation or as to which the parties are not in dispute—changes which would be consistent with the statute for the same reasons. The NPRM presents this weighing of the relative costs, delays, burdens, and benefits of the proposed procedural changes for comment.

The legislative history cited by the dissent does not preclude the proposed rule changes. The dissent argues that the 1947 Congress intended to foreclose the Board from deferring voter eligibility issues until after the election. But the Act clearly says nothing of the kind. Indeed, Congress knew about the Board's challenge procedure—which expressly deferred decision of voter eligibility until after the election—and chose not to

forbid this procedure. Still more significantly, though it changed the timing of the hearing, the crucial language defining the *scope* of the hearing—the terms "appropriate hearing" and "question of representation"—were left entirely unchanged in 1947. These terms are all original to the 1935 Act. Thus, the dissent errs in relying on Senator Taft's statements twelve years later, in 1947, about how he viewed statutory language that was *not being changed*; these statements are "in no sense a part of the legislative history." *Huffman v. OPM*, 263 F.3d 1341, 1354 (Fed. Cir. 2001), and cases discussed therein. For the same reason the 1947 amendments could not "repudiat[e]" Supreme Court caselaw definitively interpreting *unamended* statutory terms. See discussion of the Supreme Court's *Inland Empire* decision at note 97 of the dissent. Similarly, the legislative history cited by the dissent regarding changes to the statute which were rejected by Congress cannot be read into the statute. Failed enactments, also raised by the dissent, are just that—failed. They do not make law. *See Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 169–70 (2001).

The proposed rule would not change the role of the hearing officer at the pre-election hearing in any way contrary to the statutory requirement that the hearing officer "not make any recommendations" with respect to the existence of a question of representation. Indeed, §102.66(i) of the proposed rule specifically provides that the hearing officer "shall make no recommendations," precisely the same language in §102.66(e) of the current rules. Nor, contrary to the dissent, does the NPRM direct hearing officers to exclude "most evidence" from the pre-election hearing. Proposed §102.64 provides that it is the duty of the hearing officer at the pre-election hearing to "obtain a full and complete record" so that the regional director can discharge his duties

under Section 9(c) and determine whether a question of representation exists. The hearing officer would not be given an improper role under the amendments and the NPRM does not suggest any changes inconsistent with Section 9(c)(1).

Likewise, the NPRM does not deny Regional Director or Board review of representation issues. Appeal to *both* remains available under the proposed rule. See §§102.65, 102.67, 102.69. Nor does the proposed rule conflict with Section 3(b) of the Act. Nothing in the proposal would change a party's right to seek a *stay* of regional proceedings—which has always required special permission—and pre-election Board review would similarly be obtainable by special permission under the proposals. As the Supreme Court has stated in a related context: "One who is aggrieved by the ruling of the regional director or hearing officer can get the Board's ruling. The fact that special permission of the Board is required for the appeal is not important." *NLRB v. Duval Jewelry Co. of Miami, Inc.*, 357 U.S. 1, 6-7 (1958). This is consistent with the plain language of Section 3(b), by which "Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination." *Magnesium Casting Co. v. NLRB*, 401 U.S. 137, 142 (1971).

Contrary to the dissent's assertions, the primary purpose of the rule is *not* "to shorten the timeframe applicable to all elections," either to "limit unlawful restraint and coercion" or to diminish freedom of speech. Instead, the NPRM attempts to focus on identifying and minimizing unnecessary barriers to the fair and expeditious resolution of questions concerning representation. Unnecessary litigation, even when not accompanied by delay, can and should be eliminated. It is costly and wasteful to employees, to

employers, to unions, to the Agency, and ultimately to the public. Indeed, the mere *threat* of unnecessary litigation is unfair as parties can be unjustly compelled to enter stipulations on unreasonable terms or on terms they cannot intelligently evaluate, simply to avoid the costs and delays inherent in litigation. Reducing unnecessary delay is therefore an important purpose of the proposed changes. And, notwithstanding the dissent's expressed "disappoint[ment] . . . that the NPRM fails to squarely state that it is designed to accelerate representation elections ," in fact, the NPRM clearly regards more timely elections as a natural and salutary effect of eliminating unnecessary and duplicative litigation procedures. But reducing unnecessary delay is by no means the sole purpose of the proposed changes. As the NPRM explains, the proposals are not only designed to remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation, but also to simplify representation-case procedures and render them more transparent and uniform across regions, to reduce the cost of representation proceedings to the public and the agency by eliminating unnecessary litigation, and to modernize the Board's representation procedures.

The dissent observes that the median time for conducting elections in *all* cases is 38 days (which it asserts means that most elections are conducted promptly) and thus that the NPRM should focus not on the election process as a whole, but only on the relatively rare instances where elections are delayed—as the dissent interprets delay. The dissent's position is mistaken. Many of the proposed changes to our representation-case procedure will impact only cases which currently involve a pre-election hearing. The current median time for conducting elections in *those* cases is much longer than 38 days. For most of the past decade, when a pre-election hearing was conducted, the median number

of days from petition to election has hovered in the mid-60s. This undeniably significant difference highlights the flawed factual predicate for the dissent's position.

The dissent also argues that the Board's ability to meet current agency time targets for elections undercuts the need for rulemaking. But those time targets have never been intended to establish an ideal standard. Rather, they reflect judgments about what, as a practical matter, could be achieved based on the Agency's then-current procedures—including, of course, any built-in inefficiencies. The history of congressional and administrative efforts in the representation-case area represents a progression of reforms aimed at reducing the amount of time required to ultimately resolve questions concerning representation, which, as Congress has found, can disrupt the workplace. With each reform, the waiting time before employees have an opportunity to vote has been reduced. The result has been widely viewed as progress, and the achievement of the full measure of time savings by agency employees has been lauded as success. The Board conceives of the proposed amendments as the next step for the agency in improving its performance of this critical part of its statutory mission. In sum, that the Board seeks to, and does, meet its current time targets in most instances may be commendable, but it is also irrelevant to whether additional improvements may be made by amending the rules.[60]

The dissent faults the NPRM for failing to propose a minimum time period between the petition and election, to preserve the parties' opportunity to campaign. Notably, the Act itself does not set forth any such minimum time period to campaign; Congress has rejected proposals that would have set forth a minimum time period; and the Board's current rules and regulations do not set forth any such time periods. Contrary

[60] Thus, it is only under the dissent's faulty reasoning that our colleagues can claim that there is "no election delay" in cases where the agency is meeting its time targets.

to the dissent's suggestion, the General Counsel's time targets for representation case processing do *not* reflect any judgment by this or any other Board that any particular time is a necessary minimum for campaigning. Even the dissent disclaims knowledge of the "precise point in time when shortening the timetable applicable to all Board-conducted elections impermissibly denies employers, unions and employees the right to engage in speech protected by the Act and the First Amendment." Our tentative conclusion at this point is that these matters are likely not amenable to resolution in this rulemaking. If, as applied in particular cases, there is an apparent lack of adequate time to campaign, this can be addressed by the Board in the context of the particular case. Again, the proposed rules themselves do not compel any particular number of days or time periods for holding or not holding elections.[61]

Finally, the dissent faults the Board for failing to address specific issues responsible for delaying elections. However, the dissent itself fails to identify any such issues other than blocking charges, as to which, as the dissent acknowledges, the NPRM already invites comments. The proposals also address delay in conducting elections that may be attributable to the Board in cases where no blocking charges have been filed. The dissent recommends in addition that the Board consider unspecified reforms of the Board's internal procedures concerning election-related issues. We agree that internal

[61] Relatedly, the Board does not anticipate that employees will have to face "vote now, understand later" dilemmas under the proposed rules. The Board recognizes that there is value to providing employees with greater guidance than they receive under the current representation case procedures. It is for that very reason that the Board is proposing in §§102.63 and 102.67 that the initial notice that must be posted before any pre-election hearing is held will notify employees of their rights and of the filing of the petition, and that the final notice of election will notify employees if the regional director directs that certain employees be permitted to vote subject to challenge and what that means. In short, the NPRM proposals are designed to give employees more, not less, information, than they currently enjoy.

Board case-management practices, which are not addressed by the Board in rulemaking, can affect the timeliness of representation-case processing. While efforts have been made in this area over the past several years, we welcome discussions among the members of the Board concerning further improvements that might be possible.

VI. Dissenting Views of Members Philip A. Miscimarra and Harry I. Johnson III

Members Philip A. Miscimarra and Harry I. Johnson III, dissenting.

We dissent from this Notice of Proposed Rulemaking ("NPRM"). Like our colleagues, we believe the Board should do everything within its power to ensure that representation elections give effect to employee free choice consistent with the National Labor Relations Act ("NLRA" or "Act"). We support rulemaking if it is necessary to address relevant issues consistent with the Board's authority and the Act's requirements. We are not irrevocably committed to the status quo, nor do we criticize our colleagues for their desire to more effectively protect and enforce the rights and obligations of parties subject to the Act. We share the same desire, and remain committed to work as a full Board to further our responsibilities to everyone covered by the Act.

Our points of departure relate to important considerations about this NPRM that, in our view, make it contrary to the Act and ill-advised.

First, the *process* governing Board-conducted elections is compelled by the statute to a significant degree. The Act gives the Board a single-minded responsibility "in *each* case" regarding elections, which is to "assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."[62] The Act protects the right of employees to "engage in" protected concerted activities and "to refrain from any or all of

[62] NLRA Sec. 9(b), 29 U.S.C. 159(b) (emphasis added).

such activities."[63] The Board's conduct of elections may not be tilted against or in favor of any party or outcome.[64] Finally, the rules governing union representation and collective bargaining are complicated and unknown to many or most employees and employers in the United States. The NPRM does not adequately take into account these considerations, and it contradicts specific provisions in the Act. Among other things, the NPRM would impermissibly conduct expedited elections before a hearing is held regarding fundamental questions such as who is actually eligible to vote, thereby resulting in an "election now, hearing later." The NPRM would improperly shorten the time needed for employees to understand relevant issues, compelling them to "vote now, understand later." It would also curtail the right of employers, unions *and* employees to engage in protected speech.

Second, the *substance* of the NLRA includes rights, obligations and restrictions affecting how employers, unions and employees may conduct themselves during election campaigns. Most important, the Act prohibits employers and unions from restraining or coercing employees in the exercise of protected rights.[65] To the extent the NPRM treats the substantive issue of unlawful restraint and coercion as a reason to shorten the timeframe applicable to all elections, the NPRM advocates a "cure" that is not rationally

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[63] *Id*. Sec. 7, 29 U.S.C. 157.

[64] See, e.g., *NLRB v. Action Automotive*, 469 U.S. 490, 498 (1985) (the Act "mandate[s] that the Board remain wholly neutral as between the contending parties in representation elections") (internal quotation omitted). See also note 80, *infra*.

[65] See NLRA Sec. 8(a)(1) and 8(b)(1)(A), 29 U.S.C. 158(a)(1), 158(b)(1)(A). Pre-election conduct found unlawful under these provisions can invalidate a representation election's outcome. In the event of violations, the Board is empowered to fashion remedies effectuating the policies of the Act. Moreover, Section 10(j) authorizes the Board, even *before* a violation is proven in an unfair labor practice proceeding, to seek a federal court injunction that can require an unlawfully discharged employee's reinstatement with backpay and benefits, the rescission of unlawful changes, and other measures.

related to the disease. Nothing in the NPRM directly addresses unlawful election conduct by employers or unions, nor does the NPRM invite public comment regarding different or better remedies in these situations. The same disconnect exists between the proposed revisions and the NPRM's claim of unacceptable delay. If some elections involve excessive delay – and objective evidence shows this occurs at most in only a very small percentage of Board-conducted elections – this is not a rational basis for rewriting the procedures governing *all* elections. This deficiency warrants particular scrutiny because the proposed changes, in other respects, accomplish what Congress has indicated the Board may *not* do regarding important election issues, which is to conduct the "election now, hearing later," and to cause employees to "vote now, understand later."

Third, the new NPRM does not reflect a *de novo* examination of important election-related issues. The NPRM is identical in substance to the 2011 proposed rule regarding representation elections published on June 22, 2011 (hereinafter "2011 election proposal"), after which the Board received more than 65,000 sets of public comments, supplemented by oral presentations by 66 individuals during two days of hearing in July of that year. The NPRM updates some election statistics from the 2011 election proposal but attempts no significant qualitative evaluation of that information. There is no collection of other new data relevant to assess whether the NPRM is necessary at this time or whether alternative measures might more effectively address whatever election issues might be genuine reasons for concern. Likewise, the NPRM fails to consider the potential impact of more recent Board initiatives such as the General Counsel's increased emphasis on "nip-in-the-bud" lawsuits to obtain injunctions against discriminatory

discharges or the Board's *Specialty Healthcare* standard[66] regarding whether particular employees should be excluded from a petitioned-for bargaining unit. In substance and structure, the new NPRM – like the Board's 2011 election proposal – advocates an array of changes that are difficult to understand, especially in the aggregate, while changing existing procedures that reflect decades of real world experience balancing rights under the Act. Although the NLRA authorizes the Board to adopt "such rules and regulations as may be necessary to carry out the provisions of [the] Act,"[67] no reasons articulated in the NPRM warrant a wholesale rewrite, in one stroke, of the procedures governing every representation election conducted by the Board.[68]

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[66] *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, 357 NLRB No. 174 (2011), *enfd. sub nom. Kindred Nursing Centers East, LLC v. NLRB*, 727 F.3d 552 (6th Cir. 2013). *Specialty Healthcare* and its progeny demonstrate the importance of determining whether certain employees should be included in or excluded from whatever bargaining units may result from representation elections. However, this dissent should not be regarded as passing judgment on the merits of the *Specialty Healthcare* standard.

[67] NLRA Sec. 6, 29 U.S.C. 156.

[68] The broad-ranging nature and complexity of the NPRM – and the extent of public interest as reflected in more than 65,000 comments on the 2011 proposed election rule – contrasts sharply with the Board's 1989 rule governing acute care hospital bargaining unit determinations. The 1989 rule, though much more limited in scope than the NPRM, involved a much longer rulemaking process with more extensive opportunities for public comment. Former Member Hayes described as follows the 1989 rulemaking regarding acute care hospital bargaining unit determinations: "The need for this effort was obvious, based on years of litigation highlighting specific problems and differences among the Board, the courts of appeals, and health care industry constituents. The initial July 2, 1987 notice of proposed rulemaking was followed by a series of four public hearings, the last one held over a 7-day period, in October 1987. Thereafter, the written comment period was extended. Another rulemaking notice followed on September 1, 1988. It reviewed the massive amount of oral testimony (3545 pages and 144 witnesses) and written comments (1500 pages filed by 315 individuals and organizations) received during the prior year and announced a revised rule with another 6-week period for written comment. The final rule was published on April 21, 1989, almost 2 years after the initial notice." 76 FR 36812, 36830 (June 22, 2011) (Member Hayes, dissenting).

Fourth, we are receptive to potential regulatory reforms that improve Board procedures and enhance our enforcement of the law regarding representation elections. In Part D of this dissent, we outline an alternative path that, if pursued, would permit the full Board to consider different potential rulemaking regarding election reforms that would advance the interests of employees, unions and employers. We also believe that our approach, if backed by the full Board, would receive substantial support within all three of these groups. Our suggested approach would bolster the Board's long track record of conducting elections with an extremely high degree of integrity and transparency. The most important threshold question to address, in any event, would be whether and why further rulemaking of any kind is necessary.

To repeat, we are not reflexively committed to the status quo. We do not fault our colleagues for their desire to advance the Board's enforcement of the Act. We have the same desire, but we hope the full Board – after a *de novo* review of all public comments regarding this NPRM and its 2011 predecessor – will refrain from implementing the current NPRM. If further review supports a conclusion by the Board that new proposed rulemaking is necessary, we advocate the approach outlined in Part D.

A. The NPRM's Procedures Contradict Requirements in the Act and Are Ill-Advised.

1. Background: What the NPRM Would Change. It is difficult to summarize the changes reflected in the NPRM because they are so numerous and implicate so many disparate aspects of the Board's longstanding election procedures. However, the uniform thrust of the proposed changes is to greatly reduce the time between a representation petition's filing and the election. The NPRM does not directly articulate an objective to conduct elections as quickly as possible, but this is the inevitable consequence of the

NPRM's changes, as is implicit in the many references to efficiency, promptness, and the avoidance of unnecessary proceedings and needless delay.[69]

The NPRM's keystone concept is to have elections occur *before* addressing important election-related issues, and the NPRM would relegate these issues to a post-election hearing. Ironically, among the issues subject to this "election now, hearing later" approach would be questions about voter eligibility. Yes, this means the election would take place first, and only later would there be a hearing regarding issues as fundamental as: (i) who can actually vote, (ii) which employees who cast votes would, in the end, be excluded from the bargaining unit and would *not* even have their votes counted, (iii) whether people who represent themselves as employee-voters during the campaign may actually be supervisors (*i.e.*, representatives of one of the campaigning parties), (iv) whether other people who appear to be supervisors may actually be employee-voters, and (v) whether the union-represented workforce, if the union prevails, will ultimately exclude important employee groups whose absence would adversely affect the outcome of resulting negotiations.

These are indisputably important issues. They are not only relevant to the election campaign, they can profoundly affect what type of bargaining relationship would exist after the election if the union prevails, and the inclusion or exclusion of certain

[69] The NPRM clearly subordinates important Board procedures in the interest of having elections occur more quickly. The Proposed Rule refers, for example, to the "expeditious resolution of questions concerning representation," to allowing the Board "to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election," to the "expeditious processing of representation petitions," to "delays in the regional offices' transmission of the eligibility list to the parties," to "shorten[ing] the time for production of the eligibility list," and to a "progression of reforms to reduce the amount of time required to ultimately resolve questions concerning representation."

groups may positively or negatively affect employee bargaining leverage. For employees, the "election now, hearing later" approach would create a new norm where essential issues do not even receive potential pre-election *consideration* by the Board. This exacerbates the NPRM's shortening of the period between petition-filing and the election which, as noted previously, creates a situation where employees will be forced to "vote now, understand later."[70]

The NPRM would also change *who* decides election issues within the NLRB's agency structure, mostly by cutting the Board out of the process. Ironically, the statute makes the Board responsible for representation elections,[71] with two caveats: (1) pre-election hearings are presided over by hearing officers, although Congress in 1947

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[70] It is true, as our colleagues point out, that the NPRM does not completely eliminate the pre-election hearing, nor does the NPRM rule out the possibility that a particular hearing officer might permit the introduction of evidence regarding voter eligibility or supervisory status, for example. However, the NPRM expressly states that it dramatically narrows the scope and duration of pre-election hearings, and it relegates all but the most basic issues to post-election proceedings. Therefore the NPRM clearly will not result in pre-election hearings where voter eligibility and other fundamental issues continue to be addressed. The NPRM explicitly states otherwise. Further, the inclusion or exclusion of such evidence would be determined by hearing officers who, under Section 9(c)(1), 29 U.S.C. 159(c)(1), are not even permitted to make "recommendations" about relevant issues. See note 109, *infra*.

We also recognize that, under existing Board procedures, elections may take place while some questions remain unresolved, and some employees may cast votes that, if challenged, are ruled upon in post-election proceedings. In all such cases, however, the Act gives parties the right to present evidence regarding these issues at a pre-election hearing. And based upon such evidence, the Act requires that the Regional Director *and* the Board consider requests to stay the election until such issues are resolved. See text accompanying note 108, *infra*. In addition to dramatically shortening the time period between petition-filing and the election, the NPRM would impermissibly curtail the right to present any evidence at the pre-election hearing regarding many fundamental issues, which in turn would prevent the Regional Director and the Board even from considering whether the resolution of such issues is important enough to warrant staying the election. *Id*.

[71] NLRA Sec. 9(c)(1), 29 U.S.C. 159(c)(1).

severely limited their authority by prohibiting hearing officers even from making "recommendations" about election issues;[72] and (2) in 1959, Congress permitted the delegation of election responsibilities to Regional Directors, but conditioned this on a statutory right to seek Board review regarding "any action" by Regional Directors, including pre-election requests to "stay" the election.[73] The NPRM essentially turns this arrangement upside down. Hearing officers – who the NPRM directs to exclude most evidence from the pre-election hearing – become the sole judge and jury regarding such matters, and the absence from the record of that evidence precludes *any* review of those matters by Regional Directors and the Board. In contrast to the statutory mandate making "any action" by Regional Directors subject to requests for Board review, the NPRM *eliminates* the existing pre-election right to seek Board review, and adopts a "new narrower standard" governing "extraordinary" situations where parties have been able to request "special permission" for an appeal to the Board. Finally, the NPRM provides that post-election Board review – currently a guaranteed option – would become discretionary in all cases. Under the NPRM, therefore, many or most election issues would never be decided by Board members.

The NPRM proposes equally dramatic changes in other election procedures. It would require all employers to submit a near-immediate binding, comprehensive, written response to the petition (where the employer *forever* waives available arguments and defenses not set forth in this position statement); it would require employers to disclose employee email addresses and phone numbers in an expanded "*Excelsior*" list to be

[72] *Id*. See also note 109, *infra*.

[73] NLRA Sec. 3(b), 29 U.S.C. 153(b).

transmitted electronically to the union; it would make many other time deadlines much shorter; and it would implement other changes too numerous to summarize here.

The NPRM acknowledges the importance of transparency in public policymaking. This makes it most disappointing, then, that the NPRM fails to squarely state that it is designed to accelerate representation elections, although our colleagues acknowledge it will have that effect. Here, the NPRM, like the Board's 2011 election proposal, leaves critical questions unanswered:

(1) As a result of the NPRM, precisely how short will election periods be?

(2) How short is too short to assure employees the "fullest freedom" of choice as required by the Act?

(3) Conversely, on what basis has the Board ruled out the possibility that employees need *more* time than presently available to understand relevant issues and to make an informed free choice about union representation?

(4) To the extent that the NPRM promotes efficiency or conserves the Board's resources, why are these objectives more important than (i) the right of employees to have sufficient time and information to understand relevant issues before voting, and (ii) the right of employees, unions and employers to engage in protected speech regarding election issues?

(5) Why doesn't the NPRM propose a mandatory minimum time period between petition-filing and an election, which could permit the adoption of procedural improvements *without* impairing the protected employee, union, and employer rights referenced above?

We do not know the answers to these important questions, and we hope they will be the subject of public comment as part of this rulemaking and then receive careful consideration by our colleagues.

2. The NLRA's Requirements. In contrast to the complicated array of changes advocated in the NPRM, the National Labor Relations Act is straightforward: its fundamental purpose is to guarantee employee free choice when employees vote in elections regarding union representation. Sections 1 and 7 refer to "the exercise by workers of *full freedom* of association" encompassing the right of employees to have "representatives *of their own choosing.*"[74] Section 7 protects the right of employees to "*engage* in" protected activities and "to *refrain* from any or all of such activities."[75] Sections 8(a) and 8(b) prohibit actions by employers and unions that "restrain" or "coerce" employees in the exercise of protected rights.[76] Section 8(c) and other provisions of the Act protect the free speech rights of employees, employers and unions, consistent with similar guarantees afforded by the First Amendment.[77] Section 9(a)

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[74] NLRA Sec. 1, 7, 29 U.S.C. 151, 157 (emphasis added).

[75] *Id*. Sec. 7, 29 U.S.C. 157 (emphasis added).

[76] 29 U.S.C. 158(a)(1), 158(b)(1)(A).

[77] Section 8(c) of the Act reads: "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." Although Section 8(c) does not directly address representation elections, it has long been recognized by the Board and the courts as protecting speech generally, consistent with the First Amendment. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the National Labor Relations Board."); see also *Chamber of Commerce* v. *Brown,* 554 U.S. 60, 67-68 (2008) (Section 8(c) reflects a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes.") (internal quotation

provides for unions to represent employees in an appropriate unit to the extent they are "*designated* or *selected* . . . by the majority of the employees in [the] unit."[78] And Section 9(b) – specifically pertaining to elections – refers to the Board's obligation "in each case" to "assure to employees the *fullest freedom* in exercising the rights guaranteed by [the] Act."[79]

When it comes to preserving the "fullest freedom" of employees to exercise their protected rights in an NLRB-conducted election, the Act makes additional considerations extremely important:

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omitted); *Healthcare Ass'n of N.Y. State v. Pataki*, 471 F.3d 87, 98-99 (2d Cir. 2006) (Section 8(c) "serves a labor law function of allowing employers to present an alternative view and information that a union would not present."); *United Rentals, Inc.*, 349 NLRB 190, 191 (2007) ("[T]ruthful statements that identify for employees the changes unionization will bring inform employee free choice which is protected by Section 7 and the statements themselves are protected by Section 8(c)."). Section 7 of the Act has been interpreted as broadly protecting the right of employees to engage in speech regarding election issues. *Letter Carriers v. Austin*, 418 U.S. 264, 277 (1974) ("The primary source of protection for union freedom of speech under the NLRA, however, particularly in an organizational context, is the guarantee in § 7 of the Act of the employees' rights 'to form, join, or assist labor organizations.'").

The First Amendment is clearly implicated in Board regulations that impermissibly curtail free speech guarantees since federal regulation constitutes quintessential state action for purposes of the United States Constitution. See *Chamber of Commerce v. Brown*, *supra* at 68 (noting that the Court recognized "the First Amendment right of employers to engage in noncoercive speech about unionization" even before Section 8(c) was enacted).

[78] *Id*. Sec. 159(a) (emphasis added).

[79] *Id*. Sec. 159(b) (emphasis added).

- Congress has mandated that the Board remain neutral while preserving employee choice, which is consistent with the Act's protection of employee rights to "engage in" concerted activities and to "refrain from any or all of such activities."[80]

- The great majority of employees in the United States lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.[81] In 2011, the Board found that "*nonunion*

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[80] NLRA Sec. 7, 29 U.S.C. 157. The need for neutrality in the Board's procedures exists to the same degree applicable to the Board's case adjudications. In fact, concern that the Board's procedures detracted from the agency's neutrality were among the reasons Congress adopted the Taft-Hartley amendments in 1947. See S. Rep. 80-105, 80th Cong., at 3, reprinted in 1 Comm. on Lab. and Pub. Welfare, Subcomm. on Lab., 93d Cong., LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947 (hereinafter "LMRA Hist."), at 407 (Senate report stating that "as a result of certain administrative practices which developed in the early period of the act, the Board has acquired a reputation for partisanship, which the committee seeks to overcome, by insisting on certain procedural reforms"). The "procedural reforms" insisted upon by Congress in 1947, and reaffirmed in 1959, included a repudiation of precisely the type of arrangement incorporated into the NPRM. See notes 93 and 97, *infra*, and accompanying text. See also note 64, *supra*.

[81] The Board based this finding on "several factors," including "the comparatively small percentage of private sector employees who are represented by unions and thus have ready access to information about the NLRA; the high percentage of immigrants in the labor force, who are likely to be unfamiliar with workplace rights in the United States; studies indicating that employees and high school students about to enter the work force are generally uninformed about labor law; and the absence of a requirement that, except in very limited circumstances, employers or anyone else inform employees about their NLRA rights." 76 FR 54006, 54014-15 (2011). As a result, the Board has attempted to expand its outreach efforts, including distribution of a mobile app regarding the NLRB and the Act, which we fully support. See "National Labor Relations Board Launches Mobile App," Aug. 30, 2013 (http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-launches-mobile-app). 76 Fed. Reg. at 54,014-15. In fact, we favor having Agency resources directed to a higher profile public relations campaign regarding the NLRB mobile app and other outreach efforts.

In 2011, the Board attempted to increase familiarity with the Act's requirements by adopting a rule requiring employers to post notices advising employees about the Act (*id.*), but this rule has been permanently suspended after appellate courts ruled that it exceeded the Board's authority. *Chamber of Commerce of the United States v. NLRB*,

employees are *especially* unlikely to be aware of their NLRA rights,"[82] and the Board acknowledged that "to the extent that lack of contact with unions contributed to lack of knowledge of NLRA rights 20 years ago, it probably is *even more of a factor today*."[83]

- The Board has found that many *employers* – and even some *union* officials – lack familiarity with important NLRA principles and many complex principles that govern union representation and collective bargaining.[84]

- Employers and unions have protected rights to engage in protected speech prior to an election. As noted, the Supreme Court has characterized Section 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'"[85]

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721 F.3d 152 (4th Cir. 2013); *National Ass'n of Mfrs. v. NLRB*, 717 F.3d 947 (D.C. Cir. 2013).

[82] 76 FR at 54016 (emphasis added).

[83] *Id*. (emphasis added).

[84] *Id*. at 54017 (emphasis added). In the words of a union official cited by the Board with approval in 2011: "Having been active in labor relations for 30 years I can assure you that *both employees and employers are confused about their respective rights under the NLRA*. Even *union officers* often do not understand their rights. *Members and non-members rarely understand their rights*. Often labor management disputes arise because one or *both sides are misinformed about their rights*." *Id*. at 54017 n.88 (emphasis added).

[85] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67–68 (2008) (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 272–73 (1974)). *See also Thomas v. Collins*, 323 U.S. 516, 532 (1945) ("The right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly."); *Thornhill v. Alabama*, 310 U.S. 88, 102-103 (1940) ("[I]n the circumstances of our times the dissemination of information concerning the facts of a

3. The NPRM's Problems and Deficiencies. Unfortunately, the NPRM does not adequately take into account the above considerations and it is contrary to the Act.[86] This is especially evident in the following respects.

First, we do not understand the reasons for embarking on the path outlined in the NPRM, because it describes the Board's very successful track record conducting timely elections. Casehandling statistics since 2011 indicate no significant variation from those described in the 2011 proposed election rule. *See* 76 FR at 36813-36814. In 1960, the median time from petition to a direction of election was 82 days, with more time obviously elapsing before the elections occurred (*id*. at 36814 n.16). By 1975, only 20.1 percent of all elections occurred more than 60 days after the filing of a petition, and this percentage decreased to 16.5 percent by 1985 (*id*. at 36814 n.19). Since at least 2001, the Board has applied a well-known target to have elections conducted within a median of 42 days after the petition-filing.[87] Over the past decade, elections have occurred within a median of approximately 38 days after the filing of a petition, and in fiscal 2010, the

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labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution.").

[86] *See NLRB v. Brown*, 380 U.S. 278, 291 (1965) ("Reviewing courts are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.")

[87] NLRB's 2004 Performance and Accountability Report: Protecting Workplace Democracy, 15-17 and 67 (undated), *www.nlrb.gov/reports-guidance/reports/performance-and-accountability*. In the early 1990s, the Agency's articulated goal was to hold elections within a median of 50 days after the filing of the petition. *See* General Counsel's Memorandum, GC 93-16, "Major Accomplishments of the Office of the General Counsel for Fiscal Years (1990-1993)," 3 (Nov. 24, 1993), *www.nlrb.gov/reports-guidance/general-counsel-memos*.

average time from petition to an election was 31 days.[88] Another significant Board target is to hold 90% of all elections within 56 days of the filing of the petition. The Board has consistently done better than that standard.[89] In fact, in 2013, 94.3% of elections were held within that 56-day period.[90] Thus, it is fair to conclude that in 2013, by the Board's own measures, less than 6% of elections were unduly "delayed." Some elections take too long to resolve, but in recent years these cases have been few in number.[91] We are not saying the Board's work here is done. However, the available data

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[88] General Counsel's Memorandum, GC-11-09, "Report on Midwinter ABA PP Committee," 19 (March 16, 2011), *www.nlrb.gov/reports-guidance/general-counsel-memos*.

[89] NLRB Summaries of Operations, fiscal years 2007-2012, and Performance Accountability Reports, 2004-2013, *www.nlrb.gov/reports-guidance/reports*. *See* GC-11-09, *supra* note 88, at 18-19.

[90] NLRB Performance Accountability Report, fiscal year 2013, *www.nlrb.gov/reports-guidance/reports*.

[91] As indicated in the Appendix to this dissent, our initial review of internal case-processing statistics indicates that pre-election issues do not cause an overall delay in case processing except for a tiny fraction of cases. Case-processing statistics also indicate that the regional offices' processing of representation petitions from filing to election, including the holding of pre-election hearings, is a highly efficient and effective operation. We provide a very preliminary analysis in an Appendix to foster discussion about the scope and nature of the purported problems with representation case processing. We encourage commenters to provide their own evaluation of the specific reasons for delay in particular cases based on relevant statistics that are publicly available or disclosable under the Freedom of Information Act.

The majority discounts the Board's excellent track record (for example, the fact that elections have occurred within a median of 38 days after petition-filing over the past decade) by focusing only on cases involving pre-election hearings. For example, they indicate that for these cases, the median time from petition-filing to an election has been about 64-65 days in recent years (and only 59 days in fiscal year 2013). Any criticism of the 38-day median does not detract from our preliminary case-processing analysis in the Appendix because that analysis does not even reference the 38-day median. Moreover, the pre-election hearing statistics do not depict a problem that warrants an overhaul of the procedures governing all elections. Just looking at pre-election hearing cases, the conducting of elections within a median of 59-65 days means that the hearing and related

do not provide a rational basis for engaging in a wholesale reformulation of the Board's election procedures.[92]

Second, Congress at least twice rejected the "election now, hearing later" and "vote now, understand later" approaches reflected in the NPRM. In particular, Congress has repudiated the notion that the Board may conduct elections *before* important issues such as voter eligibility are the subject of an "appropriate hearing," where such issues would be deferred to a post-election hearing. In 1947, after the Board actually conducted such "pre-hearing elections" for a brief period, Congress explicitly prohibited this practice in language added to Sections 9(c)(1) and (4) of the Act.[93] In 1959, the "election

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processes (i.e., the writing and consideration of briefs, issuance of a decision and direction of election, and the processing of potential requests for Board review) only required three or four weeks beyond the overall 38-day median. These hearing statistics are indicative of efficient and timely case-handling, not a lack of efficiency, especially given the importance of relevant issues and the statutory mandate that the Board hold an "appropriate hearing" in all contested representation cases.

[92] In many other contexts – which the NPRM does not propose to change – the Board routinely imposes lengthy delays, ranging up to three years, before employee sentiments about union representation are given effect. For example, under the Board's longstanding contract bar rule, the Board refrains from conducting any election for up to three years while a collective-bargaining agreement is in effect (during which a petition will be accepted only during a 30-day open period occurring between 60 and 90 days prior to contract expiration or the three-year anniversary date of the contract). *Absorbent Cotton Co.*, 137 NLRB 908, 909 (1962); *Gen. Cable Corp.*, 139 NLRB 1123, 1128 (1962). The Act also imposes a statutory election bar that prevents any election from being directed for a *12-month period* following any other valid election. NLRA Sec. 9(c)(3), 29 U.S.C. 159(c)(3). Recent Board decisions also routinely impose delays of six months to a year in successorship situations where employees change their sentiments regarding union representation. *UGL-UNICCO Service Co.*, 357 NLRB No. 76 (2011).

[93] For a short time before the Taft-Hartley amendments were adopted in 1947, the Board permitted pre-hearing elections, and Congress repudiated this practice by adding language in Sections 9(c)(1) and (4) requiring the Board to conduct an "appropriate hearing" *before* any election, and permitting "the waiving of hearings" *only* "by stipulation" of all parties. 29 U.S.C. 159(c)(1), (4); 61 Stat. 136 (1947), 29 U.S.C. 141 *et seq.*, reprinted in 1 LMRA Hist. 1 *et seq.* (1974); *NLRB v. S.W. Evans & Son*, 181 F.2d 427, 429-30 (3d Cir. 1950); H.R. Rep. 86-741, at 24 (1959), reprinted in 1 NLRB,

now, hearing later" and "vote now, understand later" approaches received renewed consideration to the point of being *adopted* in the Senate-passed version of the Landrum-Griffin Act amendments.[94] Significantly, though authorizing the Board to conduct elections on an expedited basis while deferring important issues to a post-election hearing, the Senate-passed bill explicitly prohibited elections from occurring fewer than 30 days after the filing of a petition. Then-Senator John F. Kennedy – who chaired the Conference Committee – stated that at least 30 days were required between the petition's filing and the election to "safeguard *against rushing employees into an election where they are unfamiliar with the issues*."[95] Ultimately, Congress still refused to adopt the Senate-passed arrangement because *elections would take place too quickly*,[96] and

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LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, 782 (1974) (hereinafter "LMRDA Hist.") ("During the last 19 months of the Wagner Act . . . a form of prehearing election was used by the NLRB."); S. Rep. 86-187, at 30 (1959), reprinted in 1 LMRDA Hist. 426 (the practice of holding prehearing elections "was tried in the last year and a half prior to passage of the Taft-Hartley Act, but it was eliminated in that [A]ct"). In 1959, Congress rejected a proposal to permit pre-hearing elections that was part of the Senate-passed version of the LMRDA. See note 97, *infra*, and accompanying text.

[94] See S. 1555, 86th Cong. § 705 (as passed by the Senate on April 25, 1959), reprinted in 1 LMRDA Hist. 581.

[95] 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (emphasis added). To the same effect, Senator Kennedy stated "there should be at least a 30-day interval between the request for an election and the holding of the election," and he opposed proposals that, in his words, failed to provide "at least 30 days in which both parties can present their viewpoints." 105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. Kennedy); see also H.R. Rep. 86-741, at 25 (1959), reprinted in 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to "guard[] against 'quickie' elections").

[96] Representative Graham Barden, when describing the Senate-passed bill's abandonment, explained that pre-election "hearings have not been dispensed with. There is not any such thing as reinstating authority or procedure for a quicky election. Some were disturbed over that and the possibility of that is out. The right to a formal hearing before an election can be directed is preserved without limitation or qualification." 105

Congress reaffirmed the requirement that the Board conduct an "appropriate hearing" before any contested election, and precluded the Board from deferring voter eligibility and other issues to post-election hearings.[97]

Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714. Cf. H.R. Rep. 86-741, at 76 (1959), reprinted in 1 LMRDA Hist. 834 (indicating that Representative Barden was Chairman of the House Committee on Education and Labor; H.R. Rep. 86-1147, at 42 (1959), reprinted in 1 LMRDA Hist. 946 (indicating that Representative Barden was the ranking House Conference Committee Manager). See also 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (opposing "pre-hearing or so-called quickie election" with indication that "right to a hearing is a sacred right"); H.R. Rep. 86-741, at 24-25 (1959), reprinted in 1 LMRDA Hist. 782-83 (mandatory period between petition-filing and election "guards against 'quickie' elections"); 105 Cong. Rec. A8522 (1959), reprinted in 2 LMRDA Hist. 1856 (referencing opposition to pre-hearing election proposal).

[97] The core concepts underlying the NPRM ("election now, hearing later" and "vote now, understand later") were not simply matters of peripheral concern when Congress – in 1947 and again in 1959 – rejected the notion of having expedited elections without a hearing regarding fundamental election issues like voter eligibility and supervisor status. Based on the original Wagner Act (which did not require elections but provided for an "appropriate hearing" *if* an election was conducted), the Supreme Court decided in 1945 that the "appropriate hearing" requirement could be satisfied by a *post*-election hearing. *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 707 (1945). As noted above, the Board then conducted a number of prehearing elections prior to 1947, which relegated important election-related issues to a post-election hearing. See note 93, *supra*, and accompanying text. Thus, when the Taft-Hartley amendments explicitly prohibited elections without an "appropriate hearing" *before* the election, this not only repudiated a practice that had been adopted by the Board, it repudiated the Supreme Court's *Inland Empire* decision. *Id*.

In 1959, the resurrected concept of having expedited elections, *followed* by the consideration of important issues in post-election hearings, was part of President Eisenhower's original "20-point program" that prompted Congress to adopt the Landrum-Griffin Act. See S. Rep. 86-10, at 3 (1959), reprinted in 1 LMRDA Hist. 82 ("In order to speed up the orderly processes of election procedures, to permit the Board under proper safeguards to conduct representation elections without holding a prior hearing where no substantial objection to an election is made."). Not only was this "election first, hearing later" concept considered throughout the 1959 legislative debates, it was *adopted* in the Senate version of the Landrum-Griffin amendments, with a requirement that there be no fewer than 30 days between a petition's filing and an election. In the words of then-Senator John F. Kennedy, a minimum 30-day period was required in all cases to prevent employees from being forced to vote while they were "unfamiliar with the issues." See note 95, *supra*, and accompanying text. One version of the Senate approach even

Third, it is especially objectionable for the NPRM to exclude from pre-election hearings[98] evidence regarding *who is eligible to vote*. To state the obvious, when people participate in an election, it is significant whether they actually have a right to vote, whether their vote will be counted, and whether the election's outcome will even affect them.[99] In this respect, the NPRM's approach would be intolerable in every other voting

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provided for a minimum period of 45 days between a petition's filing and the Board-conducted election. See S. 1555, 86th Cong. § 705 (as passed by the Senate on April 25, 1959), reprinted in 1 LMRDA Hist. 581. Ultimately, the Senate bill's "election first, hearing later" approach was consciously abandoned, and Congress thus decided, for a second time, that it was *not* permissible for the Board to conduct representation elections unless they were preceded by an "appropriate hearing" that included evidence regarding bargaining unit and voter eligibility issues, among other things. See note 96, *supra*, and accompanying text.

Congress' failure to pass electoral initiatives in the Labor Law Reform Act of 1977-1978 represented yet another rejection of the "vote now, understand later" approach. See Cong. Res. Serv., Digest of Public General Bills and Resolutions, Final Issue, Part 1, 501-02 (95th Cong. 2d Sess. 1979) (recounting passage of bill in House on Oct. 6, 1977; failure of four cloture motions in Senate from June 13-22, 1978; closest votes 58-41 on June 14 and 58-39 on June 15).

[98] Under the NPRM, hearing officers ostensibly have the right – in their discretion – to permit certain excluded issues to be considered in particular cases. As noted previously, however, this is another area in which the NPRM is contrary to the Act, because Section 9(c)(1), 29 U.S.C. 159(c)(1), precludes hearing officers from having the authority even to make "recommendations" regarding such issues, *much less conclusively determine*, by excluding any creation of a record regarding such issues, that they will not be considered by the Board or Regional Directors prior to the election.

[99] An array of problems and incongruities stem from the broad exclusion of voter eligibility issues from pre-election hearings. Under the NPRM, there will be more situations where many employees cast votes in NLRB-conducted elections where, based on the post-election resolution of eligibility issues, the employees learn their votes were not even counted and, even if the union prevailed, the ineligible employees are excluded from any bargaining. Without a pre-election hearing regarding whether certain individuals are eligible voters versus statutory supervisors, many employees will not know there is even a question about whether fellow voters – with whom they may have discussed many issues – will later be declared supervisor-agents of the employer. Many employers will be placed in an untenable situation regarding such individuals based on uncertainty about whether they could speak as agents of the employer or whether their individual actions – though not directed by the employer – could later become grounds

context, whether it involved a national political election or high school class president. Thus, for good reason, the "appropriate hearing" requirement has consistently been deemed to require that pre-election hearings encompass evidence regarding fundamental questions including voter eligibility.[100] The Board's recent decisions have highlighted

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for overturning the election. Also, employees ultimately included in the bargaining unit will not know – at the time they voted – whether they will have the support of other employees who, after the election, end up being excluded from the bargaining unit. Congress clearly intended that parties would have the right to present evidence regarding such issues in the "appropriate hearing" required before any non-stipulated election. As noted previously, the point here is not that such issues require resolution before every election; the NPRM adopts the broad-based position that these issues *should not even be the subject of evidence* in the pre-election hearing. This is all the more perplexing given that Congress repeatedly reaffirmed the need for a pre-election hearing to permit evidence regarding such important issues and, in every case, potential pre-election Board review of "any action" by Regional Directors. NLRA Sec. 3(b), 29 U.S.C. 153(b).

[100] Regarding the NPRM's provisions for Board-conducted elections without even permitting a pre-election hearing about who is eligible to vote, the NPRM is on the wrong side of history and common sense. See NLRA Sec. 9(c)(1), (4), 29 U.S.C. 159(c)(1), (4) (requiring an "appropriate hearing upon due notice" before an election, unless there is a "waiver . . . for the purpose of a consent election"). The Senate Report on S. 1958, 74th Cong. (1935), which became the Wagner Act, stated that "the units must be determined before it can be known *what employees are eligible to participate in a choice of any kind*," and NLRA Section 9(b) was described as "similar" to the Section 2 of the Railway Labor Act amendments, enacted in 1934, providing that "the Board shall designate *who may participate in the election* and establish the rules to govern the election." S. Rep. 74-573, at 14 (1935), reprinted in 2 NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 2313 (hereinafter "NLRA Hist.") (emphasis added). Regarding the Taft-Hartley Act's rejection of the "election first, hearing later" concept, Senator Taft – cosponsor of the legislation – stated, "It is the *function of hearings in representation cases* to determine whether an election may properly be held at the time; and if so, to decide questions of unit *and eligibility to vote*." 93 Cong. Rec. 7002 (1947), reprinted in 2 LMRA Hist. 1625 (supplemental analysis of LMRA by Senator Taft) (emphasis added). Regarding the Landrum-Griffin amendments adopted in 1959, Representative Graham Barden – Chairman of the House Committee on Education and Labor, and the ranking House conferee – stated that "[t]he right to a *formal hearing before an election can be directed* is preserved *without limitation or qualification.*" 105 Cong. Rec. 16629 (1959), reprinted in 2 LMRDA Hist. 1714 (emphasis added), describing H.R. Rep. 86-1147, at 1 (1959), reprinted in 1 LMRDA Hist. 934 (conference report). Chairman Barden stated: "The right to a hearing *is a sacred right*. . . ." 105 Cong. Rec. A8062 (1959), reprinted in 2 LMRDA Hist. 1813 (emphasis added). Consistent with these requirements, the Board itself has repeatedly held that Section 9(c)(1) *requires* that pre-election hearings provide

the importance of determining what employees may be excluded from petitioned-for bargaining units, which prompted a Board majority in *Specialty Healthcare* to change the legal standard governing such determinations.[101] In any event, by accelerating elections and especially by deferring an appropriate hearing about important issues like supervisor status and other voter eligibility, the NPRM will be "rushing employees into an election where they are unfamiliar with the issues."[102]

Fourth, the NPRM reflects an incorrect premise that, when adopting and amending the NLRA, Congress placed primary emphasis on speed, efficiency, and the need to minimize NLRB litigation. We agree it is desirable to avoid inefficiency and protracted delays in the electoral process.[103] However, the Act's detailed provisions

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the opportunity to present evidence regarding who is eligible to vote and questions regarding supervisor status, among other things. See, e.g., *Barre-National, Inc*., 316 NLRB 877 (1995) (finding that hearing officer's refusal to permit evidence regarding supervisory status "did not meet the requirements of the Act" even though the hearing officer – like the NPRM – would have permitted the individual to vote under challenge, subject to post-election proceedings to determine supervisory status). See also *Angelica Healthcare Services Group*, 315 NLRB 1320 (1995); *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999); *Avon Prods., Inc.*, 262 NLRB 46, 48-49 (1982).

[101] *Specialty Healthcare and Rehabilitation Center of Mobile, Inc.*, *supra* note 66.

[102] 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (statement of Sen. John F. Kennedy). See also105 Cong. Rec. 5770 (1959), reprinted in 2 LMRDA Hist. 1085 (statement of Sen. John F. Kennedy) (election timetable must be long enough so "both parties can present their viewpoints"); H.R. Rep. 86-741, at 25 (1959), reprinted in 1 LMRDA Hist. 783 (minimum 30-day pre-election period was designed to "guard[] against 'quickie' elections").

[103] Understandably, Board and court cases speak favorably about having "employees' votes . . . recorded accurately, efficiently and speedily." *NLRB v. A.J. Tower Co*., 329 U.S. 324, 330 (1946). See also *AFL v. NLRB*, 308 U.S. 401, 409 (1940) (the Wagner Act was designed in part to avoid "long delays in the procedure . . . for review of orders for elections"); *Northeastern Univ.*, 261 NLRB 1001, 1002 (1982) (referring to "expeditiously resolving questions concerning representation"); *Tropicana Prods., Inc.*, 122 NLRB 121, 123 (1958) ("[T]ime is of the essence if Board processes are to be effective."). Yet, nothing in these cases suggests speed or efficiency should be pursued at

require that NLRB proceedings consider evidence regarding important issues. Indeed, in addition to at least twice rejecting the "election now, hearing later" and "vote now, understand later" approaches reflected in the NPRM, Congress enacted other amendments requiring the Board to abandon procedures – ostensibly justified by administrative efficiency – because Congress placed primary importance on having issues resolved without administrative shortcuts, so that Board members would do the "deciding" to ensure that *all* decisions would reflect "the considered opinions of the Board members."[104]

Fifth, we do not know the precise point in time when shortening the timetable applicable to all Board-conducted elections impermissibly denies employers, unions, and employees the right to engage in speech protected by the Act and the First

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the expense of the Act's principal purpose, which is to safeguard the "fullest freedom" of employees to vote in elections that determine whether or not they will be union-represented. NLRA Sec. 9(b), 29 U.S.C. 159(b).

[104] H.R. Rep. No. 80-245, at 25 (1947), reprinted in 1 LMRA Hist. 316; S. Rep. 80-105, 80th Cong., at 8-9, 1 LMRA Hist. 415. After the Wagner Act's adoption, the Board created a "Review Section" of attorneys to review transcripts and draft decisions, which a Senate report characterized as disposing of cases "in an institutional fashion." *Id*. Congress amended the Act to prohibit the Board even from employing attorneys for the purpose of reviewing transcripts, apart from each Board member's own legal assistants. *Id*. Thus, NLRA Section 4, 29 U.S.C. 154, added to the Act in 1947, states: "The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts." Congress also amended Section 9(c)(1) by adding language prohibiting hearing officers from even formulating "recommendations" apart from presiding over the hearing to produce a record for Board review. See note 109, *infra*, and accompanying text. In 1959, Congress permitted the Board to delegate responsibility to Regional Directors regarding representation-election issues, but the Act explicitly conditioned this delegation on each party's right to have the Board review "any action" by Regional Directors. *Id*. This delegation did not expand or modify the authority of hearing officers.

Amendment.[105] However, by further reducing the time between petition-filing and the election, the NPRM curtails the ability of parties to exercise their right to engage in protected speech. Particularly because the consequences of an election can be long-lasting – regardless of whether employees vote for or against union representation – the NPRM limits the right of *all* parties to engage in protected speech at precisely the time when their free speech rights are most important.

Sixth, the NPRM – though making elections occur more quickly – will significantly lengthen the period it takes to completely resolve election questions, with significantly greater confusion and potential adverse consequences for everyone. Under established Board law, the election date marks the commencement of the statutory obligation to bargain and the duty to refrain from making any unilateral changes regarding wages, hours, benefits, and working conditions.[106] Yet, by having elections take place first, with fundamental issues that have not even been the subject of a hearing, employers and unions will not even definitively know what employees are even covered by any bargaining that takes place. This will create greater uncertainty and much less predictability for everyone, not the least of whom will be the employees who have already voted, contrary to another of the Board's primary mandates, which is to foster greater labor relations stability, not less.[107]

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[105] See note 77, *supra*, and accompanying text.

[106] See, e.g., *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974).

[107] *Colgate-Palmolive-Peet Co. v. NLRB*, 338 U.S. 355, 362-63 (1949) ("To achieve stability of labor relations was the primary objective of Congress in enacting the National

Seventh, other aspects of the NPRM deviate from the Act's requirements or are ill-advised.

- The NPRM purports to eliminate a party's right, *before* any election, to seek review from the full Board regarding Regional Director decisions. This is directly contrary to Section 3(b) of the Act, added by Congress in 1959, which permitted the Board to delegate to Regional Directors the responsibility to decide representation election issues, subject to the explicit condition that parties must have the right to seek Board review of "any action of a Regional Director," including requests to "stay" the election.[108]

- The NPRM authorizes hearing officers to exclude *all* evidence from pre-election hearings regarding fundamental election issues such as (i) what employees are part of the bargaining unit, and what employees are not; and (ii) whether certain individuals qualify as statutory "supervisors" (who are excluded from collective

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Labor Relations Act."); *First Nat'l Maint. Corp. v. NLRB*, 452 U.S. 666, 678-79 (1981) (management "must have some degree of certainty beforehand . . . without fear of later evaluations labeling its conduct an unfair labor practice"); *NLRB v. Appleton Elec. Co.*, 296 F.2d 202, 206 (7th Cir. 1961) (recognizing that a "basic policy of the Act [is] to achieve stability of labor relations").

[108] NLRA Sec. 3(b), 29 U.S.C. 153(b). The NPRM eliminates the right to seek pre-election Board review, but it purports to leave open the possibility that parties in an "extraordinary" situation may still seek "special permission" to appeal a Regional Director's ruling to the Board, and even this would also be subject to a "new, narrower standard." This extremely limited opportunity to seek "special permission" to appeal an "extraordinary" issue to the Board – which the NPRM clearly states would be highly disfavored – is qualitatively different from what Section 3(b) requires, which is the right to seek Board review regarding "any action" taken by Regional Directors including every ruling (or refusal to rule) on all issues.

bargaining, who can lawfully speak for the employer with employees regarding election issues, and whose misconduct is attributable to the employer) rather than non-supervisory employees (who are eligible to vote in the election). The NPRM deprives parties of the right to file post-hearing briefs in all cases unless there is "special permission of the hearing officer," and even then parties may only address "subjects permitted by the hearing officer." These provisions are contrary to Section 9(c)(1) of the Act, added by Congress in 1947, which prohibits hearing officers even from making "recommendations" about issues raised in pre-election hearings.[109] Under the NPRM, the hearing officer does not merely make recommendations, the hearing officer

[109] 29 U.S.C. 159(c)(1). The Act's legislative history reveals that, in 1947, Congress specifically amended the Act to divest hearing officers of the authority even to make "recommendations" because Congress intended to require every Board member – and nobody else – to do the "deciding" regarding all hearing issues. See also S. Rep. No. 80-105, at 8-9 (1947), reprinted in 1 LMRA Hist. 414-15 ("One of the major criticisms of the Board's performance . . . has been that the members themselves . . . have fallen into the habit of delegating the reviewing of the transcripts of the hearings and findings" resulting in decisions that fail to reflect the "considered opinions of the Board members."); *id*. at 25, reprinted in 1 LMRA Hist. 431 ("By the amendment, [the] hearing officer's duties are confined to presiding at the hearing."); H.R. Rep. No. 80-245, at 25 (1947), reprinted in 1 LMRA Hist. 316 ("[T]he members of the Board will be expected to do their own deciding.") (describing H.R. 3020, 80th Cong. (1935)); S. Rep. No. 80-105, at 3 (1947), reprinted in 1 LMRA Hist. 409 (The amendments reorganize the Board's structure "by placing upon the members individual responsibility in performing their judicial functions."); 93 Cong. Rec. 3953 (1947), reprinted in 2 LMRA Hist. 1011 ("[T]he hearing officer . . . shall make no recommendations; he shall simply pass on the hearing to the Board, and the Board itself shall pass on the question of representation, and shall do so on the basis of the facts that are shown in the hearing.").

In 1959, Congress authorized the Board to delegate the running of hearings to Regional Directors, but this delegation did not change limitations on the authority of hearing officers, and it was explicitly conditioned on giving parties the right to seek Board review of "any action of a regional director," including pre-election rulings or refusals to rule on voter eligibility issues, supervisor status, and requests to "stay" the election, among other things. NLRA Sec. 3(b), 29 U.S.C. 153(b). As noted in the text, apart from vesting improper authority in hearing officers, the NPRM also improperly purports to eliminate the parties' right to seek any pre-election Board review of Regional Director decisions and actions.

impermissibly becomes the sole judge and jury regarding all issues that the hearing officer is directed to exclude from the pre-election hearing.

- Although the NPRM delays the consideration of fundamental issues until after the election, it accelerates and expands the hearing requirements applicable to employers. In particular, the NPRM *requires a near-immediate submission by every employer regarding virtually everything that may relate to the election*. This comprehensive, written response is required "no later than the date of the hearing," which would require its submission within 7 days after petition-filing (assuming the notice of hearing were served on that date), absent special circumstances, and the NPRM provides that the employer forever waives every argument and defense not set forth in this position statement.

- The NPRM would impose new disclosure requirements affecting personal employee information. Within 7 days after a petition's filing, the employer is required to electronically transmit a list of employee names (even though evidence regarding individual voter eligibility would be deferred until after the election). As part of the "*Excelsior* list" disclosures, employers would be required to electronically transmit employee names, telephone numbers, and possibly email addresses no later than 2 days after the Regional Director schedules the election. The NPRM does not specify whether the required disclosures encompass personal and/or work information, and it does not consider the fundamental question of whether and to what extent "*Excelsior*" disclosure

requirements should be changed by the widespread use of social media and alternative vehicles for communication.[110]

- The NPRM would eliminate pre-election hearings as to important issues at the discretion of the hearing officer, and this would be compounded by making any post-election review by the Board discretionary. Thus, the NPRM contemplates the Board may never review pre- or post-election decisions of the hearing officer or the Regional Director. Again, this is contrary to Section 9(c)(1) of the Act (which precludes hearing officers even from making "recommendations" regarding pre-election issues) and Section 3(b) of the Act (which gives parties the pre- and post-election right to have the Board consider pre- and post-election requests for review of "any action of a Regional Director," including pre-election requests to "stay" the election.)

Finally, the NPRM stands in marked contrast to other contexts in which Congress, courts, and federal agencies have emphasized the need to ensure that individuals exercising free choice regarding representation or other significant matters in a group setting have *more time*, not less, to receive information and to evaluate their options:

(a) Employers in union and nonunion work settings are required to give employees (or their unions) a minimum of *60 days'* written notice in advance of any plant

[110] For example, constitutional principles regarding privacy and technology have both come a long way since 1969, when the Supreme Court affirmed the *Excelsior* rule in *NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759 (1969). As described in the NPRM and Part D of this dissent, we invite public comment regarding existing and alternative vehicles for potential election-related communications, including the option of providing for employees to consent regarding any disclosure of personal information, or the possibility that giving employees their own Agency-sponsored and -protected email accounts could avoid having an automatic surrender (with no means to register disagreement) of employees' home addresses and personal phone numbers, and businesses' own proprietary email accounts.

closing or mass layoff[111] so they can have the "information necessary for each of them to take responsible action."[112] The 60-day period is a minimum, and is "not intended to discourage . . . longer periods of advance notice."[113]

(b) Congress has required that employees be given at least *45 days* before being required to sign a one-time waiver of age discrimination claims in exchange for severance pay or other benefits.[114] The 45-day period begins running only *after* employees have received complete written information regarding members of the "class, unit, or group of individuals covered," including the positions and ages of people being retained versus separated, among other things, and they must be given 7 additional days to revoke any waiver agreement.

(c) In order to give class action plaintiffs enough time to decide whether to opt-out of a Rule 23 class action, the Federal Judicial Center states that a minimum notice period of *30 days* is necessary, and it recommends *60-90 days*.[115]

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[111] Worker Adjustment and Retraining Notification Act, 29 U.S.C. 2101 *et seq.* ("WARN").

[112] 54 FR 16059 (1989) (preamble accompanying Department of Labor regulations interpreting WARN).

[113] 20 CFR 639.2.

[114] This requirement is part of the Older Workers Benefit Protection Act ("OWBPA"), Pub. L. No. 101-433, 104 Stat. 978 (1990). OWBPA added Section 7(f) to the federal Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. 626(f), which articulates the minimum requirements for a waiver of ADEA rights to be considered enforceable as a "knowing and voluntary" agreement. The 45-day period is a prerequisite to enforceability of any age discrimination waiver requested in connection with "an exit incentive or other employment termination program offered to a group or class of employees." ADEA Sec. 7(f)(1)(F)(ii), 29 U.S.C. 626(f)(1)(F)(ii).

[115] Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, 4 (2010), http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf.

(d) For Fair Labor Standards Act collective actions, courts generally allow *at least 30 days* – and a median of 60 days – for potential plaintiffs to opt into the action.[116]

(e) Department of Labor guidelines implementing the requirements of LMRDA Title IV for conducting elections of local union officials refer to a timeline providing *4 to 6 weeks* from the nomination of candidates to the election date.[117]

(f) In addition to applying its own *56-day* and *42-day* targets regarding representation elections,[118] the Board has established a *30-day open period* for the filing of a rival union or decertification election petition during the term of a collective bargaining agreement. Such petitions must be given to the Board between *60 and 90 days* prior to the agreement's expiration.[119] This means that, even in situations involving multi-year collective-bargaining agreements where employees may have had nearly three years to assess the merits of collective-bargaining representation by the incumbent union, they are still afforded 30 days to decide whether to take the formal step of filing a petition seeking to oust the incumbent.

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[116] *See* Charlotte Alexander, *Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act*, 80 Miss. L.J. 443, 489-91 (2010).

[117] Office of Labor-Management Standards, *Conducting Local Union Officer Elections: A Guide for Election Officials*, 4 (2010), http://www.dol.gov/olms/regs/compliance/localelec/localelec.pdf.

[118] See notes 88-90, *supra*, and accompanying text.

[119] *Leonard Wholesale Meats*, 136 NLRB 1000 (1962) (petition must be filed more than 60 days but less than 90 days before the expiration of the contract), modifying in relevant part *Deluxe Metal Furniture Company*, 121 NLRB 995, 999, 1000 (1958).

(g) It is particularly relevant to recognize a substantial body of judicial precedent that governs campaigning in political elections.[120] Numerous courts have ruled that all but the most narrowly drawn durational limitations on political electioneering are impermissible government restrictions of free speech.[121] Further, the Supreme Court has declared: "It is simply not the function of government to select which issues are worth discussing or debating in the course of a political campaign."[122] Neither should it be the Board's function to curtail opportunities for discussion and debate in representation elections.

In short, a substantial universe of laws, regulations, and legal decisions specifically address the time needed for people to review and understand important issues before casting a vote or signing on the dotted line. All of these have one thing in common: they require *more* time, not less. Against the backdrop of these examples, we have difficulty believing that federal labor law works in reverse. The thrust of the NPRM

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[120] Courts have long recognized the similarities between representation elections and political elections. See *Wirtz v. Hotel, Motel & Club Emp. Union, Local 6*, 391 U.S. 492, 504 (1968) (when creating representation elections, "Congress' model of democratic elections was political elections in this country"); *NLRB v. Hudson Oxygen Therapy Sales Co.*, 764 F.2d 729, 733 (9th Cir. 1985) ("Congress intended representation elections to follow the model of elections for political office."). See also *NLRB v. A.J. Tower Co.*, supra at 332 (rationale for opposing post-election challenges in political elections also applies to representation elections). Therefore, the courts' regulation of conduct in political elections may be particularly instructive in the Board's regulation of representation elections and provide support for the assertion that individual free choice in representation elections requires more time and information, not less.

[121] See, e.g., *Mills v. Alabama*, 384 U.S. 214 (1966) (invalidating state ban on election-day newspaper editorials); *Emineth v. Jaeger*, 901 F. Supp. 2d 1138 (D. N.D. 2012) (enjoining state ban on all electioneering on election day); *Curry v. Prince George's Cnty., Md.*, 33 F. Supp. 2d 447, 454-55 (D. Md. 1999) (invalidating county ban on display of political signage for all but 45 days before and 10 days after a political election).

[122] *Republican Party of Minnesota v. White*, 536 U.S. 765, 782 (2002), citing *Brown v. Hartlage*, 456 U.S. 46, 60 (1982).

– unintended or not – is that employees make better choices when they vote first, and understand later. Congress and other state and federal regulators have rejected such reasoning. Given that the Board's primary responsibility is to safeguard employee free choice, especially in elections, the NPRM is deficient in its failure to carefully evaluate these other available sources of information. These are additional issues that deserve careful consideration and will hopefully be the subject of public comment in this rulemaking.

B. The NPRM Does Not Address Substantive Election Misconduct or Target Election Cases that Involve Too Much Delay.

The NLRA involves more than procedures in representation cases. The Act's *substance* consists of important election-related rights, obligations, and constraints, including the prohibition against restraint or coercion by employers or unions regarding any employee's exercise of protected rights.[123] As noted previously, the reasons for reissuing this NPRM are far from clear, and no overt justification involves unlawful conduct during election campaigns. However, it is well known that many union advocates have argued for greatly expedited representation elections based on alleged employer misconduct that, it is claimed, adversely affects the outcome.[124] To the extent

[123] See note 65, *supra*, and accompanying text.

[124] These arguments were referenced in the preamble accompanying the final election rule adopted by the Board in 2011 (which has now been rescinded). See 76 FR 80138 (2011) (prior final rule regarding representation case procedures with explanatory preamble). The preamble noted that many labor organizations cited research studies indicating that shorter election periods would result in "fewer unfair labor practices," although the preamble also acknowledged that various management-side organizations "question[ed] the validity of such studies." *Id*. at 80149 n.33. For present purposes, we find it unnecessary to comment on this debate. However, it is predictable in contested elections that the union will favor representation, the employer will oppose it, and advocacy by both sides is entirely permissible under the Act. Indeed, election campaigns are intended to provide the opportunity for such advocacy. Conversely, unlawful conduct

that unlawful election-related conduct is the problem, the NPRM leaves this virtually unaddressed. The NPRM proposes no changes regarding the Board's treatment of unlawful election conduct by employers or unions, nor does the NPRM invite public comment regarding better ways to remedy these situations.

Moreover, to the extent that the NPRM seeks to address unacceptable election delay, the objective evidence shows such delay occurs, at most, in only a very small percentage of Board-conducted elections. These relatively few cases do not provide a rational basis for rewriting the procedures governing *all* elections.

Thus, the graph below, based on a breakdown of all NLRB initial elections conducted between 2008 and 2010, illustrates this point. In more than 90 percent of those cases, elections occurred within 56 days after the filing of the petitions (these cases are reflected in the graph area appearing in white, marked "A"). As noted previously, this represents a dramatic improvement over the Board's track record since the early 1960s. Conversely, less than 10 percent of the cases identified in the graph involved elections that occurred more than 56 days after petition-filing (these delayed cases are reflected in the graph area shaded in black, which is barely visible, to the right of the 56-day line).

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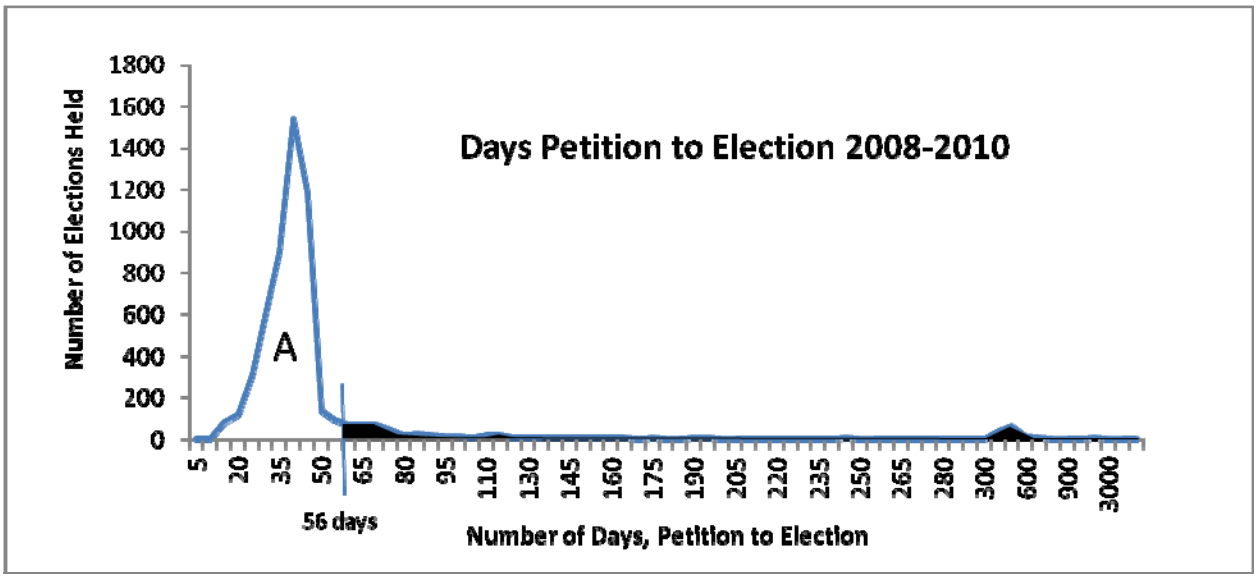
by any party should not be countenanced, and the Board already has authority to address such misconduct. As noted in Part D below, if the Board determines that future rulemaking is necessary, we would support directly addressing whether and how the Board could devise more effective ways to deal with election-related misconduct by employers and unions.



The case distribution in the graph shows there is no evidence of delay evenly apportioned across the universe of Board-conducted elections, i.e., delay affecting a large group of cases to a significant degree. In fact, the graph is far from a standard bell curve; it does not show *any kind of significant distribution of cases greater than 56 days* between petition-filing and election.[125] We are not the first to note this wildly uneven statistical distribution in the context of an asserted "systemwide delay" problem. An earlier study addressing the same distribution findings accurately described the scattering of cases along the extended time continuum beyond 56 days as the "long tail" of election cases.[126] In other words, empirical data seem to disprove the existence of a systemwide delay problem, and instead demonstrate that delay is only an issue confined to a discrete minority of cases, possibly for issues unique to those cases.

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[125] As noted previously, 56 days is the Board's own traditional target for conducting at least 90 percent of elections, a target that the Board has surpassed in recent years. See notes 88-90, *supra*, and accompanying text.

[126] See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 Indus. & Lab. Rel. Rev. 3, 10 n.9 (Oct. 2008).

The NPRM contains many references to increased speed and efficiency, but fails here by making no differentiation between the overwhelming majority of elections that already take place quickly and the relatively small number that do not. Instead, the NPRM rewrites the procedures that govern *all cases*, the overwhelming number of which *already* take place quickly.

Suppose, for instance, that the U.S. Fish and Wildlife Service had a mandate to stop the poaching of manatees which reside almost exclusively in Florida.[127] It would defy logic and common sense to deploy anti-poaching rangers in all 50 states, when most states do not even have bodies of water where manatees live. This is precisely the approach reflected in the NPRM. It applies almost entirely to elections that do *not* involve significant delay, while failing to target the specific causes of delay in those few cases where employees are denied the opportunity to vote in a timely manner.

Every federal agency has a responsibility to take action that bears a rational relation to relevant facts and the matters being addressed.[128] In this respect, the NPRM involves poor public policy and is not rational, even putting aside the many ways in which it is contrary to statutory mandates (see Part A above). At a minimum, there needs to be a better fit between rulemaking in this important area and any problems that ostensibly warrant Agency action.

C. The NPRM Does Not Reflect A *De Novo* Examination of Important Election Issues.

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[127] Manatees, sometimes known as "sea cows," are large aquatic marine mammals considered to be relatives of the elephant. *See* http://en.wikipedia.org/wiki/Manatee; http://www.defenders.org/florida-manatee/basic-facts. The Florida manatee is Florida's state marine mammal. *Id*.

[128] *Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Automobile. Ins. Co*., 463 U.S. 29, 43 (1983).

We recognize and appreciate that our colleagues have afforded the opportunity for renewed public comment on this NPRM. However, the NPRM does not reflect a *de novo* examination of relevant issues. Although the Board has four new members and the year is 2014, the NPRM is essentially the same document that the Board issued in 2011. We have three problems with this approach.

First, it is disappointing that the current Board has not undertaken a *de novo* examination of relevant issues *before* conceiving and issuing yet another comprehensive set of proposed election regulations. The Board is an independent agency first and foremost. We would serve the public better by "listening first, formulating later" instead of "formulating first, listening later." Once the NPRM has issued, it necessarily reflects a conscious set of public policy choices or preferences. It follows that the NPRM's issuance may unduly tether the Board majority to the proposed regulations. Just as the exchange of views during bargaining leads to improved outcomes and furthers industrial peace, so does engagement with the public. The Act itself disfavors the assumption that there is a "perfect initial offer" leaving nothing to discuss. See *General Electric*, 150 NLRB 192 (1964), *enf'd* 418 F.2d 736 (2d Cir. 1969), *cert. denied* 397 U.S. 965 (1970). It would be a good practice if the Board took this lesson to heart before it formulates any regulatory proposal.

Second, the NPRM does not evaluate more recent Agency initiatives relevant in assessing whether the NPRM is necessary now or whether alternative measures might more effectively address whatever underlying issues motivate the NPRM. The Act's election process is a dynamic system, with its inherent fairness dependent on factors beyond the simple passage of time between petition and election. Indeed, many of these

factors are under the Board's control, such as internal Board initiatives, General Counsel initiatives and the underlying representation case law. For example, the NPRM does not specifically address measures that the Board itself might take to speed up its own decisions in representation cases, rather than shortening election timeframes by forcing a regulatory mandate on the parties. The NPRM does not reflect any changes based on the General Counsel's new initiative to promote "nip-in-the-bud" injunctions against discriminatory discharges during election campaigns. One might easily consider this approach more protective of employee rights than simply decreasing the time employees have to listen to all sides, exchange views with one another, and make up their minds. Similarly, the NPRM does not recognize the impact of *Specialty Healthcare*,[129] which makes smaller units easier to organize more quickly and highlights the importance of questions regarding the inclusion or exclusion of certain employee groups from the bargaining unit.

Third, the Board majority's "reboot" of the 2011 election proposal does not inspire confidence in the current Board's issuance of a new election NPRM. The NPRM proposal published on June 22, 2011 generated more than 65,000 sets of written public comments, with a further 66 individuals representing nearly as many different organizations making oral presentations to the Board. We commend our colleagues for incorporating by reference the entire administrative record of the 2011 rulemaking, including "numerous arguments both for and against the proposals," rather than requiring the public to resubmit the same comments. It is also important to recognize that the NPRM states "[a]ll of this material will be fully considered by the Board in deciding

[129] *Supra* note 66.

whether to issue any final rule" (emphasis added). However, we regret that the current Board has not fully considered this voluminous material *before* determining the contours of the new NPRM issued today.

The conduct of elections lies at the heart of the Board's statutory responsibilities, and the current Board's rulemaking regarding these issues should not involve an examination that commences after a new proposed rule has already been published. It would be far better to take a different approach – if an NPRM is deemed necessary – based on *de novo* review of relevant issues by the current Board.

D. The Board Should Consider An Alternative Path Regarding Potential Election Reforms.

We fully agree that the Board should do everything within its power to conduct representation elections in a way that gives effect to employee free choice. We also support rulemaking to the extent necessary to address relevant issues consistent with the Board's authority and the Act, and we agree that the Board should work aggressively in carrying out its statutory responsibilities to everyone covered by the Act.

Our opposition to the NPRM stems from its variance from choices already made by Congress, in addition to provisions that predictably will cause unfairness and adverse consequences for many parties. The most important threshold question to address, of course, is whether and why rulemaking is necessary. Regarding the substance of any rulemaking, we strongly believe the Board should consider a different approach which, if pursued in the future, would focus on the following issues. We believe the Board will benefit from public comment regarding each of these suggestions.

1. Address the "Speed" Issue. The Board should acknowledge that freedom of choice requires a reasonable minimum time period, *before* the election, to avoid "rushing

employees into an election where they are unfamiliar with the issues."[130] As noted previously, the Board has applied a target time period of 42 days for the scheduling of contested elections,[131] which constitutes – at least implicitly – an indication that 42 days is more appropriate than a shorter standard period. The Act's legislative history – especially the extensive consideration of potential "election first, hearing later" arrangements in 1959 – reflected an across-the-board consensus that fewer than 30 days was too short. Congress has adopted 60- and 45-day time period requirements governing WARN notification and age discrimination waivers regarding a "group" or class of employees, and other minimum time periods have been deemed appropriate in other contexts. Consistent with these minimum time periods, the Board should consider public comments regarding the creation of a minimum time period between a petition's filing and any contested election. The establishment of a guaranteed minimum period would permit everyone to consider other election-related proposals on their own merit, and there would also be greater consistency in assuring employees their "fullest freedom" of choice in representation elections.[132]

2. Address the Specific Issues Responsible for Delayed Elections. The Board has an excellent overall track record when conducting prompt elections. Yet, as noted above, there have been particular cases – few in number – where elections and related issues have taken too long to resolve. Rather than engaging in a wholesale revision of the procedures applicable to all elections, the Board should closely examine the particular

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[130] 105 Cong. Rec. 5361 (1959), reprinted in 2 LMRDA Hist. 1024 (statement of Sen. John F. Kennedy). See also note 97, *supra*, and accompanying text.

[131] See note 88, *supra*, and accompanying text.

[132] NLRA Sec. 9(a), 29 U.S.C. 159(a).

reasons that have contributed to those relatively few elections that have involved unacceptable delay (depicted as the statistical long "tail" in the above graph and described in the Appendix accompanying this dissent). Here, we agree with the majority that a prime candidate for potential change is the Board's "blocking charge" doctrine (which permits parties to indefinitely delay an election by filing certain unfair labor practice charges). More generally, however, given that the Board's history of conducting elections now spans nearly 80 years, there is no lack of data regarding factors that have contributed to the relatively small number of cases involving too much time. This data should be carefully examined, with a view towards targeting the problem cases, rather than reformulating the procedures governing all elections.

3. Consider Reforms to the Board's Internal Procedures So Election Issues Are Addressed More Quickly. One of the biggest contributors to the delays associated with resolving election-related issues is the time that particular cases are pending before the Board, rather than in regional offices. Many Board procedures are mandated by the Act. However, we firmly believe that the Board has not exhausted the available avenues to expedite the internal processing of election cases so they can be decided more quickly by the Board. This is an area uniquely suited for the Board to take the initiative and formulate changes since the Board is most familiar with its own procedures. In any election-related rulemaking, the Board should propose and solicit public input regarding a variety of different ways it could "fast track" its own role in reviewing and resolving election issues.

4. Aggressively Pursue Measures to Prevent and Remedy Unlawful Election Conduct. To the extent that unlawful employer or union conduct occurs during any

election, this is already prohibited by the Act, and warrants aggressive Board enforcement and the formulation of effective remedies. As noted above, one of the greatest deficiencies in the NPRM is its failure to address these substantive issues in any meaningful way. The Act deserves to be enforced by the Board, and to be respected by the parties, as much as any other federal or state legal requirements. The Board should propose ways in which the Board can more effectively handle litigation regarding alleged substantive misconduct, which can include injunctions and other interim remedies pursued under Section 10(j) of the Act. The Board should also consider more aggressive use of potential civil and criminal contempt sanctions to the extent available under the Act and federal law. Of course, the Board may not presume the existence of unlawful conduct, and much of the Board's statutory responsibility involves the adjudication of unfair labor practices if they are alleged. However, when violations of the Act occur, including instances where they affect elections, they should be dealt with promptly and aggressively by the Board, and we support further consideration of ways in which employer or union violations can be more effectively remedied.

5. Deal More Directly with the Need to Preserve and Enhance Privacy. As noted above, we live in an age where advanced technology is available to nearly all the workers that the Board strives to serve. Current discourse regarding such technology involves concerns about preserving privacy and restricting the broad-based dissemination of personal information. We support the NPRM's solicitation of public input concerning the safeguarding of privacy interests regarding personal information, and the possibility of giving employees the opportunity to choose whether and how any personal information might be disclosed.

Like our colleagues, we are interested in public comment regarding a possible Agency-sponsored protected communications portal (e.g., a sealed-off email system) for use by petitioners and employees rather than the forced surrender of private information by employees and employers, and whether such an approach could reduce Board litigation regarding ancillary issues implicated in the involuntary disclosure of email addresses, phone numbers, and other personal information.[133] We join in our colleagues' request for constructive input regarding this option and any alternative views or related concerns in this important area.

Summary. We believe that these types of initiatives, if backed by the full Board, could receive substantial support from unions, employees, and employers, among others. Our approach would bolster the Board's enviable track record of conducting elections with integrity and transparency. In any event, the most important starting point is to have a *de novo* examination of whether and why there should be further rulemaking. This would provide an essential foundation by identifying issues to be addressed, and it would instill greater public confidence in any resulting Board initiatives.

E. Conclusion

As noted above, we do not fault our colleagues for endeavoring to improve the Board's handling of representation elections. We acknowledge that the Board shoulders

[133] For example, reliance by the Board on an Agency-sponsored communications portal or currently existing vehicles for communication could eliminate the need for Board litigation regarding an array of issues otherwise implicated in forced employer or employee disclosure of personal or business email addresses and phone numbers, including alleged surveillance of communications on employer email systems, the potential invalidation of lawful policies stating that employees and others can have no expectation of privacy when using employer-provided technological resources, alleged discriminatory employer restrictions on non-business computer use, alleged misuse of personal information by unions, and the potential "spamming" of personal or business email accounts, among other things.

the "special function of applying the general provisions of the Act to the complexities of industrial life."[134] Neither the Act nor Board members are frozen in time. We hope it will be possible to reach agreement regarding these important issues.

However, the Board lacks the authority to adopt changes that are contrary to legislative choices made by Congress. And putting aside this issue, it would be far better to have rulemaking regarding a more manageable set of potential changes, which could provide a much more orderly process for evaluating and explaining necessity, consistency with the Act, and potential better alternatives. The scope and magnitude of the complex technical changes proposed in the NPRM span virtually every stage of the election process, and this makes it extremely difficult even to conduct a meaningful appraisal of particular changes or the NPRM as a whole.

Our colleagues and many others strongly believe that policy adjustments regarding the Act are long overdue. We believe representation elections must be conducted fairly, and there are some changes that we support. But the NPRM directly implicates the Act's cornerstone requirement, vested exclusively in the Board, which is to safeguard employee freedom of choice. As to this issue, the Board is not permitted to write from a clean slate. Indeed, more than 50 years ago, arguments were raised that "the time has come for a reevaluation of the basic content of collective bargaining," and the Supreme Court stated: "[T]hat is for Congress. . . . [W]e do not see how the Board can do so on its own."[135] The same admonition applies with equal force here.

For these reasons, we dissent from this NPRM.

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[134] *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 236 (1963) (citation omitted).

[135] *NLRB v. Insurance Agents' Int'l Union*, 361 U.S. 477, 500 (1960).

Appendix to Dissenting Opinion:

How Many Representation Cases Involve Delays Based on Pre-Election Issues the NPRM Would Remove from the Pre-Election Hearing?

As noted in Part A of our dissent, we believe the NPRM fails to adequately target the causes responsible for delayed representation cases. In the hope of providing a starting point for further analysis in public comments, we conducted an extremely preliminary examination of available case-processing statistics during the relatively short time available for the current Board's consideration of this NPRM. We have relied on the Board's own operational and performance standards looking at all representation cases involving initial elections in a three-year period (fiscal years 2008-2010).[136] Over this three-year period, the Board handled a total of 5664 representation cases involving initial elections.

This preliminary examination reinforces our view that the NPRM does not effectively identify or address the reasons for delays in the resolution of some representation cases. Our review focused on the following variables and produced several observations as summarized below.

First, we identified representation cases involving initial elections where there was an unacceptable *overall* delay (from petition-filing until the final resolution of the case, regardless of whether there was a hearing and how quickly the election occurred).

[136] In the Board's published Final Election Rule, now withdrawn, the prior Board majority criticized former Member Hayes' consideration of the Agency's case processing goals as measures of the timely processing of cases, essentially asserting that these goals have no independent normative value. The majority also dismissed as irrelevant public comments that raise the question whether delay in case processing is demonstrable. *See* Final Rule, 76 FR at 80155. However, the operational goals applied by the Board for decades, that were created and relied upon by bipartisan Board majorities, certainly provide an appropriate starting point for evaluating the Board's track record handling representation cases. We also invite public comment regarding alternative methods and metrics.

Using the Board's internal benchmark, we regard cases as involving an unacceptable overall "delay" if they were closed more than *100 days* after petition-filing. During the three-year period, approximately 85 percent of the cases were closed within 100 days, and only 15 percent involved an overall delay.[137]

Second, 5,185 cases – 91 percent of the total – were stipulated elections or consent elections that did not even involve contested pre-election proceedings. The NPRM's changes would be applicable to all of these cases even though pre-election hearing issues were not even in dispute and, therefore, could not have contributed to any delay.

Third, over the three-year period, contested issues required pre-election hearings in 479 cases, amounting to nine percent of the total. A majority of these cases involving pre-election hearings – 269 cases or five percent of the total – did not involve *any* overall delay (i.e., they were closed within 100 days after petition-filing).

Fourth, 210 cases involving pre-election hearings and an overall delay – roughly four percent of the total – also had a pre-election delay (i.e., between petition-filing and the election).[138] However, only 16 percent of these cases involved a delay based on disputed issues that the NPRM would remove from the pre-election hearing, and this constitutes *less than 1 percent of the total number of representation cases over the three-*

[137] The proportion of representation cases involving initial elections where an overall delay occurred was 16.5 percent in fiscal year 2008, 15.6 percent in fiscal year 2009, and 13.7 percent in fiscal year 2010.

[138] For purposes of this review, consistent with the Board's own benchmarks, we considered elections to have been "delayed" if they occurred more than 56 days after the filing of the petition.

year period.[139] By comparison, as noted in Part B of our dissent, the NPRM would change the timetable and procedures applicable to *all* representation elections.

The following breakdown summarizes all representation cases involving pre-election hearings and an overall delay (more than 100 days between petition-filing and the Board's closing of the case) and indicates how many involved delayed elections (more than 56 days between petition-filing and the election) attributable to disputed pre-election issues that would be changed by the NPRM:

Representation Cases Involving Pre-Election Hearings and Overall Delays (More Than 100 Days Between Petition-Filing and Being Closed), Fiscal Years 2008-2010			
Description	# Cases	% of Total Hearing Cases Involving Overall Delay	% of Total Representation Cases
Elections occurred within 56 days (i.e., no election delay)	56 cases	27%	1.1%
Election delays attributable to issues unaffected by NPRM	120 cases	57%	2.3%
Election delays caused by issues the NPRM would remove from pre-election hearings	34 cases	16%	.6%
Totals	210 cases	100%	4%

VII. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 ("RFA"), 5 U.S.C. 601 *et seq*., requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis

[139] The "overall delay" cases that also had delayed elections, based on pre-election hearing issues that the NPRM purports to address, involved questions like supervisor status or voter eligibility which, under the NPRM, would be relegated to post-election proceedings. Delayed elections in other cases were attributable to hearing issues or other factors that would be unaffected by the NPRM (e.g., questions regarding statutory coverage, blocking charges).

and to develop alternatives, wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies "review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA]." E.O. 13272, Sec. 1, 67 FR 53461 ("Proper Consideration of Small Entities in Agency Rulemaking"). An agency is not required to prepare an initial regulatory flexibility analysis for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

As explained below, the Board concludes that the proposed amendments will not affect a substantial number of small entities. In any event, the Board further concludes that the proposed amendments will not have a significant economic impact on such small entities. Accordingly, the Agency Chairman has certified to the Chief Counsel for Advocacy of the Small Business Administration ("SBA") that the proposed amendments will not have a significant economic impact on a substantial number of small entities.

The RFA does not define either "significant economic impact" or "substantial" as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, "what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact." See *A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act*, Office of Advocacy, U.S. Small Business Administration at 17 (available at www.sba.gov) ("SBA Guide").

The Board has determined that the proposed amendments would not affect a substantial number of small entities within the meaning of 5 U.S.C. 605(b). There are approximately six million private employers in the United States, the vast majority of which are classified as small entities under the Small Business Administration's standards.[140] Nearly all of those employers are subject to the Board's jurisdiction.[141] Because, under section 9 of the Act, parties have filed fewer than 3,300 petitions per year for the past five years and the Board has conducted fewer than 1,800 elections per year for the past five years,[142] the number of small employers participating in representation proceedings each year is less than one-tenth of one percent of the small employers in this country. Moreover, the employers that would be affected by the proposed amendments are not concentrated in one or a few sectors, but are found in every sector and industry subject to the Board's jurisdiction. Accordingly, the Board finds that the proposed amendments would not affect a substantial number of small entities within the meaning of 5 U.S.C. 601.

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[140] The Small Business Administration estimates that of the roughly six million private sector employers in 2007, all but about 18,300 were small businesses with fewer than 500 employees. *Source*: SBA Office of Advocacy estimates based on data from the U.S. Department of Commerce, Bureau of the Census, and trends from the U.S. Department of Labor, Bureau of Labor Statistics, Business Employment Dynamics.

[141] The principal private sector employers exempt from the Board's jurisdiction are employers of agricultural laborers and firms covered by the Railway Labor Act, 45 U.S.C. 151. See section 2 of the National Labor Relations Act, 29 U.S.C. 152 (2), (3). Employers whose connection to interstate commerce is so slight that they do not satisfy the Board's discretionary jurisdictional standards are also treated as exempt. See 29 U.S.C. 164(c); An Outline of Law and Procedure in Representation Cases, Chapter 1, found on the Board's web site, *www.nlrb.gov*.

[142] See NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2009-2012); Number of Petitions Filed in FY13 and Number of Elections Held in FY13, *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections* (reporting that the annual number of representation elections conducted decreased from 1,790 to 1,594).

In any event, the Board estimates that the net effect of the proposed amendments could be to decrease costs for small entities. While certain of the proposed amendments—when viewed in isolation—could result in small cost increases, those costs should be more than offset by the many efficiencies in the Board's representation procedures created by the proposed amendments. For example, by permitting electronic filing, providing greater transparency and compliance assistance, reducing the length of evidentiary hearings, deferring litigation of issues that may be rendered moot by elections, deferring requests for review that may be rendered moot by elections, consolidating requests for review into a single proceeding, and making such review discretionary, the proposed amendments should help small entities conserve resources that they might otherwise expend when they are involved in a representation case under the Board's current rules and regulations.

To the extent that any individual requirements—isolated from the proposed amendments' overall efficiencies—could impose additional costs on small entities, those added costs would be de minimus. Indeed, even when aggregated, the potential additional costs that a small entity could face in a given representation proceeding would still be minimal. For example, four new requirements in the proposed amendments might impose a cost on small employers: (1) posting and electronic distribution of the Board's preliminary election notice and electronic distribution of the final notice; (2) completing the substantive portions of the Statement of Position form at or before any pre-election hearing; (3) providing the petitioner and the regional director with a list of the names and job information, and providing the regional director with contact information, for the employees at issue at or before any pre-election hearing; and (4) providing the petitioner

and the regional director with additional job and contact information concerning employees eligible to vote following approval of an election agreement or issuance of a direction of election.

The proposed amendments' new notice requirements would involve merely posting paper copies of notices that will be sent to the employer by the regional director, as well as taking the few minutes to electronically distribute electronic versions of those notices, also supplied by the regional director, if the employer already regularly communicates with its employees over email or via a website. The substantive portions of the Statement of Position form would only require a small employer to reduce to writing the positions on several issues that it would need to formulate, in any event, to effectively prepare for a pre-election hearing and which parties largely must already articulate at such a hearing under the current rules. And by entering into an election agreement, as do the vast majority of employers under the Board's current rules, a small employer would not have to complete the Statement of Position at all. The additional information to be supplied regarding voting employees should already be contained in employers' records, increasingly in readily retrievable electronic form, thereby allowing small employers to assemble such electronic lists without expending significant resources. Moreover, the typically small sizes of bargaining units at issue in Board elections (with medians ranging from 23 to 26 employees over the last decade) suggests that small employers will not be significantly burdened by having to provide the additional information.

For these reasons, the Board concludes that several of the proposed amendments would result in little to no adverse economic impact on the relatively few small entities

who participate in representation proceedings each year, while the proposed amendments as a whole should actually reduce the costs incurred in connection with representation proceedings. Accordingly, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

These proposed amendments would not impose any information collection requirements. Accordingly, they are not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq.

The NLRB is an agency covered by the PRA. 44 U.S.C. 3502(1) and (5). The PRA establishes rules for such agencies' "collection of information." 44 U.S.C. 3507.

The Board has considered whether any of the provisions of the proposed amendments provide for a "collection of information" covered by the PRA. Specifically, the Board has considered the following proposed provisions that contain petition and response requirements, posting requirements, and requirements that lists of employees or eligible voters be filed:

1) Under the proposed amendments, as under the current rules, parties seeking to initiate the Board's representation procedures are required to file a petition with the Board containing specified information relevant to the Board's adjudication of the specific question raised by the filing of the petition. Under the proposed amendments, non-petitioning parties to such representation proceedings are required to file a Statement of Position setting forth the parties' positions and specified information relevant to the Board's adjudication of the question raised by the petition. Employers are currently

asked to supply the portion of the information specified in the proposed amendments relating to their participation in interstate commerce.

2) Under the proposed amendments, employers are required to post an initial and final notice to employees of an election. The second posting requirement exists currently. Employers are currently asked but not required to post the first notice (in a different form).

3) Finally, under the proposed amendments, as under current case law, employers are required to file a list of eligible voters prior to an election. Under the proposed amendments, a preliminary list of employees is required at or before the pre-election hearing. For the reasons given below, the Board believes that none of these actions constitutes a collection of information covered by the PRA.

The PRA exempts from the definition of "collection of information" "a collection of information described under section 3518(c)(1)" of the Act. 44 U.S.C. 3502(3)(B).

Section 3518(c) provides:

- Except as provided in paragraph (2), this subchapter shall not apply to the collection of information--
    - during the conduct of--
    - an administrative action or investigation involving an agency against specific individuals or entities;
- This subchapter applies to the collection of information during the conduct of general investigations . . . undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

44 U.S.C. 3518(c). The legislative history of this provision makes clear that it is not limited to prosecutorial proceedings. The Senate Report on the PRA states, "Section

3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties." S. Rep. No. 96-930, at 56 (1980).

The Board believes that all of the above-described provisions of the proposed amendments fall within the exemption created by sections 3502(3)(B) and 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the NLRA is "an administrative action or investigation involving an agency." A representation proceeding is also "against specific individuals or entities" within the meaning of section 3518(c)(1)(B)(ii). The Board's decisions in representation proceedings are binding on and thereby alter the legal rights of the parties to the proceedings. For example, the employer of any employees who are the subject of a petition is a party to the resulting representation proceeding.[143] If the Board finds in a representation proceeding that a petition has been filed concerning an appropriate unit and that employees in that unit have voted to be represented, the Board will thereafter certify the petitioner as the employees' representative for purposes of collective bargaining with the employer. As a direct and automatic consequence of the Board's certification, the employer is legally bound to recognize and bargain with the certified representative. If the employer refuses to do so, it commits an unfair labor practice.[144] If such an employer is charged with a refusal to bargain, it is precluded from relitigating in the unfair labor practice proceeding

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[143] See, e.g., *Pace University v. NLRB*, 514 F.3d 19, 23 (D.C. Cir. 2008); *Kearney & Trecker Corp. v. NLRB*, 209 F.2d 782, 786-88 (7th Cir. 1953).

[144] See, e.g., *Country Ford Trucks, Inc. v. NLRB*, 229 F.3d 1184, 1191 (D.C. Cir. 2000); *C.J. Krehbiel Co. v. NLRB*, 844 F.2d 880, 882, 886 (D.C. Cir. 1988).

any issues that were or could have been raised in the representation proceeding.[145] Finally, if such an employer seeks review of the Board's order in the unfair labor practice proceeding or the Board seeks to enforce its order in a court of appeals, the record from the representation proceeding must be filed with the court and "the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript." 29 U.S.C. 159(d); see also *Boire v. Greyhound Corp*. 376 U.S. 473, 477-79 (1964).[146]

Three limitations on the filing and posting requirements in the proposed amendments lead to the conclusion that they fall within the statutory exemption. First, the amendments impose requirements only on parties to the representation case proceeding, an administrative action or investigation against specific individuals or entities within the scope of section 3518(c)(1)(B)(ii). Second, any adverse consequences for failing to provide the requested information are imposed only on persons and entities that are party to the representation proceeding. Third, the possible adverse consequences that may result from noncompliance do not reach beyond the representation case proceeding. The proposed amendments impose no consequences on any party based on

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[145] See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941).

[146] Similarly, a union that has been certified or recognized as the representative of employees in an appropriate unit has a legal right to continue to be recognized as the exclusive representative of such employees. See *Scepter, Inc. v. NLRB*, 280 F.3d 1053, 1056 (D.C. Cir. 2002). However, if a petition is filed under section 9 seeking to decertify such a union, which is a party to the resulting representation proceeding, see *Brom Mach. & Foundry Co. v. NLRB*, 569 F.2d 1042, 1044 (8th Cir. 1978), and at the conclusion of the proceeding the Board certifies the results of an election finding that less than a majority of the voters cast ballots in favor of continued representation by the union, the union loses its legal right to represent the employees. *Retail Clerks Int'l Ass'n v. Montgomery Ward & Co.*, 316 F.2d 754, 756-57 (7th Cir. 1963).

its failure to file or provide information requested in a petition or statement of position form other than to prevent the party from initiating a representation proceeding or to restrict a party's rights to raise issues or participate in the adjudication of issues in the specific representation proceeding and any related unfair labor practice proceeding. Similarly, as is the case currently,[147] no consequences attach to a failure to post either notice or to file the eligibility list beyond the overturning of an election conducted as part of the specific proceeding.

Sections 102.62(e), 102.63(a) and 102.67(i) of the proposed amendments require that an employer which is party to a representation proceeding post an Initial Notice to Employees of Election subsequent to the filing of a petition and, if an election is agreed to or directed, a Final Notice to Employees of Election. The Board will make available both notices to the employer in paper and electronic form, and employers will be permitted to post exact duplicate copies of the notices. The Board does not believe these posting requirements are subject to the PRA for the reasons explained above. Moreover, the Board does not believe that the notice posting requirements constitute a "collection of information" as defined in section 3502(3) of the PRA for an additional, independent reason. The notice posting requirements do not involve answers to questions or any form of reporting. Nor do they involve a "recordkeeping requirement" as that term is defined in section 3502(13) of the PRA. The proposed notice posting requirements do not require any party to "maintain specified records." The Board notes that this construction is consistent with the Office of Management and Budget's regulations construing and

[147] See John E. Higgins, Jr., The Developing Labor Law 595, 607 (5th ed. 2006) (noting that failure to provide *Excelsior* list or post notice of election constitutes grounds for setting aside election).

implementing the PRA, which provide that "[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public" is not considered a "collection of information" under the Act. See 5 CFR 1320.3(c)(2). For all of these reasons, the Board concludes that the posting requirements are not subject to the PRA.

Accordingly, the proposed amendments do not contain information collection requirements that require approval of the Office of Management and Budget under the Paperwork Reduction Act.

List of Subjects

29 CFR Part 101

Administrative practice and procedure, Labor management relations.

29 CFR Part 102

Administrative practice and procedure, Labor management relations.

29 CFR Part 103

Labor management relations.

In consideration of the foregoing, the National Labor Relations Board proposes to amend chapter I of title 29, Code of Federal Regulations, as follows:

PART 101—STATEMENTS OF PROCEDURES

1. The authority citation for part 101 continues to read as follows:

Authority: Sec. 6 of the National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a) of the Administrative Procedure Act (5 U.S.C. 552(a)). Section 101.14 also issued under sec. 2112(a)(1) of Pub. L. 100–236, 28 U.S.C. 2112(a)(1).

Subpart C— [Removed and Reserved]

2. Remove and reserve subpart C, consisting of §§ 101.17 through 101.21.

Subpart D—[Removed and Reserved]

3. Remove and reserve subpart D, consisting of §§ 101.22 through 101.25.

Subpart E—[Removed and Reserved]

4. Remove and reserve subpart E, consisting of §§ 101.26 through 101.30.

PART 102—RULES AND REGULATIONS, SERIES 8

5. The authority citation for part 102 continues to read as follows:

Authority: Sections 1, 6, National Labor Relations Act (29 U.S.C. 151, 156). Section 102.117 also issued under section 552(a)(4)(A) of the Freedom of Information Act, as amended (5 U.S.C. 552(a)(4)(A)), and Section 102.117a also issued under section 552a(j) and (k) of the Privacy Act of 1974 (5 U.S.C. 552a(j) and (k)). Sections 102.143 through 102.155 also issued under section 504(c)(1) of the Equal Access to Justice Act, as amended (5 U.S.C. 504(c)(1)).

Subpart C—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees[2] And for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

6. Revise § 102.60 to read as follows:

§ 102.60 Petitions.

[2] Procedure under the first proviso to sec. 8(b)(7)(C) of the Act is governed by subpart D of this part.

(a) Petition for certification or decertification. A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed. A person filing a petition by facsimile or electronically pursuant to § 102.114(f) or (i) of this part shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile or electronically, if otherwise proper. Except as provided in § 102.72 of this subpart, such petitions shall be filed with the regional director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions with a certificate of service on all parties named in the petition. Along with the petition, the petitioner shall serve a description of procedures in representation cases and a Statement of Position form. Prior to the transfer of the record to the Board, the petition may be withdrawn only with the consent of the

regional director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the regional director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) Petition for clarification of bargaining unit or petition for amendment of certification. A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question concerning representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

7. Revise § 102.61 to read as follows:

§ 102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) RC Petitions. A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any other party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(b) RM Petitions. A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the

representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date.

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(8) Evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. Such evidence shall be filed together with the petition, but if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any other party. However, no proof of representation on the part of the labor organization claiming a majority is required and the regional director shall proceed with

the case if other factors require it unless the labor organization withdraws its claim to majority representation.

(c) RD Petitions. Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) The name and address of the petitioner and affiliation, if any, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(5) The name or names and addresses of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in section 9(a) of the Act.

(7) The number of employees in the unit.

(8) A statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any other party.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(d) UC Petitions. A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual

who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(11) Any other relevant facts.

(e) AC Petitions. A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(8) Any other relevant facts.

(f) Provision of original signatures. Evidence filed pursuant to § 102.61(a)(7), (b)(8), or (c)(8) of this subpart together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in

electronic form provided that the original documents are received by the regional director no later than two days after the facsimile or electronic filing.

8. Revise § 102.62 to read as follows:

§ 102.62 Election agreements; voter list.

(a) Consent election agreements with final regional director determinations of post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the regional director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 of this subpart except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(b) Stipulated election agreements with discretionary board review. Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the regional director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 of this subpart.

(c) Full consent election agreements with final regional director determinations of pre- and post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66 and 102.67 of this subpart to determine if a question concerning representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director

thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 of this subpart, except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(d) Voter lists. Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction, within two days after approval of an election agreement pursuant to paragraphs (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the regional director and the parties named in the agreement or direction a list of the full names, home addresses, available telephone numbers, available email addresses, work locations, shifts, and job classifications of all eligible voters. In order to be timely filed, the list must be received by the regional director and the parties named in the agreement or direction within two days after the approval of the agreement or issuance of the direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the

list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the petition. Failure to file or serve the list within the specified time and in proper format shall be grounds for setting aside the election whenever proper objections are filed. The regional director shall make the list available upon request to all parties in the case on the same day or as soon as practicable after the director receives the list from the employer. The parties shall use the list exclusively for purposes related to the representation proceeding and related Board proceedings.

(e) Final notices to employees of election. Upon approval of the election agreement pursuant to paragraphs (a) or (b) or with the direction of election pursuant to paragraph (c), the regional director shall promptly transmit the Board's Final Notice to Employees of Election to the parties by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The regional director shall also electronically transmit the Final Notice to Employees of Election to affected employees to the extent practicable. The Final Notice to Employees of Election shall be posted in accordance with § 102.67(i) of this subpart.

9. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by regional director; notice of hearing; service of notice; Initial Notice to Employees of Election; Statement of Position form; withdrawal of notice.

(a) Investigations and notices. (1) After a petition has been filed under § 102.61(a), (b), or (c) of this subpart, if no agreement such as that provided in § 102.62 of this subpart is entered into and if it appears to the regional director that there is reasonable

cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall set the hearing for a date 7 days from the date of service of the notice absent special circumstances. A copy of the petition, a description of procedures in representation cases, an "Initial Notice to Employees of Election", and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(2) The employer shall immediately post the Initial Notice to Employees of Election, where notices to employees are customarily posted, and shall also distribute it electronically if the employer customarily communicates with its employees electronically. The employer shall maintain the posting until the petition is dismissed or the Initial Notice is replaced by the Final Notice to Employees of Election. Failure to properly post and distribute the Initial Notice to Employees of Election shall be grounds for setting aside the results of the election whenever proper objections are filed.

(b)(1) Statement of Position in RC cases. After a petition has been filed under § 102.61(a) of this subpart and the regional director has issued a notice of hearing, the employer shall file and serve on the parties named in the petition its Statement of Position by the date and in the manner specified in the notice unless that date is the same as the

hearing date. If the Statement of Position is due on the date of the hearing, its completion shall be the first order of business at the hearing before any further evidence is received, and its completion may be accomplished with the assistance of the hearing officer.

(i) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over the petition and provide the requested information concerning the employer's relation to interstate commerce; state whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis of the contention that the proposed unit is inappropriate, and describe the most similar unit that the employer concedes is appropriate; identify any individuals occupying classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the employer's position concerning the type, dates, times, and location of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(ii) The Statement of Position shall also state the name, title, address, telephone number, fax number, and e-mail address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(iii) The Statement of Position shall further state the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall also state the full names, work locations, shifts, and job classifications of all employees in the

most similar unit that the employer concedes is appropriate. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(iv) In addition to the information described in paragraph (b)(1)(iii) of this section, the lists filed with the regional director, but not served on any other party, shall contain available telephone numbers, available email addresses, and home addresses of all individuals referred to in paragraph (b)(1)(iii) of this section.

(v) The employer shall be precluded from contesting the appropriateness of the petitioned-for unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish the information described in paragraphs (b)(1)(iii) and (iv) of this section.

(2) Statement of Position in RM cases. If a petition has been filed under § 102.61(b) of this subpart, the individual or labor organization which is alleged to have presented to the petitioner a claim to be recognized shall file and serve on the regional director and the parties named in the petition its Statement of Position such that it is received by the regional director and the parties named in the petition on the date specified in the notice unless that date is the same as the hearing date. If the Statement of Position is due on the date of the hearing, its completion shall be the first order of business at the hearing before any further evidence is received, and its completion may be accomplished with the assistance of the hearing officer.

(i) Individual or labor organization's Statement of Position. The individual or labor organization's Statement of Position shall describe all issues the party intends to raise at the hearing.

(ii) Identification of representative for service of papers. The Statement of Position shall also state the name, title, address, telephone number, fax number, and e-mail address of the individual who will serve as the representative of the individual or labor organization and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the individual or labor organization.

(iii) Employer's Statement of Position. Within the time permitted for filing the Statement of Position, the employer shall file with the regional director, and serve on the individual or labor organization, a list of the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(iv) Contact information for individuals in proposed unit. In addition to the information described in paragraph (b)(2)(iii) of this section, the lists filed with the regional director, but not served on any other party, shall contain the full names, available telephone numbers, available e-mail addresses, and home addresses of all individuals referred to in paragraph (b)(2)(iii) of this section.

(v) Preclusion. The employer shall be precluded from contesting the appropriateness of the unit at any time and from contesting the eligibility or inclusion of

any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish the information described in paragraphs (b)(2)(iii) and (iv) of this section.

(3) Statement of Position in RD cases. If a petition has been filed under § 102.61(c) of this subpart, the employer and the certified or recognized representative of employees shall file and serve on the regional director and the parties named in the petition their respective Statements of Position such that they are received by the regional director and the parties named in the petition on the date specified in the notice unless that date is the same as the hearing date. If the Statements of Position are due on the date of the hearing, their completion shall be the first order of business at the hearing before any further evidence is received, and their completion may be accomplished with the assistance of the hearing officer.

(i) The Statements of Position of the employer and the certified or recognized representative shall describe all issues each party intends to raise at the hearing.

(ii) The Statements of Position shall also state the name, title, address, telephone number, fax number, and e-mail address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(iii) The employer's Statement of Position shall also state the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of

filing, and if the employer contends that the proposed unit is inappropriate, the employer shall also state the full names, work locations, shifts, and job classifications of all individuals in the certified or recognized unit. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(iv) In addition to the information described in paragraph (b)(3)(iii) of this section, the lists filed with the regional director, but not served on any other party, shall contain the full names, available telephone numbers, available email addresses, and home addresses of all individuals referred to in paragraph (b)(3)(iii) of this section.

(v) The employer shall be precluded from contesting the appropriateness of the petitioned-for unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish the information described in paragraphs (b)(3)(iii) and (b)(3)(iv) of this section.

(c) UC or AC cases. After a petition has been filed under § 102.61(d) or (e) of this subpart, the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the

regional director on his own motion. All hearing and posthearing procedure under paragraph (c) of this section shall be in conformance with §§ 102.64 through 102.69 of this subpart whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a) of this subpart, the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by §102.71 of this subpart. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67 of this subpart, except where an agreement under § 102.62(a) of this subpart is involved.

10. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a petition as described in section 9(c) of the Act has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a petition filed under section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. If, upon the record of the hearing, the regional director finds that such a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question and, subsequent to that election, unless specifically provided otherwise in these rules, resolve any disputes concerning the eligibility or inclusion of voters that might affect the results of the election.

(b) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. Subject to the provisions of § 102.66 of this subpart, it shall be the duty of the hearing officer to inquire fully into all genuine disputes as to material facts in order to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the Act.

(c) The hearing officer shall continue the hearing from day to day until completed absent extraordinary circumstances.

11. Revise § 102.65 to read as follows:

§ 102.65 Motions; interventions.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the record to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. The regional director may rule upon all motions filed with him, causing a copy of said ruling to be served on the parties, or he may refer the motion to the hearing officer: *Provided*, That if the regional director prior to the close of the hearing grants a

motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71 of this subpart. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be.

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The regional director or the hearing officer, as the case may be, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as he may deem proper, and such intervenor shall thereupon become a party to the proceeding. Any person desiring to intervene in any such proceeding shall also complete a Statement of Position form.

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(g) of this subpart. Unless expressly authorized by the Rules and Regulations, rulings by the regional director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate request for review pursuant to § 102.67 (b), (c), and (d) or § 102.69 of this subpart. Nor shall rulings by the hearing officer be appealed directly to the regional director unless expressly authorized by the Rules and Regulations, except by special permission of the regional director, but shall be considered by the regional director when he reviews the entire record. Requests to the regional director, or to the

Board in appropriate cases, for special permission to appeal from a ruling of the hearing officer or the regional director, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted, including why the issue will otherwise evade review, and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the regional director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the regional director. Neither the Board nor the regional director will grant a request for special permission to appeal except in extraordinary circumstances where it appears that the issue will otherwise evade review. No party shall be precluded from raising an issue at a later time based on its failure to seek special permission to appeal. If the Board or the regional director, as the case may be, grants the request for special permission to appeal, the Board or the regional director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall, unless otherwise ordered by the Board, operate as a stay of an election or any action taken or directed by the regional director. Notwithstanding a pending request for special permission to appeal, the regional director shall not impound ballots cast in an election unless otherwise ordered by the Board.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e) (1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision

or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules: *Provided*, *however*, That the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing *de novo*, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to this paragraph (e) shall be filed within 14 days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor

will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

12. Revise § 102.66 to read as follows:

§ 102.66 Introduction of evidence: rights of parties at hearing; subpoenas.

(a) Rights of parties at hearing. Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence relevant to any genuine dispute as to a material fact. The hearing officer shall identify such disputes as follows:

(1) Joinder in RC cases. In a case arising under § 102.61(a) of this subpart, after the employer completes its Statement of Position and prior to the introduction of further evidence, the petitioner shall respond to each issue raised in the Statement. The hearing officer shall not receive evidence relevant to any issue concerning which parties have not taken adverse positions: *Provided*, *however*, That if the employer fails to take a position regarding the appropriateness of the petitioned-for unit, the petitioner shall explain why

the proposed unit is appropriate and may support its explanation with evidence in the form of sworn statements or declarations consistent with the requirements stated in § 102.60(a) of this subpart or through examination of witnesses and introduction of documentary or other evidence.

(2) Joinder in RM cases. In a case arising under § 102.61(b) of this subpart, after the individual or labor organization completes its Statement of Position and prior to the introduction of further evidence, the petitioner shall respond to each issue raised in the Statement. The hearing officer shall not receive evidence relevant to any issue concerning which parties have not taken adverse positions: *Provided*, *however*, That if the individual or labor organization fails to take a position regarding the appropriateness of the petitioned-for unit, the petitioner shall explain why the proposed unit is appropriate and may support its explanation with evidence in the form of sworn statements or declarations consistent with the requirements stated in § 102.60(a) of this subpart or through examination of witnesses and introduction of documentary or other evidence.

(3) Joinder in RD cases. In a case arising under § 102.61(c) of this subpart, after the employer and the certified or recognized representative of employees complete their respective Statements of Position and prior to the introduction of further evidence, the petitioner shall respond to each issue raised in the Statements. The hearing officer shall not receive evidence relevant to any issue concerning which parties have not taken adverse positions: *Provided*, *however*, That if the employer and/or the certified or recognized representative fails to take a position regarding whether the petitioned-for unit is coextensive with the unit for which a representative is certified or recognized, the petitioner shall explain why the proposed unit is appropriate and may support its

explanation with evidence in the form of sworn statements or declarations consistent with the requirements stated in § 102.60(a) of this subpart or through examination of witnesses and introduction of documentary or other evidence.

(b) Offers of proof; discussion of election procedure. After identifying the issues in dispute pursuant to paragraph (a) of this section, the hearing officer shall solicit offers of proof from the parties or their counsel as to all such issues. The offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing the witness' testimony. The hearing officer shall examine the offers of proof related to each issue in dispute and shall proceed to hear testimony and accept other evidence relevant to the issue only if the offers of proof raise a genuine dispute as to any material fact. Prior to the close of the hearing, the hearing officer will:

(1) Solicit the parties' positions on the type, dates, times, and locations of the election and the eligibility period, but shall not permit litigation of those issues;

(2) Inform the parties that the regional director will issue a decision, direction of election or both as soon as practicable and that the director will immediately transmit the document(s) to the parties' designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and

(3) Inform the parties what their obligations will be under these rules if the director directs an election and of the time for complying with such obligations.

(c) Preclusion. A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely

Statement of Position or to place in dispute in response to another party's Statement: *Provided*, *however*, that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition; *Provided, further*, that no party shall be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the petitioned-for unit is not appropriate in its Statement of Position but fails to state the most similar unit that it concedes is appropriate, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit.

(d) Disputes concerning less than 20 percent of the unit. If at any time during the hearing, the hearing officer determines that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer shall close the hearing.

(e) Witness examination and evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(f) Objections. Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(g) Subpoenas. The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena or by such earlier time as the hearing officer or regional director shall determine, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided*, *however*, That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer or, with the permission of the hearing officer, presented orally. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in

the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(h) Oral argument and briefs. Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Briefs shall be filed only upon special permission of the hearing officer and within the time the hearing officer permits.

(i) Hearing officer analysis. The hearing officer may submit an analysis of the record to the regional director but he shall make no recommendations.

(j) Witness fees. Witness fees and mileage shall be paid by the party at whose instance the witness appears.

13. Revise § 102.67 to read as follows:

§ 102.67 Proceedings before the regional director; further hearing; action by the regional director; review of action by the regional director; statement in opposition; final notice of election; voter list.

(a) Proceedings before regional director. The regional director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or

further hearing, as he may deem proper, to determine whether a question concerning representation exists in a unit appropriate for purposes of collective bargaining, and to direct an election, dismiss the petition, or make other disposition of the matter. If the hearing officer has determined during the hearing or the regional director determines after the hearing that the only issues remaining in dispute concern the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the regional director shall direct that those individuals be permitted to vote subject to challenge. In the event that the regional director permits individuals whose eligibility or inclusion remains in dispute to vote subject to challenge, the Final Notice to Employees of Election shall advise employees that said individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as the regional director has permitted them to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of said individuals will be resolved, if necessary, following the election.

(b) Directions of elections; dismissals; requests for review. A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction: *Provided*, *however*, that the regional director may direct an election with findings and a statement of reasons to follow prior to the tally of ballots. In the event that the regional director directs an election, said direction shall specify the type, date, time, and place of the election and the eligibility period. The regional director shall schedule the election for the earliest date practicable consistent with these rules. The regional director shall transmit the direction of election to the parties' designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile

number was provided). Along with the direction of election, the regional director shall also transmit the Board's Final Notice to Employees of Election by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The regional director shall also electronically transmit the Final Notice to Employees of Election to affected employees to the extent practicable. The decision of the regional director shall be final: *Provided*, *however*, That within 14 days after service of a decision dismissing a petition any party may file a request for review of such a dismissal with the Board in Washington, DC: *Provided*, *further*, That any party may, after the election, file a request for review of a regional director's decision to direct an election within the time periods specified and as described in § 102.69 of this subpart.

(c) Grounds for review. The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of, or

(ii) A departure from, officially reported Board precedent.

(2) That the regional director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(d) Contents of request. Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (c)(2) of this section, and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

(e) Opposition to request. Any party may, within 7 days after the last day on which the request for review must be filed, file with the Board a statement in opposition thereto, which shall be served in accordance with the requirements of paragraph (h) of this section. A statement of such service of opposition shall be filed simultaneously with the Board. The Board may deny the request for review without awaiting a statement in opposition thereto.

(f) Waiver; denial of request. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(g) Grant of review; briefs. The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and

other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h)(1) Format of request. All documents filed with the Board under the provisions of this section shall be filed in seven copies, double spaced, on 81/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Requests for review, including briefs in support thereof; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page authorities cited.

(2) Service of copies of request. The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the regional director. A statement of such service shall be filed with the Board together with the document.

(3) Extensions. Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing

the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

(i) Final notice to employees of election. The employer shall post copies of the Board's Final Notice to Employees of Election in conspicuous places at least 2 full working days prior to 12:01 a.m. of the day of the election and shall also distribute the Final Notice to Employees of Election electronically if the employer customarily communicates with employees in the unit electronically. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the regional office in the mail. In all cases, the notices shall remain posted until the end of the election. The term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. A party shall be estopped from objecting to nonposting of notices if it is responsible for the nonposting. Failure properly to post and distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of § 102.69(a) of this subpart.

(j) Voter lists. Absent extraordinary circumstances specified in the direction of election, the employer shall, within 2 days after such direction, provide to the regional director and the parties named in such direction a list of the full names, home addresses, available telephone numbers, available email addresses, work locations, shifts, and job classifications of all eligible voters. In order to be timely filed, the list must be received by the regional director and the parties named in the direction within 2 days of the direction of election unless a longer time is specified therein. The list of names shall be

alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the petition. Failure to file or serve the list within the specified time and in proper format shall be grounds for setting aside the election whenever proper objections are filed. The regional director shall make the list available upon request to all parties in the case on the same day or as soon as practicable after the director receives the list from the employer. The parties shall use the list exclusively for purposes of the representation proceeding and related Board proceedings.

14. Revise § 102.68 to read as follows:

§ 102.68 Record; what constitutes; transmission to Board.

The record in a proceeding conducted pursuant to the foregoing section, or conducted pursuant to § 102.69 of this subpart, shall consist of: the petition, notice of hearing with affidavit of service thereof, Statements of Position, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any. Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit the record to the Board.

15. Revise § 102.69 to read as follows:

§ 102.69 Election procedure; tally of ballots; objections; requests for review of directions of elections, hearings; hearing officer reports on objections and challenges; exceptions to hearing officer reports; requests for review of regional director reports or decisions in stipulated or directed elections.

(a) Election procedure; tally; objections. Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided*, *however*, That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the regional director an original

and five copies of objections to the conduct of the election or to conduct affecting the results of the election with a certificate of service on all parties, which shall contain a short statement of the reasons therefore and a written offer of proof in the form described in § 102.66(b) of this subpart insofar as applicable, but the written offer of proof shall not be served on any other party. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile or electronically pursuant to § 102.114(f) or (i) of this part shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.114(f) or (i) of this part.

(b) Requests for review of directions of elections. If the election has been conducted pursuant to § 102.67 of this subpart, any party may file a request for review of the decision and direction of election with the Board in Washington, D.C. In the absence of election objections or potentially determinative challenges, the request for review of the decision and direction of election shall be filed within 14 days after the tally of ballots has been prepared. In a case involving election objections or potentially determinative challenges, the request for review shall be filed within 14 days after the regional director's report or supplemental decision on challenged ballots, on objections, or on both, and may be combined with a request for review of that decision as provided in paragraph (d)(3) of this section. The procedures for such request for review shall be the same as set forth in § 102.67(c) through (h) of this subpart insofar as applicable. If no request for review is filed, the decision and direction of election is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right

to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(c) Certification in the absence of objections, determinative challenges and requests for review. If no objections are filed within the time set forth in paragraph (a) of this section, if the challenged ballots are insufficient in number to affect the results of the election, if no runoff election is to be held pursuant to § 102.70 of this subpart, and if no request for review is filed pursuant to paragraph (b) of this section, the regional director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding will thereupon be closed.

(d)(1)(i) Reports. If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof would not constitute grounds for overturning the election if introduced at a hearing, the regional director shall issue a report or supplemental decision disposing of objections and a certification of the results of the election, including certification of representative where appropriate, unless there are potentially determinative challenges.

(ii) Notices of hearing. If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the regional director determines that the evidence described in the accompanying offer of proof could be grounds for

overturning the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election, the regional director shall transmit to the parties' designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a notice of hearing before a hearing officer at a place and time fixed therein no later than 14 days after the preparation of the tally of ballots or as soon as practicable thereafter: *Provided*, *however*, that the regional director may consolidate the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge.

(iii) Hearings; hearing officer reports; exceptions to regional director. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66 of this subpart, insofar as applicable, except that, upon the close of such hearing, the hearing officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 14 days from the date of issuance of such report, file with the regional director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other

parties and a statement of service filed with the regional director. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

(2) Regional director reports or decisions in consent or full consent elections. If the election has been held pursuant to § 102.62(a) or (c) of this subpart, the report or decision of the regional director shall be final and shall include a certification of the results of the election, including certification of representative where appropriate.

(3) Requests for review of regional director reports or decisions in stipulated or directed elections. If the election has been held pursuant to §§ 102.62(b) or 102.67 of this subpart, within 14 days from the date of issuance of the regional director's report or decision on challenged ballots or on objections, or on both, any party may file with the Board in Washington, DC, a request for review of such report or decision which may be combined with a request for review of the regional director's decision to direct an election as provided in § 102.67(b) of this subpart. The procedures for post-election requests for review shall be the same as set forth in § 102.67(c) through (h) of this subpart insofar as applicable. If no request for review is filed, the report or decision is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor

practice proceeding. *Provided, however,* that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing the provisions of § 102.46 of this part shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

(e)(1)(i) Record in case with hearing. In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the notice of hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the regional director, any requests for review, and the record previously made as defined in § 102.68 of this subpart. Materials other than those set out above shall not be a part of the record.

(ii) Record in case with no hearing. In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any report or decision on objections or on challenged ballots and any request for review of such a report or decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision or report, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings or orders of the regional director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (e)(3) of this section.

(2) Immediately upon issuance of an order granting a request for review by the Board, the regional director shall transmit to the Board the record of the proceeding as defined in paragraph (e)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a regional director's report or decision on objections, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the regional director and which were not included in the report or decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(f) Revised tally of ballots. In any case under this section in which the regional director, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 7 days after the revised tally of ballots has been made available, the regional director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board. The proceeding shall thereupon be closed.

(g) Format of filings with regional director. All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 81/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject

index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(h) Extensions of time. Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed with the Board or the regional director, as the case may be. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the regional director. A statement of such service shall be filed with the document.

16. Revise § 102.71(c) to read as follows:

§ 102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the regional director.

* * * * *

(c) A request for review must be filed with the Board in Washington, DC, and a copy filed with the regional director and copies served on all the other parties within 14 days of service of the notice of dismissal or notification that the petition is to be held in abeyance. The request shall be submitted in eight copies and shall contain a complete statement setting forth facts and reasons upon which the request is based. Such request shall be printed or otherwise legibly duplicated. Requests for an extension of time within

which to file the request for review shall be filed with the Board in Washington, DC, and a statement of service shall accompany such request.

Subpart D—Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

17. Revise § 102.76 to read as follows:

§ 102.76 Petition; who may file; where to file; contents.

When picketing of an employer has been conducted for an object proscribed by Section 8(b)(7) of the Act, a petition for the determination of a question concerning representation of the employees of such employer may be filed in accordance with the provisions of §§ 102.60 and 102.61 of this part, insofar as applicable: *Provided*, *however*, That if a charge under § 102.73 of this subpart has been filed against the labor organization on whose behalf picketing has been conducted, the petition shall not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act; or that the union represents a substantial number of employees; or that the labor organization is currently recognized but desires certification under the act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

18. Revise § 102.77(b) to read as follows:

§ 102.77 Investigation of petition by regional director; directed election.

* * * * *

(b) If after the investigation of such petition or any petition filed under subpart C of this part, and after the investigation of the charge filed pursuant to § 102.73 of this subpart, it appears to the regional director that an expedited election under section 8(b)(7)(C) of the Act is warranted, and that the policies of the Act would be effectuated thereby, he shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter: *Provided*, *however*, That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be served on the parties, individuals, and labor organizations involved a notice of hearing before a hearing officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following, shall be governed insofar as applicable by §§ 102.63 to 102.69 inclusive of this part. *Provided further, however*, That if a petition has been filed which does not meet the requirements for processing under the expedited procedures, the regional director may process it under the procedures set forth in subpart C of this part.

Subpart E—Procedure for Referendum Under Section 9(e) of the Act

19. Revise § 102.83 to read as follows:

§ 102.83 Petition for referendum under section 9(e)(1) of the Act; who may file; where to file; withdrawal.

A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in

writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. One original of the petition shall be filed with the regional director wherein the bargaining unit exists or, if the unit exists in two or more Regions, with the regional director for any of such Regions. A person filing a petition by facsimile or electronically pursuant to § 102.114(f) or (i) of this part shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. The petition may be withdrawn only with the approval of the regional director with whom such petition was filed. Upon approval of the withdrawal of any petition the case shall be closed.

20. Amend § 102.84 by revising paragraph (i), redesignating paragraph (j) as paragraph (k), and adding new paragraphs (j), (l) and (m) to read as follows:

§ 102.84 Contents of petition to rescind authority.

* * * * *

(i) The name and address of the petitioner, and the name, title, address, telephone number, fax number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the proceeding.

(j) A statement that 30 percent or more of the bargaining unit employees covered by an agreement between their employer and a labor organization made pursuant to

section 8(a)(3) of the Act, desire that the authority to make such an agreement be rescinded.

* * * * *

(l) Evidence supporting the statement that 30 percent or more of the bargaining unit employees desire to rescind the authority of their employer and labor organization to enter into an agreement made pursuant to section 8(a)(3) of the Act. Such evidence shall be filed together with the petition, but shall not be served on any other party.

(m) Evidence filed pursuant to paragraph (l) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than two days after the facsimile or electronic filing.

21. Revise § 102.85 to read as follows:

§ 102.85 Investigation of petition by regional director; consent referendum; directed referendum.

Where a petition has been filed pursuant to § 102.83 of this subpart and it appears to the regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, he shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the

labor organization to make such an agreement with their employer: *Provided*, *however*, That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or, upon grant of a request for review, by the Board.

22. Revise § 102.86 to read as follows:

§ 102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing shall be governed, insofar as applicable, by §§ 102.63 to 102.69 inclusive of this part.

Subpart I—Service and Filing of Papers

23. Revise § 102.112 to read as follows:

§ 102.112 Date of service; date of filing.

The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by electronic mail, the date of service shall be the date on which the message is sent. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is

received. The date of filing shall be the day when the matter is required to be received by the Board as provided by § 102.111 of this subpart.

24. Revise § 102.113(d) to read as follows:

§ 102.113 Methods of service of process and papers by the Agency; proof of service.

*** * * * ***

(d) *Service of other documents*. Other documents may be served by the Agency by any of the foregoing methods as well as regular mail, electronic mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.

* * * * *

25. Revise § 102.114(a), (d), and (g) to read as follows:

§ 102.114 Filing and service of papers by parties; form of papers; manner and proof of filing or service; electronic filings.

(a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically or if specifically provided for in these rules), or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a

copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of § 102.113(a) or (c) of this subpart provide otherwise.

* * * * *

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 81/2 by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Nonconforming papers may, at the Agency's discretion, be rejected.

* * * * *

(g) Facsimile transmissions of the following documents will not be accepted for filing: Answers to Complaints; Exceptions or Cross-Exceptions; Briefs; Requests for Review of Regional Director Decisions; Administrative Appeals from Dismissal of Petitions or Unfair Labor Practice Charges; Objections to Settlements; EAJA Applications; Motions for Default Judgment; Motions for Summary Judgment; Motions to Dismiss; Motions for Reconsideration; Motions to Clarify; Motions to Reopen the Record; Motions to Intervene; Motions to Transfer, Consolidate or Sever; or Petitions for Advisory Opinions. Facsimile transmissions in contravention of this rule will not be filed.

* * * * *

PART 103—OTHER RULES

26. The authority citation for part 103 continues to read as follows:

Authority**:** 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

Subpart B—[Removed and Reserved]

27. Remove and reserve subpart B, consisting of § 103.20.

By direction of the Board.

Dated: Washington, DC, January 28, 2014.

William B. Cowen, Solicitor.

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