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NATIONAL LABOR RELATIONS BOARD

29 CFR Part 102

Procedural Rules and Regulations

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: The National Labor Relations Board amends its procedural Rules and Regulations to: reflect modern technology, such as E-Filing, and eliminate references to telegraphs, carbon copies, and the requirements for hard copy submissions and multiple copies; use more plain language and eliminate legalistic terms such as "therefrom," "thereupon," "therein," "herein," and "said;" reorganize the Rules and add headings so that the subject matter is easier to find; incorporate current practices that had not been included in the published Rules, such as the Board's Alternative Dispute Resolution Program; and update and streamline procedural provisions of the FOIA regulations. The amendments also clarify the means by which documents are filed and service is made by the parties and the Board. They also promote the parties' use of E-Filing, which will facilitate sharing documents with the public. These revisions are procedural rather than substantive.

DATES: This rule will be effective on [INSERT DATE 10 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Gary Shinners, Executive Secretary, National Labor Relations Board, 1015 Half Street, SE, Washington, DC 20570, (202) 273-3737 (this is not a toll-free number), 1-866-315-6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

Background on the Rulemaking

The changes are summarized below and grouped as follows: **I. Global Changes**; **II. Definitions, Filing, and Service**; **III. Unfair Labor Practice Cases**; **IV. FOIA**; and **V. Other Sections**.

I. Global Changes

Throughout the Rules the Board has eliminated requirements for filing multiple copies and references to antiquated technology, such as carbon paper, stenographic copies, and telegraphic communications. The Rules have also been revised to use plain language and eliminate terms such as "therefrom." Time periods have been changed to multiples of 7, the use of gender specific pronouns has been minimized, and the term "shall" was replaced with "must," "will," or "may" as appropriate. The revisions also ensure that terms, such as E-Filing, and capitalization of titles, such as "Regional Director" and "Administrative Law Judge," are consistent throughout the Rules. Changes were also made to ensure consistency in terminology by, for example, using only the term "paragraph" instead of using "subsection" interchangeably with "paragraph." Where feasible, headings were added to facilitate finding particular rules.

II. Definitions, Filing, and Service

The filing and service requirements found in §§ 102.111 through 102.114 were moved to the beginning of part 102 so that these provisions, which apply to all parties

and many different types of documents, are easily found in one location at the beginning of the Rules and not buried throughout the Rules. This change and others are discussed below in numerical sequence (based on where the material is located in the revised version).

A. Sections 102.1 through 102.7

The changes convert subpart A to a definitions section and subpart B to a section that covers the service and filing of documents. The revisions renumber the definitions currently in §§ 102.1 through 102.8 as §102.1(a) through (h). The service and filing provisions currently in §§ 102.111 through 102.114 are moved to §§ 102.2 through 102.5 to give them a higher profile position closer to the beginning of the Rules so that users who are not familiar with the Rules may find them more easily. Sections 102.6 and 102.7 are new and address notice to the Board of supplemental authority and signatures on E-Filed documents.

Section 102.2 (Formerly §102.111), *Time requirements for filing with the Agency*, was reorganized and given headings. It first addresses filings, then extensions of time, and then late-filed documents. Other revisions are set forth below.

(a) *Time computation*. This paragraph was clarified with regard to the time for filing a responsive document. Specifically, it now provides that "the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the preceding document was filed prior to that date." This language was originally in § 102.112, which dealt with the date of service and the date of filing, but was moved here where it more logically fits. The last phrase was added to clarify what happens when a document is filed early.

(b) *Timeliness of filings*. This paragraph was updated to include E-Filing and specifies that E-Filed documents must be received on the due date by 11:59 p.m. of the receiving office's time zone. The Board deleted from this paragraph the language about extensions of time and placed that in a separate paragraph (c) below. This paragraph was also modified so that it directs the public to the Agency's website instead of appendix A for information on the official business hours of the Agency's offices, which will ensure that the public is provided with the most current information.

(c) *Extension of time to file*. This paragraph specifies that, except as otherwise provided in the Rules, a request for an extension of time to file a document must be filed no later than the date on which the document is due and that requests filed within 3 days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. This paragraph was clarified to require that such requests be in writing and served simultaneously on the other parties. Language was added to encourage parties to seek agreement from the other parties for the extension, and to indicate the other parties' position in the extension of time request. Language was also added to require any party intending to file an opposition to the request to do so as soon as possible following receipt of the request.

(d) *Late-filed documents*. This paragraph codifies what has been permitted in practice.

Section 102.3 (Formerly § 102.112). *Date of service*. This section was revised to include a reference to email and was made more concise and reorganized for clarity.

Section 102.4 (Formerly § 102.113). *Methods of service of process and papers by the Agency; proof of service.* This section was revised to exclude service by telegraph

and to provide that the Agency may serve documents by facsimile or email. General language authorizing email service was added to give the Agency flexibility to use this method where email service has been agreed to by the recipient. This section also adds authorization for service of subpoenas by private delivery service.

Section 102.5 (Formerly § 102.114). *Filing and service of papers by parties: form of papers; manner and proof of filing or service.* Former § 102.114 articulated the requirements for service and filings by parties and the General Counsel, when acting as a party. This section was reordered to better match the chronology of events (for example, filings appear before service). Topic headings were added for each paragraph to aid in navigating this section.

Paragraph (a) consolidates § 102.114(d) and other paragraphs that specified the form of filing (such as § 102.46(j)). The revisions change the font requirements from 12 points per inch to 12 point type with no more than 10.5 characters per inch, and add more detail to the spacing requirements. Multiple references to the requirement that briefs longer than 20 pages must contain a subject index and a table of cases are consolidated here.

Paragraph (b) specifies the means by which parties may file requests to exceed the page limits for documents. Previously this provision was located in a number of places.

Paragraph (c) is new and addresses E-Filing with the Agency. It provides that charges, petitions in representation proceedings, and showings of interest may be filed in paper format or by E-Filing, and that all other documents must be E-Filed unless the party filing also files an accompanying statement explaining why the party does not have

access to the means for filing electronically or why filing electronically would impose an undue burden.

Paragraph (d) consolidates the oft-repeated requirement in the Rules that documents are to be filed with the Board in Washington, DC. For uniformity, it also specifies filing locations for the Regions and the Administrative Law Judges.

Paragraphs (e) and (f) continue the general limitation on filing documents via fax to encourage E-Filing instead.

Paragraph (e) limits the documents that may be filed via fax to unfair labor practice charges, petitions in representation cases, objections to elections, and requests for extension of time for filing documents with the Agency.

Paragraph (h) adds elements such as fax number and email address to the statement of service requirement. This paragraph was revised to eliminate language that restricted the types of documents that could be E-Filed, and permits E-Filing of charges, petitions in representation cases, and showings of interest.

Section 102.6 *Notice to the Administrative Law Judge or Board of Supplemental Authority.* This section is new and provides that authorities that come to a party's attention after the party's submission to the Administrative Law Judge or the Board has been filed may be brought to the Judge's or the Board's attention by the party promptly filing a letter with the Judge or the Board and simultaneously serving all other parties. The language of the section is based on *Reliant Energy*, 339 NLRB 66 (2003). The language specifies deadlines for responses.

Section 102.7 *Signature on documents E-Filed with the Agency.* This section is new and clarifies that E-filed documents may contain an electronic signature of the filer, which will have the same legal effect, validity, and enforceability as if signed manually.

III. Unfair Labor Practice Cases

The changes include: (a) in §§ 102.11 and 102.12, eliminating the requirement to submit an original copy of a charge filed by facsimile and making minor language changes to the contents of the charge; (b) in § 102.14 revising language regarding service of charges; (c) in § 102.19, eliminating the requirement that a Charging Party serve notice of appeal; (d) in § 102.24, adding language about replies and further responses to an opposition to a motion; (e) in the subpoena section (now § 102.32), including electronic data as well as the more traditional books and records; (f) in § 102.37, adding language about the unavailability of a judge; (g) in § 102.45, adding language about the Alternative Dispute Resolution (ADR) Program; and (h) in § 102.53, deleting the requirement that a Charging Party serve notice of appeal of a compliance determination and adding language specifically permitting the filing of an opposition to a compliance appeal. Those revisions are described more fully below.

A. Sections 102.11 and 102.12

Section 102.11 *Signature; sworn or declaration* was revised to eliminate the requirement to file an "original" and to provide an "original" for the Agency's records if filed by facsimile. This requirement had been added when the Rules first permitted filing by facsimile. The requirement to submit an original sometimes resulted in the mailed original being docketed as a new charge because someone did not realize it was a hard

copy of a charge that had already been filed by facsimile. Because filings by facsimile have not been problematic, the language has been eliminated.

Section 102.12 *Contents* was revised to describe the person against whom the charge is filed as the "Charged Party" instead of the "Respondent," as is the Agency's custom until a complaint issues. It was also revised to state that the charge should contain a "brief statement of the conduct" constituting the alleged unfair labor practices rather than a "clear and concise statement of the facts." In practice, the Agency does not require or expect a factual recitation. A statement has been added providing that attachments to charges are not permitted.

B. Section 102.14 Service of charge.

(a) Charging Party's obligation to serve; methods of service. This paragraph was modified to add that the Charging Party may serve the charge on the Charged Party (Respondent) by email with the permission of the recipient and to remove the requirement that the permission of the recipient be obtained before serving the charge via facsimile transmission. The Rules retain the requirement that permission be obtained for service by email in case a party does not frequently check email.

(b) Service as courtesy by Region. This paragraph, which currently provides that the Regional Director will serve the charge by regular mail or facsimile transmission, was revised to reflect that charges may also be served in person, via private delivery service, by email, by any manner provided for in Rules 4 or 5 of the Federal Rules of Civil Procedure, or in any other agreed-upon manner. This change will permit service by more expedient means.

(c) Date of service of charge. In connection with the addition of email service (see paragraph (a) above), this provision was amended to show that, in the case of delivery by email, the date of service is the date the email is sent.

C. Section 102.19 Appeal to the General Counsel from refusal to issue or reissue.

This section was revised to eliminate the requirement that the Charging Party serve a copy of the appeal on all parties. This requirement was deemed unnecessary because the Office of Appeals routinely sends an acknowledgement letter notifying all parties of the appeal. Further, the existing rule specifically provides that the failure to serve a copy of the appeal does not invalidate the appeal. This requirement also sometimes led to confusion as to whether a party had to serve the appeal form on the other parties or had to serve the document explaining why the appeal should be granted, which might discuss specific affidavit evidence provided during the investigation.

D. Section 102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures.

A new paragraph was added addressing replies to an opposition to a motion and further responsive documents.

This section codifies the rule established by the Board in *D. L. Baker, Inc.*, 330 NLRB 521, fn. 4 (2000).

E. Section 102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect or copy data.

Paragraph (a) of this section was revised to clarify that subpoenas can require production of "electronic data" as well as books, records, correspondence, and documents. Paragraph (b) was revised to reflect the current practice of allowing parties to file oppositions to petitions to revoke subpoenas and replies to oppositions, as well as the practice of allowing the party aggrieved by an adverse ruling to make the ruling and other filings part of the official record during a formal proceeding (rather than at the investigative stage of the proceeding). Paragraph (b) was also revised to reflect that petitions to revoke subpoenas filed in response to a subpoena issued upon request of the Contempt, Compliance, and Special Litigation Branch must be filed with that Branch, which shall refer the petition to the Board for ruling.

F. Section 102.36 Disqualification and unavailability of Administrative Law Judges.

This section was amended to add a paragraph (b) regarding the unavailability of Administrative Law Judges. This provision was previously in the Rules, but did not have a separate lettered paragraph

G. Section 102.45 Administrative Law Judge's decision; contents of record; alternative dispute resolution program.

New paragraphs (c)(1) through (10) cover the Alternative Dispute Resolution (ADR) Program. The ADR Program provides for a neutral to assist in resolving unfair labor practice cases pending before the Board. Although the ADR pilot program was

launched in December 2005 and was converted to permanent status in March 2009, it had not previously been incorporated in the Rules. Incorporating this provision in the Rules will help ensure that the public will be more fully aware of the ADR Program.

H. Section 102.53 Appeal of compliance determination to the General Counsel; General Counsel's action; request for review by the Board; Board action; opposition to appeal or request for review.

Paragraph (a) of this section was revised to delete the requirement that the Charging Party serve a copy of the appeal on all other parties inasmuch as the Office of Appeals notifies all parties of the appeal.

A new paragraph (e) was added specifically to permit the filing of an opposition to the compliance appeal.

IV. FOIA

The revisions update and streamline procedural provisions of the FOIA regulations (§ 102.117). They are intended to make the regulations consistent with the restructuring of the Agency's Headquarters offices and centralization of the FOIA processing. *See* 78 FR 44981-82 (July 23, 2013). In addition, the changes make the FOIA regulations more readable and requester-friendly, including additional headings and subheadings, in accordance with the recommendations of the Office of Government Information Service (OGIS), the agency charged by Congress to review the regulations and policies of federal administrative agencies to improve compliance with the FOIA. They also reflect procedural changes mandated by the OPEN Government Act of 2007, Pub. L. No. 110-175, including, for example, the Agency's designation of a FOIA Officer, Chief FOIA Officer, and Public Liaison. Finally, they conform the Agency's

regulations to the recently-enacted FOIA Improvement Act of 2016, Pub. L. No. 114-185 (June 30, 2016).

The changes explain that the FOIA Branch will handle all FOIA requests for Agency records, with the exception of Office of Inspector General records, which are handled by the Office of Inspector General. They also explain that all appeals for Agency documents will be decided by the Chief FOIA Officer, who is the Associate General Counsel for the Division of Legal Counsel.

The changes also set forth the various methods for submitting requests, and in particular, state that the Agency's preferred method of submission is through its website. Regarding requests for documents maintained by the Office of the Inspector General (OIG), the changes state that such requests should be submitted to the FOIA Branch, which will then forward such requests to the OIG for processing. This permits requesters to make requests for Inspector General documents through the Agency's website. Nonetheless, the revised Rules maintain the option for requesters to make requests directly to the Office of the Inspector General (by mail).

Some of the specific changes include:

- Section 102.117(a)(1) deletes a sentence stating the Agency's policy that discretionary disclosures may be made when there is no foreseeable harm to an interest protected by a FOIA exemption, as the FOIA Improvement Act now requires disclosure when there is no such foreseeable harm;
- Section 102.117(c)(1)(ii) updates the most significant procedural change, that all FOIA requests should be made to the FOIA Branch in Washington, D.C.,

with electronic submissions being the preferred method for making requests, including requests to the Office of the Inspector General;

- Section 102.117 (a)(2)(i)-(iii) is new and identifies the Agency's FOIA officials;
- Section 102.117(a)(3) is new and explains the authority of each of the FOIA officials to respond to requests and administrative appeals;
- Section 102.117(a)(4) deletes the list of records made available, as the FOIA itself provides what records are to be made available;
- Section 102.117(b)(2) was modified to specify that the Division of Legal Counsel will certify General Counsel records and that the Executive Secretary will continue to certify Board records;
- Section 102.117(c)(2)(v) was modified to provide 90 days, rather than 28 days, for a requester to file an administrative appeal of an adverse determination, as required by the FOIA Improvement Act;
- Section 102.117(c)(2)(vi) was modified to clarify that the Agency will provide requesters an opportunity to limit their requests so that the request may be processed within the statutory time periods.
- Several paragraphs have been modified to add that requesters will be notified of their right to seek assistance from the Agency's FOIA Public Liaison or the Office of Government Information Services, as required by the FOIA Improvement Act.

V. Other Sections

A. Section 102.96 Issuance of complaint promptly.

This section was reworded to use plain language to make it more easily understandable.

B. Section 102.122 Subpart N—Reserved

This section dealt with Enforcement of Rights, Privileges, and Immunities Granted or Guaranteed Under Section 222(f), Communications Act of 1934 to Employees of Merged Telegraph Carriers. The section has been deleted because the original Section 222(f) to which this section refers was repealed, and the subpart and Section number have been reserved for future use.

C. Section 102.136 Establishment and use of advisory committees.

This section was revised to delete the reference to Office of Management and Budget Circular A–63 (rev. March 27, 1975) and Advisory Committee Management Guidance, 39 FR 12389–12391, because they are obsolete. Currently, each federal agency that sponsors advisory committees must adhere to the requirements established by the Federal Advisory Committee Act (FACA) as well as regulations promulgated by the U.S. General Services Administration's (GSA) Committee Management Secretariat. GSA has had the responsibility for overseeing the FACA since 1977. OMB Circular A-63 from 1975 and the Advisory Committee Management Guidance, 39 FR 12389-12391 were superseded by a 2001 Federal Advisory Committee Act (FACA) Final Rule. Accordingly, the references to the OMB Circular and Advisory Committee Management Guidance were deleted and replaced by a more generic reference to "applicable rules and regulations."

Appendix A – NLRB Official Office Hours (Local Times)

Appendix A was deleted because this information is already on the Agency's website, and would have to be modified frequently to keep it current. Section 102.2(b) directs the public to our website for this information.

Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Agency has determined that these rule amendments will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act of 1995

These rule amendments will not result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of $100,000,000 or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions are deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

Small Business Regulatory Enforcement Fairness Act of 1996

This action is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. These amendments will not result in an annual effect on the economy of $100,000,000 or more or a major increase in costs or prices, nor will these amendments have significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets.

Paperwork Reduction

The amended regulations contain no additional information-collection or record-keeping requirements under the Paperwork Reduction Act of 1995, 44 U.S.C. 3501, *et seq*.

Public Participation

This rule is published as a final rule. The National Labor Relations Board considers this rule to be a procedural rule which is exempt from notice and public comment, pursuant to 5 U.S.C. 553(b)(3)(A), as a rule of "agency organization, procedure, or practice." If you wish to contact the Agency, please do so at the above listed address. However, before including your address, phone number, email address, or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information—may be made publicly available at any time. While you can ask us in your comment to withhold your personal identifying information from public review, we cannot guarantee that we will be able to do so.

List of Subjects in 29 CFR Part 102

Administrative practice and procedure, Labor management relations.

Gary Shinners,
Executive Secretary.

For the reasons stated in the preamble, the National Labor Relations Board amends 29 CFR part 102 as follows:

PART 102–RULES AND REGULATIONS, SERIES 8

1. 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)).

2. Revise subparts A and B to read as follows:

Subpart A – Definitions

§102.1 Terms defined in Section 2 of the Act.

(a) Definition of terms. The terms person, employer, employee, representative, labor organization, commerce, affecting commerce, and unfair labor practice as used herein have the meanings set forth in Section 2 of the National Labor Relations Act, as amended by title I of the Labor Management Relations Act, 1947.

(b) Act, Board, and Board agent. The term Act means the National Labor Relations Act, as amended. The term Board means the National Labor Relations Board and must include any group of three or more Members designated pursuant to Section 3(b) of the Act. The term Board agent means any Member, agent, or agency of the Board, including its General Counsel.

(c) General Counsel. The term General Counsel means the General Counsel under Section 3(d) of the Act.

(d) Region and Subregion. The term Region means that part of the United States or any territory thereof fixed by the Board as a particular Region. The term Subregion means that area within a Region fixed by the Board as a particular Subregion.

(e) Regional Director, Officer-in-Charge, and Regional Attorney. The term Regional Director means the agent designated by the Board as the Regional Director for a particular Region, and also includes any agent designated by the Board as Officer-in-Charge of a Subregional office, but the Officer-in-Charge must have only such powers, duties, and functions appertaining to Regional Directors as have been duly delegated to such Officer-in-Charge. The term Regional Attorney means the attorney designated as Regional Attorney for a particular Region.

(f) Administrative Law Judge and Hearing Officer. The term Administrative Law Judge means the agent of the Board conducting the hearing in an unfair labor practice proceeding. The term Hearing Officer means the agent of the Board conducting the hearing in a proceeding under Section 9 or in a dispute proceeding under Section 10(k) of the Act.

(g) State. The term State includes the District of Columbia and all States, territories, and possessions of the United States.

(h) Party. The term party means the Regional Director in whose Region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the Act, any person named as Respondent, as employer, or as party to a contract in any proceeding under the Act, and any labor organization alleged to be dominated, assisted, or supported in violation of Section 8(a)(1) or 8(a)(2) of the Act; but nothing herein should be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of the party's interest only.

Subpart B – Service and Filings

Sec.

102.2 Time requirements for filings with the Agency.

102.3 Date of service.

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

102.5 Filing and service of papers by parties: form of papers; manner and proof of filing or service.

102.6 Notice to the Administrative Law Judge or Board of supplemental authority.

102.7 Signature on documents E-Filed with the Agency.

102.8 [Reserved]

§102.2 Time requirements for filings with the Agency.

(a) Time computation. In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday, or a legal holiday, in which event the period runs until the next Agency business day. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays are be excluded in the computation. Except as otherwise provided, in computing the period of time for filing a responsive document, the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the preceding document was filed prior to that date.

(b) Timeliness of filings. If there is a time limit for the filing of a motion, brief, exception, request for extension of time, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter on

or before the last day of the time limit for such filing or the last day of any extension of time that may have been granted. Non E-Filed documents must be received before the official closing time of the receiving office (see www.nlrb.gov setting forth the official business hours of the Agency's several offices). E-Filed documents must be received by 11:59 p.m. of the time zone of the receiving office. In construing this section of the Rules, the Board will accept as timely filed any document which is postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. "Postmarking" must include timely depositing the document with a delivery service that will provide a record showing that the document was given to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date. However, the following documents must be received on or before the last day for filing:

(1) Charges filed pursuant to Section 10(b) of the Act (see also §102.14).

(2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.

(3) Petitions to revoke subpoenas.

(4) Requests for extensions of time to file any document for which such an extension may be granted.

(c) Extension of time to file. Except as otherwise provided, a request for an extension of time to file a document must be filed no later than the date on which the document is due. Requests for extensions of time filed within 3 days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. Requests for extension of time must be in writing and must be served simultaneously on the other parties. Parties

are encouraged to seek agreement from the other parties for the extension, and to indicate the other parties' position in the extension of time request. An opposition to a request for an extension of time should be filed as soon as possible following receipt of the request.

(d) Late-filed documents. (1) The following documents may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:

(i) In unfair labor practice proceedings, motions, exceptions, answers to a complaint or a backpay specification, and briefs; and

(ii) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents.

(2) A party seeking to file such documents beyond the time prescribed by these Rules must file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion must be set forth in affidavit form and sworn to by individuals with personal knowledge of the facts. The time for filing any document responding to the untimely document will not commence until the date a ruling issues accepting the untimely document. In addition, cross-exceptions are due within 14 days, or such further period as the Board may allow, from the date a ruling issues accepting the untimely filed documents.

§102.3 Date of service.

Where service is made by mail, private delivery service, or email, the date of service is the day when the document served is deposited in the United States mail, 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 sent by email, as the case may be. Where

service is made by personal delivery or facsimile, the date of service will be the date on which the document is received.

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

(a) Method of service for certain Agency-issued documents Complaints and compliance specifications (including accompanying notices of hearing, and amendments to either complaints or to compliance specifications), final orders of the Board in unfair labor practice cases and Administrative Law Judges' decisions must be served upon all parties personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by email as appropriate, or by any other method of service authorized by law.

(b) Service of subpoenas. Subpoenas must be served upon the recipient personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by private delivery service, or by any other method of service authorized by law.

(c) Service of other Agency-issued documents. Other documents may be served by the Agency by any of the foregoing methods as well as by regular mail, private delivery service, facsimile, or email.

(d) Proof of service. In the case of personal service, or delivery to a principal office or place of business, the verified return by the serving individual, setting forth the manner of such service, is proof of service. In the case of service by registered or certified mail, the return post office receipt is proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(e) Service upon representatives of parties. Whenever these Rules require or permit the service of pleadings or other papers upon a party, a copy must be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party satisfies this requirement. Service by the Board or its agents of any documents upon any such attorney or other representative may be accomplished by any means of service permitted by these Rules, including regular mail.

§102.5 Filing and service of papers by parties: form of papers; manner and proof of filing or service.

(a) Form of papers to be filed. All papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer must be typewritten or otherwise legibly duplicated on 8 1/2 by 11-inch plain white paper, and must have margins no less than one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there. Typeface that is single-spaced must not contain more than 10.5 characters per inch, and proportionally-spaced typeface must be 12 point or larger, for both text and footnotes. Condensed text is not permitted. The text must be double-spaced, but headings and footnotes may be single-spaced, and quotations more than two lines long may be indented and single-spaced. Case names must be italicized or underlined. Where any brief filed with the Board exceeds 20 pages, it must contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(b) Requests to exceed the page limits. Requests for permission to exceed the page limits for documents filed with the Board must state the reasons for the requests. Unless

otherwise specified, such requests must be filed not less than 10 days prior to the date the document is due.

(c) E-Filing with the Agency. Unless otherwise permitted under this section, all documents filed in cases before the Agency must be filed electronically ("E-Filed") on the Agency's website (www.nlrb.gov) by following the instructions on the website. The Agency's website also contains certain forms that parties or other persons may use to prepare their documents for E-Filing. If the document being E-Filed is required to be served on another party to a proceeding, the other party must be served by email, if possible, or in accordance with paragraph (g) of this section. Unfair labor practice charges, petitions in representation proceedings, and showings of interest may be filed in paper format or E-Filed. A party who files other documents in paper format must accompany the filing with a statement explaining why the party does not have access to the means for filing electronically or why filing electronically would impose an undue burden. Notwithstanding any other provision in these Rules, if a document is filed electronically the filer need not also file a hard copy of the document, and only one copy of a document filed in hard copy should be filed. Documents may not be filed with the Agency via email without the prior approval of the receiving office.

(d) Filing with the Agency by Mail or Delivery. Documents to be filed with the Board are to be filed with the Office of the Executive Secretary in Washington, DC. Documents to be filed with the Regional Offices are to be filed with the Regional Office handling the case. Documents to be filed with the Division of Judges are to be filed with the Division office handling the matter.

(e) Filing by fax with the Agency. Only unfair labor practice charges, petitions in representation proceedings, objections to elections, and requests for extensions of time for filing documents will be accepted by the Agency if faxed to the appropriate office. Other documents may not be faxed. At the discretion of the receiving office, the person submitting a document by fax may be required simultaneously to file the original with the office by overnight delivery service. When filing a charge, a petition in a representation proceeding, or election objections by fax pursuant to this section, receipt of the faxed document by the Agency constitutes filing with the Agency. A failure to timely file or serve a document will not be excused on the basis of a claim that facsimile transmission could not be accomplished because the receiving machine was off-line or busy or unavailable for any other reason.

(f) Service. Unless otherwise specified, documents filed with the Agency must be simultaneously served on the other parties to the case including, as appropriate, the Regional Office in charge of the case. Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, email (unless otherwise provided for by these Rules), private delivery service, or by fax for documents of or under 25 pages in length. Service of documents by a party on other parties by any other means, including by fax for documents over 25 pages in length, is permitted only with the consent of the party being served. When a party does not have the ability to receive service by email or fax, or chooses not to accept service of a document longer than 25 pages by fax, the other party must be notified personally or by telephone of the substance of the filed document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or by fax or email as

appropriate. Unless otherwise specified elsewhere in these Rules, service on all parties must be made in the same manner as that used in filing the document with the Board, or in a more expeditious manner. When filing with the Board is done by hand, however, the other parties must be immediately notified of such action, 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 §102.4(a) provide otherwise.

(g) Proof of service. When service is made by registered or certified mail, the return post office receipt will be proof of service. When service is made by a private delivery service, the receipt from that service showing delivery will be proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(h) Statement of service. The person or party filing a document with the Agency must simultaneously file a statement of service. Such statement must include the names of the parties served, the date and manner of service, and the location of service such as mailing address, fax number, or email address as appropriate. The Agency requires proof of service as defined in paragraph (g) of this section only if, subsequent to the receipt of the statement of service, a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

(i) Failure to properly serve. Failure to comply with the requirements of this section relating to timeliness of service on other parties will be a basis for either:

(1) Rejecting the document; or

(2) Withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

§102.6 Notice to the Administrative Law Judge or Board of supplemental authority.

Pertinent and significant authorities that come to a party's attention after the party's submission to the Administrative Law Judge or the Board has been filed may be brought to the Judge's or the Board's attention by the party promptly filing a letter with the judge or the Board and simultaneously serving all other parties. The body of the letter may not exceed 350 words. A party may file and serve on all other parties a response that is similarly limited. In unfair labor practice cases, the response must be filed no later than 14 days after service of the letter. In representation cases, the response must be filed no later than 7 days after service of the letter. No extension of time will be granted to file the response.

§102.7 Signature on documents E-Filed with the Agency.

Documents filed with the Agency by E-Filing may contain an electronic signature of the filer which will have the same legal effect, validity, and enforceability as if signed manually. The term ''electronic signature'' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the document.

§102.8 [Reserved]

Subpart I [Removed]

4. Remove subpart I.

Subparts C through H [Redesignated Subparts D through I]

5. Redesignate subparts C through H as subparts D through I.

6. Add new subpart C to read as follows:

SUBPART C—PROCEDURE UNDER SECTION 10(A) TO (I) OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

Sec.

102.9 Who may file; withdrawal and dismissal.

102.10 Where to file.

102.11 Signature; sworn; declaration.

102.12 Contents.

102.13 [Reserved]

102.14 Service of charge.

102.15 When and by whom issued; contents; service.

102.16 Hearing; change of date or place.

102.17 Amendment.

102.18 Withdrawal.

102.19 Appeal to the General Counsel from refusal to issue or reissue.

102.20 Answer to complaint; time for filing; contents; allegations not denied deemed admitted.

102.21 Where to file; service upon the parties; form.

102.22 Extension of time for filing.

102.23 Amendment.

102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures.

102.25 Ruling on motions.

102.26 Motions; rulings and orders part of the record; rulings not to be appealed directly to the Board without special permission; requests for special permission to appeal.

102.27 Review of granting of motion to dismiss entire complaint; reopening of the record.

102.28 Filing of answer or other participation in proceedings not a waiver of rights.

102.29 Intervention; requisites; rulings on motions to intervene.

102.30 Depositions; examination of witnesses.

102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect or copy data.

102.32 Payment of witness fees and mileage; fees of persons taking depositions.

102.33 Transfer of charge and proceeding from Region to Region; consolidation of proceedings in same Region; severance.

102.34 Who will conduct hearing; public unless otherwise ordered.

102.35 Duties and powers of Administrative Law Judges; stipulations of cases to Administrative Law Judges or to the Board; assignment and powers of settlement judges.

102.36 Disqualification and unavailability of Administrative Law Judges.

102.37 [Reserved]

102.38 Rights of parties.

102.39 Rules of evidence controlling so far as practicable.

102.40 Stipulations of fact admissible.

102.41 Objection to conduct of hearing; how made; objections not waived by further participation.

102.42 Filings of briefs and proposed findings with the Administrative Law Judge and oral argument at the hearing.

102.43 Continuance and adjournment.

102.44 [Reserved]

102.45 Administrative Law Judge's decision; contents of record; alternative dispute resolution program.

102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements.

102.47 Filing of motion after transfer of case to Board.

102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

102.49 Modification or setting aside of Board order before record filed in court; action thereafter.

102.50 Hearings before the Board or a Board Member.

102.51 Settlement or adjustment of issues.

102.52 Compliance with Board order; notification of compliance determination.

102.53 Appeal of compliance determination to the General Counsel; General Counsel's action; request for review by the Board; Board action; opposition to appeal or request for review.

102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.

102.55 Contents of compliance specification.

102.56 Answer to compliance specification.

102.57 Extension of date of hearing.

102.58 Withdrawal of compliance specification.

102.59 Hearing and posthearing procedures.

SUBPART C—PROCEDURE UNDER SECTION 10(A) TO (I) OF THE ACT FOR THE PREVENTION OF UNFAIR LABOR PRACTICES

§102.9 Who may file; withdrawal and dismissal.

Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce. The charge may be withdrawn, prior to the

hearing, only with the consent of the Regional Director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to §102.45, upon motion, with the consent of the Administrative Law Judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to §102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon will be dismissed by the Regional Director issuing the complaint, the Administrative Law Judge designated to conduct the hearing, or the Board.

§102.10 Where to file.

Except as provided in §102.33, a charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of those Regions.

§102.11 Signature; sworn; declaration.

Charges must be in writing and signed, and either must be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or must 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).

§102.12 Contents.

(a) A charge must contain the following:

(1) The full name and address of the person making the charge.

(2) If the charge is filed by a labor organization, the full name and address of any national or international labor organization of which it is an affiliate or constituent unit.

(3) The full name and address of the person against whom the charge is made (referred to as the Charged Party).

(4) A brief statement of the conduct constituting the alleged unfair labor practices affecting commerce.

(b) Attachments to charges are not permitted.

§102.13 [Reserved]

§102.14 Service of charge.

(a) Charging Party's obligation to serve; methods of service. Upon the filing of a charge, the Charging Party is responsible for the timely and proper service of a copy upon the person against whom such charge is made. Service may be made personally, or by registered mail, certified mail, regular mail, private delivery service, or facsimile. With the permission of the person receiving the charge, service may be made by email or by any other agreed-upon method.

(b) Service as courtesy by Regional Director. The Regional Director will, as a matter of courtesy, serve a copy of the charge on the charged party in person, or send it to the charged party by regular mail, private delivery service, email or facsimile transmission, in any manner provided for in Rules 4 or 5 of the Federal Rules of Civil Procedure, or in any other agreed-upon method. The Region will not be responsible for such service.

(c) Date of service of charge. In the case of service of a charge by mail or private delivery service, the date of service is the date of deposit with the post office or other carrier. In the case of delivery by email, the date of service is the date the email is sent. In the case of service by other methods, including hand delivery or facsimile transmission, the date of service is the date of receipt.

§102.15 When and by whom issued; contents; service.

After a charge has been filed, if it appears to the Regional Director that formal proceedings may be instituted, the Director will issue and serve on all parties a formal complaint in the Board's name stating the alleged unfair labor practices and containing a Notice of Hearing before an Administrative Law Judge at a fixed place and at a time not less than 14 days after the service of the complaint. The complaint will contain:

(a) A clear and concise statement of the facts upon which the Board asserts jurisdiction, and

(b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives who committed the acts.

§102.16 Hearing; change of date or place.

(a) Upon the Regional Director's own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may extend the hearing date or change the hearing place, except that the Regional Director's authority to extend the hearing date is limited to the following circumstances:

(1) Where all parties agree or no party objects to extension of the hearing date;

(2) Where a new charge or charges have been filed which, if meritorious, might be appropriate for consolidation with the pending complaint;

(3) Where negotiations which could lead to settlement of all or a portion of the complaint are in progress;

(4) Where issues related to the complaint are pending before the General Counsel's Division of Advice or Office of Appeals; or

(5) Where more than 21 days remain before the scheduled hearing date.

(b) In circumstances other than those set forth in paragraph (a) of this section, motions to reschedule the hearing may be filed with the Division of Judges in accordance with §102.24(a). When a motion to reschedule has been granted, the Regional Director issuing the complaint retains the authority to order a new hearing date and the responsibility to make the necessary arrangements for conducting the hearing, including its location and the transcription of the proceedings.

§102.17 Amendment.

A complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the Regional Director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to §102.45, upon motion, by the Administrative Law Judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to §102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

§102.18 Withdrawal.

A complaint may be withdrawn before the hearing by the Regional Director on the Director's own motion.

§102.19 Appeal to the General Counsel from refusal to issue or reissue.

(a) If, after the charge has been filed, the Regional Director declines to issue a complaint or, having withdrawn a complaint pursuant to §102.18, refuses to reissue it, the Director will so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for that action. The Charging Party may obtain a review of such action by filing the "Appeal Form" with the General Counsel in Washington, DC, and filing a

copy of the "Appeal Form" with the Regional Director, within 14 days from the service of the notice of such refusal to issue or reissue by the Regional Director, except where a shorter period is provided by §102.81. The Charging Party may also file a statement setting forth the facts and reasons upon which the appeal is based. If such a statement is timely filed, the separate "Appeal Form" need not be served. A request for extension of time to file an appeal must be in writing and be received by the General Counsel, and a copy of such request filed with the Regional Director, prior to the expiration of the filing period. Copies of the acknowledgment of the filing of an appeal and of any ruling on a request for an extension of time for filing of the appeal must be served on all parties. Consideration of an appeal untimely filed is within the discretion of the General Counsel upon good cause shown.

(b) Oral presentation in Washington, DC, of the appeal issues may be permitted by a party on written request made within 4 days after service of acknowledgement of the filing of an appeal. In the event such request is granted, the other parties must be notified and afforded, without additional request, a like opportunity at another appropriate time.

(c) The General Counsel may sustain the Regional Director's refusal to issue or reissue a complaint, stating the grounds of the affirmance, or may direct the Regional Director to take further action; the General Counsel's decision must be served on all the parties. A motion for reconsideration of the decision must be filed within 14 days of service of the decision, except as hereinafter provided, and must state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only since the decision on appeal must be filed promptly on discovery of such evidence. Motions for reconsideration of a decision

previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration.

§102.20 Answer to complaint; time for filing; contents; allegations not denied deemed admitted.

The Respondent must, within 14 days from the service of the complaint, file an answer. The Respondent must specifically admit, deny, or explain each of the facts alleged in the complaint, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the Respondent states in the answer that the Respondent is without knowledge, will be deemed to be admitted to be true and will be so found by the Board, unless good cause to the contrary is shown.

§102.21 Where to file; service upon the parties; form.

An original and four copies of the answer shall be filed with the Regional Director issuing the complaint. Immediately upon the filing of his answer, respondent shall serve a copy thereof on the other parties. An answer of a party represented by counsel or non-attorney representative shall be signed by at least one such attorney or non-attorney representative of record in his/her individual name, whose address shall be stated. A party who is not represented by an attorney or non-attorney representative shall sign his/her answer and state his/her address. Except when otherwise specifically provided by rule or statute, an answer need not be verified or accompanied by affidavit. The signature of the

attorney or non-attorney party representative constitutes a certificate by him/her that he/she has read the answer; that to the best of his/her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If an answer is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the answer had not been served. For a willful violation of this section an attorney or non-attorney party representative may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

§102.22 Extension of time for filing.

Upon the Regional Director's own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may by written order extend the time within which the answer must be filed.

§102.23 Amendment.

The Respondent may amend its answer at any time prior to the hearing. During the hearing or subsequently, the Respondent may amend the answer in any case where the complaint has been amended, within such period as may be fixed by the Administrative Law Judge or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the Administrative Law Judge or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the Administrative Law Judge or the Board.

§102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures.

(a) All motions under §§102.22 and 102.29 made prior to the hearing must be filed in writing with the Regional Director issuing the complaint. All motions for default judgment, summary judgment, or dismissal made prior to the hearing must be filed in writing with the Board pursuant to the provisions of §102.50. All other motions made prior to the hearing, including motions to reschedule the hearing under circumstances other than those set forth in §102.16(a), must be filed in writing with the Chief Administrative Law Judge in Washington, DC, with the Associate Chief Judge in San Francisco, California, or with the Associate Chief Judge in New York, New York, as the case may be. All motions made at the hearing must be made in writing to the Administrative Law Judge or stated orally on the record. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to §102.45, must be filed with the Administrative Law Judge, care of the Chief Administrative Law Judge in Washington, DC, the Associate Chief Judge in San Francisco, or the Associate Chief Judge in New York, as the case may be. Motions must briefly state the order or relief applied for and the grounds therefor. All motions filed with a Regional Director or an Administrative Law Judge as set forth in this paragraph (a) must be filed together with an affidavit of service on the parties. All motions filed with the Board, including motions for default judgment, summary judgment, or dismissal, must be filed with the Executive Secretary of the Board in Washington, DC, together with an affidavit of service on the parties. Unless otherwise provided in these Rules, motions, oppositions, and replies must be filed promptly and within such time as not to delay the proceeding.

(b) All motions for summary judgment or dismissal must be filed with the Board no later than 28 days prior to the scheduled hearing. Where no hearing is scheduled, or where the

hearing is scheduled less than 28 days after the date for filing an answer to the complaint or compliance specification, whichever is applicable, the motion must be filed promptly. Upon receipt of the motion, the Board may deny the motion or issue a Notice to Show Cause why the motion may not be granted. If a Notice to Show Cause is issued, the hearing, if scheduled, will normally be postponed indefinitely. If a party desires to file an opposition to the motion prior to issuance of the Notice to Show Cause to prevent postponement of the hearing, it may do so. However, any such opposition must be filed no later than 21 days prior to the hearing. If a Notice to Show Cause is issued, an opposing party may file a response notwithstanding any opposition it may have filed prior to issuance of the notice. The time for filing the response must be fixed in the Notice to Show Cause. Neither the opposition nor the response must be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist. If the opposing party files no opposition or response, the Board may treat the motion as conceded, and default judgment, summary judgment, or dismissal, if appropriate, will be entered.

(c) A party that has filed a motion may file a reply to an opposition to its motion within 7 days of receipt of the opposition, but in the interest of administrative finality, further responses are not permitted except where there are special circumstances warranting leave to file such a response.

§102.25 Ruling on motions.

An Administrative Law Judge designated by the Chief Administrative Law Judge, the Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge as the case may be, will rule on all prehearing motions (except as provided in §§102.16, 102.22, 102.29, and 102.50), and all such rulings and orders will be issued in writing and a copy served on each of the parties. The Administrative Law Judge designated to conduct the hearing will rule on all motions after opening of the hearing (except as provided in §102.47), and any related orders, if announced at the hearing, will be stated orally on the record; in all other cases, the Administrative Law Judge will issue such rulings and orders in writing and must cause a copy to be served on each of the parties, or will make the ruling in the decision. Whenever the Administrative Law Judge has reserved ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to §102.50, the Board must rule on such motion.

§102.26 Motions; rulings and orders part of the record; rulings not to be appealed directly to the Board without special permission; requests for special permission to appeal.

All motions, rulings, and orders will become a part of the record, except that rulings on motions to revoke subpoenas will become a part of the record only upon the request of the party aggrieved thereby as provided in §102.31. Unless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the Administrative Law Judge on motions and/or by the Administrative Law Judge on objections, and related orders, may not be appealed directly to the Board except by special permission of the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to

§102.46. Requests to the Board for special permission to appeal from a ruling of the Regional Director or of the Administrative Law Judge, together with the appeal from such ruling, must be filed in writing promptly and within such time as not to delay the proceeding, and must briefly state the reasons special permission may be granted and the grounds relied on for the appeal. The moving party must simultaneously serve a copy of the request for special permission and of the appeal on the other parties and, if the request involves a ruling by an Administrative Law Judge, on the Administrative Law Judge. Any statement in opposition or other response to the request and/or to the appeal must be filed within 7 days of receipt of the appeal, in writing, and must be served simultaneously on the other parties and on the Administrative Law Judge, if any. If the Board grants the request for special permission to appeal, it may proceed immediately to rule on the appeal.

§102.27 Review of granting of motion to dismiss entire complaint; reopening of the record.

If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the Administrative Law Judge before the filing of the Judge's decision, any party may obtain a review of such action by filing a request with the Board in Washington, DC, stating the grounds for review, and, immediately on such filing must serve a copy on the Regional Director and on the other parties. Unless such request for review is filed within 28 days from the date of the order of dismissal, the case will be closed.

§102.28 Filing of answer or other participation in proceedings not a waiver of rights.

The right to make motions or to make objections to rulings upon motions will not be deemed waived by the filing of an answer or by other participation in the proceedings before the Administrative Law Judge or the Board.

§102.29 Intervention; requisites; rulings on motions to intervene.

Any person desiring to intervene in any proceeding must file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion must be filed with the Regional Director issuing the complaint; during the hearing, such motion must be made to the Administrative Law Judge. Immediately upon filing a written motion, the moving party must serve a copy on the other parties. The Regional Director will rule upon all such motions filed prior to the hearing, and will serve a copy of the rulings on the other parties, or may refer the motion to the Administrative Law Judge for ruling. The Administrative Law Judge will rule upon all such motions made at the hearing or referred to the Judge by the Regional Director, in the manner set forth in §102.25. The Regional Director or the Administrative Law Judge, 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 may be deemed proper.

§102.30 Depositions; examination of witnesses.

Witnesses must be examined orally under oath at a hearing, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions must be in writing and set forth the reasons why the depositions may be taken, the name, mailing address and email address (if available) of the witness, the matters concerning which it is expected the witness will testify, and the

time and place proposed for taking the deposition, together with the name and mailing and email addresses of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the "officer"). Such application must be made to the Regional Director prior to the hearing, and to the Administrative Law Judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to §102.45 or §102.50. Such application must be served on the Regional Director or the Administrative Law Judge, as the case may be, and on all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The Regional Director or the Administrative Law Judge, as the case may be, will upon receipt of the application, if in the Regional Director's or Administrative Law Judge's discretion, good cause has been shown, make and serve on the parties an order specifying the name of the witness whose deposition is to be taken and the time, place, and designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order will be served on all the other parties by the Regional Director or on all parties by the Administrative Law Judge.

(b) The deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any Board agent authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in the order, the officer designated to take the deposition will permit the witness to be examined and cross-examined under oath by all the parties appearing, and the witness's testimony will be reduced to type-writing by the officer or under his direction. All objections to questions or evidence will be deemed waived unless made at the examination. The officer will not have power to rule upon any objections but the objections will be noted in the deposition. The testimony must be subscribed by the witness to the satisfaction of the officer who will attach a certificate stating that the witness was duly sworn by the officer, that the deposition is a true record of the testimony and exhibits given by the witness, and that the officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because the witness is ill, dead, cannot be found, or refuses to sign it, such fact will be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer will immediately deliver the transcript, together with the certificate, in person, by registered or certified mail, or by E-File to the Regional Director or Division of Judges' office handling the matter.

(d) The Administrative Law Judge will rule upon the admissibility of the deposition or any part of the deposition.

(e) All errors or irregularities in compliance with the provisions of this section will be deemed waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

§102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect or copy data.

(a) The Board or any Board Member will, on the written application of any party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, electronic data, or documents, in their possession or under their control. The Executive Secretary has the authority to sign and issue any such subpoenas on behalf of the Board or any Board Member. Applications for subpoenas, if filed before the hearing opens, must be filed with the Regional Director. Applications for subpoenas filed during the hearing must be filed with the Administrative Law Judge. Either the Regional Director or the Administrative Law Judge, as the case may be, will grant the application on behalf of the Board or any Member. Applications for subpoenas may be made ex parte. The subpoena must show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person served with a subpoena, whether ad testificandum or duces tecum, if that person does not intend to comply with the subpoena, must, within 5 business days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke is the date the subpoena is received. All petitions to revoke subpoenas must be served on the party at whose request the subpoena was issued. A petition to revoke, if made prior to

the hearing, must be filed with the Regional Director and the Regional Director will refer the petition to the Administrative Law Judge or the Board for ruling. Petitions to revoke subpoenas filed during the hearing must be filed with the Administrative Law Judge. Petitions to revoke subpoenas filed in response to a subpoena issued upon request of the Agency's Contempt, Compliance, and Special Litigation Branch must be filed with that Branch, which will refer the petition to the Board for ruling. Notice of the filing of petitions to revoke will be promptly given by the Regional Director, the Administrative Law Judge, or the Contempt, Compliance and Special Litigation Branch, as the case may be, to the party at whose request the subpoena was issued. The Administrative Law Judge or the Board, as the case may be, will revoke the subpoena if in their 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 Administrative Law Judge or the Board, as the case may be, will make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke any opposition to the petition, response to the opposition, and ruling on the petition will not become part of the official record except upon the request of the party aggrieved by the ruling, at an appropriate time in a formal proceeding rather than at the investigative stage of the proceeding.

(c) Upon refusal of a witness to testify, the Board may, with the approval of the Attorney General of the United States, issue an order requiring any individual to give testimony or

provide other information at any proceeding before the Board if, in the judgment of the Board:

(1) The testimony or other information from such individual may be necessary to the public interest; and

(2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination. Requests for the issuance of such an order by the Board may be made by any party. Prior to hearing, and after transfer of the proceeding to the Board, such requests must be made to the Board in Washington, DC, and the Board will take such action thereon as it deems appropriate. During the hearing, and thereafter while the proceeding is pending before the Administrative Law Judge, such requests must be made to the Administrative Law Judge. If the Administrative Law Judge denies the request, the ruling will be subject to appeal to the Board, in Washington, DC, in the manner and to the extent provided in §102.26 with respect to rulings and orders by an Administrative Law Judge, except that requests for permission to appeal in this instance must be filed within 24 hours of the Administrative Law Judge's ruling. If no appeal is sought within such time, or if the appeal is denied, the ruling of the Administrative Law Judge becomes final and the denial becomes the ruling of the Board. If the Administrative Law Judge deems the request appropriate, the Judge will recommend that the Board seek the approval of the Attorney General for the issuance of the order, and the Board will take such action on the Administrative Law Judge's recommendation as it deems appropriate. Until the Board has issued the requested order, no individual who claims the privilege against self-incrimination will be required or permitted to testify or to give other information respecting the subject matter of the claim.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel will, in the name of the Board but on relation of such private party, institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with law and with the policies of the Act. Neither the General Counsel nor the Board will be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

(e) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the Regional Director to inspection of the official transcript of their testimony, but must be entitled to make copies of documentary evidence or exhibits which they have produced.

§102.32 Payment of witness fees and mileage; fees of persons taking depositions.

Witnesses summoned before the Administrative Law Judge must be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the officer taking them are severally entitled to the same fees as are paid for like services in the courts of the United States. Witness fees and mileage will be paid by the party at whose instance the witnesses appear, and the persons taking the deposition will be paid by the party at whose instance the deposition is taken.

§102.33 Transfer of charge and proceeding from Region to Region; consolidation of proceedings in same Region; severance.

(a) Whenever the General Counsel deems it necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay, a charge may be filed with the General Counsel in Washington, DC, or, at any time after a charge has been filed with a Regional Director, the General Counsel may order that such charge and any proceeding regarding the charge be:

(1) Transferred to and continued before the General Counsel for investigation or consolidation with any other proceeding which may have been instituted in a Regional Office or with the General Counsel; or

(2) Consolidated with any other proceeding which may have been instituted in the same region; or

(3) Transferred to and continued in any other Region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other region; or

(4) Severed from any other proceeding with which it may have been consolidated pursuant to this section.

(b) The provisions of §§102.9 through 102.32 will, insofar as applicable, govern proceedings before the General Counsel, pursuant to this section, and the powers granted to Regional Directors in such provisions will, for the purpose of this section, be reserved to and exercised by the General Counsel. After the transfer of any charge and any proceeding which may have been instituted with respect thereto from one Region to another pursuant to this section, the provisions of this subpart will, insofar as possible, govern such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

(c) The Regional Director may, prior to hearing, exercise the powers in paragraphs (a)(2) and (4) of this section with respect to proceedings pending in the Director's Region.

(d) Motions to consolidate or sever proceedings after issuance of complaint must be filed as provided in §102.24 and ruled upon as provided in §102.25, except that the Regional Director may consolidate or sever proceedings prior to hearing upon the Director's own motion. Rulings by the Administrative Law Judge upon motions to consolidate or sever may be appealed to the Board as provided in §102.26.

§102.34 Who will conduct hearing; public unless otherwise ordered.

The hearing for the purpose of taking evidence upon a complaint will be conducted by an Administrative Law Judge designated by the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or any Associate Chief Judge, as the case may be, unless the Board or any Board Member presides. At any time, an Administrative Law Judge may be designated to take the place of the Administrative Law Judge previously designated to conduct the hearing. Hearings will be public unless otherwise ordered by the Board or the Administrative Law Judge.

§102.35 Duties and powers of Administrative Law Judges; stipulations of cases to Administrative Law Judges or to the Board; assignment and powers of settlement judges.

(a) The Administrative Law Judge will inquire fully into the facts as to whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The Administrative Law Judge has authority, with respect to cases assigned to the Judge, between the time the Judge is

designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers, to:

(1) Administer oaths and affirmations.

(2) Grant applications for subpoenas.

(3) Rule upon petitions to revoke subpoenas.

(4) Rule upon offers of proof and receive relevant evidence.

(5) Take or cause depositions to be taken whenever the ends of justice would be served.

(6) Regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question.

(7) Hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases.

(8) Dispose of procedural requests, motions, or similar matters, including motions referred to the Administrative Law Judge by the Regional Director and motions for default judgment, summary judgment, or to amend pleadings; also to dismiss complaints or portions thereof; to order hearings reopened; and, upon motion, to order proceedings consolidated or severed prior to issuance of Administrative Law Judge decisions.

(9) Approve stipulations, including stipulations of facts that waive a hearing and provide for a decision by the Administrative Law Judge. Alternatively, the parties may agree to waive a hearing and decision by an Administrative Law Judge and submit directly to the Executive Secretary a stipulation of facts, which, if approved, provides for a decision by the Board. A statement of the issues presented may be set forth in the

stipulation of facts, and each party may also submit a short statement (no more than three pages) of its position on the issues. If the Administrative Law Judge (or the Board) approves the stipulation, the Judge (or the Board) will set a time for the filing of briefs. In proceedings before an Administrative Law Judge, no further briefs may be filed except by special leave of the Judge. In proceedings before the Board, answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed. No further briefs may be filed except by special leave of the Board. At the conclusion of the briefing schedule, the Administrative Law Judge (or the Board) will decide the case or otherwise dispose of it.

(10) Make and file decisions, including bench decisions delivered within 72 hours after conclusion of oral argument, in conformity with Public Law 89-554, 5 U.S.C. 557.

(11) Call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.

(12) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case and/or supporting theory(ies).

(13) Take any other necessary action authorized by the Board's published Rules and Regulations.

(b) Upon the request of any party or of the Administrative Law Judge assigned to hear a case, or upon the Chief Judge, Deputy Chief Judge, or Associate Chief Judge's own motion, the Chief Judge, Deputy Chief Judge or an Associate Chief Judge may assign a Judge other than the trial judge to conduct settlement negotiations. In exercising this discretion, the Chief Judge, Deputy Chief Judge, or Associate Chief Judge making the assignment will consider, among other factors, whether there is reason to believe that

resolution of the dispute is likely, the request for assignment of a settlement judge is made in good faith, and the assignment is otherwise feasible. However, no such assignment will be made absent the agreement of all parties to the use of this procedure.

(1) The settlement judge will convene and preside over conferences and settlement negotiations between the parties, assess the practicalities of a potential settlement, and report to the Chief Judge, Deputy Chief Judge, or Associate Chief Judge the status of settlement negotiations, recommending continuation or termination of the settlement negotiations. Where feasible, settlement conferences will be held in person.

(2) The settlement judge may require that the attorney or other representative for each party be present at settlement conferences and that the parties or agents with full settlement authority also be present or available by telephone.

(3) Participation of the settlement judge will terminate upon the order of the Chief Judge, Deputy Chief Judge, or Associate Chief Judges issued after consultation with the settlement judge. The conduct of settlement negotiations must not unduly delay the hearing.

(4) All discussions between the parties and the settlement judge will be confidential. The settlement judge must not discuss any aspect of the case with the trial judge, and no evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement judge will be admissible in any proceeding before the Board, except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless voluntarily produced or obtained pursuant to subpoena.

(5) No decision of a Chief Judge, Deputy Chief Judge, or Associate Chief Judge concerning the assignment of a settlement judge or the termination of a settlement judge's assignment is appealable to the Board.

(6) Any settlement reached under the auspices of a settlement judge is subject to approval in accordance with the provisions of §101.9 of the Board's Statements of Procedure.

§102.36 Disqualification and unavailability of Administrative Law Judges.

(a) An Administrative Law Judge may withdraw from a proceeding because of a personal bias or for other disqualifying reasons. Any party may request the Administrative Law Judge, at any time following the Judge's designation and before filing of the Judge's decision, to withdraw on grounds of personal bias or disqualification, by filing with the Judge promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the Administrative Law Judge's opinion, the affidavit is filed with due diligence and is sufficient on its face, the Judge will promptly disqualify himself/herself and withdraw from the proceeding. If the Administrative Law Judge does not disqualify himself/herself and withdraw from the proceeding, the Judge must rule upon the record, stating the grounds for that ruling, and proceed with the hearing, or, if the hearing has closed, the Judge will proceed with issuance of the decision, and the provisions of §102.26, with respect to review of rulings of Administrative Law Judges, will apply.

(b) If the Administrative Law Judge designated to conduct the hearing becomes unavailable to the Board after the hearing has been opened, the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or an Associate Chief Administrative

Law Judge, as the case may be, may designate another Administrative Law Judge for the purpose of further hearing or other appropriate action.

§102.37 [Reserved]

§102.38 Rights of parties.

Any party has the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the Administrative Law Judge may limit the participation of any party as appropriate. Documentary evidence must be submitted in duplicate for the record with a copy to each party.

§102.39 Rules of evidence controlling so far as practicable.

The hearing will, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, Sections 723–B, 723–C).

§102.40 Stipulations of fact admissible.

Stipulations of fact may be introduced in evidence with respect to any issue.

§102.41 Objection to conduct of hearing; how made; objections not waived by further participation.

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 will be deemed waived by further participation in the hearing.

§102.42 Filings of briefs and proposed findings with the Administrative Law Judge and oral argument at the hearing.

Any party is entitled, upon request, to oral argument, for a reasonable period at the close of the hearing. Oral argument and any presentation of proposed findings and conclusions will be included in the transcript of the hearing. In the discretion of the Administrative Law Judge, any party may, upon request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the Administrative Law Judge, who may fix a reasonable time for such filing, but not in excess of 35 days from the close of the hearing. Requests for further extensions of time must be made to the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge, as the case may be. Notice of the request for any extension must be immediately served on all other parties, and proof of service must be furnished. The brief or proposed findings and conclusions must be served on the other parties, and a statement of such service must be furnished. In any case in which the Administrative Law Judge believes that written briefs or proposed findings of fact and conclusions may not be necessary, the Judge must notify the parties at the opening of the hearing or as soon thereafter as practicable that the Judge may wish to hear oral argument

in lieu of briefs.

§102.43 Continuance and adjournment.

In the Administrative Law Judge's discretion, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement at the hearing by the Administrative Law Judge, or by other appropriate notice.

§102.44 [Reserved]

§102.45 Administrative Law Judge's decision; contents of record; alternative dispute resolution program.

(a) Administrative Law Judge's decision. After a hearing for the purpose of taking evidence upon a complaint, the Administrative Law Judge will prepare a decision. The decision will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper disposition of the case. If the Respondent is found to have engaged in the alleged unfair labor practices, the decision will also contain a recommendation for such affirmative action by the Respondent as will effectuate the policies of the Act. The Administrative Law Judge will file the decision with the Board. If the Judge delivers a bench decision, promptly upon receiving the transcript the Judge will certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the Judge may deem necessary to complete the decision; and serve a copy on each of the parties. Upon the filing of the decision, the Board will enter an order transferring the case to the Board, setting forth the date of the transfer and will serve on all the parties copies of the decision and the order. Service of the Administrative

Law Judge's decision and of the order transferring the case to the Board is complete upon mailing.

(b) Contents of record. The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in §102.46, constitutes the record in the case.

(c) Alternative dispute resolution program. The Alternative Dispute Resolution (ADR) Program is available to parties with unfair labor practice or compliance cases pending before the Board at any stage subsequent to the initial issuance of an Administrative Law Judge's decision or any other process involving the transfer to the Board of such cases. Participation in the ADR Program is voluntary, and a party that enters the ADR Program may withdraw any time after the first meeting with the neutral. No party will be charged fees or expenses for using the ADR Program.

(1) The parties may request participation in the ADR Program by contacting the program director. Deadlines for filing pleadings with the Board will be stayed effective the date that the case enters the ADR Program. If the case is removed from the ADR Program, the time period for filing will begin to run and will consist of the time period that remained when the case entered the ADR Program. Notice will be provided to the parties of the date the case enters the ADR Program and the date it is removed from the ADR Program.

(2) A case may remain in the ADR Program for 28 days from the first settlement meeting or until the parties reach a settlement, whichever occurs first. A request for extension of the stay beyond the 28 days will be granted only with the approval and in the discretion of both the neutral and the program director upon a showing that such an extension is supported by good cause.

(3) Once the case enters the ADR Program, the program director will arrange for the appointment of a neutral to assist the parties in settling the case.

(4) The preferred method of conducting settlement conferences is to have the parties or their representatives attend in person, and therefore the neutral will make every reasonable effort to meet with the participants face-to-face at the parties' location. Settlement conferences by telephone or through videoconference may be held if the parties so desire.

(5) Parties may be represented by counsel at the conferences, but representation by counsel is not required. However, each party must have in attendance a representative who has the authority to bind the party to the terms of a settlement agreement.

(6) The neutral may ask the parties to submit pre-conference memos setting forth the issues in dispute, prior settlement efforts, and anything else that the parties would like to bring to the neutral's attention. A party's memo will be treated as a confidential submission unless the party that prepared the memo authorizes its release to the other parties.

(7) Settlement discussions held under the ADR Program will be confidential. All documents submitted to the neutral and statements made during the ADR proceedings, including proposed settlement terms, are for settlement purposes only and are

confidential. However, evidence otherwise admissible or discoverable will not be rendered inadmissible or undiscoverable because of its use in the ADR proceedings. No evidence as to what transpired during the ADR proceedings will be admissible in any administrative or court proceeding except to the extent it is relevant to determining the existence or meaning of a settlement agreement. The parties and their representatives will not discuss with the press any matters concerning settlement positions communicated during the ADR proceedings except by express written permission of the other parties. There will be no communication between the ADR Program and the Board on specific cases submitted to the ADR Program, except for procedural information such as case name, number, timing of the process, and status.

(8) The neutral has no authority to impose a settlement. Settlement agreements are subject to approval by the Board in accordance with its existing procedures for approving settlements.

(9) No party will at any time or in any proceeding take the position that participation in the ADR Program resulted in the waiver of any legal rights related to the underlying claims in the case, except as set forth in any settlement agreement.

(10) Nothing in the ADR Program is intended to discourage or interfere with settlement negotiations that the parties wish to conduct outside the ADR Program.

§102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements.

(a) Exceptions and brief in support. Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to §102.45, any party may (in accordance with Section 10(c) of the Act and §§102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1) Exceptions. (i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) Brief in support of exceptions. Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

(b) Answering briefs to exceptions. (1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding, the answering brief must specify those pages of the record which the party contends support the Judge's finding.

(c) Cross-exceptions and brief in support. Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (a) and (h) of this section.

(d) Answering briefs to cross-exceptions. Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (b) and (h) of this section. Such answering brief must be limited to the questions raised in the cross-exceptions.

(e) Reply briefs. Within 14 days from the last date on which an answering brief may be filed pursuant to paragraphs (b) or (d) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this paragraph (e) must be limited to matters raised in the brief to which it is replying, and must not exceed 10 pages. No extensions of time will be granted for the filing of reply briefs, nor will permission be granted to exceed the 10-page limit. The reply brief must be filed with the Board and served on the other parties. No further briefs may be filed except by special leave of the Board. Requests for such leave must be in writing and copies must be served simultaneously on the other parties.

(f) Failure to except. Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

(g) Oral argument. A party desiring oral argument before the Board must request permission from the Board in writing simultaneously with the filing of exceptions or

cross-exceptions. The Board will notify the parties of the time and place of oral argument, if such permission is granted. Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

(h) Filing requirements. Documents filed pursuant to this section must be filed with the Board in Washington, DC, and copies must also be served simultaneously on the other parties. Any brief filed pursuant to this section must not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (e) of this section, must not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited.

§102.47 Filing of motion after transfer of case to Board.

All motions filed after the case has been transferred to the Board pursuant to §102.45 must be filed with the Board in Washington, DC, and served upon the other parties. Such motions must be printed or otherwise legibly duplicated.

§102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

(a) No exceptions filed. If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions must be deemed waived for all purposes.

(b) Exceptions filed. (1) Upon the filing of timely and proper exceptions, and any cross-exceptions or answering briefs, as provided in §102.46, the Board may decide the matter

upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board Member or other Board agent or agency, or otherwise dispose of the case.

(2) Where exception is taken to a factual finding of the Administrative Law Judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(c) Motions for reconsideration, rehearing, or reopening the record. A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

§102.49 Modification or setting aside of Board order before record filed in court; action thereafter.

Within the limitations of the provisions of Section 10(c) of the Act, and §102.48, until a transcript of the record in a case is filed in a court, within the meaning of Section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in whole or in part, any findings of fact, conclusions of law, or order made or issued by it. Thereafter, the Board may proceed pursuant to §102.50, insofar as applicable.

§102.50 Hearings before the Board or a Board Member.

Whenever the Board deems it necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay, it may, at any time, after a complaint has issued pursuant to §102.15 or §102.33, order that such complaint and any proceeding which may have been instituted with respect thereto be transferred to and continued before it or any Board Member. The provisions of this subpart, insofar as applicable, govern proceedings before the Board or any Board Member pursuant to this section, and the powers granted to Administrative Law Judges in such provisions will, for the purpose of this section, be reserved to and exercised by the Board or the Board Member who will preside.

§102.51 Settlement or adjustment of issues.

At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties have an opportunity to submit to the

Regional Director, with whom the charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

§102.52 Compliance with Board order; notification of compliance determination.

After entry of a Board order directing remedial action, or the entry of a court judgment enforcing such order, the Regional Director will seek compliance from all persons having obligations under the order. As appropriate, the Regional Director will make a compliance determination and notify the parties of that determination. A Charging Party adversely affected by a monetary, make-whole, reinstatement, or other compliance determination will be provided, on request, with a written statement of the basis for that determination.

§102.53 Appeal of compliance determination to the General Counsel; General Counsel's action; request for review by the Board; Board action; opposition to appeal or request for review.

(a) Appeal of compliance determination to the General Counsel. The Charging Party may appeal a compliance determination to the General Counsel in Washington, DC, within 14 days of the written statement of compliance determination as set forth in §102.52. The appeal must contain a complete statement setting forth the facts and reasons upon which it is based and must identify with particularity the error claimed in the Regional Director's determination. The General Counsel may for good cause shown extend the time for filing an appeal.

(b) General Counsel's action. The General Counsel may affirm or modify the Regional Director's determination or take such other action deemed appropriate, and must state the grounds for that decision.

(c) Request for review by Board. Within 14 days after service of the General Counsel's decision, the Charging Party may file a request for review of that decision with the Board in Washington, DC. The request for review must contain a complete statement of the facts and reasons upon which it is based and must identify with particularity the error claimed in the General Counsel's decision. A copy of the request for review must be served simultaneously on all other parties and on the General Counsel and the Regional Director.

(d) Board action. The Board may affirm or modify the General Counsel's decision, or otherwise dispose of the matter as it deems appropriate. The denial of the request for review will constitute an affirmance of the General Counsel's decision.

(e) Opposition to appeal or request for review. Within 7 days of receipt of a compliance appeal or request for review, a party may file an opposition to the compliance appeal or request for review.

§102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.

(a) If it appears that controversy exists with respect to compliance with a Board order which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification will contain or be accompanied by a Notice of Hearing before an Administrative Law Judge at a specific place and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may

issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to §102.15 a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation. Issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

§102.55 Contents of compliance specification.

(a) Contents of specification with respect to allegations concerning the amount of backpay due. With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) Contents of specification with respect to allegations other than the amount of backpay due. With respect to allegations other than the amount of backpay due, the specification will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent and, where known, the approximate dates,

places, and names of the Respondent's agents or other representatives described in the specification.

(c) Amendments to specification. After the issuance of the Notice of Compliance Hearing but before the hearing opens, the Regional Director may amend the specification. After the hearing opens, the specification may be amended upon leave of the Administrative Law Judge or the Board, upon good cause shown.

§102.56 Answer to compliance specification.

(a) Filing and service of answer to compliance specification. Each Respondent alleged in the specification to have compliance obligations must, within 21 days from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) Form and contents of answer. The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer

must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) Failure to answer or to plead specifically and in detail to backpay allegations of specification. If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) Extension of time for filing answer to specification. Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.

(e) Amendment to answer. Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

§102.57 Extension of date of hearing.

Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and Notice of Hearing may extend the hearing date.

§102.58 Withdrawal of compliance specification.

Any compliance specification and Notice of Hearing may be withdrawn before the hearing by the Regional Director upon the Director's own motion.

§102.59 Hearing and posthearing procedures.

After the issuance of a compliance specification and Notice of Hearing, the procedures provided in §§102.24 through 102.51 will be followed insofar as applicable.

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

7. Revise §§102.73 through 102.76 to read as follows:

Sec.

102.73 Initiation of proceedings.

102.74 Complaint and formal proceedings.

102.75 Suspension of proceedings on the charge where timely petition is filed.

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

§102.73 Initiation of proceedings.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 8(b)(7) of the Act, the Regional Director will investigate such charge, giving it the priority specified in subpart H of this part.

§102.74 Complaint and formal proceedings.

If it appears to the Regional Director that the charge has merit, formal proceedings will be instituted in accordance with the procedures described in §§102.15 through 102.51, insofar as they are applicable, and insofar as they are not inconsistent with the provisions of this subpart. If it appears to the Regional Director that issuance of a complaint is not

warranted, the Director will decline to issue a complaint, and the provisions of §102.19, including the provisions for appeal to the General Counsel, are applicable unless an election has been directed under §§102.77 and 102.78, in which event the provisions of §102.81 are applicable.

§102.75 Suspension of proceedings on the charge where timely petition is filed.

If it appears to the Regional Director that issuance of a complaint may be warranted but for the pendency of a petition under Section 9(c) of the Act, which has been filed by any proper party within a reasonable time not to exceed 30 days from the commencement of picketing, the Regional Director will suspend proceedings on the charge and will proceed to investigate the petition under the expedited procedure provided below, pursuant to the first proviso to subparagraph (C) of Section 8(b)(7) of the Act.

§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, insofar as applicable, except that if a charge under §102.73 has been filed against the labor organization on whose behalf picketing has been conducted, the petition will 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.

8. In §102.77, revise the section heading and paragraph (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 D of this part, and after the investigation of the charge filed pursuant to §102.73, 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, the Regional Director shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter, except that in any case in which it appears to the Regional Director that the proceeding raises questions which cannot be decided without a hearing, the Director 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 through 102.68.

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

9. 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 must be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or must 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 must 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 must also file an original for the Agency's records, but failure to do so must not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically need not file an original. 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 will be closed.

10. Revise §102.84(1) to read as follows:

§102.84 Contents of petition to rescind authority.

* * * * *

(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 must be filed together with the petition, but must not be served on any other party.

* * * * *

11. Revise §§102.85 through 102.88 to read as follows:

Sec.

102.85 Investigation of petition by Regional Director; consent referendum; directed referendum.

102.86 Hearing; posthearing procedure.

102.87 Method of conducting balloting; postballoting procedure.

102.88 Refusal to conduct referendum; appeal to Board.

§102.85 Investigation of petition by Regional Director; consent referendum; directed referendum.

Where a petition has been filed pursuant to §102.83, 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, the Regional Director will 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, except that, in any case in which it appears to the Regional Director that the proceeding raises questions which cannot be decided without a hearing, the Director 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 will 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.

§102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing will be governed, insofar as applicable, by §§102.63 through 102.68.

§102.87 Method of conducting balloting; postballoting procedure.

The method of conducting the balloting and the postballoting procedure will be governed by the provisions of §102.69, insofar as applicable.

§102.88 Refusal to conduct referendum; appeal to Board.

If, after a petition has been filed, and prior to the close of the hearing, it appears to the Regional Director that no referendum should be conducted, the Regional Director will dismiss the petition by administrative action. Such dismissal will be in writing and accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, DC, and filing a copy of such request with the Regional Director and the other parties within 14 days from the service of notice of such dismissal. The request must contain a complete statement setting forth the facts and reasons upon which the request is based.

12. Revise newly redesignated subpart G to read as follows:

Subpart G—Procedure to Hear and Determine Disputes Under Section 10(k) of the Act

Sec.

102.89 Initiation of proceedings.

102.90 Notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.

102.91 Compliance with determination; further proceedings.

102.92 Review of determination.

102.93 Alternative procedure.

§102.89 Initiation of proceedings.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 8(b)(4)(D) of the Act, the Regional Director of the office in which such charge is filed or to which it is referred will, as soon as possible after the charge has been filed, serve on the parties a copy of the charge and will investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act, the Regional Director will give it priority over all other cases in the office except other cases under Section 10(l) and cases of like character.

§102.90 Notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.

If it appears to the Regional Director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the Regional Director that they have adjusted, or have agreed-upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice has arisen, the Regional Director will serve on all parties to such dispute a Notice of Hearing under Section 10(k) of the Act before a Hearing Officer at a time and place stated in the Notice. The hearing date will not be less than 10

days after service of the notice of the filing of the charge. The Notice of Hearing must contain a simple statement of the issues involved in such dispute. Such Notice will be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to Section 10(l) of the Act, will normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings will be conducted by a Hearing Officer, and the procedure will conform, insofar as applicable, to the procedure set forth in §§102.64 through 102.68. Upon the close of the hearing, the proceeding will be transferred to the Board, and the Board will proceed either promptly upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or otherwise dispose of the matter. Parties who desire to file a brief with the Board must do so within 7 days after the close of the hearing. However, no briefs will be filed in cases designated in the Notice of Hearing as involving the national defense, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions; except that, upon application for leave to file briefs expeditiously made to the Board in Washington, DC, after the close of the hearing, the Board may for good cause shown, grant leave to file briefs and set a time for filing. Simultaneously upon such filing, a copy must be served on the other parties. No reply brief may be filed except upon special leave of the Board.

§102.91 Compliance with determination; further proceedings.

If, after issuance of the determination by the Board, the parties submit to the Regional Director satisfactory evidence that they have complied with the determination, the Regional Director will dismiss the charge. If no satisfactory evidence of compliance is submitted, the Regional Director will proceed with the charge under Section 8(b)(4)(D)

and Section 10 of the Act and the procedure prescribed in §§102.9 through 102.51 will, insofar as applicable, govern. However, if the Board determination is that employees represented by a Charged Union are entitled to perform the work in dispute, the Regional Director will dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

§102.92 Review of determination.

The record of the proceeding under Section 10(k) and the determination of the Board will become a part of the record in such unfair labor practice proceeding and may be subject to judicial review in proceedings to enforce or review the final order of the Board under Section 10(e) and (f) of the Act.

§102.93 Alternative procedure.

If, either before or after service of the Notice of Hearing, the parties submit to the Regional Director satisfactory evidence that they have adjusted the dispute, the Regional Director will dismiss the charge and will withdraw the Notice of Hearing if Notice has issued. If, either before or after issuance of the Notice of Hearing, the parties submit to the Regional Director satisfactory evidence that they have agreed-upon methods for the voluntary adjustment of the dispute, the Regional Director will defer action upon the charge and will withdraw the Notice of Hearing if Notice has issued. If it appears to the Regional Director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of Section 8(b)(4)(D) of the Act is occurring or has occurred, the Regional Director may issue a complaint under §102.15, and the procedure prescribed in §§102.9 through 102.51 will, insofar as applicable, govern; and §§102.90 through 102.92 are inapplicable, except that if an

agreed-upon method for voluntary adjustment results in a determination that employees represented by a Charged Union are entitled to perform the work in dispute, the Regional Director will dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

13. Revise newly redesignated subpart H to read as follows:

Subpart H—Procedure in Cases Under Section 10(j), (l), and (m) of the Act

Sec.

102.94 Expeditious processing of Section 10(j) cases.

102.95 Priority of cases pursuant to Section 10(l) and (m) of the Act.

102.96 Issuance of complaint promptly.

102.97 Expeditious processing of Section 10(l) and (m) cases in successive stages.

§102.94 Expeditious processing of Section 10(j) cases.

(a) Whenever temporary relief or a restraining order pursuant to Section 10(j) of the Act has been procured by the Board, the complaint which has been the basis for such temporary relief or restraining order will be heard expeditiously and the case will be given priority by the Board in its successive steps following the issuance of the complaint (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all other cases except cases of like character and cases under Section 10(l) and (m) of the Act.

(b) In the event the Administrative Law Judge hearing a complaint, concerning which the Board has procured temporary relief or a restraining order pursuant to Section 10(j), recommends a dismissal in whole or in part of such complaint, the chief law officer will promptly suggest to the district court which issued such temporary relief or restraining

order the possible change in circumstances arising out of the findings and recommendations of the Administrative Law Judge.

§102.95 Priority of cases pursuant to Section 10(l) and (m) of the Act.

(a) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of Section 8(b)(4)(A), (B), (C), 8(b)(7), or 8(e) of the Act, the Regional Office in which such charge is filed or to which it is referred will give it priority over all other cases in the office except cases of like character and cases under Section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act.

(b) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of Section 8(a)(3) or 8(b)(2), the Regional Office in which such charge is filed or to which it is referred will give it priority over all other cases in the office except cases of like character and cases under Section 10(l) of the Act.

§102.96 Issuance of complaint promptly.

Whenever injunctive relief pursuant to Section 10(l) of the Act is sought in district court, a complaint against the party or parties sought to be enjoined, covering the same subject matter as the application for injunctive relief, will be issued promptly, normally within 5 days of the date when injunctive relief is first sought, except in cases in which a Notice of Hearing under Section 10(k) of the Act has issued.

§102.97 Expeditious processing of Section 10(l) and (m) cases in successive stages.

(a) Any complaint issued pursuant to §102.95(a) or, in a case in which it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act, any complaint issued pursuant to §102.93 or Notice of Hearing issued pursuant to

§102.90 will be heard expeditiously and the case will be given priority in such successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character.

(b) Any complaint issued pursuant to §102.95(b) will be heard expeditiously and the case will be given priority in its successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character and cases under Section 10(l) of the Act.

14. Revise the heading for newly redesignated subpart I to read as follows:

Subpart I—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

15. Revise §§102.99 through 102.110 to read as follows:

Sec.

102.99 Contents of petition for advisory opinion.

102.100 Notice of petition; service of petition.

102.101 Response to petition; service of response.

102.102 Intervention.

102.103 Proceedings before the Board; briefs; advisory opinions.

102.104 Withdrawal of petition.

102.105 Petitions for declaratory orders; who may file; where to file; withdrawal.

102.106 Contents of petition for declaratory order.

102.107 Notice of petition; service of petition.

102.108 Response to petition; service of response.

102.109 Intervention.

102.110 Proceedings before the Board; briefs; declaratory orders.

§102.99 Contents of petition for advisory opinion.

(a) A petition for an advisory opinion, when filed by an agency or court of a State or territory, must allege the following:

(1) The name of the agency or court.

(2) The names of the parties to the proceeding and the docket number.

(3) The nature of the proceeding, and the need for the Board's opinion on the jurisdictional issue to the proceeding.

(4) The general nature of the business involved in the proceeding and, where appropriate, the nature of and details concerning the employing enterprise.

(5) The findings of the agency or court or, in the absence of findings, a statement of the evidence relating to the commerce operations of such business and, where appropriate, to the nature of the employing enterprise.

(b) The petition or request must be submitted to the Board in Washington, DC.

§102.100 Notice of petition; service of petition.

Upon the filing of a petition, the petitioner must simultaneously serve, in the manner provided by §102.5(g), a copy of the petition on all parties to the proceeding and on the Director of the Board's Regional Office having jurisdiction over the territorial area in which such agency or court is located. A statement of service must be filed with the petition as provided by §102.5(h).

§102.101 Response to petition; service of response.

Any party served with such petition may, within 14 days after service thereof, respond to the petition, admitting or denying its allegations. The response must be filed with the Board in Washington, DC. The response must simultaneously be served on all other

parties to the proceeding, and a statement of service must be filed in accordance with the provisions of §102.5(h).

§102.102 Intervention.

Any person desiring to intervene must file a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. The motion must be filed with the Board in Washington, DC.

§102.103 Proceedings before the Board; briefs; advisory opinions.

The Board will thereupon proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that the Board would or would not assert jurisdiction. Such determination will be in the form of an advisory opinion and will be served on the parties. No briefs may be filed except upon special permission of the Board.

§102.104 Withdrawal of petition.

The petitioner may withdraw the petition at any time prior to issuance of the Board's advisory opinion.

§102.105 Petitions for declaratory orders; who may file; where to file; withdrawal.

Whenever both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a Regional Office of the Board, and the General Counsel entertains doubt whether the Board would assert jurisdiction over the employer involved, the General Counsel may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the case. Such petition may be withdrawn at any time prior to the issuance of the Board's order.

§102.106 Contents of petition for declaratory order.

(a) A petition for a declaratory order must allege the following:

(1) The name of the employer.

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

(3) The case numbers of the unfair labor practice and representation cases.

(4) The commerce data relating to the operations of such business.

(5) Whether any proceeding involving the same subject matter is pending before an agency or court of a State or territory.

(b) The petition must be filed with the Board in Washington, DC.

§102.107 Notice of petition; service of petition.

Upon filing a petition, the General Counsel will simultaneously serve a copy thereof on all parties and must file a statement of service as provided by §102.5(h).

§102.108 Response to petition; service of response.

Any party to the representation or unfair labor practice case may, within 14 days after service, respond to the petition, admitting or denying its allegations. The response must be filed with the Board in Washington, DC. The response must be served on the General Counsel and all other parties, and a statement of service must be filed as provided by §102.5(h).

§102.109 Intervention.

Any person desiring to intervene must file a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. The motion must be filed with the Board in Washington, DC.

§102.110 Proceedings before the Board; briefs; declaratory orders.

The Board will proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that the Board would or would not assert jurisdiction over the employer. Such determination will be made by a declaratory order, with like effect as in the case of other orders of the Board, and will be served on the parties. Any party desiring to file a brief must file the brief with the Board in Washington, DC, with a statement that copies are being served simultaneously on the other parties.

§§102.111 through 102.114 [Added and Reserved]

16. Add reserved §§102.111 through 102.114 to subpart I.

17. Revise subparts J through M to read as follows:

Subpart J—Certification and Signature of Documents

Sec.

102.115 Certification of Board papers and documents.

102.116 Signature on Board orders.

§102.115 Certification of Board papers and documents.

The Executive Secretary of the Board, or, in the event of the Executive Secretary's absence or disability, whomever may be designated by the Board in the Executive Secretary's place, will certify copies of all papers and documents which are a part of any of the files or records of the Board as necessary or desirable from time to time.

§102.116 Signature on Board orders.

The Executive Secretary, Deputy Executive Secretary, or an Associate Executive Secretary, or, in the event of their absence or disability, whomever may be designated by the Board in their place, is hereby authorized to sign all orders of the Board.

Subpart K—Records and Information

Sec.

102.117 Freedom of Information Act Regulations: Agency materials including formal documents available pursuant to the Freedom of Information Act; requests for described records; time limit for response; appeal from denial of request; fees for document search, duplication, and review; files and records not subject to inspection.

102.118 Present and former Board employees prohibited from producing documents and testifying; production of witnesses' statements after direct testimony.

102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

§102.117 Freedom of Information Act Regulations: Agency materials including formal documents available pursuant to the Freedom of Information Act; requests for described records; time limit for response; appeal from denial of request; fees for document search, duplication, and review; files and records not subject to inspection.

(a)(1) Introduction. This subpart contains the Rules that the National Labor Relations Board (Agency) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The Rules in this subpart may be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (OMB

Guidelines). Some records will be made available on the Agency's website at www.nlrb.gov to facilitate public access. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552(a), are processed under § 102.119.

(2) FOIA Officials. The following are designated as the Agency's FOIA officials with responsibilities for complying with the FOIA:

(i) FOIA Officer. The Assistant General Counsel for the FOIA Branch is the Agency's designated FOIA Officer.

(ii) Chief FOIA Officer. The Associate General Counsel for the Division of Legal Counsel is the Agency's designated Chief FOIA Officer.

(iii) FOIA Public Liaison. The official(s) designated by the Chief FOIA Officer is the Agency's FOIA Public Liaison, with overall responsibilities for assisting in reducing delays, increasing transparency, understanding the status of requests, and assisting in the resolution of disputes. The designated FOIA Public Liaison is available on the Agency's website.

(3) Authority to respond to requests and administrative appeals. The FOIA Officer has the authority to act upon and respond on behalf of the Board and the General Counsel to all requests for Agency records, except for records maintained by the Agency's Office of the Inspector General. The Office of the Inspector General has the authority to respond to all requests for records maintained by that Office. The Chief FOIA Officer has the authority to respond on behalf of the Chairman of the Board and the General Counsel to all administrative appeals of adverse determinations. The Chief FOIA Officer's authority

includes responding, on behalf of the Chairman of the Board, to appeals of initial determinations made by the Office of the Inspector General.

(4) Records made available. Records that are required by the FOIA under 5 U.S.C. 552(a)(2) may be accessed through the Agency's website at www.nlrb.gov.

(b)(1) Formal documents. The formal documents constituting the record in a case or proceeding are matters of official record and, until officially destroyed pursuant to applicable statutory authority, are available to the public pursuant to the procedures in this section.

(2) Certification of records. The Executive Secretary will certify copies of all formal documents maintained by the Board upon request made a reasonable time in advance of need and payment of lawfully prescribed costs. The Deputy General Counsel will certify copies of any record maintained by, or originating from, the Office of General Counsel and any division, branch, or office organizationally overseen by the Office of the General Counsel, including any Regional, Subregional, or Resident Office.

(c)(1) Making FOIA requests to the Agency--(i) Content of requests--(A) Description of records sought. Requests for records must be in writing and must reasonably describe the record so as to permit its identification and location. To the extent possible, requesters may include specific information, such as the NLRB case number, case name, date(s) of record(s) requested, and/or full name of the party, author, or recipient of the record(s) in question. Requesters should include as much detail as practicable about the records sought. Requesters may contact the FOIA Public Liaison to discuss the records sought and to receive assistance in describing the records.

(B) Assumption of fees. Requests must contain a specific statement assuming financial responsibility for the direct costs of responding to the request in accordance with paragraph (d)(2) of this section.

(C) Specificity requirement. Requests that do not reasonably describe the records sought or assume sufficient financial responsibility for responding to the request, or that otherwise fail to comply with this section, may delay the Agency's response to the request.

(ii) Transmission of requests. Requests for records maintained by the Agency should be made to the FOIA Branch, which is located in the Agency's Washington, DC headquarters. The FOIA Branch is responsible for responding to requests for records originating from, or maintained by, the Board and the Office of the General Counsel, including Regional, Subregional, and resident offices. Requests for records maintained by the Agency's Office of the Inspector General may be made directly to that office.

(A) Requesters may file FOIA requests electronically through the Agency's website (https://www.nlrb.gov), which is the preferred method of submission to allow for prompt receipt, including for requests for records maintained by the Agency's Office of the Inspector General. FOIA requests may also be made by mail to the Agency's Washington, DC headquarters address, by email to the Agency's designated mailbox, or by facsimile. The mailing address, email address, and facsimile number are available on the Agency's website.

(B) Requests not made through the Agency's website should be clearly marked to indicate that they contain a request for records under the Freedom of Information Act.

(C) Requests made to an Agency division, branch, or any office other than the FOIA Branch will be forwarded to the FOIA Branch by the receiving office, but in that event, the applicable time limit for response set forth in paragraph (i) of this section will be calculated from the date of receipt by the FOIA Branch. The receiving office will normally forward the request to the FOIA Branch within 10 days of the initial receipt.

(D) Requests made to the Agency for records that originated with another governmental agency may be referred to that agency.

(2) Processing of FOIA requests--(i) Timing of response. The Agency ordinarily responds to FOIA requests according to their order of receipt. An initial determination will be issued within 20 working days (i.e., exempting Saturdays, Sundays, and legal public holidays) after the receipt of a request. Responsive records are released at the time of the determination or, if necessary, at a time thereafter on a rolling basis.

(ii) Expedited treatment. A request for expedited processing may be made at any time during the pendency of a FOIA request or appeal. Requests and appeals will be taken out of order and given expedited treatment when warranted. A requester must provide sufficient justification to grant such processing by showing that any one of the following circumstances exists:

(A) The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) There is an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information; or

(C) The loss of substantial due process rights; or

(D)(*1*) There is widespread and exceptional media interest and possible questions exist about the government's integrity which may affect public confidence.

(*2*) Within 10 calendar days of receipt of a request for expedited processing, the Agency will decide whether to grant it and will notify the requester of the decision. Once the determination has been made to grant expedited processing, the request will be given priority and processed as soon as practicable. If a request for expedited processing is denied, the Agency will act expeditiously on any appeal of that decision.

(iii) Initial determination of requests. Within 20 working days after receipt of a request by the FOIA Branch, a determination will be made whether to comply with such request, and the requester will be notified in writing of that determination. In the case of requests made for records maintained by the Agency's Office of the Inspector General, that determination will be made by the Office of the Inspector General. Requesters will be made aware of their right to seek assistance from the Agency's FOIA Public Liaison.

(A) Grants of requests. If the determination is to comply with the request, the records will be made promptly available to the person making the request and, at the same time, a statement of any charges due in accordance with the fee schedule provisions of paragraph (d)(2) of this section will be provided.

(B) Denials of requests. If the determination is to deny the request in any respect, the requester will be notified in writing of that determination. The determination will set forth: the reason(s) for the denial; the name and title or position of each person responsible for the denial; and an estimate of the volume of records or information

withheld, in number of pages or in some other reasonable form of estimation: however, this estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption. The determination will also inform the requester of the right to seek dispute resolution services from the Agency's FOIA Public Liaison or the Office of Government Information Services, as well as the right to appeal the adverse determination under the administrative appeal provisions of paragraph (c)(2)(v) of this section.

(C) Adverse determinations may consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver or reduction or placement in a particular fee category; and a denial of a request for expedited treatment. An adverse determination to an administrative appeal by the Chief FOIA Officer will be the final action of the Agency. An adverse determination will inform the requester of the right to seek dispute resolution services from the Agency's FOIA Public Liaison or the Office of Government Information Services, as well as the right to appeal the adverse determination under the administrative appeal provisions of paragraph (c)(2)(v) of this section.

(iv) Records containing business information. Business information obtained by the Agency from a submitter will be disclosed under the FOIA only consistent with the procedures established in this section.

(A) For purposes of this section:

(*1*) *Business information* means commercial or financial information obtained by the Agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(*2*) *Submitter* means any person or entity from whom the Agency obtains business information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(B) A submitter of business information will use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period. The Agency will provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (c)(2)(iv)(C) of this section, except as provided in paragraph (c)(2)(iv)(F) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (c)(2)(iv)(D) of this section. The notice will either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

(C) Notice will be given to a submitter whenever: the information has been designated in good faith by the submitter as information considered protected from

disclosure under Exemption 4; or the Agency has reason to believe that the information may be protected from disclosure under Exemption 4.

(D) The Agency will allow a submitter a reasonable time to respond to the notice described in paragraph (c)(2)(iv)(B) of this section. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(E) The Agency will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever the Agency decides to disclose business information over the objection of a submitter, the Agency will give the submitter written notice, which will include: A statement of the reason(s) why each of the submitter's disclosure objections was not sustained; a description of the business information to be disclosed; and a specified disclosure date, which will be a reasonable time subsequent to the notice.

(F) The notice requirements of paragraphs (c)(2)(iv)(B) and (E) of this section will not apply if: The Agency determines that the information may not be disclosed; the information lawfully has been published or has been officially made available to the public; disclosure of the information is required by statute (other than the FOIA) or by a

regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or the designation made by the submitter under paragraph (c)(2)(iv)(B) of this section appears obviously frivolous--except that, in such a case, the Agency will, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(G) Whenever a requester files a lawsuit seeking to compel the disclosure of business information, the Agency will promptly notify the submitter.

(H) Whenever the Agency provides a submitter with notice and an opportunity to object to disclosure under paragraph (c)(2)(iv)(B) of this section, the Agency will also notify the requester(s). Whenever the Agency notifies a submitter of its intent to disclose requested information under paragraph (c)(2)(iv)(E) of this section, the Agency will also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the Agency will notify the requester(s).

(v) Administrative appeals. (A) An appeal from an adverse determination made pursuant to paragraph (c)(2)(iii) of this section must be filed within 90 calendar days of the service of the notification of the adverse determination, in whole or in part. Appeals of adverse determinations made by the FOIA Officer or the Office of the Inspector General may be filed with the Division of Legal Counsel in Washington, DC.

(B) As provided in paragraph (c)(2)(iii) of this section, an adverse determination will notify the requester of the right to appeal the adverse determination and will specify where such appeal may be filed. Within 20 working days after receipt of an appeal, the Chief FOIA Officer will make a determination with respect to such appeal and will notify the requester in writing. If the determination is to grant the appeal, the responsive records

will be made promptly available to the requester upon receipt of payment of any charges due in accordance with the provisions of paragraph (d)(2) of this section. If the appeal is denied, in whole or in part, the requester will be notified of the reasons for the decision, the name and title or position of any person responsible for the denial, and the provisions for judicial review of that determination under the provisions of 5 U.S.C. Section 552(4)(B).

(C) Before seeking judicial review of an adverse determination, a requester must first submit a timely administrative appeal.

(D) Even if no FOIA appeal is filed, the Chief FOIA Officer may, without regard to the time limit for filing of an appeal, initiate reconsideration of an adverse determination by issuing written notice to the requester. In such event, the time limit for making the determination will commence with the issuance of such notification.

(vi) Extension of time to respond to requests. In unusual circumstances as specified in this paragraph (c)(2)(vi), the Agency may extend the time limits prescribed in either paragraph (c)(2)(i) or (iv) of this section by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected, and notifying the requester of the right to seek dispute resolution services from the Office of Government Information Services. The extension of time will not exceed 10 working days. As used in this paragraph (c)(2)(vi), *unusual circumstances* means, but only to the extent reasonably necessary to the proper processing of the particular request:

(A) The need to search for and collect the requested records from other offices in the Agency that are separate from the FOIA Branch;

(B) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single request;

(C)(*1*) The need for consultation, which will be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or with two or more offices in the Agency having a substantial subject matter interest in the request.

(*2*) If the request cannot be processed within the time limits prescribed above, the Agency will provide the requester with an opportunity to limit the request so that it may be processed within the 10-day extended time limit for response. The requester may also arrange an alternative time frame with the Agency for processing the request or a modified request. The Agency's FOIA Public Liaison is available to assist with any issues that may arise.

(vii) Preservation of FOIA request files. The Agency will preserve files created in response to requests for information under the FOIA and files created in responding to administrative appeals under the FOIA until disposition or destruction is authorized by Title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 4.2, item 020. Records will not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

(d)(1) Fees. For purposes of this section, the following definitions apply:

(i) Direct costs means those expenditures which are actually incurred in searching for and duplicating and, in the case of commercial use requests, reviewing documents to respond to a FOIA request.

(ii) Search refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of material within documents and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The Agency will ensure that searches are done in the most efficient and least expensive manner reasonably possible.

(iii) Duplication refers to the process of making a copy of a record, or the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of paper, microfilm, videotape, audiotape, or electronic records (e.g., magnetic tape or disk), among others. The Agency will honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

(iv) Review refers to the process of examining documents located in response to a request that is for commercial use to determine whether any portion of it is exempt from disclosure. It includes processing any documents for disclosure, e.g., doing all that is necessary to redact and prepare them for disclosure. Review time includes time spent considering any formal objection to disclosure made by a business submitter under paragraph (c)(2)(iv) of this section, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(v) Commercial use request refers to a request from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.

(vi) Educational institution refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(vii) Representative of the news media refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in instances where they can qualify as disseminators of *news*) who make their products available for purchase or subscription by the general public. For "freelance" journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract is the clearest proof, but the Agency will also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for commercial use. However, a request for records supporting the news dissemination function of the requester will not be considered to be for a commercial use.

(viii) Working days, as used in this section, means calendar days excepting Saturdays, Sundays, and legal holidays.

(2) Fee schedule. Requesters will be subject to a charge of fees for the full allowable direct costs of document search, review, and duplicating, as appropriate, in accordance with the following schedules, procedures, and conditions:

(i) Schedule of charges:

(A) For each one-quarter hour or portion thereof of clerical time $3.10.

(B) For each one-quarter hour or portion thereof of professional time $9.25.

(C) For each sheet of duplication (not to exceed 8 1/2 by 14 inches) of requested records $0.12.

(D) All other direct costs of preparing a response to a request will be charged to the requester in the same amount as incurred by the Agency. Such costs will include, but not be limited to: certifying that records are true copies; sending records to requesters or receiving records from the Federal records storage centers by special methods such as express mail; and, where applicable, conducting computer searches for information and for providing information in electronic format.

(ii) Fees incurred in responding to information requests are to be charged in accordance with the following categories of requesters:

(A) Commercial use requesters will be assessed charges to recover the full direct costs for searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought.

(B) Educational institution requesters will be assessed charges for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but are

sought in furtherance of scholarly research. Requesters must reasonably describe the records sought.

(C) Requesters who are representatives of the news media will be assessed charges for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (d)(1)(vii) of this section, and the request must not be made for commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester will not be considered to be a request for commercial use. Requesters must reasonably describe the records sought.

(D) All other requesters, not elsewhere described, will be assessed charges to recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first 2 hours of search time will be furnished without charge. Requesters must reasonably describe the records sought.

(E) Absent a reasonably based factual showing that a requester may be placed in a particular user category, fees will be imposed as provided for in the commercial use requester category.

(iii) Unusual fee circumstances. (A) In no event will fees be imposed on any requester when the total charges are less than $5, which is the Agency's cost of collecting and processing the fee itself.

(B) If the Agency reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The

Agency may presume that multiple requests of this type made within a 30-day period have been made to avoid fees. Where requests are separated by a longer period, the Agency will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(iv) Requests for fee waiver or reduction. Documents are to be furnished without charge or at reduced levels if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest. A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Where only some of the requested records satisfy the requirements for a fee waiver, a waiver will be granted for those records.

(v) Failure to pay fees. If a requester fails to pay chargeable fees that were incurred as a result of the Agency's processing of the information request, beginning on the 31st day following the date on which the notification of charges was sent, the Agency may assess interest charges against the requester in the manner prescribed in 31 U.S.C. Section 3717. Where appropriate, other steps permitted by federal debt collection statutes, including disclosure to consumer reporting agencies, use of collection agencies, and offset, will be used by the Agency to encourage payment of amounts overdue.

(vi) Assumption of financial responsibility for processing requests. Each request for records must contain a specific statement assuming financial liability, in full or to a specified maximum amount, for charges, in accordance with paragraphs (d)(2)(i) and (ii) of this section, which may be incurred by the Agency in responding to the request. If the anticipated charges exceed the maximum limit stated by the person making the request, or if the request contains no assumption of financial liability or charges, the requester will be notified and afforded an opportunity to assume financial liability. In either case, the request for records will not be deemed received for purposes of the applicable time limit for response until a written assumption of financial liability is received. The Agency may require a requester to make an advance payment of anticipated fees under the following circumstances:

(A) If the anticipated charges are likely to exceed $250, the Agency will notify the requester of the likely cost and obtain satisfactory assurance of full payment when the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(B) If a requester has previously failed to pay fees that have been charged in processing a request within 30 days of the date the notification of fees was sent, the requester will be required to pay the entire amount of fees that are owed, plus interest as provided for in paragraph (d)(2)(v) of this section, before the Agency will process a further information request. In addition, the Agency may require advance payment of fees that the Agency estimates will be incurred in processing the further request before the Agency commences processing that request. When the Agency acts under paragraph

(d)(2)(vi)(A) or (B) of this section, the administrative time limits for responding to a request or an appeal from initial determinations will begin to run only after the Agency has received the fee payments required in paragraph (d)(2) of this section.

(vii) Fees may be charged even if no documents are provided. Charges may be imposed even though the search discloses no records responsive to the request, or if records located are determined to be exempt from disclosure.

§102.118 Present and former Board employees prohibited from producing documents and testifying; production of witnesses' statements after direct testimony.

(a) Prohibition on producing files and documents. Except as provided in §102.117 respecting requests cognizable under the Freedom of Information Act, no present or former employee or specially designated agent of the Agency will produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent of the Board or the Chairman of the Board if the document is in Washington, DC, and in control of the Board; or of the General Counsel if the document is in a Regional Office of the Board or is in Washington, DC, and in the control of the General Counsel.

(b) Prohibition on testifying. No present or former employee or specially designated agent of the Agency will testify on behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to that person's knowledge in that person's official capacity or with respect to the contents of

any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the Chairman of the Board if the person is in Washington, DC, and subject to the supervision or control of the Board or was subject to such supervision or control when formerly employed at the Agency; or of the General Counsel if the person is in a Regional Office of the Agency or is in Washington, DC, and subject to the supervision or control of the General Counsel or was subject to such supervision or control when formerly employed at the Agency. A request that such consent be granted must be in writing and must identify the documents to be produced, or the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the production of the document or the testimony of the official.

(c) Motion to quash subpoena. Whenever any subpoena ad testificandum or subpoena duces tecum, the purpose of which is to adduce testimony or require the production of records as described above, has been served on any present or former employee or specially designated agent of the Agency, that person will, unless otherwise expressly directed by the Board or the Chairman of the Board or the General Counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this Rule.

(d) Prohibition on disclosure of personal information. No present or former employee or specially designated agent of the Agency will, by any means of communication to any person or to another agency, disclose personal information about an individual from a record in a system of records maintained by this Agency, as more fully described in the

notices of systems of records published by this Agency in accordance with the provisions of Section (e)(4) of the Privacy Act of 1974, 5 U.S.C. 552a(e)(4), or by the Notices of Government-wide Systems of Personnel Records published by the Civil Service Commission in accordance with those statutory provisions, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be in accordance with the provisions of Section (b)(1) through (11), both inclusive, of the Privacy Act of 1974, 5 U.S.C. 552a(b)(1) through (11).

(e) Production of statement for cross-examination. Notwithstanding the prohibitions of paragraphs (a) and (b) of this section, after a witness called by the General Counsel or by the Charging Party has testified in a hearing upon a complaint under Section 10(c) of the Act, the Administrative Law Judge must, upon motion of the Respondent, order the production of any statement, as defined paragraph (g) of this section, of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified.

(1) If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Administrative Law Judge must order the statement to be delivered directly to the respondent for examination and use for the purpose of cross-examination.

(2) If the General Counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the Administrative Law Judge will order the General Counsel to deliver the statement for the inspection of the Administrative Law Judge in camera. Upon delivery,

the Administrative Law Judge will excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that the Administrative Law Judge has discretion to decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With the material excised, the Administrative Law Judge will then direct delivery of the statement to the Respondent for use on cross-examination. If any portion of the statement is withheld and the Respondent objects to the withholding, the General Counsel will preserve the entire text of the statement, and, if the Respondent files exceptions with the Board based upon such withholding, make the entire text available to the Board for the purpose of determining the correctness of the ruling of the Administrative Law Judge. If the General Counsel elects not to comply with an order of the Administrative Law Judge directing delivery to the Respondent of any statement, or portion thereof as the Administrative Law Judge may direct, the Administrative Law Judge will strike from the record the testimony of the witness.

(f) Production of statement in postelection hearings. The provisions of paragraph (e) of this section will also apply after any witness has testified in any postelection hearing pursuant to §102.69(d) and any party has moved for the production of any statement, as defined in paragraph (g) of this section, of the witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the Administrative Law Judge under paragraph (e) of this section will be exercised by the Hearing Officer presiding.

(g) Definition of statement. The term statement as used in this section means:

(1) A written statement made by the witness and signed or otherwise adopted or approved by the witness; or

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of the oral statement.

§102.119 Privacy Act Regulations: notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

(a)(1) An individual will be informed whether a system of records maintained by the Agency contains a record pertaining to such individual. An inquiry may be made in writing or in person during normal business hours to the official of the Agency designated for that purpose and at the address set forth in a notice of a system of records published by this Agency, in a Notice of Systems of Government-wide Personnel Records published by the Office of Personnel Management, or in a Notice of Government-wide Systems of Records published by the Department of Labor. Copies of such notices, and assistance in preparing an inquiry, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. The inquiry may contain sufficient information, as defined in the notice, to identify the record.

(2) Reasonable verification of the identity of the inquirer, as described in paragraph (e) of this section, will be required to assure that information is disclosed to the proper person. The Agency will acknowledge the inquiry in writing within 10 days

(excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment will supply the information requested. If, for good cause shown, the Agency cannot supply the information within 10 days, the inquirer will within that time period be notified in writing of the reasons therefor and when it is anticipated the information will be supplied. An acknowledgment will not be provided when the information is supplied within the 10-day period. If the Agency refuses to inform an individual whether a system of records contains a record pertaining to an individual, the inquirer will be notified in writing of that determination and the reasons therefor, and of the right to obtain review of that determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (a)(2) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(b)(1) An individual will be permitted access to records pertaining to such individual contained in any system of records described in the notice of system of records published by the Agency, or access to the accounting of disclosures from such records. The request for access must be made in writing or in person during normal business hours to the person designated for that purpose and at the address set forth in the published notice of system of records. Copies of such notices, and assistance in preparing a request for access, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. Reasonable verification of the identity of the requester, as described in paragraph (e) of this section, will be required to assure that records are disclosed to the proper person. A request for access to records or the accounting of disclosures from such records will be acknowledged in writing by the Agency within 10 days of receipt

(excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment will inform the requester whether access will be granted and, if so, the time and location at which the records or accounting will be made available. If access to the record of accounting is to be granted, the record or accounting will normally be provided within 30 days (excluding Saturdays, Sundays, and legal public holidays) of the request, unless for good cause shown the Agency is unable to do so, in which case the individual will be informed in writing within that 30-day period of the reasons therefor and when it is anticipated that access will be granted. An acknowledgment of a request will not be provided if the record is made available within the 10-day period.

(2) If an individual's request for access to a record or an accounting of disclosure from such a record under the provisions of this paragraph (b) is denied, the notice informing the individual of the denial will set forth the reasons therefor and advise the individual of the right to obtain a review of that determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (b)(2) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(c) An individual granted access to records pertaining to such individual contained in a system of records may review all such records. For that purpose, the individual may be accompanied by a person of the individual's choosing, or the record may be released to the individual's representative who has written consent of the individual, as described in paragraph (e) of this section. A first copy of any such record or information will ordinarily be provided without charge to the individual or representative in a form

comprehensible to the individual. Fees for any other copies of requested records will be assessed at the rate of 12 cents for each sheet of duplication.

(d) An individual may request amendment of a record pertaining to such individual in a system of records maintained by the Agency. A request for amendment of a record must be in writing and submitted during normal business hours to the person designated for that purpose and at the address set forth in the published notice for the system of records containing the record of which amendment is sought. Copies of such notices, and assistance in preparing a request for amendment, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. The requester must provide verification of identity as described in paragraph (e) of this section, and the request must set forth the specific amendment requested and the reason for the requested amendment. The Agency will acknowledge in writing receipt of the request within 10 days of receipt (excluding Saturdays, Sundays, and legal public holidays) and, whenever practicable, the acknowledgement will advise the individual of the determination of the request. If the review of the request for amendment cannot be completed and a determination made within 10 days, the review will be completed as soon as possible, normally within 30 days (Saturdays, Sundays, and legal public holidays excluded) of receipt of the request unless unusual circumstances preclude completing the review within that time, in which event the requester will be notified in writing within that 30-day period of the reasons for the delay and when the determination of the request may be expected. If the determination is to amend the record, the requester will be so notified in writing and the record will be amended in accordance with that determination. If any disclosures accountable under the provisions of 5 U.S.C. 552a(c) have been made, all

previous recipients of the record which was amended must be advised of the amendment and its substance. If it is determined that the request may not be granted, the requester will be notified in writing of that determination and of the reasons therefor, and advised of the right to obtain review of the adverse determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (d) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(e) Verification of the identification of individuals required under paragraphs (a), (b), (c), and (d) of this section to assure that records are disclosed to the proper person will be required by the Agency to an extent consistent with the nature, location, and sensitivity of the records being disclosed. Disclosure of a record to an individual will normally be made upon the presentation of acceptable identification. Disclosure of records by mail may be made on the basis of the identifying information set forth in the request. Depending on the nature, location, and sensitivity of the requested record, a signed notarized statement verifying identity may be required by the Agency. Proof of authorization as representative to have access to a record of an individual must be in writing, and a signed notarized statement of such authorization may be required by the Agency if the record requested is of a sensitive nature.

(f)(1) Review may be obtained with respect to:

(i) A refusal, under paragraph (a) or (g) of this section, to inform an individual if a system of records contains a record concerning that individual;

(ii) A refusal, under paragraph (b) or (g) of this section, to grant access to a record or an accounting of disclosure from such a record; or

(iii) A refusal, under paragraph (d) of this section, to amend a record.

(iv) The request for review may be made to the Chairman of the Board if the system of records is maintained in the office of a Member of the Board, the Office of the Executive Secretary, the Office of the Solicitor, the Office of Congressional and Public Affairs, or the Division of Administrative Law Judges. Consistent with the provisions of Section 3(d) of the Act, and the delegation of authority from the Board to the General Counsel, the request may be made to the General Counsel if the system of records is maintained by an office of the Agency other than those enumerated above. Either the Chairman of the Board or the General Counsel may designate in writing another officer of the Agency to review the refusal of the request. Such review will be completed within 30 days (excluding Saturdays, Sundays, and legal public holidays) from the receipt of the request for review unless the Chairman of the Board or the General Counsel, as the case may be, for good cause shown, extends such 30-day period.

(2) If, upon review of a refusal under paragraph (a) or (g) of this section, the reviewing officer determines that the individual may be informed of whether a system of records contains a record pertaining to that individual, such information will be promptly provided. If the reviewing officer determines that the information was properly denied, the individual will be so informed in writing with a brief statement of the reasons therefor.

(3) If, upon review of a refusal under paragraph (b) or (g) of this section, the reviewing officer determines that access to a record or to an accounting of disclosures may be granted, the requester will be so notified and the record or accounting will be promptly made available to the requester. If the reviewing officer determines that the

request for access was properly denied, the individual will be so informed in writing with a brief statement of the reasons therefor, and of the right to judicial review of that determination under the provisions of 5 U.S.C. 552a(g)(1)(B).

(4) If, upon review of a refusal under paragraph (i) of this section, the reviewing official grants a request to amend, the requester will be so notified, the record will be amended in accordance with the determination, and, if any disclosures accountable under the provisions of 5 U.S.C. 552a(c) have been made, all previous recipients of the record which was amended will be advised of the amendment and its substance. If the reviewing officer determines that the denial of a request for amendment may be sustained, the Agency will advise the requester of the determination and the reasons therefor, and that the individual may file with the Agency a concise statement of the reason for disagreeing with the determination, and may seek judicial review of the Agency's denial of the request to amend the record. In the event a statement of disagreement is filed, that statement:

(i) Will be made available to anyone to whom the record is subsequently disclosed together with, at the discretion of the Agency, a brief statement summarizing the Agency's reasons for declining to amend the record; and

(ii) Will be supplied, together with any Agency statements, to any prior recipients of the disputed record to the extent that an accounting of disclosure was made.

(g) To the extent that portions of systems of records described in notices of Government-wide systems of records published by the Office of Personnel Management are identified by those notices as being subject to the management of an officer of this Agency, or an officer of the Agency is designated as the official to contact for information, access, or

contents of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment will be in accordance with the provisions of 5 CFR 297.101 through 297.501, as promulgated by the Office of Personnel Management. To the extent that portions of systems of records described in notices of Government-wide systems of records published by the Department of Labor are identified by those notices as being subject to the management of an officer of the Agency, or an officer of the Agency is designated as the official to contact for information, access, or contents of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment will be in accordance with the provisions of this section. Review of a refusal to inform an individual whether such a system of records contains a record pertaining to that individual and review of a refusal to grant an individual's request for access to a record in such a system may be obtained in accordance with the provisions of paragraph (f) of this section.

(h) Pursuant to 5 U.S.C. 552a(j)(2), the system of records maintained by the Office of the Inspector General of the National Labor Relations Board that contains Investigative Files will be exempted from the provisions of 5 U.S.C. 552a, except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), from 29 CFR 102.117(c) and (d), and from 29 CFR 102.119(a), (b), (c), (d), (e), and (f), insofar as the system contains investigatory material compiled for criminal law enforcement purposes.

(i) Pursuant to 5 U.S.C. 552a(k)(2), the system of records maintained by the Office of the Inspector General of the National Labor Relations Board that contains the Investigative Files must be exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and

(f), from 29 CFR 102.117(c) and (d), and from 29 CFR 102.119(a), (b), (c), (d), (e), and (f), insofar as the system contains investigatory material compiled for law enforcement purposes not within the scope of the exemption at 29 CFR 102.119(h).

(j) Privacy Act exemptions contained in paragraphs (h) and (i) of this section are justified for the following reasons:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at that individual's request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel, and their families and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(2) 5 U.S.C. 552a(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act. Since this system of records is being exempted from subsection (d) of the Act, concerning access to records, this section is inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act.

(3) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to the individual, to request amendment to such records, to request a

review of an agency decision not to amend such records, and to contest the information contained in such records. Granting access to records in this system of records could inform the subject of an investigation of an actual or potential criminal violation, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to the individual's activities, or of the identity of confidential sources, witnesses, and law enforcement personnel and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel, and their families, lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony, and disclose investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(4) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the

investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within scope of the investigator's jurisdiction. In the interest of effective law enforcement, OIG investigators may retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(5) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. The application of this provision could impair investigations and law enforcement by alerting the subject of an investigation, thereby enabling the subject to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Moreover, in certain circumstances, the subject of an investigation cannot be required to provide information to investigators and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

(6) 5 U.S.C. 552a(e)(3) requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority under which the information is sought and whether disclosure is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and of the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision

could provide the subject of an investigation with substantial information about the nature of that investigation that could interfere with the investigation. Moreover, providing such a notice to the subject of an investigation could seriously impede or compromise an undercover investigation by revealing its existence and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) 5 U.S.C. 552a(e)(4) (G) and (H) require an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at the individual's request, if the system of records contains a record pertaining to the individual, how to gain access to such a record, and how to contest its content. Since this system of records is being exempted from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (f) and (d) of the Act. Although the system would be exempt from these requirements, OIG has published information concerning its notification, access, and contest procedures because, under certain circumstances, OIG could decide it is appropriate for an individual to have access to all or a portion of the individual's records in this system of records.

(8) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a Federal Register notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, OIG has published such a notice in broad generic terms.

(9) 5 U.S.C. 552a(e)(5) requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about the individual. Since the Act defines maintain to include the collection of information, complying with this provision could prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In collecting information for criminal law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Facts are first gathered and then placed into a logical order to prove or disprove objectively the criminal behavior of an individual. Material which seems unrelated, irrelevant, or incomplete when collected can take on added meaning or significance as the investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, thereby impeding effective law enforcement.

(10) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(11) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules that establish procedures whereby an individual can be notified in response to the individual's request if any system of records named by the individual contains a record pertaining to the individual. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation were able to use such rules

to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject and others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since this system would be exempt from subsection (d) of the Act, concerning access to records, the requirements of subsection (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act. Although this system would be exempt from the requirements of subsection (f) of the Act, OIG has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of the individual's records in this system of records.

(12) 5 U.S.C. 552a(g) provides for civil remedies if an agency fails to comply with the requirements concerning access to records under subsections (d)(1) and (3) of the Act; maintenance of records under subsection (e)(5) of the Act; and any other provision of the Act, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. Since this system of records would be exempt from subsections (c) (3) and (4), (d), (e)(1), (2), and (3) and (4)(G) through (I), (e)(5), and (8), and (f) of the Act, the provisions of subsection (g) of the Act would be inapplicable to the extent that this system of records will be exempted from those subsections of the Act.

(k) Pursuant to 5 U.S.C. 552a(k)(2), the system of records maintained by the NLRB containing Agency Disciplinary Case Files (Nonemployees) are exempt from the provisions of 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) insofar as

the system contains investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2).

(l) The Privacy Act exemption set forth in paragraph (k) of this section is claimed on the ground that the requirements of subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of the Privacy Act, if applied to Agency Disciplinary Case Files, would seriously impair the ability of the NLRB to conduct investigations of alleged or suspected violations of the NLRB's misconduct rules, as set forth in paragraphs (j)(1), (3), (4), (7), (8), and (11) of this section.

(m) Pursuant to 5 U.S.C. 552a(k)(2), investigatory material compiled for law enforcement purposes that is contained in the Next Generation Case Management System (NxGen) (NLRB-33), are exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). This information was formerly contained within the following legacy systems, which remain accessible and which also are exempt pursuant to 5 U.S.C. 552a(k)(2), as follows:

(1) The following three legacy systems of records are exempt in their entirety from provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f), because the systems contain investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2): Case Activity Tracking System (CATS) and Associated Regional Office Files (NLRB-25), Regional Advice and Injunction Litigation System (RAILS) and Associated Headquarters Files (NLRB-28), and Appeals Case Tracking System (ACTS) and Associated Headquarters Files (NLRB-30).

(2) Pursuant to 5 U.S.C. 552a(k)(2), limited categories of information from the following four systems of records are exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f), insofar as the systems contain investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2):

(i) The legacy Judicial Case Management Systems-Pending Case List (JCMS-PCL) and Associated Headquarters Files (NLRB-21)—information relating to requests to file injunctions under 29 U.S.C. 160(j), requests to initiate federal court contempt proceedings, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes;

(ii) The legacy Solicitor's System (SOL) and Associated Headquarters Files (NLRB-23)—information relating to requests to file injunctions under 29 U.S.C. 160(j), requests to initiate federal court contempt proceedings, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes;

(iii) The legacy Special Litigation Case Tracking System (SPLIT) and Associated Headquarters Files (NLRB-27)—information relating to investigative subpoena enforcement cases, injunction and mandamus actions regarding Agency cases under investigation, bankruptcy case information in matters under investigation, Freedom of Information Act cases involving investigatory records, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes; and

(iv) The Freedom of Information Act Tracking System (FTS) and Associated Agency Files (NLRB-32)—information requested under the Freedom of Information Act, 5 U.S.C. 552, that relates to the Agency's investigation of unfair labor practice and representation cases or other proceedings described in paragraphs (m)(1) and (2) of this section.

(n) The reasons for exemption under 5 U.S.C. 552a(k)(2) are as follows:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at such individual's request. These accountings must state the date, nature, and purpose of each disclosure of a record, and the name and address of the recipient. Providing such an accounting of investigatory information to a party in an unfair labor practice or representation matter under investigation could inform that individual of the precise scope of an Agency investigation, or the existence or scope of another law enforcement investigation. Accordingly, this Privacy Act requirement could seriously impede or compromise either the Agency's investigation, or another law enforcement investigation, by causing the improper influencing of witnesses, retaliation against witnesses, destruction of evidence, or fabrication of testimony.

(2) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to such individual, to request amendment to such records, to request review of an agency decision not to amend such records, and, where the Agency refuses to amend records, to submit a statement of disagreement to be included with the records. Such disclosure of investigatory information could seriously impede or compromise the Agency's investigation by revealing the identity of confidential sources or confidential

business information, or causing the improper influencing of witnesses, retaliation against witnesses, destruction of evidence, fabrication of testimony, or unwarranted invasion of the privacy of others. Amendment of the records could interfere with ongoing law enforcement proceedings and impose an undue administrative burden by requiring investigations to be continuously reinvestigated.

(3) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence.

(4) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a Federal Register notice concerning its procedures for notifying an individual, at the individual's request, if the system of records contains a record pertaining to the individual, for gaining access to such a record, and for contesting its content. Because certain information from these systems of records is exempt from subsection (d) of the Act concerning access to records, and consequently, from subsection (f) of the Act concerning Agency rules governing access, these requirements are inapplicable to that information.

(5) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a Federal Register notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of sources of information, to protect against the disclosure of investigative techniques and procedures, to avoid threats or reprisals against informers by subjects of investigations, and to protect against

informers refusing to give full information to investigators for fear of having their identities as sources revealed.

(6) 5 U.S.C. 552a(f) requires an agency to promulgate rules for notifying individuals of Privacy Act rights granted by subsection (d) of the Act concerning access and amendment of records. Because certain information from these systems is exempt from subsection (d) of the Act, the requirements of subsection (f) of the Act are inapplicable to that information.

Subpart L—Post-employment Restrictions on Activities by Former Officers and Employees

Sec.

102.120 Post-employment restrictions on activities by former officers and employees.

§102.120 Post-employment restrictions on activities by former officers and employees.

Former officers and employees of the Agency who were attached to any of its Regional Offices or the Washington staff are subject to the applicable post-employment restrictions imposed by 18 U.S.C. 207. Guidance concerning those restrictions may be obtained from the Designated Agency Ethics Officer and any applicable regulations issued by the Office of Government Ethics.

Subpart M—Construction of Rules

Sec.

102.121 Rules to be liberally construed.

102.122 and 102.123 [Reserved]

§102.121 Rules to be liberally construed.

The Rules and Regulations in this part will be liberally construed to effectuate the purposes and provisions of the Act.

§§102.122 and 102.123 [Reserved]

Subpart N [Removed and Reserved]

18. Remove and reserve subpart N.

19. Revise subpart O to read as follows:

Subpart O—Amendments

Sec.

102.124 Petitions for issuance, amendment, or repeal of rules.

102.125 Action on petition.

§102.124 Petitions for issuance, amendment, or repeal of rules.

Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original of such petition must be filed with the Board and must state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

§102.125 Action on petition.

Upon the filing of such petition, the Board will consider the same and may either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the petition be denied in whole or in part, prompt notice will be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

Subpart P—*Ex Parte* Communications

20. Revise §102.126 to read as follows:

§102.126 Unauthorized communications.

(a) No interested person outside this Agency may, in an on-the-record proceeding of the types defined in §102.128, make or knowingly cause to be made any prohibited ex parte communication to Board agents of the categories designated in that Section relevant to the merits of the proceeding.

(b) No Board agent of the categories defined in §102.128, participating in a particular proceeding as defined in that section, may:

(i) Request any prohibited ex parte communications; or

(ii) Make or knowingly cause to be made any prohibited ex parte communications about the proceeding to any interested person outside this Agency relevant to the merits of the proceeding.

21. Revise §102.127(a) to read as follows:

§102.127 Definitions.

* * * * *

(a) The term person outside this Agency, to whom the prohibitions apply includes any individual outside this Agency, partnership, corporation, association, or other entity, or an agent thereof, and the General Counsel or the General Counsel's representative when prosecuting an unfair labor practice proceeding before the Board pursuant to Section 10(b) of the Act.

* * * * *

22. Revise §§102.128 through 102. to read as follows:

Sec.

102.128 Types of on-the-record proceedings; categories of Board agents; duration of prohibition.

102.129 Communications prohibited.

102.130 Communications not prohibited.

102.131 Solicitation of prohibited communications.

102.132 Reporting of prohibited communications; penalties.

102.133 Penalties and enforcement.

§102.128 Types of on-the-record proceedings; categories of Board agents; duration of prohibition.

Unless otherwise provided by specific order of the Board entered in the proceeding, the prohibition of §102.126 will be applicable in the following types of on-the-record proceedings to unauthorized ex parte communications made to the designated categories of Board agents who participate in the decision, from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices:

(a) In a pre-election proceeding pursuant to Section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to Section 9(b) of the Act, in which a formal hearing is held, communications to the Regional Director and the Director's staff who review the record and prepare a draft of the decision, and Board Members and their staff, from the time the hearing is opened.

(b) In a postelection proceeding pursuant to Section 9(c)(1) or 9(e) of the Act, in which a formal hearing is held, communications to the Hearing Officer, the Regional Director and

the Director's staff who review the record and prepare a draft of the report or decision, and Board Members and their staff, from the time the hearing is opened.

(c) In a postelection proceeding pursuant to Section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to Section 9(b) of the Act, in which no formal hearing is held, communications to Board Members and their staff, from the time the Regional Director's report or decision is issued.

(d) In a proceeding pursuant to Section 10(k) of the Act, communications to Board Members and their staff, from the time the hearing is opened.

(e) In an unfair labor practice proceeding pursuant to Section 10(b) of the Act, communications to the Administrative Law Judge assigned to hear the case or to make rulings upon any motions or issues therein and Board Members and their staff, from the time the complaint and/or Notice of Hearing is issued, or the time the communicator has knowledge that a complaint or Notice of Hearing will be issued, whichever occurs first.

(f) In any other proceeding to which the Board by specific order makes the prohibition applicable, to the categories of personnel and from the stage of the proceeding specified in the order.

§102.129 Communications prohibited.

Except as provided in §102.130, ex parte communications prohibited by §102.126 include:

(a) Such communications, when written, if copies are not contemporaneously served by the communicator on all parties to the proceeding in accordance with the provisions of §102.5(g).

(b) Such communications, when oral, unless advance notice is given by the communicator to all parties in the proceeding and adequate opportunity afforded to them to be present.

§102.130 Communications not prohibited.

Ex parte communications prohibited by §102.126 do not include oral or written communications or requests:

(a) Which relate solely to matters which the Hearing Officer, Regional Director, Administrative Law Judge, or Board Member is authorized by law or Board Rules to entertain or dispose of on an ex parte basis.

(b) For information solely with respect to the status of a proceeding.

(c) Which all the parties to the proceeding agree, or which the responsible official formally rules, may be made on an ex parte basis.

(d) Proposing settlement or an agreement for disposition of any or all issues in the proceeding.

(e) Which concern matters of general significance to the field of labor-management relations or administrative practice and which are not specifically related to pending on-the-record proceedings.

(f) From the General Counsel to the Board when the General Counsel is acting as counsel for the Board.

§102.131 Solicitation of prohibited communications.

No person may knowingly and willfully solicit the making of an unauthorized ex parte communication by any other person.

§102.132 Reporting of prohibited communications; penalties.

(a) Any Board agent of the categories defined in §102.128 to whom a prohibited oral ex parte communication is attempted to be made shall refuse to listen to the communication, inform the communicator of this rule, and advise the communicator that anything may be said in writing with copies to all parties. Any Board agent who receives, or who makes or knowingly causes to be made, an unauthorized ex parte communication will place or cause to be placed on the public record of the proceeding:

(1) The communication, if it was written;

(2) A memorandum stating the substance of the communication, if it was oral;

(3) All written responses to the prohibited communication; and

(4) Memoranda stating the substance of all oral responses to the prohibited communication.

(b) The Executive Secretary, if the proceeding is then pending before the Board, the Administrative Law Judge, if the proceeding is then pending before any such judge, or the Regional Director, if the proceeding is then pending before a Hearing Officer or the Regional Director, will serve copies of all such materials placed on the public record of the proceeding on all other parties to the proceeding and on the attorneys of record for the parties. Within 14 days after service of such copies, any party may file with the Executive Secretary, Administrative Law Judge, or Regional Director serving the communication, and serve on all other parties, a statement setting forth facts or contentions to rebut those contained in the prohibited communication. All such responses will be placed in the public record of the proceeding, and provision may be made for any further action, including reopening of the record which may be required under the

circumstances. No action taken pursuant to this provision will constitute a waiver of the power of the Board to impose an appropriate penalty under §102.133.

§102.133 Penalties and enforcement.

(a) Where the nature and circumstances of a prohibited communication made by or caused to be made by a party to the proceeding are such that the interests of justice and statutory policy may require remedial action, the Board, the Administrative Law Judge, or the Regional Director, as the case may be, may issue to the party making the communication a Notice to Show Cause, returnable before the Board within a stated period not less than 7 days from the date of issuance, why the Board may not determine that the interests of justice and statutory policy require that the claim or interest in the proceeding of a party who knowingly makes a prohibited communication, or knowingly causes a prohibited communication to be made may be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) Upon notice and hearing, the Board may censure, suspend, or revoke the privilege of practice before the Agency of any person who knowingly and willfully makes or solicits the making of a prohibited ex parte communication. However, before the Board institutes formal proceedings under this paragraph (b), it will first advise the person or persons concerned in writing that it proposes to take such action and that they may show cause, within a period to be stated in such written advice, but not less than 7 days from the date thereof, why it may not take such action.

(c) The Board may censure, or, to the extent permitted by law, suspend, dismiss, or institute proceedings for the dismissal of, any Board agent who knowingly and willfully violates the prohibitions and requirements of this rule.

§102.134 [Added and Reserved]

23. Add reserved §102.134 to subpart P**.**

24. Revise subparts Q through S to read as follows:

Subpart Q—Procedure Governing Matters Affecting Employment-Management Agreements Under the Postal Reorganization Act

Sec.

102.135 Postal Reorganization Act.

§102.135 Postal Reorganization Act.

(a) Employment-management agreements. All matters within the jurisdiction of the National Labor Relations Board pursuant to the Postal Reorganization Act (chapter 12 of title 39, U.S. Code, as revised) are governed by the provisions of subparts A, B, C, D, F, G, H, J, K, L, M, O, and P of this part, insofar as applicable.

(b) Inconsistencies. To the extent that any provision of this subpart is inconsistent with any provision of title 39, United States Code, the provision of title 39 governs.

(c) Exceptions. For the purposes of this subpart, references in the subparts cited in paragraphs (a) and (b) of this section to:

(1) Employer is deemed to include the Postal Service;

(2) Act will in the appropriate context mean Postal Reorganization Act;

(3) Section 9(c) of the Act and cited paragraphs will mean 39 U.S.C. 1203(c) and 1204; and

(4) Section 9(b) of the Act will mean 39 U.S.C. 1202.

Subpart R—Advisory Committees

Sec.

102.136 Establishment and use of advisory committees.

§102.136 Establishment and use of advisory committees.

Advisory committees may from time to time be established or used by the Agency in the interest of obtaining advice or recommendations on issues of concern to the Agency. The establishment, use, and functioning of such committees will be in accordance with the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, applicable Rules and Regulations.

Subpart S—Open Meetings

Sec.

102.137 Public observation of Board meetings.

102.138 Definition of meeting.

102.139 Closing of meetings; reasons.

102.140 Action necessary to close meeting; record of votes.

102.141 Notice of meetings; public announcement and publication.

102.142 Transcripts, recordings, or minutes of closed meetings; public availability; retention.

§102.137 Public observation of Board meetings.

Every portion of every meeting of the Board will be open to public observation, except as provided in §102.139, and Board Members will not jointly conduct or dispose of Agency business other than in accordance with the provisions of this subpart.

§102.138 Definition of meeting.

For purposes of this subpart, meeting means the deliberations of at least three Members of the full Board, or the deliberations of at least two Members of any group of three

Board Members to whom the Board has delegated powers which it may itself exercise, where such deliberations determine or result in the joint conduct or disposition of official Agency business, but does not include deliberations to determine whether a meeting may be closed to public observation in accordance with the provisions of this subpart.

§102.139 Closing of meetings; reasons.

(a) Except where the Board determines that the public interest requires otherwise, meetings, or portions thereof, will not be open to public observation where the deliberations concern the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition by the Board of particular representation or unfair labor practice proceedings under Section 8, 9, or 10 of the Act, or any court proceedings collateral or ancillary thereto.

(b) Meetings, or portions thereof, may also be closed by the Board, except where it determines that the public interest requires otherwise, when the deliberations concern matters or information falling within the reasons for closing meetings specified in 5 U.S.C. 552b(c)(1) (secret matters concerning national defense or foreign policy); (c)(2) (internal personnel rules and practices); (c)(3) (matters specifically exempted from disclosure by statute); (c)(4) (privileged or confidential trade secrets and commercial or financial information); (c)(5) (matters of alleged criminal conduct or formal censure); (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy); (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes); or (c)(9)(B) (disclosure would significantly frustrate implementation of a proposed Agency action).

§102.140 Action necessary to close meeting; record of votes.

A meeting will be closed to public observation under §102.139, only when a majority of the Board Members who will participate in the meeting vote to take such action.

(a) When the meeting deliberations concern matters specified in §102.139(a), the Board Members will vote at the beginning of the meeting, or portion of the meeting, on whether to close such meeting, or portion of the meeting, to public observation, and on whether the public interest requires that a meeting which may properly be closed may nevertheless be open to public observation. A record of such vote, reflecting the vote of each Board Member, will be kept and made available to the public at the earliest practicable time.

(b) When the meeting deliberations concern matters specified in §102.139(b), the Board will vote on whether to close such meeting, or portion of the meeting, to public observation, and on whether there is a public interest which requires that a meeting which may properly be closed may nevertheless be open to public observation. The vote will be taken at a time sufficient to permit inclusion of information concerning the open or closed status of the meeting in the public announcement of the vote. A single vote may be taken with respect to a series of meetings at which the deliberations will concern the same particular matters where such subsequent meetings are scheduled to be held within 30 days after the initial meeting. A record of such vote, reflecting the vote of each Board Member, will be kept and made available to the public within one day after the vote is taken.

(c) Whenever any person whose interests may be directly affected by deliberations during a meeting, or a portion of a meeting, requests that the Board close the meeting, or a portion of the meeting, to public observation for any of the reasons specified in 5 U.S.C.

552b(c)(5) (matters of alleged criminal conduct or formal censure), (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy), or (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes), the Board Members participating in the meeting, upon request of any one of its Members, will vote on whether to close such meeting, or a portion of the meeting, for that reason. A record of such vote, reflecting the vote of each Board Member participating in the meeting will be kept and made available to the public within 1 day after the vote is taken.

(d) After public announcement of a meeting as provided in §102.141, a meeting, or portion of a meeting, announced as closed may be opened, or a meeting, or portion of a meeting, announced as open may be closed, only if a majority of the Board Members who will participate in the meeting determine by a recorded vote that Board business so requires and that an earlier announcement of the change was not possible. The change made and the vote of each Board Member on the change will be announced publicly at the earliest practicable time.

(e) Before a meeting may be closed pursuant to §102.139, the Solicitor of the Board will certify that in the Solicitor's opinion the meeting may properly be closed to public observation. The certification will set forth each applicable exemptive provision for such closing. Such certification will be retained by the Agency and made publicly available as soon as practicable.

§102.141 Notice of meetings; public announcement and publication.

(a) A public announcement setting forth the time, place, and subject matter of meetings or portions of meetings closed to public observation pursuant to the provisions of §102.139(a) will be made at the earliest practicable time.

(b) Except for meetings closed to public observation pursuant to the provisions of §102.139(a), the Agency will publicly announce each meeting to be held at least 7 days before the scheduled date of the meeting. The announcement will specify the time, place, and subject matter of the meeting, whether it is to be open to public observation or closed, and the name, address, and phone number of an Agency official designated to respond to requests for information about the meeting. The 7-day period for advance notice may be shortened only upon a determination by a majority of the Board Members who will participate in the meeting that Agency business requires that such meeting be called at an earlier date, in which event the public announcements will be made at the earliest practicable time. A record of the vote to schedule a meeting at an earlier date will be kept and made available to the public.

(c) Within 1 day after the vote to close a meeting, or any portion of a meeting, pursuant to the provisions of §102.139(b), the Agency will make publicly available a full written explanation of its action closing the meeting, or portion of a meeting, together with a list of all persons expected to attend the meeting and their affiliation.

(d) If after public announcement required by paragraph (b) of this section has been made, the time and place of the meeting are changed, a public announcement will be made at the earliest practicable time. The subject matter of the meeting may be changed after the public announcement only if a majority of the Members of the Board who will participate in the meeting determine that Agency business so requires and that no earlier

announcement of the change was possible. When such a change in subject matter is approved a public announcement of the change will be made at the earliest practicable time. A record of the vote to change the subject matter of the meeting will be kept and made available to the public.

(e) All announcements or changes issued pursuant to the provisions of paragraphs (b) and (d) of this section, or pursuant to provisions of §102.140(d), will be submitted for publication in the Federal Register immediately following their release to the public.

(f) Announcements of meetings made pursuant to the provisions of this section shall be made publicly available by the executive secretary.

§102.142 Transcripts, recordings, or minutes of closed meetings; public availability; retention.

(a) For every meeting or portion of a meeting closed under the provisions of §102.139, the presiding officer will prepare a statement setting forth the time and place of the meeting and the persons present, which statement will be retained by the Agency. For each such meeting or portion of a meeting there will also be maintained a complete transcript or electronic recording of the proceedings, except that for meetings closed pursuant to §102.139(a) the Board may, in lieu of a transcript or electronic recording, maintain a set of minutes fully and accurately summarizing any action taken, the reasons for taking the action, and views on the action taken, documents considered, and the Board Members' vote on each roll call vote.

(b) The Agency will promptly make available to the public copies of transcripts, recordings, or minutes maintained as provided in accordance with paragraph (a) of this section, except to the extent the items contain information which the Agency determines

may be withheld pursuant to the provisions of 5 U.S.C. 552(c). Copies of transcripts or minutes, or transcriptions of electronic recordings including the identification of speakers, will, to the extent determined to be publicly available, be furnished to any person, subject to the payment of duplication costs in accordance with the schedule of fees set forth in §102.117(c)(2)(iv), and the actual cost of transcription.

(c) The Agency will maintain a complete verbatim copy of the transcript, a complete electronic recording, or a complete set of the minutes for each meeting or portion of a meeting closed to the public, for a period of at least one year after the close of the Agency proceeding of which the meeting was a part, but in no event for a period of less than 2 years after such meeting.

Subpart T—Awards of Fees and Other Expenses

25. Revise §102.143(a) through (d) and (g) to read as follows:

§102.143 <u>Adversary adjudication</u> defined; entitlement to award; eligibility for award.

(a) The term <u>adversary adjudication</u>, as used in this subpart, means unfair labor practice proceedings pending before the Board on a complaint and backpay proceedings under §§102.52 through 102.59 pending before the Board on a Notice of Hearing at any time after October 1, 1984.

(b) A Respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding, and who otherwise meets the eligibility requirements of this section, is eligible to apply for an award of fees and other expenses allowable under the provisions of §102.145.

(c) Applicants eligible to receive an award are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) A sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in Section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

(d) For the purpose of eligibility, the net worth and number of employees of an applicant will be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the Notice of Hearing in a backpay proceeding.

* * * * *

(g) The net worth and number of employees of the applicant and all of its affiliates will be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships

of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

* * * * *

26. Revise §102.145(b) and (c) to read as follows:

§102.145 Allowable fees and expenses.

* * * * *

(b) No award for the attorney or agent fees under these Rules may exceed $75 per hour. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the following matters will be considered:

(1) If the attorney, agent, or expert witness is in practice, that person's customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant; and

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudicative proceeding.

* * * * *

27. Revise §102.146 to read as follows:

§102.146 Rulemaking on maximum rates for attorney or agent fees.

Any person may file with the Board a petition under §102.124 for rulemaking to increase the maximum rate for attorney or agent fees. The petition should specify the rate the petitioner believes may be established and explain fully why the higher rate is warranted by an increase in the cost of living or a special factor (such as the limited availability of qualified attorneys or agents for the proceedings involved).

28. Revise §102.147(a) through (c) and (e) through (h) to read as follows:

§102.147 Contents of application; net worth exhibit; documentation of fees and expenses.

(a) An application for an award of fees and expenses under the Act must identify the applicant and the adversary adjudication for which an award is sought. The application must state the particulars in which the applicant has prevailed and identify the positions of the General Counsel in that proceeding that the applicant alleges were not substantially justified. Unless the applicant is an individual, the application must also state the number, category, and work location of employees of the applicant and its affiliates and describe briefly the type and purpose of its organization or business.

(b) The application must include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such Section; or

(2) It states that it is a cooperative association as defined in Section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application must state the amount of fees and expenses for which an award is sought.

*****

(e) The application must be signed by the applicant or an authorized officer or attorney of the applicant. It must also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true.

(f) Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in §102.143(g)) when the adversary adjudicative proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file such additional information as may be required to determine its eligibility for an award.

(g)(1) Unless otherwise directed by the Administrative Law Judge, the net worth exhibit will be included in the public record of the fee application proceeding. An applicant that objects to public disclosure of information in any portion of the exhibit may submit that portion of the exhibit in a sealed envelope labeled *Confidential Financial Information*, accompanied by a motion to withhold the information from public disclosure. The motion must describe the information sought to be withheld and explain, in detail, why public disclosure of the information would adversely affect the applicant and why disclosure is

not required in the public interest. The exhibit must be served on the General Counsel but need not be served on any other party to the proceeding. If the Administrative Law Judge finds that the information may not be withheld from disclosure, it will be placed in the public record of the proceeding.

(2) If the Administrative Law Judge grants the motion to withhold from public disclosure, the exhibit will remain sealed, except to the extent that its contents are required to be disclosed at a hearing. The granting of the motion to withhold from public disclosure will not determine the availability of the document under the Freedom of Information Act in response to a request made under the provisions of §102.117. Notwithstanding that the exhibit may be withheld from public disclosure, the General Counsel may disclose information from the exhibit to others if required in the course of an investigation to verify the claim of eligibility.

(h) The application must be accompanied by full documentation of the fees and expenses for which an award is sought. A separate itemized statement must be submitted for each professional firm or individual whose services are covered by the application, showing the dates and the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

29. Revise §§102.148 through 102.155 to read as follows:

Sec.

102.148 When an application may be filed; place of filing; service; referral to Administrative Law Judge; stay of proceeding.

102.149 Filing of documents; service of documents; motions for extension of time.

102.150 Answer to application; reply to answer; comments by other parties.

102.151 Settlement.

102.152 Further proceedings.

102.153 Administrative Law Judge's decision; contents; service; transfer of case to the Board; contents of record in case.

102.154 Exceptions to Administrative Law Judge's decision; briefs; action of the Board.

102.155 Payment of award.

§102.148 When an application may be filed; place of filing; service; referral to Administrative Law Judge; stay of proceeding.

(a) An application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding or in a significant and discrete substantive portion of that proceeding, but in no case later than 30 days after the entry of the Board's final order in that proceeding. The application for an award must be filed with the Board in Washington, DC, together with a certificate of service. The application must be served on the Regional Director and on all parties to the adversary adjudication in the same manner as other pleadings in that proceeding, except as provided in §102.147(g)(1) for financial information alleged to be confidential.

(b) Upon filing, the application will be referred by the Board to the Administrative Law Judge who heard the adversary adjudication upon which the application is based, or, in

the event that proceeding had not previously been heard by an Administrative Law Judge, it will be referred to the Chief Administrative Law Judge for designation of an Administrative Law Judge, in accordance with §102.34, to consider the application. When the Administrative Law Judge to whom the application has been referred is or becomes unavailable, the provisions of §§102.34 and 102.36 will apply.

(c) Proceedings for the award of fees, but not the time limit of this section for filing an application for an award, will be stayed pending final disposition of the adversary adjudication in the event any person seeks reconsideration or review of the decision in that proceeding.

(d) For purposes of this section the withdrawal of a complaint by a Regional Director under §102.18 will be treated as a final order, and an appeal under §102.19 will be treated as a request for reconsideration of that final order.

§102.149 Filing of documents; service of documents; motions for extension of time.

(a) All motions and pleadings after the time the case is referred by the Board to the Administrative Law Judge until the issuance of the Administrative Law Judge's decision must be filed with the Administrative Law Judge together with proof of service. Copies of all documents filed must be served on all parties to the adversary adjudication.

(b) Motions for extensions of time to file motions, documents, or pleadings permitted by §102.150 or by §102.152 must be filed with the Chief Administrative Law Judge, the Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge, as the case may be, no later than 3 days before the due date of the document. Notice of the request must be immediately served on all other parties and proof of service furnished.

§102.150 Answer to application; reply to answer; comments by other parties.

(a) Within 35 days after service of an application, the General Counsel may file an answer to the application. Unless the General Counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file a timely answer may be treated as a consent to the award requested. The filing of a motion to dismiss the application will stay the time for filing an answer to a date 35 days after issuance of any order denying the motion. Within 21 days after service of any motion to dismiss, the applicant may file a response. Review of an order granting a motion to dismiss an application in its entirety may be obtained by filing a request with the Board in Washington, DC, pursuant to §102.27.

(b) If the General Counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate toward a settlement. The filing of such a statement will extend the time for filing an answer for an additional 35 days.

(c) The answer must explain in detail any objections to the award requested and identify the facts relied on in support of the General Counsel's position. If the answer is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits must be provided or a request made for further proceedings under §102.152.

(d) Within 21 days after service of an answer, the applicant may file a reply. If the reply is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits must be provided or a request made for further proceedings under §102.152.

(e) Any party to an adversary adjudication other than the applicant and the General Counsel may file comments on a fee application within 35 days after it is served and on an answer within 21 days after it is served. A commenting party may not participate further in the fee application proceeding unless the Administrative Law Judge determines that such participation is required in order to permit full exploration of matters raised in the comments.

§102.151 Settlement.

The applicant and the General Counsel may agree on a proposed settlement of the award before final action on the application. If a prevailing party and the General Counsel agree on a proposed settlement of an award before an application has been filed, the proposed settlement must be filed with the application. All such settlements are subject to approval by the Board.

§102.152 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the documents in the record. The Administrative Law Judge, however, upon request of either the applicant or the General Counsel, or on the General Counsel's own initiative, may order further proceedings, including an informal conference, oral argument, additional written submission, or an evidentiary hearing. An evidentiary hearing will be held only when necessary for resolution of material issues of fact.

(b) A request that the Administrative Law Judge order further proceedings under this section must specifically identify the disputed issues and the evidence sought to be adduced, and must explain why the additional proceedings are necessary to resolve the issues.

(c) An order of the Administrative Law Judge scheduling further proceedings will specify the issues to be considered.

(d) Any evidentiary hearing held pursuant to this section will be open to the public and will be conducted in accordance with §§102.30 through 102.43, except §§102.33, 102.34, and 102.38.

(e) Rulings of the Administrative Law Judge are reviewable by the Board only in accordance with the provisions of §102.26.

§102.153 Administrative Law Judge's decision; contents; service; transfer of case to the Board; contents of record in case.

(a) Upon conclusion of proceedings under §§102.147 through 102.152, the Administrative Law Judge will prepare a decision, which will include written findings and conclusions as necessary to dispose of the application. The Administrative Law Judge will transmit the decision to the Board. Upon receipt of the decision, the Board will enter an order transferring the case to the Board and will serve copies on all the parties of the Judge's decision and the Board's order, setting forth the date of the transfer.

(b) The record in a proceeding on an application for an award of fees and expenses includes the application and any amendments or attachments, the net worth exhibit, the answer and any amendments or attachments, any reply to the answer, any comments by other parties, motions, rulings, orders, stipulations, written submissions, the transcript of any oral argument, the transcript of any hearing, exhibits, and depositions, together with the Administrative Law Judge's decision and exceptions, any cross-exceptions or answering briefs as provided in §102.46, and the record of the adversary adjudication upon which the application is based.

§102.154 Exceptions to Administrative Law Judge's decision; briefs; action of the Board.

Procedures before the Board, including the filing of exceptions to the Administrative Law Judge's decision and briefs, and action by the Board, will be in accordance with §§102.46, 102.47, 102.48, and 102.50. The Board will issue a decision on the application or remand the proceeding to the Administrative Law Judge for further proceedings.

§102.155 Payment of award.

To obtain payment of an award made by the Board, the applicant must submit to the Director of the Division of Administration, a copy of the Board's final decision granting the award, accompanied by a statement that the applicant will not seek court review of the decision. If such statement is filed, the Agency will pay the amount of the award within 60 days, unless judicial review of the award or of the underlying decision has been sought.

Subpart U—Debt-Collection Procedures by Administrative Offset

30. Revise §102.156 to read as follows:

§102.156 Administrative offset; purpose and scope.

The regulations in this subpart specify the Agency procedures that will be followed to implement the administrative offset procedures set forth in the Debt Collection Act of 1982 (Pub. L. 97-365), 31 U.S.C. 3716.

31. Revise §102.157(e) to read as follows:

§102.157 Definitions.

* * * * *

(e) A debt is considered delinquent if it has not been paid by the date specified in the Agency's initial demand letter (§102.161), unless satisfactory payment arrangements have been made by that date, or if, at any time thereafter, the debtor fails to satisfy the debtor's obligations under a payment agreement with the Agency.

32. Revise §102.159 to read as follows:

§102.159 Exclusions.

(a)(1) The Agency is not authorized by the Debt Collection Act of 1982 (31 U.S.C. 3716) to use administrative offset with respect to:

(i) Debts owed by any State or local government;

(ii) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or

(iii) When a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

(2) No claim that has been outstanding for more than 10 years after the Board's right to collect the debt first accrued may be collected by means of administrative offset, unless facts material to the right to collect the debt were not known, and could not reasonably have been known, by the official of the Agency who was charged with the responsibility to discover and collect such debts until within 10 years of the initiation of the collection action. A determination of when the debt first accrued may be made according to existing laws regarding the accrual of debts, such as under 28 U.S.C. 2415. Unless otherwise provided by contract or law, debts or payments owed the Board which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority,

pursuant to this paragraph (a) or Board regulations established pursuant to such other statutory authority.

(b) Collection by offset against a judgment obtained by a debtor against the United States will be accomplished in accordance with 31 U.S.C. 3728.

33. Revise §102.160(a) and (d) to read as follows:

§102.160 Agency responsibilities.

(a) The Agency will provide appropriate written or other guidance to Agency officials in carrying out this subpart, including the issuance of guidelines and instructions. The Agency will also take such administrative steps as may be appropriate to carry out the purposes and ensure the effective implementation of this subpart.

* * * * *

(d) Administrative offset must be considered by the Agency only after attempting to collect a claim under 31 U.S.C. 3711(a).

34. Revise §102.161 to read as follows:

§102.161 Notification.

(a) The Agency must send a written demand to the debtor in terms which inform the debtor of the consequences of failure to cooperate. In the demand letter, the Agency must provide the name of an Agency employee who can provide a full explanation of the claim. When the Agency deems it appropriate to protect the Government's interests (for example, to prevent the statute of limitations, 28 U.S.C. 2415, from expiring), written demand may be preceded by other appropriate actions.

(b) In accordance with guidelines established by the Agency, the Agency official responsible for collection of the debt must send written notice to the debtor, informing the debtor, as appropriate, of the:

(1) Nature and amount of the Board's claim;

(2) Date by which payment is to be made (which normally may be not more than 30 days from the date that the initial notification was mailed or hand delivered);

(3) Agency's intent to collect by administrative offset and of the debtor's rights in conjunction with such an offset;

(4) Agency's intent to collect, as appropriate, interest, penalties, administrative costs and attorneys fees;

(5) Rights of the debtor to a full explanation of the claim, of the opportunity to inspect and copy Agency records with respect to the claim and to dispute any information in the Agency's records concerning the claim;

(6) Debtor's right to administrative appeal or review within the Agency concerning the Agency's claim and how such review must be obtained;

(7) Debtor's opportunity to enter into a written agreement with the Agency to repay the debt; and

(8) Date on which, or after which, an administrative offset will begin.

35. Revise §102.163 to read as follows:

§102.163 Opportunity for repayment.

(a) The Agency must afford the debtor the opportunity to repay the debt or enter into a repayment plan which is agreeable to the Agency and is in a written form signed by

the debtor. The Agency may deem a repayment plan to be abrogated if the debtor, after the repayment plan is signed, fails to comply with the terms of the plan.

(b) The Agency has discretion and may exercise sound judgment in determining whether to accept a repayment agreement in lieu of administrative offset.

36. Revise §102.164(e) to read as follows:

§102.164 Review of the obligation.

* * * * *

(e) Nothing in this subpart will preclude the Agency from *sua sponte* reviewing the obligation of the debtor, including reconsideration of the Agency's determination concerning the debt, and the accuracy, timeliness, relevance, and completeness of the information on which the debt is based.

Subpart V—Debt-Collection Procedures by Federal Income Tax Refund Offset

37. Revise §102.168 to read as follows:

§102.168 Federal income tax refund offset; purpose and scope.

The regulations in this subpart specify the Agency procedures that will be followed to implement the federal income tax refund offset procedures set forth in 26 U.S.C. 6402(d) of the Internal Revenue Code (Code), 31 U.S.C. 3720A, and 301.6402-6 of the Treasury Regulations on Procedure and Administration (26 CFR 301.6402-6). This statute and the implementing regulations of the Internal Revenue Service (IRS) at 26 CFR 301.6402-6 authorize the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States. The regulations apply to past-due legally enforceable debts owed to the Agency by individuals and business entities. The regulations are not

intended to limit or restrict debtor access to any judicial remedies to which the debtor may otherwise be entitled.

38. Revise §102.169(a) and (b) to read as follows:

§102.169 Definitions.

(a) Tax refund offset refers to the IRS income tax refund offset program operated under authority of 31 U.S.C. 3720A.

(b) Past-due legally enforceable debt is a delinquent debt administratively determined to be valid, whereon no more than 10 years have lapsed since the date of delinquency (unless reduced to judgment), and which is not discharged under a bankruptcy proceeding or subject to an automatic stay under 11 U.S.C. 362.

* * * * *

39. Revise §102.170(a)(3), (b), (c), and (d) to read as follows:

§102.170 Agency referral to IRS for tax referral effect; Agency responsibilities.

(a) * * *

(3) The amount of the debt; and

* * * * *

(b) The Agency will ensure the confidentiality of taxpayer information as required by the IRS in its Tax Information Security Guidelines.

(c) As necessary, the Agency will submit updated information at the times and in the manner prescribed by the IRS to reflect changes in the status of debts or debtors referred for tax refund offset.

(d) Amounts erroneously offset will be refunded by the Agency or the IRS in accordance with the Memorandum of Understanding.

40. Revise §102.173(a) to read as follows:

§102.173 Relation to other collection efforts.

(a) Tax refund offset is intended to be an administrative collection remedy to be used consistent with IRS requirements for participation in the program, and the costs and benefits of pursuing alternative remedies when the tax refund offset program is readily available. To the extent practical, the requirements of the program will be met by merging IRS requirements into the Agency's overall requirements for delinquent debt collection.

* * * * *

41. Revise §102.174(a), (b) introductory text, (b)(2), and (d) to be read as follows:

§102.174 Debtor notification.

(a) The Agency must send appropriate written demand to the debtor in terms which inform the debtor of the consequences of failure to repay debts or claims owed to the Board.

(b) Before the Agency refers a debt to the IRS for tax refund offset, it will make a reasonable attempt to notify the debtor that:

* * * * *

(2) Unless the debt is repaid or a satisfactory repayment agreement is established within 60 days thereafter, the debt will be referred to the IRS for offset from any overpayment of tax remaining after taxpayer liabilities of greater priority have been satisfied; and

* * * * *

(d) The notification required by paragraph (b) of this section and sent to the address specified in paragraph (c) of this section may, at the option of the Agency, be incorporated into demand letters required by paragraph (a) of this section.

42. Revise §102.175 to read as follows:

§102.175 Agency review of the obligation.

(a) The Agency official responsible for collection of the debt will consider any evidence submitted by the debtor as a result of the notification required by §102.174 and notify the debtor of the result. If appropriate, the debtor will also be advised where and to whom to request a review of any unresolved dispute.

(b) The debtor will be granted 30 days from the date of the notification required by paragraph (a) of this section to request a review of the determination of the Agency official responsible for collection of the debt on any unresolved dispute. The debtor will be advised of the result.

§102.176 [Removed and Reserved]

43. Remove and reserve §102.176.

44. Revise subpart W to read as follows:

Subpart W—Misconduct by Attorneys or Party Representatives

Sec.

102.177 Exclusion from hearings; refusal of witness to answer questions; misconduct by attorneys and party representatives before the Agency; procedures for processing misconduct allegations.

§102.177 Exclusion from hearings; refusal of witness to answer questions; misconduct by attorneys and party representatives before the Agency; procedures for processing misconduct allegations.

(a) Any attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section.

(b) Misconduct by any person at any hearing before an Administrative Law Judge, Hearing Officer, or the Board may be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in paragraph (e) of this section for handling allegations of misconduct, the Administrative Law Judge, Hearing Officer, or Board has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper may, in the discretion of the Administrative Law Judge or Hearing Officer, be grounds for striking all testimony previously given by such witness on related matters.

(d) Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, may be grounds for discipline. Such misconduct of an aggravated character may be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

(e) All allegations of misconduct pursuant to paragraph (d) of this section, except for those involving the conduct of Agency employees, will be handled in accordance with the following procedures:

(1) Allegations that an attorney or party representative has engaged in misconduct may be brought to the attention of the Investigating Officer by any person. The

Investigating Officer, for purposes of this paragraph (e)(1), is the head of the Division of Operations-Management, or designee.

(2) The Investigating Officer or designee will conduct such investigation as is deemed appropriate and will have the usual powers of investigation provided in Section 11 of the Act. Following the investigation, the Investigating Officer will make a recommendation to the General Counsel, who will make the determination whether to institute disciplinary proceedings against the attorney or party representative. The General Counsel's authority to make this determination is not delegable to the Regional Director or other personnel in the Regional Office. If the General Counsel determines not to institute disciplinary proceedings, all interested persons will be notified of the determination, which is final.

(3) If the General Counsel decides to institute disciplinary proceedings against the attorney or party representative, the General Counsel or designee will serve the respondent with a complaint which will include: a statement of the acts which are claimed to constitute misconduct including the approximate date and place of such acts together with a statement of the discipline recommended; notification of the right to a hearing before an Administrative Law Judge with respect to any material issues of fact or mitigation; and an explanation of the method by which a hearing may be requested. The complaint will not be issued until the respondent has been notified of the allegations in writing and has been afforded a reasonable opportunity to respond.

(4) Within 14 days of service of the disciplinary complaint, the Respondent must file an answer admitting or denying the allegations, and may request a hearing. If no answer is filed or no material issue of fact or relevant to mitigation warranting a hearing

is raised, the matter may be submitted directly to the Board. If no answer is filed, then the allegations will be deemed admitted.

(5) Sections 102.24 through 102.51, rules applicable to unfair labor practice proceedings, apply to disciplinary proceedings under this section to the extent that they are not contrary to the provisions of this section.

(6) The hearing will be conducted at a reasonable time, date, and place. In setting the hearing date, the Administrative Law Judge will give due regard to the Respondent's need for time to prepare an adequate defense and the need of the Agency and the Respondent for an expeditious resolution of the allegations.

(7) The hearing will be public unless otherwise ordered by the Board or the Administrative Law Judge.

(8) Any person bringing allegations of misconduct or filing a petition for disciplinary proceedings against an attorney or party representative will be given notice of the scheduled hearing. Any such person will not be a party to the disciplinary proceeding, however, and will not be afforded the rights of a party to call, examine or cross-examine witnesses and introduce evidence at the hearing, to file exceptions to the Administrative Law Judge's decision, or to appeal the Board's decision.

(9) The Respondent will, upon request, be provided with an opportunity to read the transcript or listen to a recording of the hearing.

(10) The General Counsel must establish the alleged misconduct by a preponderance of the evidence.

(11) At any stage of the proceeding prior to hearing, the Respondent may submit a settlement proposal to the General Counsel, who may approve the settlement or elect to

continue with the proceedings. Any formal settlement reached between the General Counsel and the Respondent, providing for entry of a Board order reprimanding, suspending, disbarring or taking other disciplinary action against the Respondent, is subject to final approval by the Board. In the event any settlement, formal or informal, is reached after opening of the hearing, such settlement must be submitted to the Administrative Law Judge for approval. In the event the Administrative Law Judge rejects the settlement, either the General Counsel or the Respondent may appeal such ruling to the Board as provided in §102.26.

(12) If it is found that the Respondent has engaged in misconduct in violation of paragraph (d) of this section, the Board may issue a final order imposing such disciplinary sanctions as it deems appropriate, including, where the misconduct is of an aggravated character, suspension and/or disbarment from practice before the Agency, and/or other sanctions.

(f) Any person found to have engaged in misconduct warranting disciplinary sanctions under paragraph (d) of this section may seek judicial review of the administrative determination.

Subpart X—Special Procedures When the Board Lacks a Quorum

45. Revise §§102.179 through 102.182 to read as follows:

Sec.

102.179 Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge.

102.180 Requests for special permission to appeal referred to Chief Administrative Law Judge.

102.181 Administrative and procedural requests referred to Executive Secretary.

102.182 Representation cases should be processed to certification.

§102.179 Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, all motions for default judgment, summary judgment, or dismissal filed or pending pursuant to §102.50 will be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to §102.46.

§102.180 Requests for special permission to appeal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, any request for special permission to appeal filed or pending pursuant to §102.26 will be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to §102.46.

§102.181 Administrative and procedural requests referred to Executive Secretary.

During any period when the Board lacks a quorum, administrative and procedural requests that would normally be filed with the Office of the Executive Secretary for decision by the Board prior to the filing of a request for review under §102.67, or

exceptions under §§102.46 and 102.69, will be referred to the Executive Secretary for ruling. Rulings by the Executive Secretary, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board if such matters are raised by a party in its request for review or exceptions.

§102.182 Representation cases should be processed to certification.

During any period when the Board lacks a quorum, the second proviso of §102.67(b) regarding the automatic impounding of ballots will be suspended. To the extent practicable, all representation cases may continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

Appendix A [Removed]

46. Remove appendix A.

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