



BILLING CODE 754501

## **NATIONAL LABOR RELATIONS BOARD**

### **29 CFR Part 102**

#### **RIN 3142-AA17**

### **Representation-Case Procedures: Voter List Contact Information; Absentee Ballots for Employees on Military Leave**

**AGENCY:** National Labor Relations Board.

**ACTION:** Notice of proposed rulemaking; request for comments.

**SUMMARY:** As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act) and to further the purposes of the Act, the National Labor Relations Board (the Board) proposes to amend its rules and regulations to eliminate the requirement that employers must, as part of the Board's voter list requirement, provide available personal email addresses and available home and personal cellular telephone numbers of all eligible voters. The Board believes, subject to comments, that elimination of this requirement will better balance employee privacy interests against those supporting disclosure of this information. The Board also proposes an amendment providing for absentee mail ballots for employees who are on military leave. The Board believes, subject to comments, that it should seek to accommodate such voters in light of congressional policies facilitating their participation in federal elections and protecting their employment rights. The Board further believes, subject to comments, that a procedure for providing such voters with absentee ballots can be instituted without impeding the expeditious resolution of questions of representation.

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

REGISTER]. Comments replying to comments submitted during the initial comment period must be received by the Board on or before October 13, 2020. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted.

**ADDRESSES:** You may submit comments on this proposed rule only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through <http://www.regulations.gov>. Follow the instructions for submitting comments.

Delivery—Comments may be sent by mail to: Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570-0001. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. It is not necessary to mail comments if they have been filed electronically with [regulations.gov](http://www.regulations.gov). If you mail comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273-1940 (this is not a toll-free number). Individuals with hearing impairments may call 1-866-315-6572 (TTY/TDD). Because of precautions in place due to COVID-19, the Board recommends that comments be submitted electronically or by mail rather than by hand delivery. If you feel you must hand deliver comments to the Board, hand delivery will be accepted by appointment only. Please call (202) 273-1940 to arrange for hand delivery of comments. Please note that there may be a delay in the electronic posting of hand-delivered and mail comments due to the needs for safe handling and

manual scanning of the comments. The Board strongly encourages electronic filing over mail or hand delivery of comments.

Only comments submitted through <http://www.regulations.gov>, hand delivered, or mailed will be accepted; ex parte communications received by the Board will be made part of the rulemaking record and will be treated as comments only insofar as appropriate. Comments will be available for public inspection at <http://www.regulations.gov>.

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

**FOR FURTHER INFORMATION CONTACT:** Roxanne L. Rothschild, Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C.

20570-0001, (202) 273-1940 (this is not a toll-free number), 1-866-315-6572  
(TTY/TDD).

**SUPPLEMENTARY INFORMATION:** The National Labor Relations Board is proposing two amendments to its current rules and regulations governing the conduct of elections held pursuant to the Act. The first amendment would modify the Board’s voter list provisions—set forth in §§ 102.62(d) and 102.67(l) of the Board’s Rules and Regulations—to eliminate the requirement that the employer provide “available personal email addresses” and “available home and personal cellular (‘cell’) telephone numbers” of all eligible voters (including individuals permitted to vote subject to challenge) to the Regional Director and the other parties. The second amendment would modify the Board’s general policy of not providing absentee ballots—not currently set forth in the rules and regulations—by establishing a procedure to provide absentee ballots to employees who would otherwise be unable to vote in the election because they are on military leave.

The Board believes, subject to comments, that the current voter list requirement affords insufficient weight to employee privacy interests, and that eliminating the required disclosure of personal email addresses and personal telephone numbers will redress this imbalance. The Board also believes, subject to comments, that it should, consistent with the policies and principles underlying other statutes, seek to maximize the opportunity for otherwise-eligible voters on military leave to participate in Board-conducted elections, and that a practical procedure providing absentee mail ballots for such voters can be implemented without impeding the expeditious resolution of questions of representation.

## I. Background

The National Labor Relations Board administers the National Labor Relations Act, which, among other things, governs the formation of collective-bargaining relationships between employers and groups of employees in the private sector. Section 7 of the Act, 29 U.S.C. 157, gives employees, among other rights, the right to bargain collectively through representatives of their own choosing and to refrain from such activity.

When employees and their employer are unable to agree whether employees should be represented for purposes of collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board the authority to resolve the question of representation. The Supreme Court has recognized that “Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees.” *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330 (1946). “The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone.” *NLRB v. Waterman Steamship Co.*, 309 U.S. 206, 226 (1940).

Representation case procedures are set forth in the statute, in Board regulations, and in Board caselaw.<sup>1</sup> The Board’s General Counsel has also prepared a non-binding Casehandling Manual describing representation case procedures in detail.<sup>2</sup> With

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<sup>1</sup> The Board’s binding rules of representation procedure are found primarily in 29 CFR part 102, subpart D. Additional rules created by adjudication are found throughout the corpus of Board decisional law. See *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764, 770, 777, 779 (1969).

<sup>2</sup> NLRB Casehandling Manual (Part Two) Representation Proceedings.

respect to the procedures applicable to Board-conducted elections, the Act itself provides only that if the Board finds that a question of representation exists, “it shall direct an election by secret ballot and shall certify the results thereof.” The only express provision regarding voter eligibility in the Act pertains to employees engaged in an economic strike who are not entitled to reinstatement.<sup>3</sup>

Within this general framework, “the Board must adopt policies and promulgate rules and regulations in order that employees’ votes may be recorded accurately, efficiently and speedily.” *A. J. Tower Co.*, 329 U.S. at 331. In promulgating and applying representation rules and regulations, the Board, the General Counsel and the agency’s regional directors<sup>4</sup>—in addition to seeking efficient and prompt resolution of representation cases—have sought to guarantee fair and accurate voting, to achieve transparency and uniformity in the Board’s procedures, and to update those procedures in light of technological advances. See, e.g., 79 FR 74308 (Dec. 15, 2014).

A. Required Disclosure of Available Personal Email Addresses and Personal Telephone Numbers

In *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966), the Board established a requirement that, 7 (calendar) days after approval of an election agreement or issuance of a decision and direction of election, the employer must file an

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<sup>3</sup> 29 U.S.C. 159(c)(3) (“Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike.”).

<sup>4</sup> The Act permits the Board to delegate its decisional authority in representation cases to NLRB regional directors. See 29 U.S.C. 153(b). The Board did so in 1961. 26 FR 3811 (May 4, 1961). The General Counsel administratively oversees the regional directors. 29 U.S.C. 153(d).

election eligibility list—containing the names and home addresses of all eligible voters—with the regional director, who in turn was to make the list available to all parties. Failure to comply with the requirement constituted grounds for setting aside the election whenever proper objections were filed. *Id.* at 1240. In articulating this requirement, the Board reasoned it was needed in order to “maximize the likelihood that all the voters will be exposed to the arguments for, as well as against, union representation” and would also “eliminate the necessity for challenges based solely on lack of knowledge as to the voter’s identity,” thus furthering the public interest in “the speedy resolution of questions of representation.” *Id.* at 1241, 1243. The Supreme Court approved the *Excelsior* requirement in *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 767-768 (1969).

Aside from subsequent clarification that the list must disclose *full* names and addresses,<sup>5</sup> the *Excelsior* requirement stood undisturbed until 2014, when a Board majority adopted a series of amendments (the 2014 amendments) to its representation case procedures that, among other things, codified the voter list requirement.<sup>6</sup> In doing so, the 2014 amendments made a series of modifications to the requirement, including mandating that employers disclose “available” personal email addresses and home and

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<sup>5</sup> See *North Macon Health Care Facility*, 315 NLRB 359 (1994).

<sup>6</sup> These changes were made via notice-and-comment rulemaking. In the Notice of Proposed Rulemaking (NPRM) issued on February 6, 2014, a Board majority proposed numerous specific changes to its then-current rules governing the representation election process. See 79 FR 7318. The 2014 amendments were adopted via a final rule issued on December 15, 2014, which became effective on April 14, 2015. 79 FR 74308. On December 18, 2019, the Board issued a final rule that modified the 2014 amendments in various respects; that rule (the 2019 amendments) was set to take effect on April 16, 2020, see 84 FR 69524, but the effective date was postponed until May 31, 2020, see 85 FR 17500.

personal cellular telephone numbers of all eligible voters.<sup>7</sup> Citing the twin purposes of the original *Excelsior* requirement, the 2014 amendments concluded that, in view of dramatic changes in telecommunications since 1966, disclosure of personal email addresses and telephone numbers was warranted because it would permit nonemployer parties to promptly convey information concerning the question of representation to all voters; make it more likely that nonemployer parties could respond to employee questions; allow nonemployer parties to engage with employees in a more timely manner; and facilitate faster union investigation of names included on the list, thus reducing the risk that unions would challenge voters based solely on lack of knowledge as to their identity. 79 FR 74337-74340.<sup>8</sup>

More specifically, the 2014 amendments justified the disclosure of personal email addresses in light of the dramatically increased role electronic communications now

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<sup>7</sup> The voter list requirement, as codified and modified by the 2014 amendments, is located at § 102.62(d) (for elections conducted pursuant to election agreements) and § 102.67(l) (for directed elections). In addition to requiring the disclosure of available personal email addresses and telephone numbers, the 2014 amendments modified the voter list requirement by (1) requiring the employer to furnish the work locations, shifts, and job classifications of eligible voters; (2) requiring the employer to provide the same information for individuals permitted to vote subject to challenge as required for undisputedly eligible voters; (3) requiring the employer to submit the list in an electronic format approved by the General Counsel (unless the employer certifies that it does not possess the capacity to produce the list in the required form); (4) requiring the employer to serve the list on the other parties; (5) requiring the employer to file and serve the list electronically when feasible; and (6) specifying that parties “shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.” In addition, the 2014 amendments required the Employer to provide the list within 2 business days of the approval of an election agreement or direction of an election. The 2019 amendments provide that, for petitions filed on or after the effective date of those amendments (now May 31, 2020), the employer will have 5 business days to provide the list. 84 FR 69526, 69531-69532.

<sup>8</sup> The 2014 amendments also noted that provision of email addresses and telephone numbers would permit unions to contact employees more swiftly with respect to post-election matters that may arise. 79 FR 74340.



play in workplace communication. They also noted that, in the Board’s experience, employers were making increasingly frequent use of email to communicate with employees during election campaigns. 79 FR 74336-74338.

As for personal phone numbers, the 2014 amendments acknowledged that—in contrast to email—telephonic communication existed and was already in widespread use in 1966, and also acknowledged that *Excelsior* had not required disclosure of personal telephone numbers. The 2014 amendments nevertheless concluded that personal telephone numbers should now be disclosed due to (1) the ubiquity of telephones as compared to 1966;<sup>9</sup> (2) the fact that voicemail and text messaging permit callers to leave messages if nobody answers the call, which was not possible in 1966; (3) the emergence of cellular and smartphones as a “universal point of contact” combining telephone, email, and text messaging; (4) the need to reach persons—especially low-wage workers—who rely on the telephone, rather than email, for communication; and (5) the fact that some employers may not bother to update physical addresses and may contact their employees exclusively via telephone. 79 FR 74338-74339.

The Board’s initial proposal to expand the contact information required on the voter list<sup>10</sup> attracted voluminous comments raising concerns regarding employee privacy. The 2014 amendments acknowledged these privacy concerns, but nevertheless concluded that they were outweighed by the twin purposes underlying the

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<sup>9</sup> The 2014 amendments cited statistics indicating that as of 1960, 78% of all U.S. households had a telephone, that 95% had one by 1990, and that since 2000 only about 2.4% of households have lacked a telephone. 79 FR 74338-74339.

<sup>10</sup> 79 FR 7326-7328, 7332, 7353-7354, 7360.

disclosure requirement. 79 FR 74341-74352. More specifically, the 2014 amendments rejected comments arguing that the mere potential for misuse of the information counseled against disclosure, stated that misuse had not been a significant problem in the past, and concluded that any misuse could be dealt with if and when it occurred. 79 FR 74342-74343. The 2014 amendments also found that the limited nature of the information disclosed, the limited number of recipients, the limited purposes for which it may be used, and the supposedly limited duration of any infringement outweighed employees' acknowledged privacy interest in the information. 79 FR 74343-74344.<sup>11</sup> In addition, the 2014 amendments rejected claims that the disclosures would run afoul of other statutes (including FOIA, the Privacy Act, state privacy laws, the CAN-SPAM Act, and the Federal Trade Commission's Do-Not-Call Rule) and prior Board precedent. 79 FR 74344-74346, 74351-74352.<sup>12</sup> Finally, the 2014 amendments dismissed concerns that unwanted communications could lead to significant unwelcome costs for employees. 79 FR 74351.

Dissenting Board Members Miscimarra and Johnson criticized the 2014 amendments for failing to adequately address the privacy concerns raised by the comments, particularly the majority's failure to provide adequate protection of those

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<sup>11</sup> The 2014 amendments also sympathized with employees who wished to reduce the annoyance and irritation of unwanted communications, but stated these concerns were outweighed by the purposes of the voter list requirement. 79 FR 74350.

<sup>12</sup> The 2014 amendments also rejected proposals that the Board should provide an opt-in and/or opt-out mechanism for employees who do not wish to have their personal phone numbers or email addresses disclosed, stating that the Board had rejected similar proposals in the past and that they would be burdensome for the Board and the parties, would invite new areas of litigation or otherwise lead to complicated problems and negative consequences, and could themselves invade employee privacy. 79 FR 74346-74349, 74427-74428.

concerns in the face of the expanded disclosure requirement. More specifically, the dissent contended that the 2014 amendments did not and could not provide specific appropriate restrictions on use, and remedies for misuse, of the information. Citing the prevalence of hacking, identity theft, phishing scams, and related ills, the dissent emphasized that employees who have provided personal email addresses and phone numbers to their employer may have good reasons for not wanting to share them with nonemployer parties they do not know and trust. The dissent expressed doubt that such privacy concerns would be assuaged by the majority's reliance on the ostensibly limited nature of the disclosures, observing that the disclosed information does not disappear after election day and that the limitation on use of the information (for the "representation proceeding, Board proceedings arising from it, and related matters") was troublingly vague and specified no remedy for violations. Finally, the dissent took issue with the majority's emphasis on the absence of abuses under the original *Excelsior* requirement, pointing out that personal email addresses and telephone numbers pose different privacy concerns from home addresses. Whereas a home is a fixed, readily identifiable point the public can visit independent of disclosure of the address, a personal email address is entirely created by the employee and is typically not identifiable at all without the employee's consent, and a personal phone number is similarly created in part by the employee, who is able to determine whether it is publicly listed and identifiable at all. The dissent accordingly asserted that employees have a greater privacy interest in personal email addresses and telephone numbers than they do in their physical addresses. 79 FR 74452-74454.

In litigation that followed the 2014 amendments, several trade and employer advocacy associations contended that the expanded disclosure requirements were unlawful, and among other arguments specifically contended that employee privacy rights “should outweigh the desire of unions to use the latest technology to facilitate their organizing efforts.” *Associated Builders & Contractors of Texas, Inc. v. NLRB*, 826 F.3d 215, 224 (5th Cir. 2016). Although the court upheld the facial validity of the required disclosure of personal email addresses and telephone numbers as a valid balancing of competing interests, see *id.* at 225-226,<sup>13</sup> the court also made clear that a different balancing of the relevant interests was permissible and even preferable, stating: “We may favor greater privacy protections over disclosure, but . . . it is not the province of this court to inject a contrary policy preference.” *Id.* at 226.

The mandatory disclosure of available personal email addresses and telephone numbers has continued to garner criticism. In *RHCG Safety Corp.*, 365 NLRB No. 88, slip op. at 9-12 (2017), Chairman Miscimarra reiterated his view that the required disclosure of personal phone numbers does not adequately accommodate employees’ privacy interests in their personal phone numbers, which they may provide to a supervisor without consenting to their dissemination to third parties. On December 12, 2017, the Board issued a Request for Information that generally invited the public to respond with information about whether the 2014 amendments should be retained without change, retained with modifications, or rescinded. 82 FR 58783. Virtually every

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<sup>13</sup> See also *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d 171, 213-215 (D.D.C. 2015) (rejecting challenges to expanded disclosures and specifically finding that Board had not acted arbitrarily and capriciously in expanding disclosures despite implications for employee privacy).

responder addressed the expanded voter list disclosures.<sup>14</sup> Supportive responses generally praised the provision of available personal email addresses and telephone numbers as a desirable modernization of the *Excelsior* requirement and a great help to fostering union campaign communications (and in offsetting employers' greater access to employees);<sup>15</sup> critical responses alleged that the 2014 amendments had not adequately considered employee privacy interests and forcefully contended that such interests should have been (or, based on subsequent developments, should now be) afforded greater weight than the 2014 amendments gave them.<sup>16</sup> Critical responses also reported employee complaints over the disclosures,<sup>17</sup> asserted that disclosures have led to harassment or excessive communications from nonemployer parties,<sup>18</sup> and

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<sup>14</sup> See generally the responses to the 2017 Request for Information (available at <https://www.nlr.gov/reports-guidance/public-notice/request-information/submissions>).

<sup>15</sup> See, e.g., Sen. Patty Murray et al. at 4-5 (discussing how the pre-2014 voter list requirement had not been adapted to growing use of telephone and email communication); United Association of Journeymen & Apprentices of the Plumbing & Pipe Fitting Industry at 4 (praising expanded contact information disclosures in light of advances in communications technology); California Nurses Association/National Nurses United, AFL-CIO at 10 (access to phone numbers and email addresses has fostered communications among employees and “create[d] a more equal playing field in terms of information dissemination”); Patricia M. Shea at 4 (union had better access to employees through additional voter information); Service Employees International Union, CTW, CLC at 5 (modernization of voter list helps “ensure a more fully informed electorate, rectify the imbalance in communication inherent under the old rules, and accommodate changes in technology”).

<sup>16</sup> See, e.g., National Grocers Association at 3-4 (urging limits on disclosure of contact information because “[a] glance at recent headlines reveals that Americans today are increasingly concerned, with good reason, about their privacy rights”).

<sup>17</sup> See, e.g., Associated Builders and Contractors, Inc. at 4-5 (stating that 90% of respondents to responder’s internal survey “report complaints by employees about the infringement of their privacy rights” based on disclosure of email addresses and telephone numbers).

<sup>18</sup> See, e.g., Independent Bakers Association at 7 (“[O]ur research found examples where labor organizations used the personal contact information provided on the Voter

generally contended that disclosure of contact information beyond employee names and home addresses was not necessary.<sup>19</sup>

#### B. Absentee Mail Ballots for Employees on Military Leave

As noted above, the Act contains a single provision regarding voter eligibility that pertains only to certain economic strikers, and thus neither provides for nor prohibits absentee balloting. Similarly, the Board's Rules and Regulations neither provide for nor prohibit absentee balloting. But as a general policy matter, the Board has long declined to provide absentee mail ballots. See, e.g., *NLRB v. Cedar Tree Press, Inc.*, 169 F.3d 794 (3d Cir. 1999) (upholding Board's absentee ballot policy). This policy is articulated in the Board's Casehandling Manual (Part Two), section 11302.4, which states that where an election is conducted manually, "ballots for voting by mail should not be provided to, inter alia, those who are in the Armed Forces, ill at home or in a hospital, on vacation, or on leave of absence due to their own decision or condition."<sup>20</sup> Further, with specific reference to employees engaged in military service, Form NLRB-652—the template usually used for election agreements<sup>21</sup>—provides that "[e]mployees who are otherwise eligible but who are in the military services of the United States may vote if they appear in person at the polls."

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List to send hundreds or even thousands of unsolicited text messages, calls and emails to employees' cellphones.").

<sup>19</sup> See, e.g., *Society for Human Rights Management and the Council on Labor Law Equality at 10* (disclosure of names and home addresses "proved more than adequate for unions, employers, and the Board alike for nearly 50 years").

<sup>20</sup> This policy also applies to mixed manual-mail ballot elections. See *id.* section 11335.1 (cross-referencing section 11302.4).

<sup>21</sup> The vast majority of Board elections are conducted pursuant to election agreements. See <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/percentage-elections-conducted-pursuant-election> (91.3% of all Board elections in Fiscal Year 2019 conducted pursuant to election agreement).

The Board's general policy of not providing absentee mail ballots for employees on sick, vacation, or related types of leave on the day of election appears to have cohered relatively early in the Board's history.<sup>22</sup> The Board's experience with providing absentee mail ballots to employees on military leave presents a more complex picture. In December 1940, a union asked the Board to determine whether employees selected for military service would be permitted to vote by absentee ballot; the Board answered in the affirmative. *American Enka Corp.*, 28 NLRB 423, 427 (1940). Two months later, in *Cudahy Packing Co.*, 29 NLRB 830, 835-836 (1941), the Board announced that, because employees in active military service or training "will be entitled to reinstatement on their return to civilian life" pursuant to selective service laws, they were entitled to participate in the election even if they had not worked during the payroll eligibility period.<sup>23</sup> Although *Cudahy Packing* did not itself expressly provide for absentee ballots

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<sup>22</sup> In an early case, the Board directed a regional director to provide absentee mail ballots for employees "who are now on leave of absence." *Hirsch Shirt Corp.*, 12 NLRB 553, 567 (1939). By late 1941, however, the Board appears to have distinguished between absentee balloting by employees on military leave (which, as discussed below, was then permitted in some circumstances) and other types of absentee balloting, which were apparently not permitted. See *Bunker Hill & Sullivan Mining & Concentrating Co.*, 42 NLRB 33, 33-34 (1942). Later cases occasionally suggest a willingness to provide absentee ballots given a showing that it was necessary under the circumstances, but the Board rejected contentions that an election should be set aside because such ballots were not provided. See, e.g., *Electric Machine Controller & Manufacturing Co.*, 71 NLRB 410, 411-412 (1946); *McFarling Bros. Midstate Poultry & Egg Co.*, 123 NLRB 1384, 1391-1392 (1959). In any event, by 1966 an employer could (apparently accurately) refer to an overall Board policy of not permitting absentee balloting. See *Bray Oil Co.*, 169 NLRB 1076, 1081 (1968) (1966 letter referenced policy); *Progressive Supermarkets, Inc.*, 259 NLRB 512, 526 (1981) (employer speech referenced policy).

<sup>23</sup> Subject to certain exceptions, to be eligible to vote in a Board election, an employee must be employed on the eligibility date (usually the payroll period immediately preceding the date of the direction of election or approval of the election agreement) and on the date of the election. See, e.g., *Plymouth Towing Co.*, 178 NLRB 651, 651 (1969).

for such employees, the Board subsequently provided absentee mail ballots to employees in military service. See *Truscon Steel Co.*, 36 NLRB 983, 986 (1941) (25 employees in the military service supplied with absentee ballots); see also *Wilson & Co.*, 37 NLRB 944, 951 (1941) (stating that since *Cudahy Packing*, employees in military service or training had been permitted to vote “principally by mail ballots”).

In December 1941, however, the Board reversed course. In *Wilson & Co.*, supra, the Board held that although the reasons for extending eligibility to employees in military service or training remained valid,

administrative experience in the ensuing months has demonstrated conclusively that it is impracticable to provide for mail balloting by this group. Administrative difficulties in determining the present location of men in military service have constantly increased with concomitant delays in arrangements for elections. The actual voting of the group by mail has seriously retarded the completion of elections in many cases, since substantial time has had to be allowed for receipt and return of mail ballots by eligibles in remote sections of the country. In addition, this form of balloting has frequently raised material and substantial issues relating to the conduct of the ballot and the election. On the other hand, actual returns from such mail ballots have been relatively small.

37 NLRB at 951-952. Stating that “time is of the essence” in resolving questions concerning representation, the Board determined that although it would continue to recognize the eligibility of such employees, it would discontinue the practice of absentee mail balloting and would instead only permit them to vote if they appeared in person at the polls. *Id.* at 952.

Following *Wilson*, the Board initially strictly adhered to both aspects of its holding regarding absentee ballots. Thus, in a series of cases the Board refused to permit absentee voting by mail,<sup>24</sup> even where a party claimed to have current addresses of

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<sup>24</sup> See, e.g., *R.C. Mahon Co.*, 49 NLRB 142, 144 (1943).



employees in military service<sup>25</sup> or offered to make other accommodations to facilitate election finality.<sup>26</sup> As in *Wilson*, the Board emphasized the administrative difficulties of providing absentee mail ballots while also promptly resolving elections, noting that “with individuals scattered in various units of the armed forces throughout the world, it would be virtually impossible to insure a ballot reaching each man and affording him an opportunity to return it by mail to the Regional Director unless a period of 3 months was established between the date of the Direction and the return date.” *Mine Safety Appliances Co.*, 55 NLRB 1190, 1194 (1944). At the same time, the Board reiterated that employees in military service or training were eligible voters, and in doing so rejected stipulations that would have excluded such employees from the unit at issue. See, e.g., *Yates-American Machine Co.*, 40 NLRB 519, 522 fn. 2 (1942).<sup>27</sup>

Shortly after the end of the Second World War, the Board softened its stance towards absentee mail balloting by employees in military service or training. In *South West Pennsylvania Pipe Lines*, 64 NLRB 1384 (1945), the Board entertained an employer’s request to provide absentee mail ballots and—after noting that no party was opposed to the use of absentee ballots “so long as such alteration does not effect an undue delay in the final disposition”—concluded as follows:

Under the circumstances of this case, we are of the opinion that balloting by mail of the 15 or less employees of the Company now on military leave may be accomplished so that no undue delay in determining the election will result. It is also apparent that many of the administrative complexities necessarily involved

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<sup>25</sup> See, e.g., *Magnolia Petroleum Co.*, 52 NLRB 984, 988 (1943).

<sup>26</sup> See, e.g., *Magnetic Pigment Division of Columbia Carbon Co.*, 51 NLRB 337, 339 (1943) (refusing to provide for absentee ballots for employees in military service despite employer offer to place 14-day deadline on receipt of absentee ballots from service members stationed inside the country and to waive votes for those stationed abroad).

<sup>27</sup> See also *Rudolph Wurlitzer Co.*, 41 NLRB 1074, 1076 & fn. 1 (1942) (denying effect to stipulation “insofar as it deprives persons in the armed forces of the right to vote”).

in conducting a mail ballot of absent employees—problems arising out of overlapping bargaining units, the contraction of wartime operations, conflicting reemployment rights of servicemen—are not present here. There is evidence in this record to show that ballots can be returned within 20 days. We refer, moreover, to the relatively small size of the unit involved [124 employees], the presence of adequate and accurate data (with names and addresses of servicemen) in the original record, and the fact that no substantial reconversion question is present. This is not a war plant with a rapidly diminishing work force. Certain other cases may require other action.

Id. at 1387-1388. The Board accordingly authorized the Regional Director to use absentee ballots for employees on military leave provided that one or more of the parties filed with the Regional Director “a list containing the names, most recent addresses, and work classifications of such employees” within 7 days of the direction of election. Id. at 1388. The Board further provided that such ballots would be opened and counted provided they were “returned to and received at” the regional office within 30 days “from the date they are mailed to the employees by the Regional Director.”

Id.<sup>28</sup>

*South West Pennsylvania Pipe Lines* issued on December 13, 1945, and over the next year the Board—usually citing that case—permitted employees on military leave to vote by absentee ballot in roughly 40 cases. Despite *South West Pennsylvania Pipe Lines*’ stated reliance on the relatively small size of the unit and the relatively few employees on military leave, many subsequent cases involved significantly larger

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<sup>28</sup> In addition, the Board stated that because “free interchange between the interested parties of information on the addresses and work categories” of the absentee voters was necessary to avoid challenges and objections, the Board would make available to all interested parties any such information furnished to it by any other party. The Board determined that “any information or literature bearing directly or indirectly on the election” that parties sent to absentee voters would also need to be filed with the Board “for inspection by or transmittal to the other parties.” Id. at 1388 (footnote omitted).

units<sup>29</sup> and significantly larger percentages of employees on military leave permitted to vote by absentee ballot.<sup>30</sup> Similarly, despite *South West Pennsylvania Pipe Lines'* emphasis on the agreement of the parties to permit absentee balloting, in several cases the Board directed absentee balloting even over a party's objection.<sup>31</sup> True to its suggestion that "other cases may require other action," however, the Board did not simply permit absentee balloting in all cases raising the issue; in a series of cases, the Board found that the *South West Pennsylvania Pipe Lines'* conditions for permitting absentee balloting had not been met due to a lack of evidence regarding the number, names, and/or addresses of unit employees on military leave.<sup>32</sup>

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<sup>29</sup> See, e.g., *Johnson-Carper Furniture Co.*, 65 NLRB 414, 416 (1946) (providing for absentee balloting by 176 employees out of unit of 393); *Mayfair Cotton Mills*, 65 NLRB 511, 512 fn. 1, 513 (1946) (providing for absentee balloting by 222 employees out of unit of 625); *Thomasville Chair Co.*, 65 NLRB 1290, 1291 fn. 2, 1292 & fn. 6 (1946) (providing for absentee balloting by over 500 employees out of unit of about 1500); *Cushman Motor Works*, 66 NLRB 1413, 1415 fn. 1, 1417 & fn. 2 (1946) (providing for absentee balloting by 140 employees out of unit of 840); *Dictaphone Corp.*, 67 NLRB 307, 308 fn. 1, 312 (1946) (providing for absentee balloting by 62 employees out of unit of 690); *Endicott Johnson Corp.*, 67 NLRB 1342, 1343 fn. 2, 1348 (1946) (providing for absentee balloting by 99 employees out of unit of 476); *Swift & Co.*, 68 NLRB 440, 445 (1946) (providing for absentee balloting by 800 employees out of unit of unspecified size).

<sup>30</sup> In addition to several of the cases cited immediately above, see, e.g., *U.S. Gypsum Co.*, 65 NLRB 575, 576 fn. 3, 578 (1946) (providing for absentee balloting by 65 employees out of unit of 108); *Victor Adding Machine Co.*, 65 NLRB 653, 654 (1946) (providing for absentee balloting by 24 employees out of unit of 27); *Hoosier Desk Co.*, 65 NLRB 785, 787 & fn. 4 (1946) (providing for absentee balloting by 48 employees out of unit of 109); *Raleigh Coca Cola Bottling Works*, 65 NLRB 1010, 1012-1013 (1946) (providing for absentee balloting by 38 employees out of unit of 70); *Welch Furniture Co.*, 65 NLRB 1197, 1198 fn. 1, 1199 & fn. 4 (1946) (providing for absentee balloting by 46 employees out of unit of 99); *Thompson Products, Inc.*, 66 NLRB 123, 124 fn. 2, 125-

The Board continued to permit absentee balloting pursuant to *South West Pennsylvania Pipe Lines* into early 1947,<sup>33</sup> but then effectively discontinued the practice. A decision from July 1947 found, citing *South West Pennsylvania Pipe Lines*, that the conditions for absentee balloting had not been met,<sup>34</sup> as did a decision issued in July 1949,<sup>35</sup> but otherwise no Board decisions from this period even mention *South West Pennsylvania Pipe Lines*. Then, in *Link Belt Co.*, 91 NLRB 1143, 1144 (1950), the Board refused to allow an employee on military leave to vote by absentee mail ballot despite the parties' agreement to permit that employee to do so. By way of explanation,

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126 (1946) (providing for absentee balloting by 115 employees out of unit of 171); *U.S. Gypsum Co.*, 66 NLRB 619, 623-624 (1946) (providing for absentee balloting by 150 employees out of unit of 270).

<sup>31</sup> See, e.g., *Keystone Steel & Wire Co.*, 65 NLRB 274, 280 (1946); *U.S. Gypsum Co.*, 65 NLRB 1427, 1429 (1946); *Rockford Metal Products Co.*, 66 NLRB 538, 543 (1946); *Marsh Furniture Co.*, 66 NLRB 133, 136 & fn. 6 (1946).

<sup>32</sup> See, e.g., *Tennessee Coal, Iron & Railroad Co.*, 65 NLRB 1416, 1418 (1946) (declining to permit absentee balloting due to inadequate evidence regarding the number, names, and addresses of employees in the unit on military leave and insufficient evidence "as to the availability of such information"); *Joseph Bancroft & Sons Co.*, 67 NLRB 678, 681 (1946) (declining to provide for absentee balloting given employer's admission that it did not have, and would not be able to obtain, addresses of employees in the armed forces); *Swift & Co.*, 71 NLRB 727, 729 (1946) (declining to permit absentee balloting where employer had addresses for only 247 of 566 employees still on military leave, and correctness of addresses for those 247 employees was doubtful). See also *Scripto Manufacturing Co.*, 67 NLRB 1078, 1080 (1946) (overruling objection alleging that run-off election should have provided for absentee balloting by employees in the armed forces because issue had not been raised at pre-election hearing and there was no showing that mail ballot was "feasible" under the particular circumstances of that case).

<sup>33</sup> See *Kennametal, Inc.*, 72 NLRB 837 (1947).

<sup>34</sup> See *Iowa Packing Co.*, 74 NLRB 434, 437 (1947) (employer only had correct addresses for 12 of 404 employees in military service who had not yet applied for reemployment).

<sup>35</sup> See *Frank Ix & Sons Pennsylvania Corp.*, 85 NLRB 492, 493 (1949) (although parties agreed to permit absentee balloting for 10 employees, Board did not provide for it due to lack of information regarding addresses and employer's mere contention that "we think . . . we can obtain their whereabouts at the time the ballots would be mailed to them").

the Board simply stated that “[w]e have found . . . that mail balloting of employees on military leave is impracticable,” and added that, “[f]rom Board administrative experience, we conclude that it will best effectuate the policies and purposes of the Act to declare eligible to vote only those employees in the military service who appear in person at the polls.” By way of support, the Board simply cited *Wilson* and described *South West Pennsylvania Pipe Lines* as having “followed a different procedure in a factual situation unlike that here presented.”<sup>36</sup>

Since *Link Belt*, *Wilson* has governed the Board’s policy with respect to employees on military leave (i.e., they are eligible to vote, but only if they appear at the polls), and *South West Pennsylvania Pipe Lines* has been neither discussed nor cited in any published Board decisions. Indeed, aside from reaffirming *Wilson* and *Link Belt* in 1953, no published Board decisions have engaged in any discussion of absentee balloting for military employees at all.<sup>37</sup>

That said, the Board, on at least one occasion, has expressed willingness to revisit its approach to absentee balloting for employees on military leave. On January 8, 1992, the Board’s Division of Operations-Management issued Memorandum OM 92-2, “Mail Ballot Elections and Absentee Mail Ballots,” informing Regional Directors that

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<sup>36</sup> A subsequent Board decision indicates that the Board’s decision in *Link Belt* followed “an extensive survey conducted among the Board’s Regional Directors,” but does not elaborate on the results of this survey. *Atlantic Refining Co.*, 106 NLRB 1268, 1275 (1953).

<sup>37</sup> In *Pepsi Cola Bottling Co. of Princeton, Inc.*, 176 NLRB 716, 726, 729 (1969), a trial examiner sustained an objection alleging that because the employer was aware, two weeks before the election, that 3 employees would be absent due to National Guard duty on the day of the election, and because the employer had made no effort to secure absentee ballots for them, the employer had improperly prevented these employees from voting. The Board did not pass on this finding, however. See *id.* at 716 fn. 1.

the Board “has decided to review the Agency’s current practice and experience both with respect to mail ballot elections and with respect to the use of absentee mail ballots for employees on military leave.” The Memorandum asked Regional Directors to provide information including the number of elections in Fiscal Years 1990 and 1991 in which absentee ballots were requested for employees on military leave, the number of cases in which objections were filed based on a refusal to supply such ballots, and the number of elections in which such requested ballots might have been determinative had they been provided, returned, opened, and counted. By internal memorandum dated March 17, 1992, the General Counsel transmitted the survey results to the Board,<sup>38</sup> but thereafter the Board does not appear to have taken further action with respect to reviewing (or reconsidering) its approach to absentee ballots for employees on military leave.

More recently, individual Board members have suggested that the Board should reconsider its policy in this area. In *U.S. Foods, Inc.*, Case No. 15-RC-076271 (May 23, 2012) (not reported in Board volumes), Member Hayes stated his view that “at some point . . . the Board should reconsider its general policy of not providing mail ballots to employees who are unable to participate in a manual ballot election because they are in the military service.” And in *Tri-County Refuse Services, Inc. d/b/a Republic Services of Pinconning*, Case No. 07-RC-122650 (Sep. 9, 2014) (not reported in Board volumes), a case in which the Board overruled an employer’s objection contending that the voting

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<sup>38</sup> The results revealed 6 cases each in Fiscal Years 1990 and 1991 in which absentee ballots for employees on military leave had been requested, with no objections filed based on the refusal to provide them and no elections in which such ballots might have been determinative had they been provided, returned, opened, and counted.

period should have been extended to accommodate an employee who was out of state on military leave on the election date, Member Johnson agreed that the objection should be overruled, but also found merit

in the Employer's argument that Board policies in this area may run afoul of the spirit, if not the letter, of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. §§4301-4355 (1994), and other laws and public policies designed to protect the rights of service members to vote. Moreover, the Board should remove any impediment to military service in interpreting election rules under the Act. As a result, he believes the Board in the future should provide military ballots to employees who are unable to participate in manual ballot elections as a result of military service obligations that call them away from the workplace.

Although the Board majority in both *U.S. Foods* and *Tri-County Refuse* did not similarly state an interest in reconsidering the Board's absentee ballot policy, in both cases the Board seemingly signaled a willingness to permit absentee ballots for employees on military leave under at least some circumstances. Thus, in *U.S. Foods*, the Board, in the context of a mixed manual-mail ballot election, directed the Regional Director to provide a mail ballot to an employee based at the manual balloting location who was abroad on military leave.<sup>39</sup> And in *Tri-County Refuse*, the Board suggested that parties could enter into stipulated election agreements providing for absentee ballots for employees on military leave.

## **II. Statutory Authority and Desirability of Rulemaking**

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<sup>39</sup> The Board specified, however, that the employee on military leave was being provided with a mail ballot "consistent with the election arrangements pertaining to mail ballots," that ballots were to be counted on time, and that the employee's ballot was "subject to the same challenges as any other ballot." Even with these caveats, the Board's provision of the ballot in *U.S. Foods* appears to be in at least some tension with the nonbinding Casehandling Manual (Part Two), which states, even in the context of mixed manual-mail ballot elections, that absentee ballots are not provided in Board elections. See section 11335.1 (citing section 11302.4).

Section 6 of the Act, 29 U.S.C. 156, provides that “[t]he Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by subchapter II of chapter 5 of Title 5 [the Administrative Procedure Act], such rules and regulations as may be necessary to carry out the provisions of this Act.” The Board interprets Section 6 as authorizing the proposed rules and invites comments on these issues. Although the Board historically has made most substantive policy determinations through case adjudication, the Board has, with Supreme Court approval, engaged in substantive rulemaking. *American Hospital Assn. v. NLRB*, 499 U.S. 606 (1991) (upholding Board’s rulemaking on appropriate bargaining units in the healthcare industry); see also *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) (“[T]he choice between rulemaking and adjudication lies in the first instance within the Board’s discretion.”).

The Board finds that informal notice-and-comment rulemaking with respect to the policies at issue here is desirable for several important reasons. First, rulemaking presents the opportunity to solicit broad public comment on, and to address in a single proceeding, two related issues that would not necessarily arise in the adjudication of a single case. By engaging in rulemaking after receiving public comment on the issues presented, the Board will be better able to make informed judgments as to (1) whether the current voter list disclosures sufficiently account for employee privacy concerns, and (2) whether it should provide absentee ballots for employees on military leave. Second, the proposed amendments will be rules of general application in representation cases, and thus the types of rules for which the Act’s rulemaking provisions “were designed to assure fairness and mature consideration.” *Wyman-Gordon Co.*, 394 U.S. at 764.



Third, the proposed amendment to the voter list requirement would affect all parties to virtually all Board-conducted elections, and the proposed amendment permitting absentee ballots for employees on military leave would additionally affect individual voters in many Board-conducted elections. Notice-and-comment rulemaking will accordingly “provide the Board with a forum for soliciting the informed views of those affected in industry and labor before embarking on a new course.” *Bell Aerospace*, 416 U.S. at 295. Fourth, by establishing the new policies with respect to voter lists and absentee ballots for employees on military leave in the Board’s Rules & Regulations, the Board will enable employers, unions, and employees to plan their affairs free of the uncertainty that the legal regime may change on a moment’s notice (and possibly retroactively) through the adjudication process. See *Wyman-Gordon*, 394 U.S. at 777 (“The rule-making procedure performs important functions. It gives notice to an entire segment of society of those controls or regimentation that is forthcoming.”) (Douglas, J., dissenting). Finally, with respect to the proposed amendment providing absentee ballots for employees on military leave, the Board wishes to facilitate maximum participation by the Board’s stakeholders, the general public, and other government agencies in order to ensure that, if adopted, the proposed amendment is accompanied by procedures that also continue to effectuate the Board’s commitment to the expeditious resolution of questions of representation.

### **III. The Proposed Rule Amendments**

- A. Elimination of Provision of Personal Email Addresses and Telephone Numbers in Voter List

The Board is inclined to believe, subject to comments, that the required provision of available personal email addresses and home and cellular telephone numbers should be eliminated in light of technological developments since 2014 and ongoing privacy concerns.<sup>40</sup>

The 2014 amendments in effect concluded that disclosure of this contact information was required because, due to changes in communications technology since 1966, supplying nonemployer parties with such information would better serve the twin purposes underlying the original *Excelsior* requirement (i.e., facilitating a more informed electorate and expeditiously resolving questions of representation by avoiding challenges). The 2014 amendments acknowledged that these same changes in technology have also raised concerns regarding privacy, but ultimately concluded that the admitted interest in privacy was outweighed by the importance of expanding unions' access to voters. 79 FR 74315, 74341-74343.

The Board acknowledges that the *Excelsior* Board did not necessarily intend to limit the *Excelsior* requirement to full names and physical addresses alone for all time, and that it accordingly was appropriate for the 2014 amendments to consider whether changes in telecommunications that have taken place since 1966 warranted additional disclosures. The Board also agrees that privacy interests must be weighed against the potential benefits of disclosure, and it defers to the judgment of the courts that the 2014 amendments reached a permissible result in requiring the disclosure of personal

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<sup>40</sup> The Board is not proposing any further changes to the voter list requirement as codified and modified by the 2014 amendments.

telephone numbers despite privacy concerns.<sup>41</sup> Nevertheless, upon reflection the Board is inclined, as a policy matter, to conclude that privacy interests and their protection should be entitled to greater weight than the 2014 amendments accorded them, and that when given proper weight the privacy interests at stake outweigh the interests favoring mandatory disclosure of available personal email addresses and telephone numbers.

To begin, the Board is inclined to believe that the 2014 amendments overemphasized the degree to which disclosure of personal email addresses and telephone numbers advanced the twin purposes of the *Excelsior* requirement. Although the supplementary information to the 2014 amendments repeatedly stated that disclosure would advance these purposes, it identified no tangible evidence that unions were previously unable to contact eligible voters in a timely fashion when limited to physical addresses, nor did it establish that challenges based on a union's lack of knowledge of a voter's identity were responsible for undue delays in resolving questions of representation. This is not to suggest that disclosure of personal telephone numbers and email addresses did not or could never advance the purposes of the *Excelsior* requirement; it is only to state that the Board is inclined to believe that those purposes were already being sufficiently served prior to the 2014 amendments.

Turning to the countervailing privacy interests, the Board is of the view that the 2014 amendments imprecisely identified the privacy interest at stake. To be sure, one dimension of the privacy interest in telephone numbers and email addresses—or,

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<sup>41</sup> See *Associated Builders and Contractors of Texas, Inc. v. NLRB*, 826 F.3d at 224-226; *Chamber of Commerce of the United States of America v. NLRB*, 118 F. Supp. 3d at 171, 212-215.

indeed, any type of contact information—is the right of the individual to be left alone. In upholding the *Excelsior* rule, the Supreme Court recognized that it is for the Board to weigh the interest in the fair and free choice of bargaining representatives against “the asserted interest of employees in avoiding the problems that union solicitation may present.” *Wyman-Gordon*, 394 U.S. at 767. Generally speaking, the “problems of union solicitation” can be described as infringements of or intrusions into the employees’ personal spheres. See, e.g., 79 FR 74344. If, however, the privacy interest is defined solely in these terms, then under the rationale of *Excelsior* the interest in being left alone should *always* be outweighed by the interests served by disclosing contact information because any such disclosure “remove[s an] impediment to communication,” and the “mere possibility that a union will abuse the opportunity to communicate with employees” does not, by itself, outweigh the removal of the impediment. *Excelsior*, 156 NLRB at 1240, 1244.

But the Board is inclined to find that the privacy interest at stake is not solely limited to the interest in being left alone. As the 2014 amendments recognized, the privacy interest is also implicated by the fact of disclosure itself because “some employees will consider disclosure of the additional contact information \* \* \* to invade their privacy, even if they are never contacted.” 79 FR 74343. Put differently, an individual has a privacy interest “in controlling the dissemination of information regarding personal matters.” *U.S. Dept. of Defense v. FLRA*, 510 U.S. 478, 500 (1994).<sup>42</sup> Despite recognizing this aspect of the privacy interest at stake, the 2014

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<sup>42</sup> *U.S. Dept. of Defense v. FLRA* involved the interaction of FOIA and the Privacy Act. The Board does not suggest that this case mandates eliminating the mandatory disclosure of available personal telephone numbers and email addresses, but it is

amendments do not appear to have fully appreciated it. In this regard, almost immediately after acknowledging that disclosure itself implicates privacy interests, the 2014 amendments reverted to explaining how “many features of the voter list amendments help to minimize any invasion of employee privacy *caused by* disclosure of the information.” 79 FR 74343 (emphasis added). Specifically, the 2014 amendments emphasized that the information disclosed is limited in scope, available only to a limited group of recipients, and can be used only for limited purposes, and that any infringement it occasions will likely be of relatively limited duration. 79 FR 74343-74344.<sup>43</sup> All well and good, but if disclosure itself implicates privacy concerns, limitations on what can be done with the information after disclosure are beside the point.<sup>44</sup>

Mindful that the fact of disclosure itself, not just undesired contact that may follow from it, is part of the privacy interest at stake here, the Board is inclined to find that the privacy interest in nondisclosure of personal telephone numbers and email addresses is

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clearly instructive regarding the nature of employee privacy interests in employees’ personal contact information.

<sup>43</sup> The 2014 amendments also suggested that employees have some measure of control over whether their email addresses and telephone numbers are disclosed based on the fact that the employees have already disclosed such information to the employer. 79 FR 74343 n.169. The Board is not inclined to agree with this assessment.

Employers may require provision of personal contact information as a condition of hire or continued employment (in which case the employees’ “control” is limited to a choice between working or not working), and in any event the Board thinks it is misguided to suggest that employees should somehow anticipate in advance that their contact information might be disclosed to a third party at some future point.

<sup>44</sup> Several submissions in response to the 2017 Request for Information anecdotally illustrate that disclosure itself implicates the privacy interest at stake here. In this regard, several commenters, including employer groups, reported that since the 2014 amendments have taken effect, employees have lodged complaints with their employers upon discovering that their contact information had been disclosed to a union pursuant to the voter list requirement.

entitled to substantially greater weight than it was given by the 2014 amendments. First, concerns about the protection of privacy interests have grown exponentially in conjunction with the accompanying rapid development of communications technology and the novel problems that have come with it. Just as the Board in 1966 could not possibly have imagined the proliferation of mobile smartphones, the Board could not have envisioned the rampancy of data and identity theft in today's information- and data-based society. Personal telephone numbers present special concerns in this regard: as explained in a recent *Wired* article, "phone numbers have become more than just a way to contact someone," but have increasingly been used by companies and services as a means for both identification and verification of identity, thereby turning phone numbers into "a skeleton key into your entire online life."<sup>45</sup> The news is rife with stories of large-scale data theft as well as thefts of individual phone numbers and the mischief that can result, such as "SIM swap" attacks in which hackers convince a target's phone company to direct the target's text messages to a different SIM card, thereby intercepting two-factor authentication login codes enabling hackers to infiltrate the target's accounts.<sup>46</sup> Personal email addresses present similar concerns, as they are the principal point of attack for ever-expanding forms of email fraud (such as spoofing, phishing, and other forms of social engineering), scams, and hacking.<sup>47</sup> This is not to

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<sup>45</sup> Lily Hay Newman, "Phone Numbers Were Never Meant as ID. Now We're All At Risk," *Wired* (Aug. 25, 2018), <https://www.wired.com/story/phone-numbers-identification-authentication/?verso=true>.

<sup>46</sup> Andy Greenberg, "So Hey You Should Stop Using Texts For Two-Factor Authentication," *Wired* (June 26, 2016), <https://www.wired.com/2016/06/hey-stop-using-texts-two-factor-authentication/>.

<sup>47</sup> See, e.g., Federal Bureau of Investigation Alert Number I-071218-PSA (Jul. 12, 2018), available at <https://www.ic3.gov/media/2018/180712.aspx> (detailing growth of Business E-mail Compromise/E-mail Account Compromise scam). See generally

suggest that unions would be tempted to engage in such behavior upon receiving employee telephone numbers or email addresses, but rather to illustrate that there is a heightened privacy interest with respect to controlling the disclosure itself.

Second, the lack of an opt-out procedure entitles the privacy interest in personal telephone numbers and email addresses to greater weight. For the purposes of this proceeding, the Board assumes that the 2014 amendments were correct that crafting an opt-out provision would be difficult and impractical and would also be of limited utility given the relatively short period of time during which contacts would occur between the union and the employees. See 79 FR 74348-74349. The lack of a practical opt-out mechanism raises immediate concerns with respect to telephone numbers, given that telephone calls and text messages are subject to the user's talk, text, and/or data plan. Although many such plans are unlimited, many are not or are "pay-as-you-go" plans. A user may still be able to avoid depleting any minutes limit or incurring additional charges by declining an incoming phone call, but users typically will not be in a position to avoid unsolicited text messages in advance of receiving one from a particular sender, and although they may be able to block such messages thereafter, the text has already been counted towards the plan limit and/or charges may have been incurred. The 2014 amendments responded to this risk by predicting it was unlikely that a union would place so many calls or send so many texts as to financially harm recipients without unlimited calling and text plans, reiterating that the use of telephone numbers would be

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Federal Bureau of Investigation Internet Crime Complaint Center, "2018 Internet Crime Report," available at [https://pdf.ic3.gov/2018\\_IC3Report.pdf](https://pdf.ic3.gov/2018_IC3Report.pdf) (detailing internet crimes, including email fraud, in 2018); Federal Bureau of Investigation Internet Crime Complaint Center Press Room, available at <https://www.ic3.gov/media/default.aspx> (containing press releases describing various email and internet-related scams).

restricted to the representation and related proceedings, and referring to the Federal Communications Commission's initiatives to address "bill shock." 79 FR 74351. All of this misses the point, however, because for individuals with limited plans a single answered telephone call or a single unsolicited text message counts toward their plan limit at best or exceeds that limit and results in additional charges at worst. This concern is also present for email addresses, as email is increasingly accessed from smartphones,<sup>48</sup> and accessing email via such devices also counts toward a user's data limits. Here, too, the point is not that the disclosure can lead, or has led, to larger bills for employees; it is that employees have a stronger privacy interest in their telephone numbers and email addresses for this reason.

Third, the Board is inclined to agree with the view, expressed by dissenting Members Miscimarra and Johnson in 2014, that employees have a greater privacy interest in personal phone numbers and email addresses than they do in home addresses. As the dissenting members stated, a home is a fixed point that can be visited independent of disclosure of the address, whereas a personal email address is entirely the creation of the employee and typically is not identifiable at all without the employee's consent. A personal phone number is also created in part by the employee, who can determine whether it is publicly listed. Further, the Board is inclined to find that the emergence of smartphones as a "universal point of contact," as well as the general proliferation of cellular telephones, also heightens the privacy interest in telephone numbers. As cellular telephone ownership has increased, and as more households

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<sup>48</sup> As of February 2019, approximately 81% of U.S. adults owned a smartphone. Pew Research Center Internet & Technology, Mobile Fact Sheet (Jun. 12, 2019), available at <https://www.pewresearch.org/internet/fact-sheet/mobile/>.



have abandoned landlines,<sup>49</sup> specific phone numbers have become increasingly associated with particular individuals and their particular mobile device of choice, and this association can persist despite relocations that, in another era, would have required changing telephone numbers. Thus, although the ubiquity and convenience of cellular telephones means that disclosure of telephone numbers could serve the *Excelsior* purposes, the close association of telephone numbers with particular individuals also increases the privacy interest that those individuals have in their personal telephone numbers.

Taking these considerations together, the Board believes, subject to comments, that employees clearly have a heightened privacy interest in their personal email addresses and telephone numbers.<sup>50</sup> The Board is also inclined to find that this heightened privacy interest outweighs the competing interest in disclosure not only for the reasons listed above, but also because (1) unions will continue to have adequate alternative means of reaching employees, just as they did before the 2014

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<sup>49</sup> As of the second half of 2018, 57.1% of all households did not have a landline telephone but did have at least one wireless telephone, and approximately 56.7% of all adults in the U.S. lived in wireless telephone-only households. Stephen J. Blumberg and Julian V. Luke, “Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July-December 2018,” National Center for Health Statistics (Jun. 2019), <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201906.pdf>.

<sup>50</sup> The Board is also inclined, subject to comments, to find that there is no meaningful distinction between personal email addresses and telephone numbers with respect to the privacy interests at stake. Although there may be minor distinctions between the two, the considerations identified above apply to both types of contact information. In addition, the 2014 amendments do not appear to have suggested any meaningful difference in the privacy interests involved, nor did the courts who considered challenges to the 2014 amendments suggest there is any such difference. See *Associated Builders and Contractors of Texas v. NLRB*, 826 F.3d at 225-226; *Associated Builders and Contractors of Texas v. NLRB*, 2015 WL 3609116 at \*9-11 (W.D. Tex. June 1, 2015); *Chamber of Commerce v. NLRB*, 118 F. Supp. 3d at 213.

amendments; (2) unions will continue to be able to avail themselves of the other expanded disclosures required by the 2014 amendments, which the Board does not propose eliminating; and (3) unions will, of course, continue to be able to avail themselves of the traditional tools and techniques they have at their disposal to encourage employees to voluntarily disclose other contact information.

In sum, the Board is inclined to find that eliminating the mandatory disclosure of employees' personal telephone numbers and email addresses strikes a better balance between the purposes underlying the voter list requirement and employee privacy concerns.

#### B. Provision of Absentee Ballots to Individuals on Military Leave

The Board is inclined, subject to comments, to adopt a procedure that will provide absentee mail ballots for employees on military leave.<sup>51</sup> This proposal represents a limited exception to the Board's general policy of not providing absentee ballots; the Board is not inclined to modify that policy in any further respects.<sup>52</sup>

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<sup>51</sup> The Board is currently subject to a budgetary rider that prohibits it from using any appropriated funds "to issue any new administrative directive or regulation that would provide employees any means of voting through any electronic means in an election to determine a representative for the purposes of collective bargaining." See, e.g., "Justification of Performance Budget for Committee on Appropriations, Fiscal Year 2020" at 5, available at [https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1706/performance\\_justification\\_2020.pdf](https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1706/performance_justification_2020.pdf). Accordingly, at this time any absentee balloting must be accomplished by mail ballot.

<sup>52</sup> On this count, the Board is inclined to find that military leave presents distinct concerns and considerations from other types of leave. As previously indicated, although the Board has changed course at least three times with respect to absentee balloting by employees on military leave, the Board has much more consistently rejected arguments that absentee ballots should have been provided to employees on other types of leave. The Board is inclined to believe this distinction is justified due to the fact that other types of leave are more readily within an employee's control (e.g.,

To begin, the Board has, from its earliest days, zealously protected the eligibility of employees on military leave. From *Cudahy* forward, the Board has held that such employees are eligible voters, even if they would not otherwise meet the Board's eligibility criteria, and the Board has refused to honor stipulations that would have excluded such employees from the bargaining unit. Although the *Wilson* Board may have had valid reasons for declaring absentee ballots for military personnel "impracticable," the Board's subsequent experience under *South West Pennsylvania Pipe Lines* demonstrates that absentee balloting was nevertheless feasible, even in situations involving large units and large percentages of employees on military leave voting by absentee ballot. The *Link Belt* Board's reversion to declaring such balloting "impracticable" was ill-explained, as was its purported distinction of *South West Pennsylvania Pipe Lines*. The Board is accordingly inclined to find, subject to comments, that it should not continue deferring to the judgment expressed in *Wilson* and *Link Belt*.

In addition, the Board is also inclined to find, subject to comments, that the types of administrative difficulties cited in *Wilson* and *Link Belt* are less pronounced, and/or more easily dealt with, due to advances in transportation and telecommunications that have occurred since 1950. At present, first-class domestic mail is delivered within 1 to 3 business days.<sup>53</sup> And even for those service members stationed abroad, it appears that

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vacation) or frequently cannot be anticipated ahead of time (e.g., sick leave). And as a general matter, for employees on other types of leave, the Board is inclined to agree with the Third Circuit's enumeration of the policy reasons for not permitting absentee ballots. See *Cedar Tree*, 169 F.3d at 797-798.

<sup>53</sup> See <https://www.usps.com/ship/first-class-mail.htm>.

letters sent via priority mail can usually be delivered within two weeks.<sup>54</sup> Based on these estimates, the Board is inclined to find that there is no longer any basis to conclude, as the Board did under *Wilson*, that 3 months from the Direction of Election to the return date would be required to accommodate absentee balloting by employees on military leave. See *Mine Safety Appliances*, 55 NLRB at 1194.

Further, telecommunications have evolved markedly since 1950, as a result of which the Board anticipates it will be much easier to determine the locations and addresses of any employees on military leave. The Board is inclined to believe that most employees on military leave will have provided their employer with their contact information, and so determining such employees' mailing addresses may often be as simple as sending an employee an email to ask for it. Even where this is not possible, the Board is inclined to believe that employers will possess sufficient information to permit the parties to use the military personnel locator services provided by the U.S. Navy,<sup>55</sup> U.S. Marine Corps,<sup>56</sup> U.S. Army,<sup>57</sup> and U.S. Air Force.<sup>58</sup> Moreover, so long as an employee's installation is known, the Department of Defense website provides a convenient tool for obtaining the installation's mailing address.<sup>59</sup> And in at least some instances, the Board anticipates that employees on certain types of military leave will be

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<sup>54</sup> According to the United States Post Office, the normal mail transit times for Priority Mail Letters via Military APO/FPO/DPO Mail are as follows: 7-9 days for locations in Germany, 11-13 days for locations in Iraq/Kuwait/Afghanistan, 8-10 days for locations in Japan/Korea, and 15-18 days for locations in Africa. <https://faq.usps.com/s/article/How-long-will-it-take-for-mail-to-reach-a-MPO>

<sup>55</sup> [https://www.navy.mil/navydata/nav\\_legacy.asp?id=168](https://www.navy.mil/navydata/nav_legacy.asp?id=168).

<sup>56</sup> <https://www.marines.mil/FAQ/>.

<sup>57</sup> *Id.*

<sup>58</sup> <https://www.afpc.af.mil/Support/Worldwide-Locator/>.

<sup>59</sup> See <https://installations.militaryonesource.mil/>.

reachable at their home address, which the employer is already required to provide to the Board pursuant to the voter list requirement discussed at greater length above.

Based on these considerations, the Board is inclined to conclude, subject to comments, that the difficulties in locating and securing mailing addresses for employees on military leave are far less likely to be present today than was the case when *Wilson* and *Link Belt* were decided.

Perhaps more importantly, the Board is inclined to agree with former Member Johnson's suggestion that provision of absentee mail ballots to individuals on military leave would be more consistent with other laws and public policies than the Board's current refusal to provide absentee ballots. In this regard, the Board is inclined, subject to comments, to conclude that Congress has manifested an approach or general policy of providing special protections to service members, especially with respect to matters of employment and voting. In 1940, before *Cudahy*, Congress enacted the Soldiers' and Sailors' Civil Relief Act—which in 2003 was restated, clarified, revised, and retitled the Servicemembers Civil Relief Act<sup>60</sup>—which provides a wide range of protections for servicemembers as they enter active duty.<sup>61</sup> *Cudahy*'s holding was itself based on a congressional statute and resolution entitling servicemembers to reinstatement of their pre-service employment.<sup>62</sup> More recently, in the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA),<sup>63</sup> Congress similarly provided a range of employment protections for servicemembers in order to, among other things, encourage

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<sup>60</sup> See Pub. L. 108-189, Dec. 19, 2003, 117 Stat 2935.

<sup>61</sup> See 50 U.S.C. 3910 et seq.

<sup>62</sup> See 29 NLRB at 835 fn. 5.

<sup>63</sup> See 38 U.S.C. 4301 et seq.

military service “by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service.” 38 U.S.C. 4301(a)(1).<sup>64</sup> In addition, in 1986 Congress passed the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA),<sup>65</sup> which provides various protections and mechanisms for absentee voting in federal elections by military personnel and overseas citizens. UOCAVA has been amended several times in order to facilitate its purposes; of particular note here, amendments made as part of the National Defense Authorization Act for Fiscal Year 2002 stated that it is the sense of Congress that all administrators of Federal, State, or local elections “should be aware of the importance of the ability of each uniformed services voter to exercise the right to vote” and should perform their duties to ensure that uniformed services voters receive “the utmost consideration and cooperation when voting” and that “each valid ballot cast by such a voter is duly counted.”<sup>66</sup>

The Board does not suggest that any of these statutes apply to Board-conducted elections or require the provision of absentee ballots to employees on military leave. But taken together, they do indicate a national policy that favors taking measures to ensure that servicemembers’ employment and electoral rights are preserved. Indeed, this policy has informed the Act itself: Section 10(b) (as amended in 1947), 29 U.S.C. 160(b), provides that no complaint shall issue based on any unfair labor practice occurring more than six months prior to the filing of the charge “unless the person aggrieved thereby was prevented from filing such charge by reason of service in the

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<sup>64</sup> Congress also stated that the Federal Government should be a model employer in carrying out the provisions of USERRA. 38 U.S.C. 4301(b).

<sup>65</sup> 52 U.S.C. 20301 et seq. (as amended).

<sup>66</sup> Pub. L. 107-107, div. A, title XVI, Sec. 1601(a)(1), (2)(A)-(B), Dec. 28, 2001, 115 Stat. 1012.

armed forces in which event the six-month period shall be computed” from the date of discharge. Given that the Act itself reflects this policy, that Board-conducted elections implicate the employment-related rights of those on military leave, and that Congress has exhorted administrators who conduct political elections to facilitate the right of servicemembers to vote, the Board is inclined to find, subject to comments, that it too should provide for absentee balloting by employees on military leave.

The Board recognizes that adopting a policy of providing for absentee mail ballots presents a number of logistical challenges. The Board believes, however, that these can be avoided if the absentee ballot procedure is properly structured. The Board is accordingly soliciting comments from stakeholders, the general public, the Board’s regional personnel, and other governmental agencies regarding what procedures should apply if the Board adopts the proposed amendment. Among other things, commenters are invited to address:

- whether there should be a time limit on when an absentee ballot may be requested;
- who should be permitted and/or required to request absentee ballots on behalf of employees on military leave;
- whether the Board should require documentary proof that the individual will in fact be on military leave at the time of the election;
- how the Board should approach securing the addresses of employees on military leave, including whether the parties should be responsible for doing so;
- whether time limits on returning absentee ballots should be set and, if so, what those time limits should be;
- whether other procedures or provisions are necessary or desirable to help avoid challenges to or objections over absentee ballots.

Subject to any such comments that may be received, the Board’s preliminary inclination is to adopt a new procedure, rather than reinstate the standard applied under *South West Pennsylvania Pipe Lines*. That procedure involved case-specific determinations as to whether absentee ballots were warranted, and the Board suspects

that such individualized determinations were part of the reason the *Link Belt* Board opted to return to *Wilson's* blanket prohibition on absentee ballots. Further, despite *South West Pennsylvania Pipe Lines'* guidance regarding these determinations, the application of that guidance in subsequent cases is often difficult to understand and not always consistent with *South West Pennsylvania Pipe Lines* itself.<sup>67</sup> Nor is the Board inclined to engage in individualized determinations as to whether absentee balloting is feasible for specific employees, given the likelihood that such an approach would prove time-consuming and would give rise to increased litigation. The Board is therefore instead inclined to adopt a procedure that simply specifies that the Regional Director “shall provide absentee mail ballots for eligible voters or individuals permitted to vote subject to challenge who are on military leave upon timely notice from any party or person that such voters or individuals will otherwise be unable to vote in the election.”

With respect to notification and the timeliness thereof, the Board's initial inclination is, as just set forth, to provide that absentee ballots will be provided upon notice “from any party or person.” As a threshold matter, the Board is of the view that it would indeed be impracticable to require regional directors to investigate and identify employees on military leave in each case; such an approach would almost certainly overburden regional personnel. The Board also believes that it would be unfair to adopt a rule requiring those employees on military leave to secure their own absentee ballots.

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<sup>67</sup> As noted earlier, the Board appears to have promptly disregarded *South West Pennsylvania Pipe Lines'* emphasis on the relatively small unit size and number of employees on military leave, as well as the emphasis on the parties' agreement to permit absentee balloting. In addition, certain of the procedures used under that case would likely be superfluous in light of subsequent developments. Thus, *South West Pennsylvania Pipe Lines'* concern with gathering and sharing employee addresses is likely unnecessary following the Board's adoption of the voter list requirement.



The Board is generally of the view that the parties will be in the best position to know if there are employees in the unit that are (or will be) on military leave, and that they are also best positioned to inform the Board that absentee ballots will be required. The Board has considered whether the burden of identifying personnel on military leave should be allocated to a specific party, but is inclined, subject to comments, not to impose any such burden. Although the employer is probably best positioned to know if there are (or will be) any employees on military leave, there may be situations where an incumbent or petitioning union, or individual decertification petitioner, has earlier notice of the situation. Further, the Board's goal in adopting this amendment is to ensure that employees on military leave have maximum opportunity to participate in the election; accordingly, who informs the Board of the existence of such employees is immaterial. The Board is inclined to find that so long as timely notice is received from *someone*, the Board should furnish the employee on military leave with an absentee ballot.

On a closely related count, the Board recognizes that there may be situations in which a party is aware that an eligible employee is on military leave but does not so inform the Board, whether due to neglect, indifference, or gamesmanship. In such situations, the Board believes, subject to comments, that the party should be estopped from filing an objection based on the failure to provide the eligible employee with an absentee ballot. This is consistent with the Board's voter list requirement, which prevents an employer from filing an objection based on its own failure to comply with the requirement, as well as with the broader principle that a party cannot profit from its own misconduct. See, e.g., *Republic Electronics*, 266 NLRB 852, 853 (1983). The proposed amendment accordingly provides that "[a] party that was aware of a person on

military leave but did not timely notify the Regional Director shall be estopped from objecting to the failure to provide such person with an absentee ballot.” By the same token, the Board has considered whether it should impose a penalty on parties that are aware, but fail to notify the Board, of eligible voters on military leave. The Board believes, subject to comment, that it is not necessary to include such a provision in the amendment because Board precedent is already clear that causing an employee to miss the opportunity to vote is objectionable. See, e.g., *Sahuaro Petroleum & Asphalt Co.*, 306 NLRB 586, 586-587 (1992).<sup>68</sup>

As for “timely” notice, the Board is of the view that there must be a point after which absentee ballots will no longer be provided. Such a cutoff point is necessary to ensure that the absentee ballot procedure does not come at the expense of promptly conducting and resolving elections. The Board’s preliminary view, subject to comments, is that the cutoff point should be linked to the issuance of the decision and direction of election or the approval of the stipulated election agreement. In stipulated cases, the agreement contains the election details, at which point the parties (or other persons) will be able to determine with certainty whether there are indeed employees on military leave who will be unable to vote unless they are provided with an absentee ballot. In directed elections, regional directors have the discretion to include the election details in the decision and direction of election, though they retain the discretion to subsequently issue the election details. The 2019 amendments made the regional directors’ discretion in this regard clear (the prior rules having stated that regional directors will

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<sup>68</sup> The Board notes, however, that in such situations an election is set aside only if the employees prevented from voting could have affected the election results had they cast ballots. See *id.*

“ordinarily” include the election details in the decision and direction of election), but the supplementary information to the 2019 amendments also made clear that the Board expected that regional directors “should ordinarily be able to provide the election details in the direction of election.” 84 FR 68544. In view of these considerations, as well as the fact that the voter list is due (pursuant to the 2019 amendments) 5 business days after the issuance of a decision and direction of election or approval of an election agreement, the Board is inclined to provide that any request for an absentee ballot must also be received within 5 business days of the approval of an election agreement or issuance of the decision and direction of election. But given that there may be situations where the election arrangements are unknown until some point after the issuance of a decision and direction of election, the Board is inclined to also provide that requests for absentee ballots must be received within 5 business days “absent extraordinary circumstances.”

With respect to securing the mailing addresses of employees on military leave, the Board is inclined, subject to comments, to provide that in order to be timely, a request for an absentee ballot must not only be received within 5 business days of the direction of election or approval of an election agreement, but must also be “accompanied by the mailing address at which the person can be reached while on leave.” As discussed above, the Board believes that the parties—most often the employer—will already have such employees’ contact information or will have a way of readily obtaining it, and in such situations the parties should simply provide it in the course of notifying the Board that absentee ballots will be needed for those

employees.<sup>69</sup> The Board would, however, be particularly interested in the input of the Department of Defense (and any other commenters with experience in securing contact information for military personnel) with respect to how best to accomplish the goal of gathering military mailing addresses.

Finally, the Board is also of the view that there must be a provision setting forth a time after which absentee ballots will not be counted. Such a cutoff point is, like the cutoff point for notifying the Board of employees on military leave, necessary to prevent the absentee ballot procedure from unduly delaying the finality of election results. The Board is of the preliminary view that the cutoff point for counting absentee mail ballots should be tied to the date on which they are mailed to the employees, and that 30 calendar days should, in most circumstances, provide enough time for the absentee ballot to be delivered to the employee, filled out, and returned to the region. The Board recognizes, however, that this will often create situations when the election has been conducted but the period for receiving absentee ballots has not yet passed. The Board is of the view that where absentee ballots remain outstanding when the ballots would otherwise be counted (usually at the end of manual polling periods), the region should conduct the count as usual, but the tally of ballots should include a tabulation for outstanding absentee ballots. In the event the outstanding absentee ballots could not be determinative, the tally of ballots will be considered final; if the absentee ballots could

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<sup>69</sup> To the extent employers use the voter list to notify the Regional Director of the need for absentee ballots for employees on military leave, the Board is proposing that the voter list must include the employee's mailing address while on leave *in addition to* the employee's home address. The Board acknowledges that there may be situations in which a home address alone will be sufficient to provide the voter on military leave with an absentee ballot, including where the military leave involved is short-term.

be determinative, the region will wait until the 30-day period has elapsed, after which the region will determine whether the absentee ballots received (if any) since the initial tally of ballots are sufficient in number to affect the result. If so, the Regional Director will open and count such ballots and issue a revised tally of ballots; if not, the initial tally of ballots will be deemed final.

The Board believes that by adopting these or similar procedures, absentee ballots for military personnel can be provided without sacrificing the prompt conduct and conclusion of elections. Under the proposed amendment, the election itself will not be delayed, nor will the ballot count; the likely worst-case scenario is that the final tally of ballots will be delayed by several days in order to wait for and count outstanding determinative absentee ballots. The Board also believes that these or similar procedures will minimize or avoid the types of considerations that may otherwise favor prohibiting absentee balloting, such as those identified by the Third Circuit in *Cedar Tree*, 169 F.3d at 797-798. First, by limiting absentee ballots to employees on military leave, the Board believes that only a subset of all representation cases will be affected, avoiding logistical costs and concerns that would follow if the Board provided for absentee balloting by other categories of employees. Likewise, a blanket rule that absentee ballots will be provided to employees on military leave when timely requested avoids time-consuming individualized determinations as to whether an absentee ballot should be provided in a given case. In this regard, the proposed amendment will be predictable and even-handed. And finally, the proposed amendment will not result in the postponement of vote counts, but only (at worst) a modest delay in the issuance of a final tally of ballots.

## IV. Regulatory Procedures

### The Regulatory Flexibility Act

#### A. Initial Regulatory Flexibility Analysis

The Regulatory Flexibility Act of 1980 (“RFA”), 5 U.S.C. 601 et seq., ensures that agencies “review draft rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdiction, and small organizations, as provided by the [RFA].”<sup>70</sup> It requires agencies promulgating proposed rules to prepare an Initial Regulatory Flexibility Analysis (“IRFA”) and to develop alternatives wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities.<sup>71</sup> However, an agency is not required to prepare an IRFA for a proposed rule if the agency head certifies that, if promulgated, the rule will not have a significant economic impact on a substantial number of small entities.<sup>72</sup> The RFA does not define either “significant economic impact” or “substantial number of small entities.”<sup>73</sup> Additionally, “[i]n the absence of statutory specificity, what is ‘significant’ will vary depending on the economics of the industry or sector to be regulated. The agency is in the best position to gauge the small entity impacts of its regulations.”<sup>74</sup>

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<sup>70</sup> E.O. 13272, Sec. 1, 67 FR 53461 (“Proper Consideration of Small Entities in Agency Rulemaking”).

<sup>71</sup> Under the RFA, the term “small entity” has the same meaning as “small business,” “small organization,” and “small governmental jurisdiction.” 5 U.S.C. 601(6).

<sup>72</sup> 5 U.S.C. 605(b).

<sup>73</sup> 5 U.S.C. 601.

<sup>74</sup> Small Business Administration Office of Advocacy, “A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act” (“SBA Guide”) at 18, <https://www.sba.gov/sites/default/files/advocacy/How-to-Comply-with-the-RFA-WEB.pdf>.

As discussed below, the Board is uncertain whether its proposed rule will have a significant economic impact on a substantial number of small entities. The Board assumes for purposes of this analysis that a substantial number of small employers and small entity labor unions will be impacted by this rule because at a minimum, they will need to review and understand the effect of the changes to the voter list requirement and the provision of absentee ballots to employees on military leave. Additionally, there may be compliance costs that are unknown to the Board.

For these reasons, the Board has elected to prepare an IRFA to provide the public the fullest opportunity to comment on the proposed rule.<sup>75</sup> An IRFA describes why an action is being proposed; the objectives and legal basis for the proposed rule; the number of small entities to which the proposed rule would apply; any projected reporting, recordkeeping, or other compliance requirements of the proposed rule; any overlapping, duplicative, or conflicting Federal rules; and any significant alternatives to the proposed rule that would accomplish the stated objectives, consistent with applicable statutes, and that would minimize any significant adverse economic impacts of the proposed rule on small entities.<sup>76</sup> An IRFA also presents an opportunity for the public to provide comments that will shed light on potential compliance costs that are unknown to the Board or on any other part of the IRFA.

Detailed descriptions of this proposed rule, its purpose, objectives, and the legal basis are contained earlier in the **SUMMARY** and **SUPPLEMENTARY INFORMATION**

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<sup>75</sup> After a review of the comments, the Board may elect to certify that the rule will not have a significant economic impact on a substantial number of small entities in the publication of the final rule. 5 U.S.C. 605(b).

<sup>76</sup> 5 U.S.C. 603(b).

sections. In brief, the proposed rule includes two provisions. First, in order to better protect employee privacy interests, the proposed rule modifies the current voter list provisions to eliminate the requirement that the employer provide “available personal email addresses” and “available home and personal cellular (‘cell’) telephone numbers” of all eligible voters (including individuals permitted to vote subject to challenge) to the Regional Director and the other parties. Second, the proposed rule establishes a procedure to provide absentee ballots to employees on military leave in order to maximize their opportunity to participate in Board-conducted elections.

B. Description and Estimate of Number of Small Entities to which the Rule Applies

To evaluate the impact of the proposed rule, the Board first identified the universe of small entities that could be impacted by the changes to the voter list requirement and by the introduction of absentee balloting by employees on military leave.

Both changes will apply to all entities covered by the National Labor Relations Act (“NLRA” or “the Act”). According to the United States Census Bureau, there were 5,954,684 businesses with employees in 2016.<sup>77</sup> Of those, 5,934,985 were small businesses with fewer than 500 employees.<sup>78</sup> Although the proposed rule would only

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<sup>77</sup> See U.S. Department of Commerce, Bureau of Census, 2016 Statistics of U.S. Businesses (“SUSB”) Annual Data Tables by Establishment Industry, <https://www.census.gov/data/tables/2016/econ/susb/2016-susb-annual.html> (from downloaded Excel Table titled “U.S., 6-digit NAICS”).

<sup>78</sup> *Id.* The Census Bureau does not specifically define “small business” but does break down its data into firms with fewer than 500 employees and those with 500 or more employees. Consequently, the 500-employee threshold is commonly used to describe the universe of small employers. For defining small businesses among specific industries, the standards are defined by the North American Industry Classification System (NAICS).



apply to employers who meet the Board's jurisdictional requirement, the Board does not have the means to calculate the number of small businesses within the Board's jurisdiction.<sup>79</sup> Accordingly, the Board assumes for purposes of this analysis that the great majority of the 5,934,985 small businesses could be impacted by the proposed rule.

These two changes will also impact all labor unions, as organizations representing or seeking to represent employees. Labor unions, as defined by the NLRA, are entities "in which employees participate and which exist for the purpose . . . of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."<sup>80</sup> The Small Business Administration's ("SBA") "small business" standard for "Labor Unions and Similar Labor Organizations" is

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<sup>79</sup> Pursuant to 29 U.S.C. 152(6) and (7), the Board has statutory jurisdiction over private sector employers whose activity in interstate commerce exceeds a minimal level. *NLRB v. Fainblatt*. 306 U.S. 601, 606-607 (1939). To this end, the Board has adopted monetary standards for the assertion of jurisdiction that are based on the volume and character of the business of the employer. In general, the Board asserts jurisdiction over employers in the retail business industry if they have a gross annual volume of business of \$500,000 or more. *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1959). But shopping center and office building retailers have a lower threshold of \$100,000 per year. *Carol Management Corp.*, 133 NLRB 1126 (1961). The Board asserts jurisdiction over non-retailers generally where the value of goods and services purchased from entities in other states is at least \$50,000. *Siemons Mailing Service*, 122 NLRB 81 (1959).

The following employers are excluded from the NLRB's jurisdiction by statute:

--Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations. 29 U.S.C. 152(2).

--employers that employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery. 29 U.S.C. 152(3).

--employers subject to the Railway Labor Act, such as interstate railroads and airlines. 29 U.S.C. 152(2).

<sup>80</sup> 29 U.S.C. 152(5).

\$7.5 million in annual receipts.<sup>81</sup> In 2012, there were 13,740 labor unions in the U.S.<sup>82</sup> Of these unions, 11,245 had receipts of less than \$1,000,000; 2,022 labor unions had receipts between \$1,000,000 and \$4,999,999; and 141 had receipts between \$5,000,000 and \$7,499,999. In aggregate, 13,408 labor unions (97.6% of total) are small businesses according to SBA standards.

The proposed change to the voter list requirement will only be applied as a matter of law under certain circumstances in Board proceedings, namely, when a petition has been filed pursuant Section 9(c) of the Act and the Regional Director, based on that petition, has either approved an election agreement or directed an election. Therefore, the frequency with which the issue arises is indicative of the number of small entities most directly impacted by the proposed rule. For example, in Fiscal Year 2019, 1,179 petitions were filed and proceeded to an election.<sup>83</sup> Each of these elections involved at least one employer and at least one labor union, but even so, this is only a de minimis amount of all small entities under the Board's jurisdiction.

Similarly, the number of small entities expected to be impacted by the provision of absentee ballots for military personnel is also low. Although in theory each party to an election could be affected by this proposed change, it is unlikely that every Board-

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<sup>81</sup> See 13 CFR 121.201.

<sup>82</sup> The Census Bureau only provides data about receipts in years ending in 2 or 7. The 2017 data has not been published, so the 2012 data is the most recent available information regarding receipts. See U.S. Department of Commerce, Bureau of Census, 2012 SUSB Annual Data Tables by Establishment Industry, [https://www2.census.gov/programs-surveys/susb/tables/2012/us\\_6digitnaics\\_r\\_2012.xlsx](https://www2.census.gov/programs-surveys/susb/tables/2012/us_6digitnaics_r_2012.xlsx) (Classification #813390--Labor Unions and Similar Labor Organizations).

<sup>83</sup> "Number of Elections Held in FY19," <https://www.nlr.gov/news-outreach/graphs-data/petitions-and-elections/number-elections-held-fy17>.

conducted election will require absentee ballots for military personnel. But even if every election were to require such ballots, the number of parties involved is once again only a de minimis amount of all small entities under the Board's jurisdiction.

### C. Recordkeeping, Reporting, and Other Compliance Costs

The RFA requires agencies to consider the direct burden that compliance with a new regulation will likely impose on small entities.<sup>84</sup> Thus, the RFA requires the Board to determine the amount of "reporting, recordkeeping and other compliance requirements" imposed on small entities.<sup>85</sup>

The Board concludes that the proposed rule imposes no capital costs for equipment needed to meet the regulatory requirements; no lost sales and profits resulting from the proposed rule; no changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; and no costs of hiring employees dedicated to compliance with regulatory requirements.<sup>86</sup>

Small entities may incur some costs from reviewing the rule in order to understand the substantive changes. To become generally familiar with the revised voter list requirements and the military absentee ballot procedure, the Board estimates that a human resources specialist at a small employer or labor union may take at most ninety minutes to read the rule. It is also possible that a small employer or labor union

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<sup>84</sup> See *Mid-Tex Elec. Co-op v. FERC*, 773 F.2d 327, 342 (D.C. Cir. 1985) ("[I]t is clear that Congress envisioned that the relevant 'economic impact' was the impact of compliance with the proposed rule on regulated small entities.").

<sup>85</sup> See 5 U.S.C. 603(b)(4), 604(a)(4).

<sup>86</sup> SBA Guide at 37.

may wish to consult with an attorney, which the Board estimates will require one hour. Using the Bureau of Labor Statistics' estimated wage and benefit costs, the Board has assessed these labor costs to be \$147.12.<sup>87</sup>

The Board does not foresee any additional compliance costs related to eliminating the required disclosure of available personal email addresses and telephone numbers of employees and other individuals included on the voter list. For small employers, existing compliance costs are limited to gathering the required information (including available email addresses and telephone numbers), placing it in the proper format, and serving it on the Regional Director and the other parties within the required timeframe. The Board believes that removing the required disclosure of email addresses and telephone numbers will reduce existing compliance costs for small employers. There are no existing compliance costs for small unions with respect to the voter list requirement; they are merely obligated to refrain from misusing the list or the information contained therein. Removing email addresses and phone numbers from the list may result in some additional costs to small unions, who will now need to gather such information themselves or, failing that, resort to other methods of contacting eligible voters, but such costs do not involve compliance with the proposed change itself. Should a commenter provide data demonstrating the cost of eliminating provision

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<sup>87</sup> For wage figures, see May 2017 National Occupancy Employment and Wage Estimates, found at [https://www.bls.gov/oes/current/oes\\_nat.htm](https://www.bls.gov/oes/current/oes_nat.htm). The Board has been administratively informed that BLS estimates that fringe benefits are approximately equal to 40 percent of hourly wages. Thus, to calculate total average hourly earnings, BLS multiplies average hourly wages by 1.4. In May 2017, average hourly wages for a Human Resources Specialist (BLS #13-1071) were \$31.84. The same figure for a lawyer (BLS #13-1011) was \$57.33. Accordingly, the Board multiplied each of those wage figures by 1.4 and added them to arrive at its estimate.

of personal email addresses and telephone numbers, the Board will consider that information.

The Board also believes that any additional compliance costs related to the provision of absentee ballots to employees on military leave will be de minimis. As proposed, all a party need do to comply with the change is timely inform the Board when it is aware of such voters; parties are not required to affirmatively ascertain whether such voters exist. A party's failure to comply may in some circumstances give rise to objections, related litigation, and potentially a second election, but the cost of compliance itself is merely the de minimis cost of telling the Board what the party knows with regard to employees on military leave when the party knows it. The proposed change may result in some situations where a final tally of ballots is delayed due to outstanding dispositive absentee ballots, but the Board does not think that such delay will result in additional costs because once the final tally of ballots issues, parties will have the usual allotted time to file objections. It is possible that the absentee balloting procedure may itself give rise to additional litigation surrounding whether absentee ballots were timely requested and/or provided to the absentee voter, improperly denied or provided, or whether late-arriving absentee ballots should have been counted. But the Board's proposed procedure addresses these contingencies and should accordingly minimize this type of litigation and the costs associated with it. Should a commenter provide data demonstrating the cost of instituting an absentee ballot procedure for employees on military leave, the Board will consider that information.

#### D. Overall Economic Impacts

The Board does not find the estimated, quantifiable cost of reviewing and understanding the rule—\$147.12 for small employers and unions—to be significant within the meaning of the RFA.

In making this finding, one important indicator is the cost of compliance in relation to the revenue of the entity or the percentage of profits affected.<sup>88</sup> Other criteria to be considered are the following:

--Whether the rule will cause long-term insolvency, i.e., the regulatory costs that may reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms;

--Whether the cost of the proposed regulation will (a) eliminate more than 10 percent of the businesses' profits; (b) exceed one percent of the gross revenues of the entities in a particular sector; or (c) exceed five percent of the labor costs of the entities in the sector.<sup>89</sup>

The minimal cost to read and understand the rule will not generate any such significant economic impacts.

Since the only quantifiable impact that the Board has identified is the \$147.12 that may be incurred in reviewing and understanding the rule, the Board does not believe there will be a significant economic impact on a substantial number of small entities associated with this proposed rule. The Board welcomes input from the public regarding additional costs of compliance not identified by the Board or costs of compliance the Board identified but lacks the means to accurately estimate.

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<sup>88</sup> See SBA Guide at 18.

<sup>89</sup> Id. at 19.

E. Duplicate, Overlapping, or Conflicting Federal Rules

Agencies are required to include in an IRFA “all relevant Federal rules which may duplicate, overlap or conflict with the proposed rule.”<sup>90</sup> The Board has not identified any such federal rules, but welcomes comments that suggest any potential conflicts not noted in this section.

F. Alternatives Considered

Pursuant to 5 U.S.C. 603(c), agencies are directed to look at “any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant impact of the proposed rule on small entities.” Specifically, agencies must consider establishing different compliance or reporting requirements or timetable for small entities, simplifying compliance and reporting for small entities, using performance rather than design standards, and exempting small entities from any part of the rule.<sup>91</sup>

First, the Board considered taking no action. Inaction would leave in place the current voter list requirements and would not provide absentee ballots for employees on military leave. However, for the reasons stated in Section I through III, the Board finds it desirable to revisit these policies and to do so through the rulemaking process. Consequently, the Board rejects maintaining the status quo.

Second, the Board considered creating exemptions for certain small entities. This was rejected as impractical, considering that exemptions for small entities would substantially undermine the purposes of the proposed rule because such a large

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<sup>90</sup> 5 U.S.C. 603(b)(5).

<sup>91</sup> 5 U.S.C. 603(c).

percentage of employers and unions would be exempt under the SBA definitions. Specifically, to exempt small entities from the decision to eliminate the required disclosure of available personal email addresses and telephone numbers from the voter list would leave the employees of most small entities with inadequate protection of their privacy interests and would in fact penalize small employers by requiring them to disclose more contact information than would be required of other employers. And to exempt small entities from the provision of absentee ballots to employees on military leave would be contrary to the purposes of the rule: to maximize the opportunity such employees have to participate in Board-conducted elections.

Moreover, given the very small quantifiable cost of compliance, it is possible that the burden on a small business of determining whether it fell within an exempt category might exceed the burden of compliance. Congress gave the Board very broad jurisdiction, with no suggestion that it wanted to limit the coverage of any part of the Act to only larger employers. As the Supreme Court has noted, “[t]he [NLRA] is federal legislation, administered by a national agency, intended to solve a national problem on a national scale.”<sup>92</sup>

Because no alternatives considered will accomplish the objectives of this proposed rule while minimizing costs for small businesses, the Board believes that proceeding with this rulemaking is the best regulatory course of action. The Board welcomes public comment on any facet of this IRFA, including alternatives that it has failed to consider.

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<sup>92</sup> *NLRB v. Natural Gas Utility Dist. of Hawkins County*, 402 U.S. 600, 603-604 (1971) (quotation omitted).



## **Paperwork Reduction Act**

The NLRB is an agency within the meaning of the Paperwork Reduction Act (“PRA”). 44 U.S.C. 3502(1) and (5). The PRA creates rules for agencies for the “collection of information,” 44 U.S.C. 3507, which is defined as “the obtaining, causing to be obtained, soliciting, or requiring the disclosure to third parties or the public, of facts or opinions by or for an agency, regardless of form or format.” 44 U.S.C. 3502(3)(A). Collections of information that occur “during the conduct of an administrative action or investigation involving an agency against specific individuals or entities” are exempt from the PRA. 44 U.S.C. 3518(c)(1)(B)(ii); 5 CFR 1320.4(a)(2).

As a preliminary matter, the elimination of the required provision of available personal telephone numbers and email addresses in the voter list does not require any collection of information—indeed, it reduces the information collected—so the PRA does not apply.

Aside from that circumstance, the changes contained in this proposed rule are exempt from the PRA because any potential collection of information would take place in the context of a representation proceeding, which is an administrative action within the meaning of the PRA. As the Board noted in its 2014 rulemaking, the Senate Report on the PRA makes it clear that the exemption in “Section 3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties.” 79 FR 74468 (quoting S. Rep. No. 96-930, at 56 (1980)). See also 5 CFR 1320.4(c) (OMB regulation interpreting the PRA, providing that exemption applies “after a case file or equivalent is opened with respect to a particular party”). As the Board explained in its 2014 rulemaking, “[a] representation

proceeding is . . . ‘against specific individuals or entities’ within the meaning of section 3518(c)(1)(B)(ii),” and the outcome is binding on and thereby alters the legal rights of those parties. See 79 FR 74469. The proposed changes will apply within representation proceedings, and thus are administrative actions involving specific parties and fall within the PRA exemption.<sup>93</sup>

Accordingly, the proposed rules do not contain information collection requirements that require approval of the Office of Management and Budget under the PRA.

### **List of Subjects in 29 CFR Part 102**

Administrative practice and procedure, Claims, Equal access to justice, Freedom of information, Income taxes, Labor management relations, Lawyers, Privacy, Reporting and recordkeeping requirements, Sunshine Act.

### **Text of the Proposed Rule**

For the reasons discussed in the preamble, the Board proposes to amend 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

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<sup>93</sup> As acknowledged in the Initial Regulatory Flexibility Analysis above, the provision for absentee ballots to employees on military leave may result in litigation that may in turn result in rerun elections, and such litigation would not have been conducted and such elections would not have been held under the prior policy of not permitting absentee ballots. Nonetheless, particular collections of information required during the course of an election proceeding are not attributable to the instant proposed rule; instead, such requirements flow from prior rules. And in any event, even if such collections of information were attributable to this proposed rule, an election is a representation proceeding and therefore exempt from the PRA.

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 §102.62(d) to read as follows:

**§102.62 Election agreements; voter list; Notice of Election.**

\* \* \* \* \*

(d) *Voter list.* Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 5 business days after the approval of an election agreement pursuant to paragraph (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the Regional Director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and home addresses of all eligible voters. The employer shall also include in separate sections of that list the same information for those individuals who will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the Regional Director and the parties named in the agreement or direction respectively within 5 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certified that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the Regional

Director and served electronically on the other parties named in the agreement or direction. A certificate of service on all parties shall be filed with the Regional Director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

\* \* \* \* \*

3. Revise §102.67(l) to read as follows:

**§102.67 Proceedings before the Regional Director; further hearing; action by the Regional Director; appeals from actions of the Regional Director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.**

\* \* \* \* \*

(l) *Voter list.* Absent extraordinary circumstances specified in the direction of election, the employer shall, within 5 business days after issuance of the direction, provide to the Regional Director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and home addresses of all eligible voters. The employer shall also include in separate sections of that list the same information for those individuals who will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the Regional Director and the parties named in the

direction respectively within 5 business days after issuance of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the Regional Director and served electronically on the other parties named in the direction. A certificate of service on all parties shall be filed with the Regional Director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

4. Revise §102.69(a)(1), (2), and (7) to read as follows:

**§102.69 Election procedure; tally of ballots; objections; certification by the Regional Director; hearings; Hearing Officer reports on objections and challenges; exceptions to Hearing Officer reports; Regional Director decisions on objections and challenges.**

(a) *Election procedure; tally; objections.* (1) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending.

(2) All elections shall be by secret ballot. The Regional Director shall provide absentee mail ballots for eligible voters or individuals permitted to vote subject to challenge who are on military leave upon timely notice from any party or person that such voters or individuals will otherwise be unable to vote in the election. Absent extraordinary circumstances, such notification will be timely if received by the Regional Director within 5 business days of the direction of election or approval of election agreement, and if accompanied by the mailing address at which the person can be reached while on leave. This paragraph (a)(2) does not in any way modify the requirement that the employer provide the voter list information required in §102.62(d) or §102.67(l). A party that was aware of a person on military leave but did not timely notify the Regional Director shall be estopped from objecting to the failure to provide such person with an absentee ballot. Absentee ballots must be returned to and received at the regional office within 30 calendar days from the date they are mailed to the employees by the Regional Director.

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(7) Upon conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. If the Regional Director has provided absentee ballots to employees on military leave, the time for returning such ballots remains open at the conclusion of the election, and absentee ballots remain outstanding, the tally of ballots shall include the number of absentee ballots that remain outstanding. If the outstanding absentee ballots are potentially dispositive, after the time for

returning absentee ballots has passed the Regional Director shall determine whether the number of outstanding absentee ballots received since the initial tally of ballots is dispositive; if so, the Regional Director shall open and count any absentee ballots received since the election, and shall issue a revised tally of ballots. If the number of outstanding absentee ballots received since the initial tally of ballots is not dispositive, the initial tally of ballots shall be deemed final.

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Dated: July 15, 2020.

Roxanne L. Rothschild,  
Executive Secretary,  
National Labor Relations Board.

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