NLRB-00000001

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101, 102 and 103

RIN 3142–AA08

Representation—Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Notice of Proposed Rulemaking.

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

DATES: Comments regarding this proposed rule must be received by the Board on or before August 22, 2011. Comments replying to comments submitted during the initial comment period must be received by the Board on or before September 6, 2011. Reply comments should be limited to replying to comments previously filed by other parties. No late comments will be accepted. The Board intends to issue a notice of public hearing to be held in Washington, DC, on July 18–19, at which interested persons would be invited to share their views on the proposed amendments and to make any other proposals concerning the Board's representation case procedures.

ADDRESSES: You may submit comments identified by 3142–AA08 only by the following methods:

Internet—Federal eRulemaking Portal. Electronic comments may be submitted through *http://www.regulations.gov.* To locate the proposed rule, search ''documents open for comment'' and use key words such as ''National Labor Relations Board'' or ''representation-case procedures'' to find documents accepting comments. Follow the instructions for submitting comments.

Delivery—Comments should be sent by mail or hand delivery to: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570. Because of security precautions, the Board continues to experience delays in U.S. mail delivery. You should take this into consideration when preparing to meet the deadline for submitting comments. The Board encourages electronic filing. It is not necessary to send comments if they have been filed electronically with regulations.gov. If you send comments, the Board recommends that you confirm receipt of your delivered comments by contacting (202) 273–1067 (this is not a toll-free number). Individuals with hearing impairments may call 1–866–315–6572 (TTY/TDD).

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

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

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570, (202) 273–1067 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background

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

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

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

[1] The Board's failure to rely on rulemaking in other areas has met widespread scholarly criticism. See R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB,* 5 FIU L. Rev. 347, 351–52 (2010); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,* 79 Yale L.J. 571 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking,* 37 Admin. L. Rev. 163 (1985); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB,* 5 FIU L. Rev. 411, 414–17, 435 (Spring 2010); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication,* 21 UCLA L. Rev. 63 (1973); Charles J. Morris, *The NLRB in the Dog House—Can*

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

Congress intended that the Board adopt procedures that permit questions concerning representation to be resolved both quickly and fairly. As the Supreme Court has noted, ''[T]he Board must adopt policies and promulgate rules and regulations in order that employees' votes may be recorded accurately, efficiently and speedily.'' *A.J. Tower Co.,* 329 U.S. at 330–31. The Board has repeatedly recognized ''the Act's policy of expeditiously resolving questions concerning representation.'' [3] ''In * * * representation proceedings under Section 9,'' the Board has observed, ''time is of the essence if Board processes are to be effective.'' [4] Indeed, the Board's Casehandling Manual stresses that ''[t]he expeditious processing of petitions filed pursuant to the Act represents one of the most significant aspects of the Agency's operations.'' [5]

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

One of the primary purposes of the original Wagner Act was to avoid ''the long delays in the procedure * * * resulting from applications to the federal appellate courts for review of orders for elections.'' *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940). The Senate Committee Report explained that one of the ''weaknesses in existing law'' was ''that the Government can be delayed indefinitely before it takes the first step toward industrial peace'' by conducting an election.[8] For this reason, Congress did not provide for direct judicial review of either interlocutory orders or final certifications or dismissals in representation proceedings conducted under section 9 of the Act. Rather, in order to insure that elections were conducted promptly, judicial review was permitted only after issuance of an order under section 10 relying, in part, on the Board's certification under section 9.

A. Evolution of Board Regulation of Representation Case Procedures

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

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

Accordingly, in 1959, as part of the amendments of the NLRA effected by the Labor-Management Reporting and Disclosure Act, Congress revised Section 3(b) of the Act to authorize the Board to delegate its election-related duties to the directors of the Board's regional offices, subject to discretionary Board review.[11] Section 3(b) provides:

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

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

Soon after the authorizing amendment was adopted in 1959, the Board made the permitted delegation to its regional directors by amending its rules and regulations.[13] Since the delegation, the Board's regional directors have resolved pre-election disputes and directed elections, subject to a procedure through which aggrieved parties can seek Board review of regional directors' pre-election decisions.[14] The Board's amended rules made such review discretionary, only to be granted in compelling circumstances, and that process was subsequently upheld by the Supreme Court.[15]

As intended by Congress, the implementation of the new procedure led to a significant decrease in the time it took to conduct representation

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an Old Board Learn New Tricks?, 24 San Diego L. Rev. 9 (1987); Cornelius Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board,* 70 Yale L.J. 729 (1961); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making,* 117 U. Pa. L. Rev. 254 (1968); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921 (1965); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction,* 25 Lab. L.J. 607 (1974); and Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units,* 32 Lab. L.J. 105 (1981).

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

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

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

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

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

[7] *Id.*

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

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

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

[11] Public Law 86–257 (codified as amended in 29 U.S.C. 153(b)).

[12] 105 Cong. Rec. 19770.

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

[14] 29 CFR 102.67 (1961).

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

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elections. Immediately following the Board's amendment of its rules in 1961, the median number of days necessary to process election petitions to a decision and direction of election was roughly cut in half.[16] By 1975, the Board was conducting elections in a median of 50 days from the filing of an election petition.[17]

The Board's next major improvement in the efficiency of its election procedures came in 1977. After a decade and a half of experience with the request for review procedure, the Board again amended its rules to reduce delay in elections after the Board granted review of a regional director's decision and direction of election or a preliminary ruling.[18] Specifically, the Board established a procedure whereby the regional directors would proceed to conduct elections as directed, notwithstanding the Board's decision to grant review, unless the Board ordered otherwise. Under this procedure, the regional director impounds the ballots at the conclusion of the election, and delays tallying them until the Board issues its decision. Although this change did not have a significant effect on the overall median number of days from petition to election, it substantially decreased the time it took to conduct elections in the small number of cases in which the Board granted review.[19] These procedures remain in place today.

The Board continued to focus on processing representation petitions expeditiously in the years following implementation of the vote and impound procedure. As a result, more than 90 percent of elections were conducted within 56 days of the filing of a petition during the last decade, with a median time of 37–38 days between petition and election.[20]

Notably, however, the nature of the Board's review of regional directors' decisions varies, depending on whether the decision was issued before or after the election.[21] As described above, the Board has exercised its authority to delegate to its regional directors the task of processing petitions through the conduct of an election subject only to discretionary Board review. In contrast, the current rules provide that any party, unless it has waived the right in a pre-election agreement, may in most cases obtain Board review of a regional director's resolution of any post-election dispute, whether concerning challenges to the eligibility of a voter or objections to the conduct of the election or conduct affecting the results of an election. The right to review of regional directors' post-election decisions has caused extended delay of final certification of election results in many instances.[22]

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

a. Identification and Joinder of Issues

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

The Board has, nevertheless, developed administrative practices in an effort to identify and narrow the issues in dispute before or at a pre-election hearing. The regional director's initial letter to an employer following the filing of a petition asks the employer to state its position ''as to the appropriateness of the unit described in the petition.'' [23] In some cases, regions will conduct pre-hearing conferences either face-to-face or by telephone in an effort to identify and narrow the issues in dispute. Further, section 11217 of the Casehandling Manual provides, ''Prior to the presentation of evidence or witnesses, parties to the hearing should succinctly state on the record their positions as to the issues to be heard.'' However, none of these practices is mandatory, and they are not uniformly followed in the regions.

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

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

Id.

In *Allen Health Care Services,* 332 NLRB 1308 (2000), however, the Board held that even when an employer refuses to take a position on the appropriateness of a petitioned-for unit, the regional director must nevertheless take evidence on the issue unless the unit is presumptively appropriate. The Board held that, ''absent a stipulated agreement, presumption, or rule, the Board must be able to find—based on some record evidence—that the proposed unit is an appropriate one for bargaining before directing an election in that unit.'' *Id.* at 1309. The Board did not make clear in *Allen* whether a party that refuses to take a position on the appropriateness of a petitioned-for unit must nevertheless be permitted to introduce evidence relevant to the issue. The Casehandling Manual provides that parties should be given the following, equivocal notice in such circumstances: ''If a party refuses to state its position on an issue and no controversy exists, the

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

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

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

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

[20] See NLRB Office of the General Counsel, Summary of Operations (Fiscal Years 2002–2010).

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

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

[23] Casehandling Manual section 11009.1(e).

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party should be advised that it may be foreclosed from presenting evidence on that issue.'' Section 11217.

b. Identification of Genuine Disputes as to Material Facts

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

The Board has developed such a procedure in reviewing post-election objections to the conduct of an election or conduct affecting the results of an election. The current regulations provide that any party filing such objections shall also file, within seven days, ''the evidence available to it to support the objections.'' 29 CFR 102.69(a). Casehandling Manual section 1132.6 further specifies, ''In addition to identifying the nature of the misconduct on which the objections are based, this submission should include a list of the witnesses and a brief description of the testimony of each.'' If an objecting party fails to file such an offer of proof or if the offer fails to describe evidence which, if introduced at a hearing, could require the election results to be overturned, the regional director dismisses the objection without a hearing. In the post-election context, the courts of appeals have uniformly endorsed the Board's refusal to hold a hearing when no party has created a genuine dispute as to any material fact. See, *e.g., NLRB* v. *Bata Shoe Co.,* 377 F.2d 821, 826 (4th Cir. 1967), *cert. denied,* 389 U.S. 917 (1967); *NLRB* v. *Air Control Products of St. Petersburg, Inc.,* 335 F.2d 245, 249 (5th Cir. 1964).

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

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

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

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

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

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

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

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

3. Provision of a List of Eligible Voters

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

> [W]ithin 7 days after the Regional Director has approved a consent-election agreement * * * or after the Regional Director or the Board has directed an election * * *, the employer must file with the Regional Director an election eligibility list, containing the names and addresses of all the eligible voters. The Regional Director, in turn, shall make this information available to all parties in the case. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

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

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

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

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

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

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

156 NLRB at 1242–43.

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

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

The Board's effort to promote expeditious case processing under the NLRA by utilizing advances in communications technology is nearly a decade old. The Board first began a pilot project in 2003, permitting the electronic filing of documents with the Agency.[24] Thereafter, the use and scope of electronic filing by parties to NLRB proceedings expanded significantly. By January 2009, more than 12,000 documents had been filed electronically with the Board and its regional offices.[25] The Board currently permits most documents in both unfair labor practice and representation proceedings to be filed electronically with only a limited number of expressly specified exceptions.[26] The NLRB public Web site sets out instructions for the Agency's E-filing procedures in order to facilitate their use, and the instructions ''strongly encourage parties or other persons to use the Agency's E-filing program.'' [27] However, included among documents that may not currently be filed electronically are representation petitions.[28]

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

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

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

C. Purposes of the Proposed Amendments

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

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

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

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

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

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

[29] See 74 FR at 5619.

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

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

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

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

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

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

Given the variation in the number and complexity of issues that may arise in a representation proceeding, the amendments do not establish inflexible time deadlines or mandate that elections be conducted a set number of days after the filing of a petition. Rather, the amendments seek to avoid unnecessary litigation and establish standard and fully transparent practices while leaving discretion with the regional directors to depart from those practices under special circumstances.

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

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

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

D. Summary of Current Representation Case Procedures

Every year, thousands of election petitions are filed in NLRB regional offices by employees, unions, and employers to determine if employees wish to be represented by a labor organization for purposes of collective bargaining with their employer.[36] A lesser number are filed by employees to determine whether the Board should decertify an existing representative.[37] Under current procedures, the petitioner is not required to serve the petition on other interested parties. For example, a labor organization is not required to serve a petition through which it seeks to be certified as the representative of a unit of employees on the employees' employer. Rather, that task is imposed on the regional office. In addition, the petitioner is not required, at the time of filing, to supply evidence of the type customarily required by the Board to process the petition. For example, a labor organization is not required to file, along with its petition, evidence that a substantial number of employees support the petition (the ''showing of interest''). Rather, the petitioner is permitted to file such evidence within 48 hours of the filing of the petition.

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

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

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

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

[35] The Board has provided for an initial 60-day comment period followed by a 14-day reply period. In addition, the Board intends to issue a notice of public hearing to be held in Washington, DC on July 18–19 during the initial comment period in order to receive oral comments on the proposed amendments. The Board believes that all persons interested in the proposed amendments—including those best able to provide informed comment on the details of the Board's representation case procedures, the attorneys and other practitioners who regularly participate in representation proceedings—will have ample time and opportunities to do so within the two comment periods and at the public hearing.

[36] In 2010, 2,447 such petitions were filed. See Chart 9—Representation Elections (RC) and Chart 11—Employer petitioned Elections (RM), *http://www.nlrb.gov/chartsdata/petitions.*

[37] In 2010, 530 such petitions were filed. See Chart 10—Decertification Elections (RD), *http://www.nlrb.gov/chartsdata/petitions.*

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

[39] Form NLRB–5081.

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

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

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

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

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

Once the regional director sets the dates, times, and locations of the election, the regional office prepares a notice of election to inform eligible voters of those details.[43] The regional director serves the notice on the employer, which is responsible for posting the notice in the workplace for at least three days before the election.

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

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

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

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

II. Authority

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

The Board believes that the proposed amendments relate almost entirely to ''rules of agency organization, procedure or practice'' and are therefore exempt from the Administrative Procedure Act's notice and comment requirements under 5 U.S.C. 553(b)(A), but the Board has decided nevertheless to issue this Notice of Proposed Rulemaking and seek public comments.

III. Overview of the Amendments

Part 101, Subparts C–E

The Board's current regulations are divided into part 102, denominated Rules and Regulations, and part 101, denominated Statement of Procedures. Because the regulations in part 102 are procedural, however, the two sets of provisions governing representation

[40] In the last decade, between 86 and 92 percent of representation elections have been conducted pursuant to either a consent agreement or stipulation. NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2002–2010).

[41] See 29 CFR 101.19.

[42] 29 CFR 101.21(d).

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

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proceedings in §§ 102.60–102.88 and 101.17–101.30 are almost entirely redundant. Describing the same representation procedures in two separate parts of the regulations may create confusion.

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

A separate statement of ''the general course and method by which the Board's functions are channeled and determined'' in representation proceedings is also set forth in section I(D) above. To the extent any amendments are adopted by the Board, the preamble of the final rule will contain a statement of the general course and method by which the Board's functions will be channeled and determined under the amendments. Moreover, the Board will continue to publish and update its detailed Casehandling Manual, Part Two of which describes the Board's representation case procedures. The Manual is currently available on the Board's Web site.

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

Sec. 102.60 Petitions

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

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

Sec. 102.61 Contents of Petition for Certification; Contents of Petition for Decertification; Contents of Petition for Clarification of Bargaining Unit; Contents of Petition for Amendment of Certification

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

The proposed amendments would also require that the petitioner file with the petition whatever form of evidence is an administrative predicate of the Board's processing of the petition rather than permitting an additional 48 hours after filing to supply the evidence. When filing a petition seeking to be certified as the representative of a unit of employees, for example, petitioners would be required simultaneously to file the showing of interest supporting the petition. The Board's preliminary view is that parties should not file petitions without whatever form of evidence is ordinarily necessary for the Board to process the petition. However, the proposed amendments are not intended to prevent a petitioner from supplementing its showing of interest, consistent with existing practice, so long as the supplemental filing is timely. Also consistent with existing practice, the amendments do not require that such a showing be served on other parties. The amendments are not intended to change the Board's longstanding policy of not permitting the adequacy of the showing of interest to be litigated. See, *e.g., Plains Cooperative Oil Mill,* 123 NLRB 1709, 1711 (1959) (''[T]he Board has long held that the sufficiency of a petitioner's showing of interest is an administrative matter not subject to litigation.''); *O.D. Jennings & Co.,* 68 NLRB 516 (1946). Nor are the proposed amendments intended to alter the Board's current internal standards for determining what constitutes an adequate showing of interest.[44]

The proposed amendments are not intended to permit or proscribe the use of electronic signatures to support a showing of interest under § 102.61(a)(12) and (c)(11) as well as under § 102.84. The Board continues to study the use of such signatures for these purposes. See Government Paperwork Elimination Act, Public Law 105–277 section 1704(2) (1998) (providing that Office of Management and Budget shall ensure that, commencing not later than five years after the date of enactment of the Act, executive agencies provide ''for the use and acceptance of electronic signatures, when practicable''); OMB, Implementation of the Government Paperwork Elimination Act, available at *http://www.whitehouse.gov/omb/fedreg_gpea2/;* Electronic Signatures in Global and National Commerce Act, Public Law 106–229 sections 104(b)(1) and (2) (2000). The Board specifically seeks comments on the question of whether the proposed regulations should expressly permit or proscribe the use of electronic signatures for these purposes.

Sec. 102.62 Election agreements; voter list

Existing § 102.62 describes the three types of agreements parties may enter into following the filing of a petition. The proposed amendments would not in any manner limit parties' ability to enter into such agreements, including the two forms of agreement that entirely eliminate the need for a pre-election hearing. In fact, the Board anticipates that the proposed amendments would facilitate parties' entry into these forms of election agreements through an

[44] See Casehandling Manual section 11023.1.

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

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

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

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

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

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

The same evolution is taking place in pre-election campaign communication. The Board's experience with campaigns preceding elections conducted under section 9 of the Act indicates that employers are, with increasing frequency, using e-mail to communicate with employees about the vote. See, *e.g., Humane Society for Seattle,* 356 NLRB No. 13, slip op. at 4 (2010) (''On September 27, the Employer's CEO, Brenda Barnette, sent an e-mail to employees asking that they consider whether ACOG was the way to make changes at SHS. On September 29, HR Director Leader e-mailed employees a link to a third-party article regarding 'KCACC Guild's petition and reasons the Guild would be bad for SHS.''); *Research Foundation of the State University of New York at Buffalo,* 355 NLRB No. 170, slip op. at 19 (2010) (''On January 12, Scuto sent the first in a series of e-mail's [sic] to all Employer postdoctoral associates concerning the Petitioner's efforts to form a Union at the Employer[,]. * * * explaining the Employer's position on unionization * * *.''); *Black Entertainment Television,* 2009 WL 1574462, at *1 (NLRB Div. of Judges June 5, 2009) (employer notified several employees by e-mail to attend a meeting in which senior vice-president spoke one-on-one with the employees regarding the election scheduled for the following day). For these reasons, the proposed rule would require that both telephone numbers and, where available, e-mail addresses be included on the *Excelsior* list.[45]

In addition, the list currently required under *Excelsior* does little to further the second purpose for requiring its production—to identify issues concerning eligibility and, if possible, to resolve them without the necessity of a challenge. In many cases, the names on the list are unknown to the parties. The parties may not know where the listed individuals work or what they do. Only through further factual investigation, for example, consulting other employees who may work with the listed, unknown employees or contacting the unknown employees themselves at their home addresses, can the parties potentially discover the facts needed to assess eligibility. It would further the purpose of narrowing the issues in dispute—and thereby avoid unnecessary challenges and litigation—if the list also contained work location, shift, and classification.

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

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

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

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Unlimited, 331 NLRB 160, 160–62 (2000); *Alcohol & Drug Dependency Services,* 326 NLRB 519, 520 (1998); *Red Carpet Bldg. Maintenance Corp.,* 263 NLRB 1285, 1286 (1982); *Sprayking, Inc.,* 226 NLRB 1044, 1044 (1976). If adopted, the proposed amendments would eliminate this unnecessary administrative burden—as well as potential source of delay and resulting litigation—by providing for direct service of the list by the employer on all other parties. The regional office would make the list available upon request to the parties.

The proposed amendments would also shorten the time for production of the eligibility list from the current seven days to two days, absent agreement of the parties to the contrary or extraordinary circumstances specified in the direction. The Board's preliminary view is that advances in electronic recordkeeping and retrieval, combined with the provision of a preliminary list as described below in relation to § 102.63, render the full seven-day period unnecessary. This conclusion is also supported by the fact that the median size of units ranged between 23 and 26 employees from 2001 to 2010.

Finally, the proposed amendments would also impose a restriction on the use of the eligibility list, barring parties from using it for any purposes other than the representation proceeding and related proceedings. The Board specifically seeks comments regarding what, if any, the appropriate sanction should be for a party's noncompliance with the restriction.

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

The proposed amendments provide that, absent special circumstances, the regional director would set the hearing to begin seven days after service of the notice of hearing. This provision reflects the current practice of some regions, but would make the practice explicit and uniform, thereby rendering Board procedures more transparent and predictable. Under the proposed amendments, parties served with a petition and description of representation procedures, as described above in relation to § 102.60, will thus be able to predict with a high degree of certainty when the hearing will commence even before service of the notice. The Board intends that the proposed amendments would be implemented consistent with the Board's decision in *Croft Metal, Inc.,* 337 NLRB 688, 688 (2002), requiring that, ''absent unusual circumstances or clear waiver by the parties,'' parties ''receive notice of a hearing not less than 5 days prior to the hearing, excluding intervening weekends and holidays.'' The proposed amendments would thus not require any party to prepare for a hearing in a shorter time than permitted under current law. Rather, as the Board held in *Croft Metal,* 337 NLRB at 688, ''By providing parties with at least 5 working days' notice, we make certain that parties to representation cases avoid the Hobson's choice of either proceeding unprepared on short notice or refusing to proceed at all.'' The Board specifically seeks comments on the feasibility and fairness of this time period and all other such periods proposed in this Notice as well as the wording and scope of the exceptions thereto.

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

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

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

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

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

The Statement of Position form would solicit the parties' position on the Board's jurisdiction to process the petition; the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing. In those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis of the contention and identify the most similar unit it concedes is appropriate.[46] In those cases in which a party intends to contest at the pre-election hearing the eligibility of individuals occupying classifications in the proposed unit, the party would be required to both identify the individuals (by name and classification) and state the basis of the proposed exclusion, for example, because the identified individuals are supervisors. Finally, parallel to the amendment to the contents of petitions described in relation to § 102.61 above, the non-petitioning parties would be required to designate, in their Statement of Position, the individual who will serve as the party's representative in the proceeding, including for service of papers.

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

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

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would reduce the time and other resources expended in preparing to participate in representation proceedings.

In *Bennett Industries, Inc.,* 313 NLRB 1363, 1363 (1994), the Board observed, ''[I]n order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute.'' The Board's regional offices currently attempt to identify and narrow the issues through a number of procedures. In some cases, regions will conduct pre-hearing conferences either face-to-face or by telephone in an effort to identify and narrow the issues in dispute. Further, section 11217 of the Casehandling Manual provides, ''Prior to the presentation of evidence or witnesses, parties to the hearing should succinctly state on the record their positions as to the issues to be heard.'' The proposed amendments would incorporate the principles underlying these commendable practices, but would give all parties clear, advance notice of their obligations, both in the rules themselves and in the statement of procedures and Statement of Position form. The amendments are not intended to preclude any other formal or informal methods used by the regional offices to identify and narrow the issues in dispute prior to or at pre-election hearings.

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

As explained above in section I(A)(3) and in relation to § 102.62, a central purpose of requiring the employer to prepare and file an eligibility list is to insure that all parties have access to the information they need to evaluate whether individuals should be in the unit and are otherwise eligible to vote, so that the parties can attempt to resolve disputes concerning eligibility rather than prolong them ''based solely on lack of knowledge.'' *Excelsior,* 156 NLRB at 1243. The Board further observed in *Excelsior* that ''bona fide disputes between employer and union over voting eligibility will be more susceptible of settlement without recourse to the formal and time-consuming challenge procedures of the Board if such disputes come to light early in the election campaign rather than in the last few days before the election.'' But that purpose is not well served by provision of the list of eligible voters seven days after a decision and direction of election. It is prior to and during the hearing that the parties are most actively engaged in attempting to resolve such disputes. For this reason, the proposed amendments would require filing and service of a list of individuals providing services to the employer in the petitioned-for unit by a date no later than the opening of the pre-election hearing.

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

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

Sec. 102.64 Conduct of Hearing

The proposed amendments to § 102.64 are intended to insure that the hearing is conducted efficiently and is no longer than necessary to serve the statutory purpose of determining if there is a question concerning representation. Congress instructed the Board to conduct a pre-election hearing to determine if there is a question concerning representation that should be resolved through an election. But Congress did not intend the hearing to be used by any party to delay the conduct of such an election. The proposed amendments would make clear that, ordinarily, resolution of disputes concerning the eligibility or inclusion of individual employees is not necessary in order to determine if a question of representation exists and, therefore, that such disputes will be resolved, if necessary, post-election. The proposed amendments would also make clear that the duty of the hearing officers is to create an evidentiary record concerning only genuine disputes as to material facts. Finally, the proposed amendments would provide that the hearing shall continue from day to day until completed absent extraordinary circumstances.

Sec. 102.65 Motions; Interventions

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

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

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

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

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

The amendments would further describe a process to be followed by the hearing officer to identify issues in dispute and determine if there are genuine disputes as to facts material to those issues. The hearing officer would open the hearing by reviewing, or assisting the non-petitioning parties to

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make, Statements of Position. The petitioner would then be required to respond to any issues raised in the non-petitioning parties' Statements of Position, thereby joining the issues. No party would be permitted to offer evidence or cross-examine witnesses concerning an issue it did not raise in its Statement of Position or did not join in response to another party's Statement of Position. However, any party would be permitted to present evidence as to statutory jurisdiction,[47] and the petitioner would be permitted to present evidence as to the appropriateness of the unit if the nonpetitioning parties decline to take a position on that issue. In addition, the hearing officer would retain discretion to permit parties to amend their Statements of Position and responses for good cause, such as newly discovered evidence.

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

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

Consistent with both *Bennett Industries* and *Allen Health Care*, the proposed amendments would preclude any party from subsequently raising an issue or offering evidence or cross-examining witnesses at the pre-election hearing related to an issue (other than statutory jurisdiction) it did not raise or join in a Statement of Position or response thereto. In the case of exclusions from the proposed unit, for example, if no party timely asserts that an individual should be excluded, the Board would include the individual subject to challenge during the election, as explained above. If no party objects to a proposed exclusion, the Board would exclude the individual. In relation to the appropriateness of the unit, if all parties agree the unit is appropriate, the Board would so find unless it appears on its face to be a statutorily inappropriate unit or to be inconsistent with settled Board policy. If any party refuses to take a position on the appropriateness of the unit, that party would be precluded from contesting the appropriateness and offering evidence relating to the appropriateness of the unit. Such preclusion is consistent with existing precedent and clarifies parties' rights under *Allen Health Care.*

Under the proposed amendments, after the issues are properly joined, the hearing officer would require the parties to make an offer of proof concerning any relevant issue in dispute and would not proceed to take evidence unless the parties' offers create a genuine issue of material fact. An offer of proof may take the form of an oral or written statement of the party or its counsel identifying the witnesses it would call to testify and summarizing their testimony. The requirement of an offer of proof is thus similar to that which exists under current procedures for a party filing objections post-election.[48] The requirement is also consistent with existing practice in relation to a presumptively appropriate unit. See, *e.g., Laurel Associates, Inc.,* 325 NLRB 603 (1998); *Mariah, Inc.,* 322 NLRB 586, 587 (1996). The proposed amendments thus adopt standard practice in the federal and state courts and before other agencies. See, *e.g.,* Fed. R. Civ. P. 56. The proposed amendments rest on the proposition that, if no disputed issues are identified or there are no disputed facts material to such issues, there is no need for an evidentiary hearing.

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

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

Fay v. *Douds,* 172 F.2d 720, 725 (2d Cir. 1949).[49]

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

The proposed amendments would make clear that, although the Statement of Position form asks the non-petitioning parties to state their positions on the type, dates, times, and location of the election, and the eligibility period, and that the hearing officer should solicit all parties' positions on these issues, consistent with existing practice, the resolution of these issues remains within the discretion of the regional director, and the hearing officer shall not permit them to be litigated.

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

Congress specified that a hearing take place before an election in order to insure that the Board determine that a question concerning representation exists prior to directing that an election

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

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

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

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be held in order to resolve the question. Thus, Section 9(c) provides that, after the filing of a petition,

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

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

Litigation and resolution of individual eligibility issues prior to elections is not the norm within our political system. In Board-supervised elections, it often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated and decided even when their votes end up not affecting the outcome of the election. If a majority of employees vote against representation, even assuming all the disputed votes were cast in favor of representation, the disputed eligibility questions become moot. If, on the other hand, a majority of employees choose to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board.[50] As the Eighth Circuit observed, ''The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue.'' *Bituma Corp.* v. *NLRB,* 23 F.3d 1432, 1436 (8th Cir. 1994). The Sixth Circuit similarly found that ''[s]uch a practice enables the Board to conduct an immediate election.'' *Medical Center at Bowling Green* v. *NLRB,* 712 F.2d 1091, 1093 (6th Cir. 1983).

The proposed revision of this section of the rules together with the elimination of section 101.20(c) removes the basis for the Board's holding in *Barre-National, Inc.,* 316 NLRB 877 (1995), that the hearing officer must permit full litigation of all eligibility issues in dispute prior to the direction of an election, absent consent of all parties to defer litigation of the issues. Congress specified that a hearing must be held to determine if ''a question concerning representation exists.'' Adjudication of the eligibility of the 24 individuals at issue in *Barre-National* was not necessary to determine whether a question concerning representation existed. Moreover, the Board did not hold in *Barre-National* that the disputed issue had to be resolved before the regional director directed and conducted an election. In fact, the Board expressly noted, ''our ruling concerns only the entitlement to a preelection hearing, which is distinct from any claim of entitlement to a final agency decision on any issue raised in such a hearing.'' *Id.* at 878 n. 9. The Board further noted that ''reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election.'' *Id.* As observed above, the Board has frequently deferred final adjudication of such issues until after election, permitting disputed individuals to vote subject to challenge. Thus, the Board's holding in *Barre-National* required that an evidentiary hearing be held on the eligibility issue, potentially delaying the conduct of the election for a significant period of time, but the Board both in that case and in many others has permitted resolution of the issue to be deferred until after the election. Such an outcome serves no apparent purpose. Therefore, the proposed amendments would revise the regulations that formed the basis of the holding in *Barre-National* to permit deferral of both litigation and resolution of disputes that need not be resolved in order to determine that a question of representation exists.

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

The proposed amendments are consistent with, but seek to improve, the Board's current practice concerning post-election rulings on eligibility and inclusion. In a variety of circumstances, most typically when the Board has granted a pre-election request for review concerning the scope of the unit or employee eligibility, but not ruled on the merits until after the election, the Board has addressed the question of when a post-election change in the unit described in the notice of election requires a new election. The Board has uniformly held that a change representing no more than 20 percent of the unit does not require a new election. See, *e.g., Morgan Manor Nursing and Rehabilitation Center,* 319 NLRB 552 (1995) (20 percent); *Toledo Hospital,* 315 NLRB 594 (1994) (19.5 percent). In *Morgan Manor,* the Board stated that ''the exclusion of one classification from a facilitywide service and maintenance unit comprised of employees in nine other specifically named classifications, represents a numerical change which we * * * do not view as signifying a sufficient change in unit size to warrant setting aside of the election.'' 319 NLRB at 553. Similarly, in *Toledo Hospital,* the Board found, ''We do not view the change in the size of the unit here (19.5 percent * * *) as signifying a sufficiently significant change in character and scope to warrant setting aside the election.'' 315 NLRB at 594. In a small number of cases,[51] courts of appeals have reversed the Board's conclusion that a new election was not necessary when the size of the unit was altered by less than 20 percent.[52] These courts have based their holdings on the particular nature of the change in the unit, concluding that it significantly altered the scope or character of the original unit. More importantly, these courts found that, by informing employees that they were voting to be represented in one unit and then changing the scope and character of the unit after the election, the Board was ''misleading the voters as to the scope of the unit.'' *NLRB* v. *Lorimar Productions, Inc.,* 771 F.2d 1294, 1302 (9th Cir. 1985) (involving approximately 35 percent reduction in size of unit); see also *NLRB* v. *Beverly Health and Rehabilitation Services,,* 120 F.3d 262 (4th Cir. 1977) (per curiam) (unpublished) (''Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or

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

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

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

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character * * *, the employees have effectively been denied the right to make an informed choice in the representation election.'')

The Board's preliminary view is that adoption of a bright-line numerical rule requiring that questions concerning the eligibility or inclusion of individuals constituting no more than 20 percent of all potentially eligible voters be litigated and resolved, if necessary, post-election, best serves the interests of the parties and employees as well as the public interest in efficient administration of the representation case process.[53] In order to insure that prospective voters are in no way misled as to the scope of the unit, under the proposed amendments, if resolution of eligibility or inclusion disputes is deferred, the Final Notice to Employees of Election would so inform employees (including an explanation of how the dispute will be resolved) and the disputed employees would be permitted to vote subject to challenge as explained below in relation to § 102.67.

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

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

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

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

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

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

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

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

Both the decision and direction of election and the Final Notice to Employees of Election would be electronically transmitted to all parties when they have provided e-mail addresses to the regional office. When the parties have provided e-mail addresses of affected employees, the regional office would also transmit the notice electronically to those employees.[54] In addition, the employer would be required to post the Final Notice to Employees of Election in those places where it customarily posts notices to employees as well as electronically if the employer customarily uses electronic means to communicate with its employees. Because of the potential unfairness of conclusively presuming that the employer received the notice if it does not inform the region to the contrary within five work days, the proposed amendments would also eliminate the provision in § 103.20 creating such a conclusive presumption.

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

The Board anticipates that continuing advances in electronic communications and continuing expanded use of e-mail may, in the near future, enable regional offices in virtually all cases to transmit the final notice of election directly to all eligible voters, rendering employer posting of the final notice of election unnecessary. The Board similarly anticipates that the proposed amendments' adoption of dual notice procedures will be an interim measure. During this interim period, while the employer remains obligated to post the

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

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

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final notice of election, the Board does not intend that the failure of a regional office to provide electronic notice to any eligible voter would be the basis for overturning the results of an election under the proposed amendments.

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

The proposed amendments would eliminate the regional director's authority to transfer a case at any time to the Board for decision. This authority has rarely been used and, when it has been used, has led to extended delays in the disposition of petitions. See, *e.g., Centurion Auto Transport, Inc.,* 329 NLRB 394 (1999) (transferred December 1994, decided September 1999); *Roadway Package System, Inc.,* 326 NLRB 842 (1998) (transferred May 1995, decided August 1998); *PECO Energy Co.,* 322 NLRB 1074 (1997) (transferred Sept 1995, decided February 1997); *Johnson Controls, Inc.,* 322 NLRB 669 (1996) (transferred June 1994, decided December 1996).

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

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

> The parties have the right to request review of any final decision of the Regional Director, within the times set forth in the Board's Rules and Regulations, on one or more of the grounds specified therein. Any such request for review must be a self-contained document permitting the Board to rule on the basis of its contents without the necessity of recourse to the record, and must meet the other requirements of the Board's Rules and Regulations as to its contents. The Regional Director's action is not stayed by the filing of such a request or the granting of review, unless otherwise ordered by the Board. Thus, the Regional Director may proceed immediately to make any necessary arrangements for an election, including the issuance of a notice of election. However, unless a waiver is filed, the Director will normally not schedule an election until a date between the 25th and 30th days after the date of the decision, to permit the Board to rule on any request for review which may be filed.
>
> 29 CFR 101.21(d).

Thus, while the rules provide for discretionary review and expressly provide that requesting such review shall not operate as a stay of the election, the Statements of Procedures suggest that there should normally be a waiting period of 25–30 days. This is the case even though such requests are filed in a small percentage of cases, are granted in an even smaller percentage,[55] and result in orders staying the conduct of elections in virtually no cases at all. For these reasons, such a waiting period appears to serve little purpose even under the existing rules permitting a pre-election request for review.

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

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

Section 102.68 Record; What Constitutes; Transmission to Board

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

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

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

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

[55] A comparison of the total number of elections to the total number of grants of review (including grants of review after petitions were dismissed) during the period 2002 to 2009 reveals that review was granted in less than 1.3 percent of all representation cases in which an election was conducted and in approximately 15 percent of those cases in which a request was filed. See NLRB Annual Reports (Fiscal Years 2001–2009) and NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2002–2009 with 2002 including summary for 2001).

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

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

The proposed amendments would create a uniform procedure in those cases in which there are potentially outcome determinative challenges or the regional director determines that objections together with an accompanying offer of proof raise genuine issues of material fact that must be resolved. Adopting the procedure currently contained in §§ 102.69(d) and (e), the proposed amendments would provide that, in such cases, the regional director shall provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations as to the disposition of the issues. Within 14 days after issuance of such a report, any party may file exceptions with the regional director. Finally, consistent with the proposed changes described above in relation to § 102.62, the proposed amendments would make Board review of a regional director's resolution of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections.[56] The Board anticipates that this proposed change would leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the Board's regional directors who are members of the career civil service.

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

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

Subpart I—Service and Filing of Papers

Sec. 102.112 Date of Service; Date of Filing

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

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

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

Sec. 102.114 Filing and Service of Papers; Form of Papers; Manner and Proof of Filing and Service; Electronic Filings

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

Part 103, Subpart B—Election Procedures

Sec. 103.20 Posting of Election Notices

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

Request for Comment Regarding Blocking Charges

Just as the Board seeks through the proposed amendments to prevent any party from using the hearing process established under section 9 of the Act to delay the conduct of an election though unnecessary litigation, the Board also believes that no party should use the unfair labor practice procedures established under sections 8 and 10 to unnecessarily delay the conduct of an election. As set forth in the Casehandling Manual, ''The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted.'' Section 11730. This ''blocking charge'' policy is not set forth or implemented in the current rules, but it has been applied by the Board in the course of adjudication.[57]

The Board therefore specifically invites comment on whether any final amendments should include changes in the current blocking charge policy as described in sections 11730 to 11734 of the Casehandling Manual or whether any changes in that policy should be made by the Board through means other than amendment of the rules. The Board further specifically invites interested parties to comment on whether the Board should provide that (1) any party to a representation proceeding that files an unfair labor practice charge together with a request that it block the processing of the petition shall simultaneously file an offer of proof of the type described in relation to §§ 102.66(b) and 102.69(a); (2) if the regional director finds that the party's offer of proof does not describe evidence that, if introduced at a hearing, would require that the processing of the petition be held in abeyance, the regional director shall continue to process the petition; (3) the party seeking to block the processing of a

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

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

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petition shall immediately make the witnesses identified in its offer of proof available to the regional director so that the regional director can promptly investigate the charge as required by section 11740.2(c) of the Casehandling Manual; (4) unless the regional director finds that there is probable cause to believe that an unfair labor practice was committed that requires that the processing of the petition be held in abeyance, the regional director shall continue to process the petition; (5) if the Regional Director is unable to make such a determination prior to the date of the election, the election shall be conducted and the ballots impounded; (6) if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require that the processing of the petition be held in abeyance under current policy, the regional director shall instead conduct the election and impound the ballots; (7) if the regional director finds that there is probable cause to believe that an unfair labor practice was committed that would require that the petition be dismissed under section 11730.3 of the Casehandling Manual, the regional director shall instead conduct the election and impound the ballots; (8) the blocking charge policy is eliminated, but the parties may continue to object to conduct that was previously grounds for holding the processing of a petition in abeyance and the objections may be grounds for both overturning the elections results and dismissing the petition when appropriate; or (9) the blocking charge policy should be altered in any other respect.

IV. Response to Dissent

The dissent, which is printed below, criticizes both the procedure followed by the Board in proposing and seeking public comment on the possible reforms set forth in this Notice and the content of the proposed amendments. Many of these criticisms are based on inaccurate characterizations of this rulemaking proceeding, the substance of the proposed amendments, and the historical context in which they arise. However, to the extent that the dissent reflects the legitimate concerns of participants in the Board's representation case procedures and of other members of the public affected by those procedures, it offers precisely the kind of commentary that the Board hopes and expects to receive during the comment period and will consider carefully before issuing any final rule.

The dissent acknowledges that this rulemaking is being conducted in full compliance with all of the numerous and substantial legal requirements governing such proceedings. Yet it declares such compliance with congressional commands ''utterly beside the point,'' seeking to portray this proceeding as an attempt to deny interested members of the public the opportunity to communicate to the Board their views on the subjects addressed by the proposed amendments. In fact, this proceeding has been designed to elicit the broadest and most detailed public input on the subject of representation case procedure in the 76-year history of the agency.

The Board's procedures relating to the conduct of elections were first established in 1935. They have since been changed administratively on at least three dozen occasions. The Board has only rarely utilized the Administrative Procedure Act's notice-and-comment rulemaking procedure; most often the Board simply implemented the changes without prior notice or request for public comment. This procedure was permissible because notice and comment is not required in order to promulgate or amend ''rules of agency organization, procedure, or practice.'' See 5 U.S.C. 553(b)(A). The vast majority of the amendments proposed herein are procedural in nature, and the Board was not required to proceed by notice and comment with respect to them. The Board has nevertheless, in the interest of maximizing public participation, chosen to give notice and seek public comment as to all of the proposed amendments.[58]

The dissent criticizes the Board's publication of the text of proposed amendments prior to soliciting public comments on their subject matter, characterizing it as a limitation on public participation in the rulemaking process. In fact, the publication of proposed rules greatly enhances the opportunity for interested members of the public to submit meaningful comments. This level of disclosure is not required by the Administrative Procedure Act; it would suffice legally for the Board simply to describe the substance of the proposed amendments. However, the Board has chosen to maximize the openness of the process by disclosing in as much detail as possible its thinking at this preliminary stage of the rulemaking process. It is expected that providing proposed rule text in addition to more general descriptions and explanations will enable interested members of the public to understand the proposals in greater depth and to submit more specific and useful comments. It is because of the value that the Board places on public comment that it has elected to provide notice of the proposed rulemaking in the most detailed form possible.

The dissent's use of the Board's health-care unit rulemaking proceeding as a benchmark is inapt. Even that proceeding generated fundamental disagreement among the Board members about the purpose and possible value of rulemaking.[59] For all of its length and complexity, that proceeding led not to consensus among stakeholders, or even to grudging acceptance of the Board's rule, but to litigation that culminated only with a Supreme Court decision upholding the Board's action. *American Hospital Ass'n* v. *NLRB,* 499 U.S. 606 (1991). Nor is it clear that the procedure followed by the Board—described by one commentator as ''procedural overkill''—actually generated more useful information, in a cost-effective way, than a simpler, shorter proceeding would have provided.[60] In any case, the

[58] The Board's approach here is consistent with its recent solicitations of briefs from the broader labor-management community in connection with pending cases. See, *e.g., Specialty Healthcare,* 356 NLRB No. 56 (2010). There, the Board majority stated its strong belief ''that asking all interested parties to provide [the Board] with information and argument * * * is the fairest and soundest method of deciding whether our rules should remain the same or be changed and, if the latter, what the new rules should be.'' Slip op. at 2. In dissent, Member Hayes disagreed, arguing that ''copious information is already available in-house'' and predicting that ''what [the Board] will receive will be mostly subjective or partisan justification for changing the law rather than any useful information.'' *Id.* at 5. See also *Rite-Aid Store 6473–Lamons Gasket Co.,* 355 NLRB No. 157, slip op. at 5 (dissent of Members Schaumber and Hayes) (observing that in response to invitation to file briefs, ''Board will predictably receive mostly subjective and partisan claims'' critical of current precedent and that ''Board already has its own reliable and objective empirical data for evaluation'').

[59] See Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism,* 41 Duke L.J. 274, 290 (1991). (''The disagreement over the usefulness of rulemaking became even more contentious when the discussion turned to the question of whether to include a specific proposal in the notice of proposed rulemaking or merely to indicate an intent to make a rule on the subject of health care units.'').

[60] As one scholar observed, in a study prepared for the Administrative Conference of the United States:

> Almost two years elapsed between the time when the Board decided to engage in rulemaking and when it issued the final rule. During this period, substantial staff time, including a significant amount of high-level staff time, was used to manage the rulemaking and to assist in the analysis of the product of the hearings and comment periods. * * * Not only was the time commitment significant as an absolute matter, but also because regular staff rather than special rulemaking staff was used, this staff time was thus invested at a cost to other matters. * * * Moreover, a portion of the two years was consumed with a procedure not required for notice and comment rulemaking—multi-location hearings with an opportunity for a form of cross-examination. * * * Under the circumstances of this rulemaking, particularly its

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contrast between the subject matter of the health care rulemaking—the nature and organization of work in a complex industry on a nationwide basis—and the current proceeding could not be greater. No party possesses greater knowledge of the Board's own procedures than the Board itself.[61] Parties to representation cases would of course be affected by changes in the Board's procedures, including in ways that may not be obvious to the Board; their detailed written commentary is therefore being solicited and will be carefully considered before any changes are effectuated. In addition, the Board intends to issue a notice of public hearing to be held in Washington, DC, on July 18–19, at which it will hear public comments on the proposed amendments as well as such other ideas as speakers may wish to offer for improvement of the representation case process. But the suggestion that a proceeding similar to the one conducted for purposes of health-care unit rulemaking is needed here fails to consider the differences in the subject matters in the respective proceedings.

This misapprehension also leads the dissent to criticize the opportunities for public comment provided here as too brief. Our colleague concedes that the initial 60-day period violates no statutory or other requirement that applies to the rulemaking process. Indeed, a 60-day period has become a common benchmark. See, *e.g.,* E.O. No. 13563 (''Improving Regulation and Regulatory Review''), 76 FR 3821 (Jan. 18, 2011); E.O. No. 12866 (''Regulatory Planning and Review''), 58 FR 51735 (Sept. 30, 1993). Measured against the comment periods adopted by other agencies, the period provided for here is hardly abnormally short. *See* Steven J. Balla, *Brief Report on Economically Significant Rules and the Duration of Comment Periods, http://www.acus.gov/wp-content/uploads/downloads/2011/04/COR-Balla-Supplemental-Research-Brief.pdf* (2011) (the average duration of the comment periods for proposed actions that are economically significant is 45.1 days, and 38.7 days for all other types of actions). Moreover, the 60-day initial comment period will be followed by a 14-day reply period and will be supplemented with a public hearing.

As to the substance of the proposed amendments, the dissent raises a number of important questions of policy. These questions will be considered carefully in arriving at a final rule. However, the dissent also contains several errors that are worth pointing out:

The dissent states that the proposed amendments will ''substantially limit the opportunity for full evidentiary hearing or Board review on contested issues.'' In fact, the proposed amendments simply import the norms of modern civil procedure from the federal judicial system and apply them to adjudication of representation-case issues. The proposed amendments would require the parties to identify the issues that separate them and the evidence supporting their respective positions and permit an evidentiary hearing only as to triable issues of material fact. Like the Federal Rules of Civil Procedure, the proposed amendments would do away with litigation for the sake of litigation, allowing only litigation that is genuinely needed to resolve disputed issues material to the outcome of the case. The Board expects that this reform alone would result in substantial savings to both the parties and the agency, given the high cost of litigation. As to Board review, there is no issue as to which any party's right to seek Board review is proposed to be eliminated. Rather, in the interest of efficiency, requests for Board review would be consolidated into a single post-dismissal or post-election request instead of the pre-election request and post-election exceptions permitted under current practice, and review of regional director's resolution of post-election disputes would be discretionary as is currently the case in relation to pre-election disputes. Again, it is expected that the proposed reform would result in substantial savings to the parties and the public.

The dissent also contends that the proposed amendments will ''substantially shorten the time between the filing of the petition and the election date,'' and that the purpose of this change is ''to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining'' in order to increase the election success rate of unions. That accusation is unwarranted. The Board seeks to gain the efficiency and savings that would result from streamlining of its procedures. What effect the proposed changes would have on the outcome of elections is both unpredictable and immaterial. The dissent's charges ignore important facts about the proposed amendments: (1) The proposed rules would apply equally to all parties and to both elections seeking to certify and to decertify a representative of employees; (2) the limitations on evidentiary hearings would apply equally to pre- and post-election hearings; (3) the proposed rules would likely shorten post-election proceedings by avoiding altogether litigation of issues that are mooted by election results, among other efficiencies, eliminating unnecessary litigation, and by substituting a request for review procedure for the current exceptions procedure; and (4) the proposed rules do not impose any limitations on the election-related speech of any party.

Finally, the dissent relies heavily on the fact that the agency has met its own time targets for the processing of representation cases. But those time targets have been set in light of the agency's current procedures, including their built-in inefficiencies. The history of congressional and administrative efforts in the representation-case area has consisted of a progression of reforms to reduce the amount of time required to ultimately resolve questions concerning representation, which, as Congress has found, can disrupt the workplace and interfere with interstate commerce. With each reform, the waiting time has been reduced, the result has been widely viewed as progress, and the achievement of the full measure of time savings by agency employees has been lauded as success. The Board conceives of the proposed amendments as the next step for the agency in improving its performance of this critical part of its statutory mission.

V. Dissenting View of Member Brian E. Hayes

Member Hayes, dissenting,

Today, my colleagues undertake an expedited rulemaking process in order to implement an expedited representation election process. Neither process is appropriate or necessary. Both processes, however, share a common purpose: To stifle full debate on matters that demand it, in furtherance of a belief that employers should have little or no involvement in the resolution of questions concerning representation. For my part at least, I can and do dissent.

First, the rulemaking process:

The last substantive rulemaking effort of comparable scale involved the determination of appropriate bargaining

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novelty for the Board, the hearings were probably a desirable choice. Certainly as a legal matter, however, and perhaps as a practical matter, the hearings were procedural overkill and the burdens created by the number and structure of the hearings would have to be considered as part of the overall cost-benefit evaluation of the rulemaking.

Grunewald, *NLRB's First Rulemaking,* supra, 41 Duke L.J. at 319–320.

[61] The Supreme Court has made clear that, ''[a]bsent constitutional constraints or extremely compelling circumstances,'' it is a ''very basic tenet of administrative law that agencies should be free to fashion their own rules of procedure,'' consistent with statutory requirements. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519, 543–44 (1978).

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units in the health care industry. The need for this effort was obvious, based on years of litigation highlighting specific problems and differences among the Board, the courts of appeals, and health care industry constituents. The initial July 2, 1987 notice of proposed rulemaking was followed by a series of four public hearings, the last one held over a 7-day period, in October 1987. Thereafter, the written comment period was extended. Another rulemaking notice followed on September 1, 1988. It reviewed the massive amount of oral testimony (3545 pages and 144 witnesses) and written comments (1500 pages filed by 315 individuals and organizations) received during the prior year and announced a revised rule with another 6-week period for written comment. The final rule was published on April 21, 1989, almost 2 years after the initial notice.

In marked contrast to the health care unit rulemaking, my colleagues put forth proposals on their own initiative, not in response to any petition for rulemaking or in response to any specific problems defined by prior litigation. The need for their proposed electoral reform, which directly affects every employer and employee in every industry subject to Board jurisdiction, is far from obvious. The proposed revisions largely reflect the narrow concerns and proposals of a few academicians.[62] Rather than proceeding with the preparation and publication of rules responsive to just this one small and ideologically homogenous group, it was incumbent on the Board to have a far more inclusive public discussion of the need for electoral reform *before* determining what rule revisions to propose formally in the **Federal Register**.[63] In this regard, President Obama's Executive Order 13563 specifically states that ''*[b]efore* issuing a notice of proposed rulemaking, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected, including those who are likely to benefit from and those who are potentially subject to such rulemaking.'' [64] While this Order is not binding on the Board, as an independent agency, ''such agencies are encouraged to give consideration to all of its provisions, consistent with their legal authority.'' [65]

It was both ''feasible and appropriate'' for the Board to seek the views of those likely to be affected before issuing the notice of proposed rulemaking. At the very least, the proposals should have been previewed for comment by the Board's standing Rules Revision Committee, a group of agency officials specifically identified as responsible for considering and recommending modifications in existing rules and proposed new rules,[66] and by the Practice and Procedures Committee of the American Bar Association, a group representative of the broad spectrum of private and public sector labor-management professionals that frequently serves as a sounding board for revisions of our Rules. I believe the Board should also have exercised its discretion to hold an open meeting under the Government in Sunshine Act[67] when voting to authorize a rule revision proposal.[68] Alternatively, the Board could have undertaken negotiated rulemaking.[69] Any of the suggested processes could have encouraged consensus in rulemaking, rather than the inevitably divisive approach my colleagues have chosen by publishing their proposed rules with no advance notice or public discussion of their purpose or content.

The limitation on public participation in this process continues with my colleagues' choice of a 60-day written comment period, a 14-day reply period, and one public hearing for discussion about the proposed rules. Again, the contrast with health care unit rulemaking is marked. While I do not suggest that the proposed rulemaking process needs to last 2 years, I think it manifest that 2 and a half months in the dead of summer is too little time, and written comment with a single hearing is too limited a method, for public participation in discussing the myriad issues raised. There needs to be a more extended comment period and a full opportunity for broad stakeholder input through multiple public hearings on proposed rules of this magnitude.

It is utterly beside the point, and should be of little comfort to the majority, that its actions may be in technical compliance with the requirements of the Administrative Procedure Act (APA) and other regulations bearing on the rulemaking process. President Obama's Memorandum on Transparency and Open Government, issued on January 21, 2009,[70] makes clear that independent agencies have an obligation to do much more than provide minimum due process in order to assure that our regulatory actions implement the principles of transparency, participation, and collaboration. As explained in the subsequent directive from the Director of the Office of Management and Budget, these principles ''form the cornerstone of an open government.'' [71] Sadly, my colleagues reduce that cornerstone to rubble by proceeding with a rulemaking process that is opaque, exclusionary, and adversarial.[72] The sense of fait accompli is inescapable.

Now, to the proposed rules themselves:

Parts of what my colleagues propose seem reasonable enough. On the other hand, the whole of proposed reform is much, much more than the sum of its parts and out of all proportion to specific problems with the Board's current representation casehandling procedures. While the preamble frequently refers to the Board's interest in the expeditious resolution of questions concerning representation,

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[62] *E.g.,* Charles Craver, *The National Labor Relations Act at 75: In Need of a Heart Transplant,* 27 Hofstra Lab. & Emp. L.J. 311 (2010); William B. Gould, *The Employee Free Choice Act of 2009, Labor Law Reform, and What Can Be Done About the Broken System of Labor-Management Relations Law in the United States,* 43 U.S.F.L. Rev. 291 (2008); Charles J. Morris, *Renaissance at the NLRB—Opportunity and Prospect for Non-Legislative Procedural Reform at the Labor Board,* 23 Stetson L. Rev. 101 (1993).

[63] I disagree with my colleagues' characterization of the proposed rule revisions as ''almost entirely'' procedural in nature. Accordingly, I find that the notice and comment procedure is mandatory, not discretionary.

[64] E.O. 13563, 76 FR 3821, 3821–23 (Jan. 21, 2011) (emphasis added).

[65] Office of Management and Budget Memo 11–10, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies: Executive Order 13563, ''Improving Regulation and Regulatory Review'' (February 2, 2011), available at *http://www.whitehouse.gov/omb/memoranda.*

[66] See May 23, 2011, letter from Board Executive Secretary submitting the Board's Preliminary Plan to Review Significant Regulations to the OMB Office of Information and Regulatory Affairs in response to Section 6 of Executive Order 13563, available at *http://www.slideshare.net/whitehouse/national-labor-relations-board-preliminary-reform-board.*

[67] Government in the Sunshine Act, 5 U.S.C. 552b.

[68] My point is not that the process followed to date is impermissible. It is that a more open public process would be far more preferable and consistent with Executive Order guidelines.

[69] See Negotiated Rulemaking Act, 5 U.S.C. 561 *et seq.*

[70] 74 FR 4685, 4685–86 (Jan. 26, 2009).

[71] Office of Management and Budget Memo 10–06, Memorandum for the Heads of Executive Departments and Agencies: Open Government Directive (February 2, 2011), available at *http://www.whitehouse.gov/omb/memoranda.*

[72] The majority suggests an inconsistency between my dissenting position in *Specialty Healthcare and Rehabilitation Center of Mobile,* 356 NLRB No. 56 (2010), and in the present rulemaking scenario. In both instances, I find that the majority has provided an insufficient explanation for reexamining extant law and procedure. In *Specialty,* an adjudicatory proceeding, I further objected to the expansion of inquiry far beyond the issues specifically raised by the parties. That inquiry, if undertaken, should have entailed the rulemaking process.

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there is no certainty that the rule revisions even address the problems that have caused undue delay in a very small number of representation cases or that they will shorten the *overall* timeframe for processing an election case from the filing of a petition until final resolution. What *is* certain is that the proposed rules will (1) substantially shorten the time between the filing of the petition and the election date, and (2) substantially limit the opportunity for full evidentiary hearing or Board review on contested issues involving, among other things, appropriate unit, voter eligibility, and election misconduct. Thus, by administrative fiat in lieu of Congressional action, the Board will impose organized labor's much sought-after ''quickie election'' option, a procedure under which elections will be held in 10 to 21 days from the filing of the petition. Make no mistake, the principal purpose for this radical manipulation of our election process is to minimize, or rather, to effectively eviscerate an employer's legitimate opportunity to express its views about collective bargaining.

It may be best to begin a substantive analysis of the proposed rules with an accounting of the Board's current representation casehandling procedures. The Acting General Counsel's summary of operations for Fiscal Year 2010 took special note of facts that: (1) 95.1 percent of all initial elections were conducted within 56 days of the filing of the petition; (2) initial elections were conducted in a median of 38 days from the filing of the petition; and (3) the agency closed 86.3 percent of all representation cases within 100 days, surpassing an internal target rate of 85 percent.[73] The Acting General Counsel described the achievement of these results as ''outstanding.'' [74]

The Board's total representation case intake for Fiscal Year 2010 (including all categories of election petitions) was 3,204, a 10 percent increase from the Fiscal Year 2009 intake of 2,912. For all petitions filed, the average time to an election was 31 days. Voluntary election agreements were obtained in 92 percent of the merit petitions. In contested cases, Regional Directors issued 185 pre-election decisions after hearing in a median of 37 days, well below the target median of 45 days. In 56 cases, post-election objections and/or challenges were filed that required an investigative hearing. Decisions or Supplemental Reports issued in those cases after hearing in 70 median days from the election or the filing of objections. In 32 cases, post-election objections and/or challenges could be resolved without a hearing. Decisions or Supplemental Reports in those cases issued in 22 median days. The General Counsel's goal in hearing cases is 80 median days and 32 days in non-hearing cases.[75]

It is not at all apparent from the foregoing statistical picture why my colleagues have decided that it is now necessary to (1) eliminate pre-election evidentiary hearings, as much as is statutorily permissible (or arguably well beyond that point), (2) eliminate pre-election requests for review and defer decision on virtually all issues heretofore decided at the preelection stage in the small percentage of contested cases, (3) impose pleading requirements and minimal response times on election parties, most notably on employers, who risk forfeiture of the right to contest issues if they fail timely to comply with these requirements, and (4) eliminate any automatic right to post-election Board review of contested issues.

I absolutely agree that the Board should be concerned about unreasonable delay in any case, particularly in those involving questions concerning representation. It should never take 424 days from the filing of a petition to resolve pre-election issues, as happened with respect to one case in Fiscal Year 2010;[76] nor should it take years to resolve post-election objections, as it did in a trio of recently-decided Board cases.[77] However, as measured by the Board and General Counsel's own time targets and performance goals, such delay is the exception rather than the norm. Notably, my colleagues make no reference to these time targets while drastically departing from them when reducing the number of days from petition filing to an election. Further, the majority makes no effort whatsoever to identify the specific causes of delay in those cases that were unreasonably delayed. Without knowing which cases they were, I cannot myself state with certainty what caused delay in each instance, but I can say based on experience during my tenure as Board member that vacancies or partisan shifts in Board membership and the inability of the Board itself to deal promptly with complex legal and factual issues have delayed final resolution far more often than any systemic procedural problems or obstructionist legal tactics. That was the situation in each of the aforementioned extremely delayed cases, and in none of those cases would the majority's current proposals have yielded a different result.

Further, it is far from clear that shortening the time period from the filing of a petition to the conduct of an election will have the corresponding effect of shortening the median time from filing to final resolution, which should be the primary goal of any revision of the rules. Again, the majority provides no explanation. By impeding the process of timely resolving pre-election issues and eliminating any right to automatic Board review of regional decisions, the proposed revisions seemingly discourage parties from entering into any form of election agreement, thereby threatening the current high percentage of voluntary election agreements. In addition, at least in those cases where the union wins the election, the deferral of pre-election issues seems merely to add time from the pre-election period to the post-election period, with no net reduction in overall processing time. This will not save time or money for the parties or the Board. Finally, the proposed rule revision permitting up to 20 percent of individuals whose eligibility is contested to cast challenged ballots casts a cloud of uncertainty over the election process. Employees who do belong in the bargaining unit may be so mislead about the unit's scope or character that they cannot make an informed choice, instead basing their vote on perceived common interests or differences with employee groups that ultimately do not belong in the unit.[78]

The oft-repeated aim of the Board to resolve questions concerning representation expeditiously does not mean that we must conduct elections in as short a time as possible In truth, the

[73] General Counsel Memorandum 11–03 at ''Introduction'' (Jan. 10, 2011), available at *http://www.nlrb.gov/publications/general-counsel-memos.* Agency performance has continued at essentially the same level for the first 3 months of fiscal year 2011. See GC Memo 11–09, supra at 18.

[74] GC Memo11–03, supra at ''Introduction.''

[75] GC Memo11–09, supra at 18.

[76] *Kansas City Repertory Theatre,* 17–CA–12647.

[77] *Jury's Boston Hotel,* 356 NLRB No. 114 (2011), *Mastec/Direct TV,* 356 NLRB No. 110 (2011), and *Independence Residences, Inc.,* 355 NLRB No. 153 (2010).

[78] As stated by the Fourth Circuit in *NLRB* v. *Beverly Health and Rehabilitation Services, Inc.,* No. 96–2195, 1997 WL 457524, at *4 (4th Cir. 1997):

> Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, the employees have effectively been denied the right to make an informed choice in the representation election. *See NLRB* v. *Parsons Sch. of Design,* 793 F.2d 503, 506–08 (2d Cir.1986); *Lorimar Productions,* 771 F.2d at 1301–02; *Hamilton Test Sys.,* 743 F.2d at 140–42. Thus, the Board may not ''inform employees that they are voting for representation in [one] unit and later * * * consider the ballot as a vote for representation in a [different] unit.'' *Hamilton Test Sys.,* 743 F.2d at 140; *see also Lorimar Productions,* 771 F.2d at 1301 (quoting *Hamilton Test Sys.*).

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''problem'' which my colleagues seek to address through these rule revisions is not that the representation election process generally takes too long. It is that unions are not winning more elections. The perception that this is a problem is based on the premise, really more of an absolute article of faith, that employer unfair labor practices greatly distort the representation election process. This leads to the conclusion that the more limited a role an employer has in this process, the less opportunity it will have to coerce employees, and the greater the prospect that the election results will reflect employees' ''true'' choice on collective-bargaining representation, which will presumably mean a much higher percentage of union election victories. Inasmuch as unions prevailed in 67.6 percent of elections held in calendar year 2010 and in 68.7 percent of elections held in calendar year 2009,[79] the percentage of union victories contemplated by the majority in the revised rules must be remarkably high.

One way to limit employer participation is to shorten the time from petition filing to election date. Of course, limiting the election period does not operate selectively to deter unlawful coercive employer speech or conduct.[80] It broadly limits all employer speech and thereby impermissibly trenches upon protections that Congress specifically affirmed for the debate of labor issues when it enacted Section 8(c) in 1947. As the Supreme Court stated in *Chamber of Commerce* v. *Brown,* 554 U.S. 60, 67–68 (2008):

> From one vantage, § 8(c) ''merely implements the First Amendment,'' *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. See S.Rep. No. 80–105, pt. 2, pp. 23–24 (1947). But its enactment also manifested a ''congressional intent to encourage free debate on issues dividing labor and management.'' *Linn* v. *Plant Guard Workers,* 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such ''free debate'' that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as ''favoring uninhibited, robust, and wide-open debate in labor disputes,'' stressing that ''freewheeling use of the written and spoken word * * * has been expressly fostered by Congress and approved by the NLRB.'' *Letter Carriers* v. *Austin,* 418 U.S. 264, 272–73, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

Admittedly, the Court recognized the Board's right to police ''a narrow zone of speech to ensure free and fair elections,'' [81] but neither the Court's reasoning nor the congressional intent to encourage free debate can be squared with my colleagues' proposal generally to limit the opportunity for employers to engage in a legitimate pre-election campaign opposing unionization.

Another way to limit employer participation is to reduce opportunities for litigation of contested issues before the Board. That is the transparent purpose of the proposed rules' transformation of discretionary questionnaires into mandatory pleading requirements and the imposition of limitations on full evidentiary hearings, briefing, and Board review. All of these revisions are focused on preventing parties, primarily employers, from litigating issues in representation proceedings, even when legitimate issues are raised and a full record and Board review would seem to be essential.

It is difficult to identify which proposed rule change is most egregious, but a solid candidate for that dishonor might be the expanded, mandatory ''questionnaire'' process. As described by the majority,[82] the proposed Statement of Position Form would require an employer to state its position on:

> the appropriateness of the petitioned-for unit; any proposed exclusions from the petitioned-for unit; the existence of any bar to the election; the type, dates, times, and location of the election; and any other issues that a party intends to raise at hearing. In those cases in which a party takes the position that the proposed unit is not an appropriate unit, the party would also be required to state the basis of the contention and identify the most similar unit it concedes is appropriate. In those cases in which a party intends to contest at the pre-election hearing the eligibility of individuals occupying classifications in the proposed unit, the party would be required to both identify the individuals (by name and classification) and state the basis of the proposed exclusion, for example, because the identified individuals are supervisors.

Such matters deserve inquiry and definition, hopefully leading to resolution, in the preelection process. However, the proposed rules further mandate that a hearing be held 7 days from service of the petition and the Statement of Position Form, and they bar a party from offering evidence or cross-examining witnesses as to any issue it did not raise in its own statement or in response to the statement of another party. In effect, a party must raise issues and state its basis for raising them in a maximum of 7 days or forfeit all legal right to pursue those issues. It may be that employers of a certain size have legal counsel or labor consultants readily available to evaluate the election petition and proposed bargaining unit, identify any issues to be contested, and prepare the required statement in a week or less. However, the Board conducts many representation elections among employees of small business owners who have no such counsel readily at hand, have no idea how to obtain such counsel in short order, and are themselves unaware of such legal arcania as appropriate unit, contract bar, statutory supervisory status, and voter eligibility. The proposed rules, if implemented, will unconscionably and impermissibly deprive these small business owners of legal representation and due process.[83]

There is yet another aspect of the proposed rules' impact on employers that deserves mention. Under current law, an employer's obligation to bargain with a union attaches from the election date. Thus, an employer acts at its peril when making any unilateral changes pending resolution of post-election issues if the Board ultimately certifies the union's representative status.[84] Those post-election issues have heretofore been limited to election objections and challenges. Now, with the shift of virtually all pre-election issues to the post-election phase, the majority substantially increases the potential costs to all employers who have the temerity to attempt to conduct normal business operations while contesting legitimate election issues. Of course, there is no comparable burden on unions.

The proposed rule revisions are cause enough for dissent. However, one cannot help but wonder if they are a prelude to further changes. The same academicians whose treatises have inspired the current proposal have also advocated a host of other initiatives

[79] ''Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year,'' Daily Lab. Rep. (BNA), No. 85, at B–1 (May 3, 2011).

[80] Indeed, the ''quickie'' election procedure may not deter such conduct at all. Employers who are wont to use impermissible means to oppose unionization will simply be encouraged to act at the first hint of organizational activity, prior to the filing of an election petition.

[81] *Chamber of Commerce* v. *Brown,* supra at 74.

[82] The form itself is not appended to the notice of proposed rulemaking, as one might logically expect it to be.

[83] The majority relies in part on conformity of the proposed rules with practices under the Federal Rules of Civil Procedure, which are, of course, not binding on administrative agency proceedings and which the Board has steadfastly refused for decades to follow with respect to prehearing discovery in unfair labor practice proceedings.

[84] See *Mike O'Conner Chevrolet,* 209 NLRB 701, 703 (1974).

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designed to give unions greater access to employees and to limit further the opportunities for employers to communicate their views on collective bargaining representation. These initiatives include requiring an employer to provide access to employees on its premises and conducting elections off-site, by mail ballot, or by electronic vote. Finally, proceeding on a parallel adjudicatory course, my colleagues have signaled a willingness to entertain petitions for bargaining units that have heretofore not been found appropriate under Section 9(b) and 9(c)(5) of the Act.[85] The Board has not finally decided any of these issues, but the mere pendency of them should raise substantial concerns among those commenting on the proposed election rule revisions. There exists the possibility that the Board has only just begun an unprecedented campaign to supplant congressional action, subvert legal precedent, and return labor relations law to the supposed ''golden era'' of the Wagner Act's early years.[86]

In sum, the Board and General Counsel are consistently meeting their publicly-stated performance goals under the current representation election process, providing an expeditious *and fair* resolution to parties in the vast majority of cases, less than 10 percent of which involve contested preelection issues. Without any attempt to identify particular problems in cases where the process has failed, the majority has announced its intent to provide a more expeditious preelection process and a more limited postelection process that tilts heavily against employers' rights to engage in legitimate free speech and to petition the government for redress. Disclaiming any statutory obligation to provide any preliminary notice and opportunity to comment, the majority deigns to permit a limited written comment period and a single hearing when the myriad issues raised by the proposed rules cry out for far greater public participation in the rulemaking process both before and after formal publication of the proposed rule. The majority acts in apparent furtherance of the interests of a narrow constituency, and at the great expense of undermining public trust in the fairness of Board elections. I dissent from this undertaking, and I anticipate that many public voices will join in opposing it in spite of the limited opportunity to comment.

[85] See *Specialty Healthcare,* supra.

[86] See Charles J. Morris, The Blue Eagle at Work: Reclaiming Democratic Rights in the American Workplace (Cornell Univ. Press 2005).

VI. Regulatory Procedures

Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (''RFA''), 5 U.S.C. 601 *et seq.,* requires agencies promulgating proposed rules to prepare an initial regulatory flexibility analysis and to develop alternatives, wherever possible, when drafting regulations that will have a significant impact on a substantial number of small entities. The focus of the RFA is to ensure that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' E.O. 13272, Sec. 1, 67 FR 53461 (''Proper Consideration of Small Entities in Agency Rulemaking''). An agency is not required to prepare an initial regulatory flexibility analysis for a proposed rule if the Agency head certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).

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

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

The Board has determined that the proposed amendments would not affect a substantial number of small entities within the meaning of 5 U.S.C. 605(b). There are approximately six million private employers in the United States, the vast majority of which are classified as small entities under the Small Business Administration's standards.[87] Nearly all of those employers are subject to the Board's jurisdiction.[88] Because, under section 9 of the Act, parties have filed fewer than 4,000 petitions per year for the past five years and the Board has conducted fewer than 2,500 elections per year for the past five years,[89] the number of small employers participating in representation proceedings each year is less than one-tenth of one percent of the small employers in this country. Moreover, the employers that would be affected by the proposed amendments are not concentrated in one or a few sectors, but are found in every sector and industry subject to the Board's jurisdiction. Accordingly, the Board finds that the proposed amendments would not affect a substantial number of small entities within the meaning of 5 U.S.C. 601.

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

To the extent that any individual requirements—isolated from the

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

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

[89] See NLRB Office of the General Counsel, Summaries of Operations (Fiscal Years 2006–2010) (reporting that the annual number of representation elections conducted decreased from 2,296 to 1,790).

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

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

For these reasons, the Board concludes that several of the proposed amendments would result in little to no adverse economic impact on the relatively few small entities who participate in representation proceedings each year, while the proposed amendments as a whole should actually reduce the costs incurred in connection with representation proceedings. Accordingly, the proposed amendments will not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act

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

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

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

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

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

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

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

Section 3518(c) provides:

- (c)(1) Except as provided in paragraph (2), this subchapter shall not apply to the collection of information—
  - (B) During the conduct of—
  - (ii) An administrative action or investigation involving an agency against specific individuals or entities;
- (2) This subchapter applies to the collection of information during the conduct of general investigations * * * undertaken with reference to a category of individuals or entities such as a class of licensees or an entire industry.

44 U.S.C. 3518(c). The legislative history of this provision makes clear that it is not limited to prosecutorial proceedings. The Senate Report on the PRA states, ''Section 3518(c)(1)(B) is not limited to agency proceedings of a prosecutorial nature but also include[s] any agency proceeding involving specific adversary parties.'' S. Rep. No. 96–930, at 56 (1980).

The Board believes that all of the above-described provisions of the proposed amendments fall within the exemption created by sections 3502(3)(B) and 3518(c)(1)(B)(ii). A representation proceeding under section 9 of the NLRA is ''an administrative action or investigation involving an agency.'' A representation proceeding is also ''against specific individuals or entities'' within the meaning of section 3518(c)(1)(B)(ii). The Board's decisions in representation proceedings are binding on and thereby alter the legal rights of the parties to the proceedings. For example, the employer of any employees who are the subject of a petition is a party to the resulting representation proceeding.[90] If the Board finds in a representation proceeding that a petition has been filed concerning an appropriate unit and that employees in that unit have voted to be represented, the Board will thereafter certify the petitioner as the employees' representative for purposes of collective bargaining with the employer. As a direct and automatic consequence of the

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

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Board's certification, the employer is legally bound to recognize and bargain with the certified representative. If the employer refuses to do so, it commits an unfair labor practice.[91] If such an employer is charged with a refusal to bargain, it is precluded from relitigating in the unfair labor practice proceeding any issues that were or could have been raised in the representation proceeding.[92] Finally, if such an employer seeks review of the Board's order in the unfair labor practice proceeding or the Board seeks to enforce its order in a court of appeals, the record from the representation proceeding must be filed with the court and ''the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.'' 29 U.S.C. 159(d); see also *Boire* v. *Greyhound Corp.* 376 U.S. 473, 477–79 (1964).[93]

Three limitations on the filing and posting requirements in the proposed amendments lead to the conclusion that they fall within the statutory exemption. First, the amendments impose requirements only on parties to the representation case proceeding, an administrative action or investigation against specific individuals or entities within the scope of section 3518(c)(1)(B)(ii). Second, any adverse consequences for failing to provide the requested information are imposed only on persons and entities that are party to the representation proceeding. Third, the possible adverse consequences that may result from noncompliance do not reach beyond the representation case proceeding. The proposed amendments impose no consequences on any party based on its failure to file or provide information requested in a petition or statement of position form other than to prevent the party from initiating a representation proceeding or to restrict a party's rights to raise issues or participate in the adjudication of issues in the specific representation proceeding and any related unfair labor practice proceeding. Similarly, as is the case currently,[94] no consequences attach to a failure to post either notice or to file the eligibility list beyond the overturning of an election conducted as part of the specific proceeding.

Sections 102.62(e), 102.63(a) and 102.67(i) of the proposed amendments require that an employer which is party to a representation proceeding post an Initial Notice to Employees of Election subsequent to the filing of a petition and, if an election is agreed to or directed, a Final Notice to Employees of Election. The Board will make available both notices to the employer in paper and electronic form, and employers will be permitted to post exact duplicate copies of the notices. The Board does not believe these posting requirements are subject to the PRA for the reasons explained above. Moreover, the Board does not believe that the notice posting requirements constitute a ''collection of information'' as defined in section 3502(3) of the PRA for an additional, independent reason. The notice posting requirements do not involve answers to questions or any form of reporting. Nor do they involve a ''recordkeeping requirement'' as that term is defined in section 3502(13) of the PRA. The proposed notice posting requirements do not require any party to ''maintain specified records.'' The Board notes that this construction is consistent with the Office of Management and Budget's regulations construing and implementing the PRA, which provide that ''[t]he public disclosure of information originally supplied by the Federal government to [a] recipient for the purpose of disclosure to the public'' is not considered a ''collection of information'' under the Act. See 5 CFR 1320.3(c)(2). For all of these reasons, the Board concludes that the posting requirements are not subject to the PRA.

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

List of Subjects

29 CFR Part 101

Administrative practice and procedure, Labor management relations.

29 CFR Part 102

Administrative practice and procedure, Labor management relations.

29 CFR Part 103

Labor management relations.

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

PART 101—STATEMENTS OF PROCEDURES

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

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

Subpart C—[Removed and Reserved]

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

Subpart D—[Removed and Reserved]

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

Subpart E—[Removed and Reserved]

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

PART 102—RULES AND REGULATIONS, SERIES 8

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

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

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

6. Revise § 102.60 to read as follows:

§ 102.60 Petitions.

(a) *Petition for certification or decertification.* A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of section 9(c) of the Act (hereinafter called a

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

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

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

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

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

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

7. Revise § 102.61 to read as follows:

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

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

(1) The name of the employer.

(2) The address of the establishments involved.

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

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

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

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

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

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

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

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

(11) Any other relevant facts.

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

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

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

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

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

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

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

(7) Any other relevant facts.

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

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

(1) The name of the employer.

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

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

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

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

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by

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the employer are no longer the representative in the appropriate unit as defined in section 9(a) of the Act.

(7) The number of employees in the unit.

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

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

(10) Any other relevant facts.

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

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

(2) The address of the establishment involved.

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

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

(5) A description of the proposed clarification.

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

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

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

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

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

(11) Any other relevant facts.

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

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

(2) The address of the establishment involved.

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

(4) Identification and description of the existing certification.

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

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

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

(8) Any other relevant facts.

(f) *Provision of original signatures.* Evidence filed pursuant to § 102.61(a)(7), (b)(8), or (c)(8) together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than two days after the facsimile or electronic filing.

8. Revise § 102.62 to read as follows:

§ 102.62 Election agreements; voter list.

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

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

(c) *Full consent election agreements with final regional director determinations of pre- and post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66 and 102.67 to determine if a question concerning representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70, except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the

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parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

(d) *Voter lists.* Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction, within two days after approval of an election agreement pursuant to paragraphs (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the regional director and the parties named in the agreement or direction a list of the full names, home addresses, available telephone numbers, available e-mail addresses, work locations, shifts, and job classifications of all eligible voters. In order to be timely filed, the list must be received by the regional director and the parties named in the agreement or direction within two days after the approval of the agreement or issuance of the direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the petition. Failure to file or serve the list within the specified time and in proper format shall be grounds for setting aside the election whenever proper objections are filed. The regional director shall make the list available upon request to all parties in the case on the same day or as soon as practicable after the director receives the list from the employer. The parties shall use the list exclusively for purposes related to the representation proceeding and related Board proceedings.

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

9. Revise § 102.63 to read as follows:

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

(a) *Investigations and notices.* (1) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the regional director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall set the hearing for a date 7 days from the date of service of the notice absent special circumstances. A copy of the petition, a description of procedures in representation cases, an ''Initial Notice to Employees of Election'', and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

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

(b)(1) *Statement of Position in RC cases.* After a petition has been filed under § 102.61(a) and the regional director has issued a notice of hearing, the employer shall file and serve on the parties named in the petition its Statement of Position by the date and in the manner specified in the notice unless that date is the same as the hearing date. If the Statement of Position is due on the date of the hearing, its completion shall be the first order of business at the hearing before any further evidence is received, and its completion may be accomplished with the assistance of the hearing officer.

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

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

(iii) The Statement of Position shall further state the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, and if the employer contends that the proposed unit is inappropriate, the employer shall also state the full names, work locations, shifts, and job classifications of all employees in the most similar unit that the employer concedes is appropriate. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form.

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

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

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

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

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

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

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

(v) *Preclusion.* The employer shall be precluded from contesting the appropriateness of the unit at any time and from contesting the eligibility or inclusion of any individuals at the pre-election hearing, including by presenting evidence or argument, or by cross-examination of witnesses, if the employer fails to timely furnish the information described in paragraphs (b)(2)(iii) and (iv) of this section.

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

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

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

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

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

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

(c) *UC or AC cases.* After a petition has been filed under § 102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under paragraph (c) of this section shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

10. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a petition as

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

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

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

11. Revise § 102.65 to read as follows:

§ 102.65 Motions; interventions.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the record to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. The regional director may rule upon all motions filed with him, causing a copy of said ruling to be served on the parties, or he may refer the motion to the hearing officer: *Provided,* That if the regional director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be.

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

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(g). Unless expressly authorized by the Rules and Regulations, rulings by the regional director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate request for review pursuant to § 102.67 (b), (c), and (d) or § 102.69. Nor shall rulings by the hearing officer be appealed directly to the regional director unless expressly authorized by the Rules and Regulations, except by special permission of the regional director, but shall be considered by the regional director when he reviews the entire record. Requests to the regional director, or to the Board in appropriate cases, for special permission to appeal from a ruling of the hearing officer or the regional director, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted, including why the issue will otherwise evade review, and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the regional director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the regional director. Neither the Board nor the regional director will grant a request for special permission to appeal except in extraordinary circumstances where it appears that the issue will otherwise evade review. No party shall be precluded from raising an issue at a later time based on its failure to seek special permission to appeal. If the Board or the regional director, as the case may be, grants the request for special permission to appeal, the Board or the regional director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall, unless otherwise ordered by the Board, operate as a stay of an election or any action taken or directed by the regional director. Notwithstanding a pending request for special permission to appeal, the regional director shall not impound ballots cast in an election unless otherwise ordered by the Board.

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

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules: *Provided, however,* That the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing *de novo,* the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

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

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

12. Revise § 102.66 to read as follows:

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

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

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

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

(3) *Joinder in RD cases.* In a case arising under § 102.61(c), after the employer and the certified or recognized representative of employees complete their respective Statements of Position and prior to the introduction of further evidence, the petitioner shall respond to each issue raised in the Statements. The hearing officer shall not receive evidence relevant to any issue concerning which parties have not taken adverse positions: *Provided, however,* That if the employer and/or the certified or recognized representative fails to take a position regarding whether the petitioned-for unit is coextensive with the unit for which a representative is certified or recognized, the petitioner shall explain why the proposed unit is appropriate and may support its explanation with evidence in the form of sworn statements or declarations consistent with the requirements stated in § 102.60(a) or through examination of witnesses and introduction of documentary or other evidence.

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

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

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

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

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

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

(e) *Witness examination and evidence.* Witnesses shall be examined

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orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

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

(g) *Subpoenas.* The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the regional director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The regional director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena or by such earlier time as the hearing officer or regional director shall determine, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer or, with the permission of the hearing officer, presented orally. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

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

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

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

13. Revise § 102.67 to read as follows:

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

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

(b) *Directions of elections; dismissals; requests for review.* A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction: *Provided, however,* that the regional director may direct an election with findings and a statement of reasons to follow prior to the tally of ballots. In the event that the regional director directs an election, said direction shall specify the type, date, time, and place of the election and the eligibility period. The regional director shall schedule the election for the earliest date practicable consistent with these rules. The regional director shall transmit the direction of election to the parties' designated representatives by e-mail, facsimile, or by overnight mail (if neither an e-mail address nor facsimile number was provided). Along with the direction of election, the regional director shall also transmit the Board's Final Notice to Employees of Election by e-mail, facsimile, or by overnight mail (if neither an e-mail address nor facsimile number was provided). The regional director shall also electronically transmit the Final Notice to Employees of Election to affected employees to the extent practicable. The decision of the regional director shall be final: *Provided, however,* That within 14 days after service of a decision dismissing a petition any party may file a request for review of such a dismissal with the Board in Washington, DC: *Provided, further,* That any party may, after the election, file a request for review of a regional director's decision to direct an election within the time periods specified and as described in § 102.69.

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

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

(i) The absence of, or

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

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

(3) That the conduct of the hearing or any ruling made in connection with the

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proceeding has resulted in prejudicial error.

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

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

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

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

(g) *Grant of review; briefs.* The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h)(1) *Format of request.* All documents filed with the Board under the provisions of this section shall be filed in seven copies, double spaced, on 8½ by 11-inch paper, and shall be printed or otherwise legibly duplicated. Requests for review, including briefs in support thereof; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Board by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the document is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page authorities cited.

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

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

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

(j) *Voter lists.* Absent extraordinary circumstances specified in the direction of election, the employer shall, within 2 days after such direction, provide to the regional director and the parties named in such direction a list of the full names, home addresses, available telephone numbers, available e-mail addresses, work locations, shifts, and job classifications of all eligible voters. In order to be timely filed, the list must be received by the regional director and the parties named in the direction within 2 days of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the regional director and served electronically on the other parties named in the petition. Failure to file or serve the list within the specified time and in proper format shall be grounds for setting aside the election whenever proper objections are filed. The regional director shall make the list available upon request to all parties in the case on the same day or as soon as practicable after the director receives the list from the employer. The parties shall use the list exclusively for purposes of the representation proceeding and related Board proceedings.

14. Revise § 102.68 to read as follows:

§ 102.68 Record; what constitutes; transmission to Board.

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

15. Revise § 102.69 to read as follows:

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

(a) *Election procedure; tally; objections.* Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the regional director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election with a certificate of service on all parties, which shall contain a short statement of the reasons therefore and a written offer of proof in the form described in § 102.66(b) insofar as applicable, but the written offer of proof shall not be served on any other party. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile or electronically pursuant to § 102.114(f) or (i) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to § 102.114(f) or (i).

(b) *Requests for review of directions of elections.* If the election has been conducted pursuant to § 102.67, any party may file a request for review of the decision and direction of election with the Board in Washington, DC. In the absence of election objections or potentially determinative challenges, the request for review of the decision and direction of election shall be filed within 14 days after the tally of ballots has been prepared. In a case involving election objections or potentially determinative challenges, the request for review shall be filed within 14 days after the regional director's report or supplemental decision on challenged ballots, on objections, or on both, and may be combined with a request for review of that decision as provided in paragraph (d)(3) of this section. The procedures for such request for review shall be the same as set forth in § 102.67(c) through (h) insofar as applicable. If no request for review is filed, the decision and direction of election is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

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

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

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

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

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

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

(3) *Requests for review of regional director reports or decisions in stipulated or directed elections.* If the election has been held pursuant to §§ 102.62(b) or 102.67, within 14 days from the date of issuance of the regional director's report or decision on challenged ballots or on objections, or on both, any party may file with the Board in Washington, DC, a request for review of such report or decision which may be combined with a request for review of the regional director's decision to direct an election as provided in § 102.67(b). The procedures for post-election requests for review shall be the same as set forth in § 102.67(c) through (h) insofar as applicable. If no request for review is filed, the report or decision is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding. *Provided, however,* that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

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

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

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

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

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

(g) *Format of filings with regional director.* All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 8½ by 11-inch paper, and shall be printed or otherwise legibly duplicated. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

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

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

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

* * * * *

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

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

17. Revise § 102.76 to read as follows:

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

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

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

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

* * * * *

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

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

19. Revise § 102.83 to read as follows:

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

A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. One original of the petition shall be filed with the regional director wherein the bargaining unit exists or, if the unit exists in two or more Regions, with the regional director for any of such Regions. A person filing a petition by facsimile or electronically pursuant to § 102.114(f) or (i) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. The petition may be withdrawn only with the approval of the regional director with whom such petition was filed. Upon approval of the withdrawal of any petition the case shall be closed.

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

§ 102.84 Contents of petition to rescind authority.

* * * * *

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

(j) A statement that 30 percent or more of the bargaining unit employees covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of the Act, desire that the authority to make such an agreement be rescinded.

* * * * *

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

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

21. Revise § 102.85 to read as follows:

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

Where a petition has been filed pursuant to § 102.83 and it appears to the regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, he shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or, upon grant of a request for review, by the Board.

22. Revise § 102.86 to read as follows:

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§ 102.86 Hearing; posthearing procedure.

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

Subpart I—Service and Filing of Papers

23. Revise § 102.112 to read as follows:

§ 102.112 Date of service; date of filing.

The date of service shall be the day when the matter served is deposited in the United States mail, or is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is delivered in person, as the case may be. Where service is made by electronic mail, the date of service shall be the date on which the message is sent. Where service is made by facsimile transmission, the date of service shall be the date on which transmission is received. The date of filing shall be the day when the matter is required to be received by the Board as provided by § 102.111.

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

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

* * * * *

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

* * * * *

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

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

(a) Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, electronic mail (if the document was filed electronically or if specifically provided for in these rules), or private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. Unless otherwise specified elsewhere in these rules, service on all parties shall be made in the same manner as that utilized in filing the document with the Board, or in a more expeditious manner; however, when filing with the Board is done by hand, the other parties shall be promptly notified of such action by telephone, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of § 102.113(a) or (c) provide otherwise.

* * * * *

(d) Papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer shall be typewritten or otherwise legibly duplicated on 8½ by 11-inch plain white paper, shall have margins no less than one inch on each side, shall be in a typeface no smaller than 12 characters-per-inch (elite or the equivalent), and shall be double spaced (except that quotations and footnotes may be single spaced). Nonconforming papers may, at the Agency's discretion, be rejected.

* * * * *

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

* * * * *

PART 103—OTHER RULES

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

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

Subpart B—[Removed and Reserved]

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

Signed in Washington, DC, on June 15, 2011.

Wilma B. Liebman,

Chairman.

[FR Doc. 2011–15307 Filed 6–21–11; 8:45 am]

BILLING CODE 7545–01–P

NLRB-00000037

financial information which is obtained from any person and which is privileged or confidential,'' as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, don't include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).[7] Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at *http://ftcpublic.commentworks.com/ftc/aristotle,* by following the instructions on the Web-based form. If this Notice appears at *http://www.regulations.gov/#!home,* you also may file a comment through that Web site.

If you file your comment on paper, write ''Aristotle Application for Safe Harbor, Project No. P–114509'' on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H–113 (Annex B), 600 Pennsylvania Avenue, NW., Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission Web site at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before August 8, 2011. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm.*

[7] In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 2011–16007 Filed 6–24–11; 8:45 am]

BILLING CODE 6750–01–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 101

[Docket No. FDA–2011–F–0171]

Food Labeling; Calorie Labeling of Articles of Food in Vending Machines; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Proposed rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a proposed rule that appeared in the **Federal Register** of April, 6, 2011 (76 FR 19238). To implement the vending machine labeling provisions of the Patient Protection and Affordable Care Act of 2010 (Affordable Care Act), FDA proposed requirements for providing calorie information for certain articles of food sold from vending machines. The document published with several errors including an incorrect contact phone number and an incomplete address. This document corrects those errors.

FOR FURTHER INFORMATION CONTACT: Daniel Y. Reese, Center for Food Safety and Applied Nutrition (HFS–820), Food and Drug Administration, 5100 Paint Branch Pkwy., College Park, MD 20740, 240–402–2371.

SUPPLEMENTARY INFORMATION: In FR Doc. 2011–8037, appearing in the **Federal Register** of April 6, 2011 (76 FR 19238), the following corrections are made:

1. On page 19238, in the second column, under **FOR FURTHER INFORMATION CONTACT** the phone number ''301–436–2371'' is corrected to read ''240–402–2371''.

2. On page 19239, in the third column, in the last paragraph, the last sentence, '' 'Act' is defined as the Federal Food, Drug, and Cosmetic Act.'' is removed.

3. On page 19243, in the first column, beginning in the 29th line, the phrase ''FDA is proposing in § 101.8(c)(2)(i)(B) and § 101.8(c)(2)(i)(C) that the calorie declaration * * *.'' is corrected to read ''FDA is proposing in § 101.8(c)(2)(i)(C) that the calorie declaration * * *.''

4. On page 19243, in the second column, in the first full paragraph, ''§ 101.8(c)(2)(ii)(B)'' is corrected to read ''§ 101.8(c)(2)(ii)(C)''.

5. On page 19255, in the first column, in proposed § 101.8(d)(3)(v), the phrase, ''FDA, White Oak Building 22, Rm. 0209, 10903 New Hampshire Ave., Silver Spring, MD 20993.'' is corrected to read ''FDA, CFSAN Menu and Vending Machine Labeling Registration, White Oak Building 22, Rm. 0209, 10903 New Hampshire Ave., Silver Spring, MD 20993.''

Dated: June 21, 2011.

Leslie Kux,

Acting Assistant Commissioner for Policy.

[FR Doc. 2011–15983 Filed 6–24–11; 8:45 am]

BILLING CODE 4164–01–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101, 102, 103

RIN 3142–AAO8

Representation Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Proposed rule; notice of meeting.

SUMMARY: The National Labor Relations Board (NLRB or Board) invites interested parties to attend an open meeting with the Board and its staff on July 18, 2011. The Board meeting will be held from 9 a.m. until 4 p.m. The meeting will be held in the Margaret A. Browning Hearing Room (Room 11000), National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570. During the public meeting, interested persons may share their views on the proposed amendments to the Board's rules governing representation case procedures, published at 76 FR 15307 (June 22, 2011) and make other proposals for improving representation case procedures.

DATES: The meeting will be held on Monday, July 18, 2011, from 9 a.m. to 4 p.m. A second day of meetings may be scheduled for Tuesday, July 19, 2011, if necessary. Due to time and seating considerations, persons desiring to attend the meeting, or to make a presentation before the Board, must notify the NLRB staff, no later than 4 p.m. on Friday, July 1, 2011.

ADDRESSES: The public meeting will be held in the Margaret A. Browning Hearing Room (Room 11000), National Labor Relations Board, 1099 14th Street, NW., Washington, DC 20570. Requests to attend the meeting must be addressed to Mary Meyers, Administrative Assistant to the Chairman, National

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Labor Relations Board, 1099 14th Street, NW., Suite 11100, Washington, DC 20570. Written requests may also be made electronically to *publicmeeting@nlrb.gov.* All communications must include the following words on the Subject Line—''*Request to Attend Public Meeting Regarding* RIN 3142–AA08.''

FOR FURTHER INFORMATION CONTACT: Mary Meyers, Administrative Assistant to the Chairman, National Labor Relations Board, 1099 14th Street, NW., Suite 11100, Washington, DC 20570; *Phone:* 202–273–1700; *E-mail: publicmeeting@nlrb.gov.*

SUPPLEMENTARY INFORMATION: The National Labor Relations Board will hold an open public meeting on Monday, July 18, 2011, from 9 a.m. until 4 p.m. A second day of meetings may be scheduled for Tuesday, July 19, 2011, if necessary. Pursuant to 5 U.S.C. 553(c), the purpose of the meeting will be to allow interested persons to participate in the rulemaking through oral presentation on the proposed amendments to the Board's rules governing representation-case procedures and to make any other proposals for improving representation case procedures.

On June 22, 2011, the NLRB published a Notice of Proposed Rulemaking (NPRM) (76 FR 15307), proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. In addition to the comment procedure outlined in the NPRM, the NLRB is providing another opportunity for interested persons to provide their views to the Board on this important matter at the open public meeting.

Persons desiring to attend the meeting must notify the NLRB staff, in writing, at the above listed physical or e-mail address, by the deadline posted. If the person desires to make a presentation to the Board at the meeting, he or she is required to submit a brief outline of the presentation when making the request. In lieu of making an oral presentation, or in addition to such a presentation, interested persons may submit a written statement for the record or utilize the comment process described in the NPRM.

To attend the meeting, all potential attendees must include in their request: (1) Their full name, (2) organizational affiliation (if any), and (3), if they are appearing in a representative capacity, the names of any individuals or organizations on whose behalf they are appearing. Attendees are reminded to bring a photo identification card with them to the public meeting in order to gain admittance to the building. Due to the time and potential space limitations in the meeting room, the NLRB will notify persons of their attendance and/or speaking status (*i.e.,* preliminary date and time for their presentation) prior to the meeting. Time allocation for oral presentations will depend upon the number of persons who desire to make presentations to the Board. Persons making oral presentations should be prepared to summarize their written statements, if any, at the meeting. In the event that there are more requests for oral presentations than there are available time slots, the Board will allocate the available time slots in an effort to insure that a variety of viewpoints are represented at the hearing and that both individuals and organizations possessing substantial experience with and expertise concerning the Board's representation case procedures and members of the general public are heard. Subject to such allocations, available time slots will be assigned on a first-come-first-served basis.

Agenda: The meeting will be limited to issues related to the proposed amendments to the Board's rules governing representation-case procedures and other proposals for improving representation case procedures. A copy of the NPRM may also be obtained from the NLRB's Web site at: *http://www.nlrb.gov/nprm.*

Dated: June 21, 2011.

Wilma B. Liebman,

Chairman.

[FR Doc. 2011–15962 Filed 6–24–11; 8:45 am]

BILLING CODE 7545–01–P

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Parts 405 and 406

RIN 1215–AB79
RIN 1245–AA03

Labor-Management Reporting and Disclosure Act; Interpretation of the ''Advice'' Exemption; Correction

AGENCY: Office of Labor-Management Standards, Department of Labor.

ACTION: Notice of proposed rulemaking; correction.

SUMMARY: This document corrects the preamble and the regulatory text of the notice of proposed rulemaking (NPRM) that was published in the **Federal Register** on June 21, 2011 (76 FR 36178), regarding the interpretation of Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 433, and corresponding revisions to the Form LM–10 Employer Report and to the Form LM–20 Agreement and Activities Report. This correction clarifies that the NPRM intended to propose a technical revision to 29 CFR 406.2, which was inadvertently omitted from the preamble and the proposed revised regulatory text of the NPRM.

FOR FURTHER INFORMATION CONTACT: Andrew R. Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, *olms-public@dol.gov,* (202) 693–0123 (this is not a toll-free number), (800) 877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION: In a proposed rule published on June 21, 2011, in the **Federal Register**, 76 FR 36178, by the Office of Labor-Management Standards, Department of Labor, a proposed technical revision to 29 CFR 406.2 and a reference in the preamble setting out the revision were inadvertently omitted. Accordingly, the following corrections are made to this proposed rule.

Corrections to the Notice of Proposed Rulemaking

1. In proposed rule, 76 FR 36178, beginning on page 36193 in the issue of June 21, 2011, make the following correction in the **SUPPLEMENTARY INFORMATION** Section. In the first column, the first paragraph of Section VI, correct the third sentence to read as follows:

The Department is also proposing revisions to sections 405.5, 405.7, and 406.2 of title 29 of the Code of Federal Regulations to update cross-references in those sections to the instructions.

2. In proposed rule, 76 FR 36178, beginning on page 36206 in the issue of June 21, 2011, make the following addition to the proposed revisions to 29 CFR 406, which appears in the third column, by adding the following:

5. Section 406.2 is amended by removing the phrase ''other than that required by Item C, 10, (c) of the Form,'' and adding in its place ''other than that required by Item 11.c. of the Form.''

Dated: June 21, 2011.

John Lund,

Director, Office of Labor-Management Standards.

[FR Doc. 2011–15960 Filed 6–24–11; 8:45 am]

BILLING CODE 4510–CP–P

NLRB-00000039

from investments in the United States. The regulations affect foreign governments that derive income from sources within the United States.

FOR FURTHER INFORMATION CONTACT: David A. Juster, (202) 622–3850 (not toll-free number).

SUPPLEMENTARY INFORMATION:

Background

The notice of proposed rulemaking (REG–146537–06) that is the subject of this correction is under sections 892 and 602 of the Internal Revenue Code.

Need for Correction

As published on November 3, 2011 (76 FR 68119), the notice of proposed rulemaking (REG–146537–06) contains errors that may prove to be misleading and are in need of clarification.

Correction for Publication

Accordingly, the notice of proposed rulemaking (REG–146537–06) that was the subject of FR Doc. 2011–28531 is corrected as follows:

1. On page 68119, column 2, in the preamble under the paragraph heading ''Paperwork Reduction Act'', line 17 from the top of the column, the language ''the collection of information should be'' is corrected to read ''the collections of information should be''.

2. On page 68119, column 2, in the preamble under the paragraph heading ''Paperwork Reduction Act'', the first full paragraph in the column, lines 1 and 2, the language ''Whether the proposed collection of information is necessary for the proper'' is corrected to read ''Whether the proposed collections of information are necessary for the proper''.

3. On page 68119, column 2, in the preamble under the paragraph heading ''Paperwork Reduction Act'', second paragraph in the column, line 2, the language ''associate with the proposed collection'' is corrected to read ''associate with the proposed collections''.

4. On page 68119, column 2, in the preamble under the paragraph heading ''Paperwork Reduction Act'', sixth paragraph in the column, lines 1 and 2, the language ''The collection of information in this proposed regulation is in §§ 1.892–'' is corrected to read ''The collections of information in this proposed regulations are in §§ 1.892–''.

5. On page 68119, column 2, in the preamble under the paragraph heading ''Paperwork Reduction Act'', sixth paragraph in the column, lines 6 and 7, the language ''tax under section 892. The collection of information is voluntary to obtain a'' is corrected to read ''tax under section 892. The collections of information are voluntary to obtain a''.

6. On page 68119, column 3, in the preamble under the paragraph heading ''Background'', fifth line from the bottom of the paragraph, the language ''referenced notice of proposed'' is corrected to read ''reference notice of proposed''.

7. On page 68121, column 1, in the preamble under the paragraph heading ''Definition of Commercial Activity'', third line from the bottom of the last paragraph, the language ''proposed regulations revised § 1.892–'' is corrected to read ''proposed regulations revise § 1.892–''.

8. On page 68122, column 1, Paragraph 1. The authority citation, line 2, the language ''for parts 1 and 601 continues to read in'' is corrected to read ''for part 1 continues to read in''.

§ 1.892–5 [Corrected]

9. On page 68122, column 3, § 1.892–5(a)(1), line 2, the paragraph heading (a)(1) the language ''definition of term ''controlled'' is corrected to read ''definition of the term ''controlled''.

10. On page 68123, column 3, § 1.892–5(d)(5)(i), line 3, the language ''(d)(5)(ii) or (d)(5)(iii) of this section, the'' is corrected to read ''(d)(5)(ii) or paragraph (d)(5)(iii) of this section, the''.

Diane O. Williams,

Federal Register Liaison, Publications and Regulations Branch, Legal Processing Division.

[FR Doc. 2011–30171 Filed 11–22–11; 8:45 am]

BILLING CODE 4830–01–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101, 102, 103

RIN 3142–AA08

Representation Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Proposed rule; notice of meeting.

SUMMARY: The National Labor Relations Board (NLRB or Board) invites interested parties to attend an open meeting of the Board on November 30, 2011, at 2:30 p.m. The meeting will be held in the Board Agenda Room (Room 11820), National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570. The purpose of the meeting will be to vote on how to proceed in this rulemaking proceeding. No public testimony or comments will be received.

DATES: The meeting will be held on Wednesday, November 30, 2011, beginning at 2:30 p.m. Due to time and seating considerations, persons desiring to attend the meeting must notify the NLRB staff, no later than 4 p.m. on Monday, November 28, 2011.

ADDRESSES: The public meeting will be held in the Board Agenda Room (Room 11820), National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570. Requests to attend the meeting must be addressed to Mary Meyers, Administrative Assistant to the Chairman, National Labor Relations Board, 1099 14th Street, NW., Suite 11100, Washington, DC 20570. Requests may also be made electronically to *publicmeeting@nlrb.gov.* All communications must include the following words on the Subject Line—''REQUEST TO ATTEND PUBLIC MEETING REGARDING RIN 3142–AA08.''

FOR FURTHER INFORMATION CONTACT: Mary Meyers, Administrative Assistant to the Chairman, National Labor Relations Board, 1099 14th Street NW., Suite 11100, Washington, DC 20570; *Phone:* (202) 273–1700; *Email:publicmeeting@nlrb.gov.*

SUPPLEMENTARY INFORMATION: The National Labor Relations Board will hold an open public meeting on Wednesday, November 30, 2011, at 2:30 p.m. The purpose of the meeting will be to vote on how to proceed in this rulemaking proceeding. No public testimony or comments will be received.

On June 22, 2011, the NLRB published a Notice of Proposed Rulemaking (NPRM) (76 FR 36812), proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. In addition to the comment procedure outlined in the NPRM, the NLRB provided another opportunity for interested persons to provide their views to the Board on this important matter at an open public meeting. This public meeting was held on July 18–19, 2011, with 66 witnesses testifying before the Board. Thereafter, the deadline for filing initial public comments was August 22, 2011, and the deadline for filing reply comments was September 6, 2011. Over 65,000 written comments have been received and analyzed. The Board must now decide how to proceed in this matter.

Persons desiring to attend the meeting must notify the NLRB staff, in writing, at the above listed physical or email address, by the deadline posted. Attendees are reminded to bring a photo identification card with them to the public meeting in order to gain

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admittance to the building. Due to space limitations in the meeting room, an overflow room has been established in the Margaret A. Browning Hearing Room (Room 11000), where persons will be able to observe the meeting by video conference. The meeting will also be available for viewing on the Internet.

Agenda: The meeting will be limited to issues related to the proposed amendments to the Board's rules governing representation-case procedures. A copy of the NPRM may also be obtained from the NLRB's Web site at: *http://www.nlrb.gov/nprm.*

Dated: November 18, 2011.

Mark Gaston Pearce,

Chairman.

[FR Doc. 2011–30280 Filed 11–22–11; 8:45 am]

BILLING CODE 7545–01–P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket No. USCG–2011–0968]

RIN 1625–AA00

Safety Zone; Marco Island Marriott Charity Fireworks Display, Gulf of Mexico, Marco Island, FL

AGENCY: Coast Guard, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Coast Guard proposes to establish a temporary safety zone on the waters of the Gulf of Mexico in the vicinity of Marco Island Marriott Beach Resort in Marco Island, Florida during the Marco Island Marriott Charity Fireworks Display on Friday, February 17, 2012. The safety zone is necessary to protect the public from the hazards associated with launching fireworks over navigable waters of the United States. Persons and vessels would be prohibited from entering, transiting through, anchoring in, or remaining within the safety zone unless authorized by the Captain of the Port St. Petersburg or a designated representative.

DATES: Comments and related material must be received by the Coast Guard on or before December 17, 2011. Requests for public meetings must be received by the Coast Guard on or before November 30, 2011.

ADDRESSES: You may submit comments identified by docket number USCG–2011–0968 using any one of the following methods:

(1) *Federal eRulemaking Portal: http://www.regulations.gov.*

(2) *Fax:* (202) 493–2251.

(3) *Mail:* Docket Management Facility (M–30), U.S. Department of Transportation, West Building Ground Floor, Room W12–140, 1200 New Jersey Avenue SE., Washington, DC 20590–0001.

(4) *Hand delivery:* Same as mail address above, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. The telephone number is (202) 366–9329.

To avoid duplication, please use only one of these four methods. See the ''Public Participation and Request for Comments'' portion of the **SUPPLEMENTARY INFORMATION** section below for instructions on submitting comments.

FOR FURTHER INFORMATION CONTACT: If you have questions on this proposed rule, call or email Marine Science Technician First Class Nolan L. Ammons, Sector St. Petersburg Prevention Department, Coast Guard; telephone (813) 228–2191, email *D07-SMB-Tampa-WWM@uscg.mil.* If you have questions on viewing or submitting material to the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone (202) 366–9826.

SUPPLEMENTARY INFORMATION:

Public Participation and Request for Comments

We encourage you to participate in this rulemaking by submitting comments and related materials. All comments received will be posted without change to *http://www.regulations.gov* and will include any personal information you have provided.

Submitting Comments

If you submit a comment, please include the docket number for this rulemaking (USCG–2011–0968), indicate the specific section of this document to which each comment applies, and provide a reason for each suggestion or recommendation. You may submit your comments and material online (via *http://www.regulations.gov*) or by fax, mail, or hand delivery, but please use only one of these means. If you submit a comment online via *http://www.regulations.gov,* it will be considered received by the Coast Guard when you successfully transmit the comment. If you fax, hand deliver, or mail your comment, it will be considered as having been received by the Coast Guard when it is received at the Docket Management Facility. We recommend that you include your name and a mailing address, an email address, or a telephone number in the body of your document so that we can contact you if we have questions regarding your submission.

To submit your comment online, go to *http://www.regulations.gov,* click on the ''submit a comment'' box, which will then become highlighted in blue. In the ''Document Type'' drop down menu select ''Proposed Rule'' and insert ''USCG–2011–0968'' in the ''Keyword'' box. Click ''Search'' then click on the balloon shape in the ''Actions'' column. If you submit your comments by mail or hand delivery, submit them in an unbound format, no larger than 8½ by 11 inches, suitable for copying and electronic filing. If you submit comments by mail and would like to know that they reached the Facility, please enclose a stamped, self-addressed postcard or envelope. We will consider all comments and material received during the comment period and may change the rule based on your comments.

Viewing Comments and Documents

To view comments, as well as documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* click on the ''read comments'' box, which will then become highlighted in blue. In the ''Keyword'' box insert ''USCG–2011–0968'' and click ''Search.'' Click the ''Open Docket Folder'' in the ''Actions'' column. You may also visit the Docket Management Facility in Room W12–140 on the ground floor of the Department of Transportation West Building, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. We have an agreement with the Department of Transportation to use the Docket Management Facility.

Privacy Act

Anyone can search the electronic form of comments received into any of our dockets by the name of the individual submitting the comment (or signing the comment, if submitted on behalf of an association, business, labor union, etc.). You may review a Privacy Act notice regarding our public dockets in the January 17, 2008, issue of the **Federal Register** (73 FR 3316).

Public Meeting

We do not now plan to hold a public meeting. But you may submit a request for one on or before November 30, 2011 using one of the four methods specified under **ADDRESSES**. Please explain why you believe a public meeting would be beneficial. If we determine that one would aid this rulemaking, we will hold

NLRB-00000041

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101 and 102

RIN 3142–AA08

Representation—Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Final rule.

SUMMARY: On June 22, 2011, the National Labor Relations Board (the Board) issued a Notice of Proposed Rulemaking proposing various amendments of its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. This document explains which of the proposed amendments the Board is adopting at this time in the final rule and sets forth the Board's responses to comments concerning those proposals.

The Board believes that the final rule will reduce unnecessary litigation in representation cases and thereby enable the Board to better fulfill its duty to expeditiously resolve questions concerning representation. The final rule will also save time and resources for the parties and the agency. The final rule will focus pre-election hearings on those issues relevant to determining if there is a question concerning representation, provide for pre-election briefing only when it will assist the decision makers, reduce piecemeal appeals to the Board, consolidate requests for Board review of regional directors' pre- and post-election determinations into a single, post-election request, make Board review of post-election regional determinations discretionary, and eliminate duplicative regulations. The final rule will allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret-ballot election and certifying the results.

DATES: This rule will be effective on April 30, 2012.

FOR FURTHER INFORMATION CONTACT: Lester A. Heltzer, Executive Secretary, National Labor Relations Board, 1099 14th Street NW., Washington, DC 20570, (202) 273–1067 (this is not a toll-free number), 1–(866) 315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background on the Rulemaking

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 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 the employees should be represented for purposes of collective bargaining, Section 9 of the Act, 29 U.S.C. 159, gives the Board authority to resolve the question of representation.

The Act itself sets forth only the basic steps for resolving a question of representation. First, a petition is filed by an employee, a labor organization, or an employer. Second, if there is reasonable cause, a hearing is held to determine whether a question of representation exists, unless the parties agree that an election should be conducted and agree concerning election details. Third, if there is such a question, an election by secret ballot is conducted. Fourth, the results of the election are certified.

Aside from these general requirements, however, the statute says very little about representation case procedures. Instead, Congress left these procedures within the broad discretion of the Board.

The Board has exercised this discretion through two mechanisms. First, the Board has promulgated binding rules of procedure, most of which are found in 29 CFR part 102, subpart C. Second, the Board has interpreted and occasionally altered or created its representation case procedures through adjudication.[1] In addition, the Board's General Counsel has prepared a non-binding Casehandling Manual describing representation case procedures in detail. The relevant sections of the Casehandling Manual are Sections 11000 through 11886.[2]

Within the framework of the current rules, the Board, the General Counsel and the agency's regional directors[3] have sought to achieve efficient, fair, uniform, and timely resolution of representation cases. But under the current rules, inefficiency, abuse of the process, and delay still hamper resolution of many questions of representation.

In this final rule, the Board makes eight amendments to its regulations governing representation case procedures. The amendments are intended to eliminate unnecessary litigation, delay, and duplicative regulations. The final rule follows an extensive consultation with the public initiated by the Board's Notice of Proposed Rulemaking (NPRM) on June 22, 2011. 76 FR 36812. As explained below, the final rule adopts some of the proposed amendments and leaves the remainder for further deliberation.

A. Summary of Current Procedures[4]

When an employee, union, employer, individual, or organization wants the Board to determine whether employees wish to bargain collectively through a union, that party must file, in the Board's regional office, a petition, which the regional director then serves on other interested parties. An employee or union petitioner must also, ordinarily, provide evidence that a substantial number of employees support the petition. Board agents then conduct an ex parte investigation to determine if there is enough interest to justify further processing of the petition.

In further processing, three general types of disputes can arise among the parties. First are pre-election disputes. These may concern whether the employees at issue may be represented as a group—that is, whether they are ''an appropriate unit.'' At this stage, the parties may also disagree about the Board's jurisdiction, whether an election is barred by the Act or Board law, and the time, place, and other details of the election itself.

Second, disputes can also arise during the election about whether particular persons are eligible to vote. These disputes arise through ''challenges'' to the disputed individuals' ballots. When this occurs, the ballots of challenged voters are segregated from the other ballots in a manner that will not disclose the voters' identity.

Third, disputes can arise after the election about whether actions of the parties or the Board agents—or some other circumstance—made the election unfair. These disputes are brought before the Board by the filing of ''objections.''

In the vast majority of cases, the parties, often with Board agent assistance, are able to resolve pre-election disputes without litigation. In these cases, either a ''consent''

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[1] *See, e.g., NLRB* v. *Wyman-Gordon Co.,* 394 U.S. 759, 764, 770, 777, 779 (1969).

[2] NLRB Casehandling Manual (Part Two) Representation Proceedings.

[3] Pursuant to Section 3(b) of the Act, the Board has delegated to its regional directors the authority to conduct pre-election hearings, to determine whether questions of representation exist, to direct elections, and to certify election results. 29 U.S.C. 153(b). The General Counsel administratively oversees the regions. 29 U.S.C. 153(d).

[4] For a more complete discussion and citations, see the NPRM. 76 FR 36812.

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agreement or a ''stipulation'' agreement is entered into. Both kinds of agreements fully resolve pre-election disputes, but in a consent agreement the parties also waive the right to Board review of the regional director's disposition of any challenges or objections, while in a stipulation agreement the parties provide for Board disposition of such disputes.[5]

If no agreement on pre-election issues can be reached, a hearing must be held. The hearing officer, the Board agent in charge of the hearing, takes evidence relevant to the issues in dispute, and the parties often file briefs. The regional director then issues a decision, either dismissing the petition or directing an election. The regional director does not have to resolve all voter eligibility questions before the election, but can defer those questions by permitting employees whose eligibility is disputed to vote subject to challenge.

If an election is directed, the regional director typically schedules it no sooner than 25 days after the decision, so that the Board can rule on any interlocutory request for review that might be filed. Such interlocutory requests are rarely granted, still more rarely result in the regional director's decision being reversed, and virtually never result in elections being stayed. If the Board does not rule on the request before the election date, the election is held, and the ballots are impounded pending a Board ruling.

After the regional director's decision directing an election, the employer must provide the regional office a list of eligible voters and their home addresses. The regional office gives the list to the parties. The parties use the list for two purposes: To communicate with eligible voters about the election, and to determine whether to challenge a particular voter.

Elections are decided by a majority of the valid votes cast. As mentioned, during the election, the parties may challenge ballots cast by voters. A tally of ballots generally takes place shortly after the polls close. If the challenged ballots are too few in number to change the outcome of the election, the challenges will not be litigated or resolved.

Within one week after the tally, parties may file objections with the regional director. Within one additional week, the objecting party must furnish evidence in support of its objections.

The regional director has discretion to investigate any potentially determinative challenges or objections or to immediately direct a hearing. If the director conducts an investigation, he will set a hearing only if the challenges or objections raise substantial and material questions of fact. If no hearing is held, the regional director will issue a supplemental decision or a report disposing of the challenges or objections.

If a post-election hearing is held, the parties have the opportunity to present evidence to a hearing officer. The hearing officer will issue a report resolving any credibility issues and containing findings of fact and recommendations.

In cases involving consent elections, the regional director's rulings on challenges and objections are final. In cases involving stipulated elections or elections directed by a regional director, the parties generally have the right to obtain review by the Board, by filing exceptions to the report disposing of the objections and/or challenges. If a regional director directs an election and subsequently determines that the challenges or objections warrant a hearing, the regional director may direct that the hearing officer's recommendation be made directly to the Board, in which case a party has the right to Board review. On the other hand, if the regional director orders that the hearing officer's recommendations be made directly to him or her, parties can file exceptions to the hearing officer's report to the regional director, but thereafter can seek Board review of the regional director's determination only through the discretionary request-for-review procedure. Similarly, if the regional director decides to resolve the challenges and objections without directing a hearing, he or she can choose to issue a report, in which case parties have a right to Board review, or the regional director can choose to issue a supplemental decision, in which case parties may only request Board review. By contrast, if the parties enter into a stipulated election agreement, the parties are entitled to Board review of the regional director's or hearing officer's disposition of the post-election matters.

B. Problems Identified and Amendments Proposed

The Board published an NPRM on June 22, 2011, 76 FR 36812, proposing a number of changes to these procedures. These proposals are set forth at length in the NPRM. The purpose of this brief summary is to introduce the more complete discussion of the final rule. The proposed amendments are presented in the chronological order of a typical representation case.

First, under current procedures, the petitioner must file the petition in hard copy. The Board proposed to also permit electronic filing of the petition.

Second, under current procedures, the petition is filed by the petitioner and then served by the regional office on the other interested parties. The Board proposed that the petitioner would directly serve a copy of the petition.

Third, under current procedures, the petitioner may wait 48 hours before providing evidence that the employees support the petition (the ''showing of interest''). The Board proposed that the petitioner be required to file the petition and the showing of interest simultaneously. The Board also asked for comments concerning whether electronic signatures should be accepted in support of the showing of interest.

Fourth, under current procedures, after a petition is filed, the regional director asks the employer to voluntarily post a generic notice of employee rights. The Board proposed that the notice describe the type of petition that has been filed, the name of the petitioner, the petitioned-for unit, and the procedures that will follow, and that the employer be required to post the notice.

Fifth, under current procedures, some regional offices routinely schedule pre-election hearings to commence seven days after the petition is filed, while other regions wait longer. The Board proposed that the regional director set the hearing to commence seven days after the filing of the petition absent ''special circumstances.'' The Board also proposed that the hearing be continued from day to day absent extraordinary circumstances.

Sixth, under current procedures, prior to or at the opening of the pre-election hearing, regional personnel typically ask the parties what position they will take on the common subjects of pre-election disputes, such as jurisdiction, the appropriateness of the proposed unit, and any bars to an election. The Board proposed that non-petitioning parties be required to file, no later than the opening of the hearing, a statement of position setting forth their position on these issues. The Board also proposed that the employer's statement include a list of employees in the petitioned-for unit.

Seventh, under current procedures, the hearing officer may ask the parties to clarify their positions on issues

[5] In the alternative, a third type of agreement, called a ''full consent'' agreement, may also be entered into. This occurs when the parties disagree about pre-election issues but are willing to permit the regional director to resolve them as well as any post-election disputes with finality. Full consent agreements are rare.

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potentially in dispute. Although the hearing officer can prohibit a party from introducing evidence when it refuses to take a position on an issue, hearing officers' practice is not uniform. The Board proposed that the hearing process be made uniform through use of the following procedures at the commencement of the pre-election hearing. First, the petitioner would have to respond to (or ''join'') the issues raised by the other parties in their statements of position. Second, if there is a dispute between the parties, each would describe what evidence they would introduce in support of their position. The hearing officer would not permit a party to present evidence related to an issue concerning which the party had failed to take a position or concerning which there was no genuine dispute of material fact. However, parties could contest individual employees' eligibility or inclusion for the first time through a challenge during the election. In addition, the petitioner would be permitted to present evidence relevant to the appropriateness of the unit even if the non-petitioning parties declined to take a position on that issue. Finally, any party could contest the Board's jurisdiction at any time.

Eighth, under current procedures, the hearing officer takes evidence at the pre-election hearing on any individual eligibility issue raised, even though these issues need not be decided pre-election, and the regional director and Board commonly defer resolution of the issues until after the election via the challenge procedure. The Board proposed that the hearing officer exclude evidence relevant only to individual employees' voting eligibility or inclusion in the unit, subject to an exception where the dispute involves a total of more than 20 percent of the unit employees.

Ninth, under the current procedures, the parties have a right in most kinds of cases to file post-hearing briefs at any time up to seven days after the close of the hearing. The Board proposed to vest the hearing officer with discretion concerning whether to permit post-hearing briefs and, if permitted, over their contents and timing.

Tenth, under current procedures, after the pre-election hearing the regional director can choose to transfer the case to the Board without deciding it. The Board proposed to eliminate the transfer procedure.

Eleventh, under current procedures, if the regional director directs an election, the parties are required to request Board review within 14 days or they waive the right to later raise any issues that could have been raised at that time. The Board proposed to eliminate the requirement to request review before the election, instead permitting the request to be filed after the election and consolidated with any request for review of the regional director's disposition of post-election challenges and objections.

Twelfth, under current procedures, parties can request special permission to appeal both from a ruling of the hearing officer to the regional director and from a ruling of the hearing officer or the regional director to the Board, but the regulations establish no standard for the grant of such requests. The Board proposed a strict standard for the grant of such requests.

Thirteenth, under current procedures, the regional director is instructed not to schedule an election sooner than 25 days after his or her decision, so that the Board can rule on any interlocutory request for review that might be filed. The Board proposed to eliminate the 25-day waiting period.

Fourteenth, under current procedures, the employer must give the region a list of eligible voters within seven days of the regional director's decision, and the region then gives the list to the other parties. The Board proposed to codify this requirement, to shorten the time to two days, and to provide for direct service by the employer on the other parties.

Fifteenth, under current procedures, the eligibility list contains only names and home addresses. The Board proposed that the list should also include available telephone numbers and email addresses, as well as the work location, shift, and classification for each employee.

Sixteenth, under current procedures, when a charge is filed alleging the commission of unfair labor practices that could compromise the fairness of the election, the regional director has discretion to delay (or ''block'') the election until the issue can be resolved. In the NPRM, the Board asked for comments on whether the Board should change its blocking charge policy.

Seventeenth, under current procedures, after the tally of ballots from the election, the parties have seven days to file a pleading with the regional director specifying any objections. Objecting parties then have an additional seven days to describe the evidence supporting their objections. The Board proposed that the offer of proof be filed simultaneously with the objections.

Eighteenth, under current procedures, regional directors have discretion over the scheduling of a hearing concerning challenges or objections. The Board proposed that the hearing be held fourteen days after the tally of ballots, or as soon as practicable thereafter.

Nineteenth, under current procedures, in most instances, parties have a right to appeal a regional director's or hearing officer's disposition of challenges or objections to the Board. The Board proposed to make Board review of post-election regional dispositions discretionary, as is the case with pre-election rulings.

Twentieth, the current regulations are redundant in a number of places and located in various parts of Title 29 of the Code of Federal Regulations. The Board proposed to eliminate redundant regulations and consolidate and reorganize the regulations so that they may be more easily understood.

C. The Final Rule and a Concise, General Statement of Its Basis and Purpose

As explained in the NPRM, the Board proposed various revisions to its rules and regulations to further ''the Act's policy of expeditiously resolving questions concerning representation'' [6] and to better ensure ''that employees' votes may be recorded accurately, efficiently and speedily.'' [7] Over 65,000 public comments were filed in response to the NPRM. Many of the comments focused primarily on a few of the proposed amendments, most notably the proposed changes concerning the scheduling of the pre-election hearing, the requirement of a statement of position, and the content and timing of eligibility lists. In light of this commentary, further Board deliberation concerning those proposals (and some others) is necessary at this time. However, a number of the proposals were less controversial. The Board has had the opportunity to fully consider all the comments and to deliberate concerning the proposed amendments and believes it is appropriate to adopt some of the proposals in this final rule and leave the others for further consideration. The Board considers the amendments adopted in this final rule to be severable from the remainder of the proposals, and from each other.[8]

[6] *Northeastern University*, 261 NLRB 1001, 1002 (1982), *enforced,* 707 F.2d 15 (1st Cir. 1983).

[7] *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 331 (1946).

[8] Each of the major changes adopted in this final rule is independently justified, and thus the Board has decided to adopt each of them, while also deciding to deliberate further on the remaining proposals. Although, at a very high level of generality, the various proposals in the NPRM shared a common purpose to improve ''efficiency,'' in fact, each of the proposals addressed discrete sources of inefficiency in the rules, and it is clear that the amendments will serve their functions whether adopted in whole or in part, together or

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For the reasons explained below, the Board has decided to adopt the following eight proposals at this time.

First, the Board has decided to amend § 102.64 in order to expressly construe Section 9(c) of the Act and to state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists. Second, the Board has decided to amend § 102.66(a) and eliminate § 101.20(c) (along with all of Part 101, Subpart C) in order to ensure that hearing officers presiding over pre-election hearings have the authority to limit the presentation of evidence to that which supports a party's contentions and which is relevant to the existence of a question concerning representation. Third, the Board has decided to amend § 102.66(d) to afford hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs, including over the subjects to be addressed and the time for filing. Fourth, the Board has decided to amend §§ 102.67 and 102.69 to eliminate the parties' right to file a pre-election request for review of a regional director's decision and direction of election, and instead to defer all requests for Board review until after the election, when any such request can be consolidated with a request for review of any post-election rulings. Fifth, the Board has decided to eliminate the recommendation in § 101.21(d) (as stated, along with all of Part 101, Subpart C) that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review. Sixth, the Board has decided to amend § 102.65 to make explicit and narrow the circumstances under which a request for special permission to appeal to the Board will be granted. Seventh, the Board has decided to amend §§ 102.62(b) and 102.69 to create a uniform procedure for resolving election objections and potentially outcome-determinative challenges in stipulated and directed election cases and to provide that Board review of regional directors' resolution of such disputes is discretionary. Eighth, as mentioned, the Board has decided to eliminate part 101, subpart C of its regulations, which is redundant. The remainder of the amendments merely conform other sections of the Board's Rules and Regulations to the eight amendments described above. The Board has concluded, after careful review of all public comments and after deliberation, that adopting those eight proposals in a final rule will eliminate wholly unnecessary litigation and delay in the processing of petitions filed under Section 9 of the Act and thus in the resolution of questions of representation.[9]

The current rules have been interpreted to give parties a right to present evidence at a pre-election hearing relating to matters that need not be addressed in order for the hearing to fulfill its statutory function of creating a record based on which the regional director can determine if there is a question of representation that should be answered via an election. Furthermore, the current rules have been understood to give parties a right to present evidence at a pre-election hearing concerning such matters even though neither the regional director nor the Board must address those matters prior to the election, and a decision on such matters is commonly deferred until after the election. In other words, such litigation is wholly unnecessary prior to an election. Moreover, the issues in dispute in such litigation are often rendered moot by the election results or resolved by the parties post-election, thus eliminating the need for litigation of the issues. Therefore, the Board has determined that amending § 102.64(a) to expressly construe the statutory purpose of the hearing and amending § 102.66(a) to vest hearing officers with authority to limit the presentation of evidence to that supporting a party's contentions and relevant to the existence of a question concerning representation will eliminate unnecessary litigation and delay.

After the pre-election hearing, the filing of post-hearing briefs often delays issuance of the regional director's decision and direction of election, thereby delaying resolution of the question of representation even when the issue or issues in dispute can be accurately and fairly resolved without briefing. Given the recurring and often familiar and uncomplicated legal and factual issues arising in pre-election hearings, the filing of briefs, which also imposes financial costs on the parties, is not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions. Therefore, the Board has decided to amend § 102.66(d) to vest hearing officers presiding over pre-election hearings with authority to provide for the filing of post-hearing briefs only in those instances when they would be of assistance to the decision-maker and to control the subjects addressed in, and the time for filing of, any such briefs. The Board has determined that amending the rules to give the hearing officer discretion to permit the filing of post-hearing briefs will eliminate unnecessary expense and delay.

The Board's current rules require parties to file a request for review of the regional director's decision and direction of election before the election is held in order to preserve their right to raise disputed issues in post-election proceedings, even though the issues in dispute are often rendered moot by the election results or resolved by the parties post-election thus eliminating the need for litigation of the issues at any time. The pre-election request for review procedure is inconsistent with judicial procedures, which limit interlocutory appeals in order to avoid unnecessary litigation and delay. In addition, § 101.21(d) of the Board's current Statements of Procedure provides that elections ''normally'' are delayed for a period of at least 25 days after the regional director directs that an election should be conducted, ''to permit the Board to rule on any request for review which may be filed.'' This provision effectively stays the conduct of all elections for at least 25 days despite Congress's instruction in Section 3(b) of the Act that even the grant of review by the Board ''shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.'' Furthermore, even in the cases in which a request for review is filed, review is granted only rarely and the Board almost never stays the conduct of the election either before or after granting review, instead permitting employees to vote and then impounding the ballots. For these reasons, the waiting period unnecessarily delays the resolution of questions of representation in all cases, and the delay is not justified by the only purpose articulated in the Board's Statements of Procedure. Therefore, the Board has determined that amending the rules to defer the right to file requests for review of the direction of the election until after the election and to eliminate the mandatory waiting period will eliminate unnecessary litigation and delay.

Consistent with the effort to avoid piecemeal appeals to the Board, the Board has also decided to amend § 102.65 to provide that a request for special permission to appeal to the Board will only be granted under

one at a time. For this reason as well, each of the amendments in this final rule would be adopted by the Board independently of the others.

[9] The Board has not, in each instance, adopted the precise rule language proposed in the NPRM. To the extent alternative language has been adopted in the final rule, the Board sets forth its rationale in Part IV below.

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extraordinary circumstances, when it appears that the issue will otherwise evade review. To further discourage piecemeal appeals, the amendments provide that a party need not seek special permission to appeal in order to preserve an issue for review post-election. Consistent with current practice, the amendments provide that neither the filing of a request for special permission to appeal nor the grant of such a request will stay an election or any other action or require impounding of ballots unless specifically ordered by the Board. The Board has determined that narrowing the circumstances under which a request for special permission to appeal will be granted will eliminate unnecessary litigation and delay.

Under the current rules, the nature of Board review of a regional director's disposition of pre- and post-election disputes varies, but for no articulated reason. Pre-election review is discretionary, while post-election review is ordinarily mandatory. This is the case even though many post-election disputes raise no question of policy and often turn on the application of well-established principles of law to particular facts. In addition, the procedures for post-election review vary from case to case even though the nature of the issues is the same. Therefore, the Board has decided to amend §§ 102.62(b) and 102.69 to create a uniform procedure in both stipulated and directed election cases, whereby parties may file exceptions to any hearing officer's report with the regional director, and file a request for review of the regional director's disposition of the post-election matters with the Board. That request may be consolidated with a request for review of the regional director's decision and direction of election, if any. Permitting the Board to deny review when a party's request raises no compelling grounds for review will eliminate the most significant source of administrative delay in achieving finality of election results. The Board has determined that amending the rules to create this uniform procedure for handling pre- and post-election disputes will eliminate unnecessary litigation and delay.

Finally, the Board currently has two sets of regulations describing its procedures in representation cases, one in Part 102, Subpart C of its Rules and Regulations and the other in Part 101, Subpart C of its Statements of Procedure. 29 CFR Part 102, Subpart C; 29 CFR Part 101, Subpart C. The two sets of regulations are almost entirely redundant. This redundancy is a potential source of confusion. The Board has determined that eliminating Part 101, Subpart C will reduce such confusion.

II. The Rulemaking Process

A. A Brief History of Board Rulemaking

As the NPRM explains, the Board has amended its representation case procedures repeatedly over the years as part of a continuing effort to improve the process and eliminate unnecessary delays. Indeed, the Board has amended its representation case procedures more than three dozen times since they were published in the very first volume of the **Federal Register**, 1 FR 207 (April 18, 1936), and has only rarely utilized the Administrative Procedures Act's notice-and-comment rulemaking procedures; most often the Board simply implemented the changes without prior notice or request for public comment.

In fact, the Board has seldom acted through notice-and-comment rulemaking on any subject. The Board typically makes substantive policy determinations in the course of adjudication rather than through rulemaking, a practice that has occasionally drawn the ire of academic commentators and the courts.[10]

[10] See R. Alexander Acosta, *Rebuilding the Board: An Argument for Structural Change, over Policy Prescriptions, at the NLRB,* 5 FIU L. Rev. 347, 351–52 (2010); Merton C. Bernstein, *The NLRB's Adjudication-Rule Making Dilemma Under the Administrative Procedure Act,* 79 Yale L.J. 571 (1970); Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking,* 37 Admin. L. Rev. 163 (1985); Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB,* 5 FIU L. Rev. 411, 414–17, 435 (Spring 2010); Kenneth Kahn, *The NLRB and Higher Education: The Failure of Policymaking Through Adjudication,* 21 UCLA L. Rev. 63 (1973); Charles J. Morris, *The NLRB in the Dog House—Can an Old Board Learn New Tricks?,* 24 San Diego L. Rev. 9 (1987); Cornelius Peck, *The Atrophied Rulemaking Powers of the National Labor Relations Board,* 70 Yale L.J. 729 (1961); Cornelius J. Peck, *A Critique of the National Labor Relations Board's Performance in Policy Formulation: Adjudication and Rule-Making,* 117 U. Pa. L. Rev. 254 (1968); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy,* 78 Harv. L. Rev. 921 (1965); Carl S. Silverman, *The Case for the National Labor Relations Board's Use of Rulemaking in Asserting Jurisdiction,* 25 Lab. L.J. 607 (1974); and Berton B. Subrin, *Conserving Energy at the Labor Board: The Case for Making Rules on Collective Bargaining Units,* 32 Lab. L.J. 105 (1981); see also *NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 295 (1974); *NLRB* v. *Wyman-Gordon* Co., 394 U.S. 759, 764, 770, 777, 779, 783 n.2 (1969). The Portland Cement Association (PCA) contends, as it did in another recent Board rulemaking, that the Board should place these and other law review articles discussed in the NPRM online for the public to read for free on *regulations.gov.* Just as the Board replied in that prior rulemaking, 76 FR 54014, the Board has placed these articles in the hard copy docket, but has not uploaded these articles to the electronic docket because such an action could violate copyright laws. It should also be noted that these materials are generally available in libraries.

The Board has thus asked for public comments on few proposed rules of any kind. A review of prior Board rulemaking procedures reveals that the Board has not held a public hearing attended by all Board Members for at least half a century. In the rulemaking proceedings that resulted in adoption of rules defining appropriate units in acute care hospitals, the Board directed an administrative law judge to hold a series of public hearings to take evidence concerning the proposed rules, but no Board Members participated in the hearings. In fact, even in the course of adjudication, the Board has not held oral argument since 2007 and has held only two oral arguments in the last decade. The last open meeting of the Board, prior to the open meeting on November 30, 2011, to discuss and vote on whether to adopt any of the proposed amendments in a final rule in this proceeding, was held in 1989 and also concerned the acute care hospital bargaining-unit rule.

B. The Process of This Rulemaking

On June 22, 2011, the Board issued a Notice of Proposed Rulemaking. The Notice provided 60 days for comments and 14 additional days for reply comments, and announced a public hearing to be held on July 18 and 19, 2011. The Board issued press releases about the proposals and hearings, and placed summaries, answers to frequently asked questions, and other more detailed information on its Web site (*www.nlrb.gov*).

The Board Members also held two days of hearings in Washington, DC, on July 18 and 19, 2011, where 66 individuals representing diverse organizations and groups gave oral statements and answered questions asked by the Board Members. The purpose of all of these procedures was to give the Board the benefit of the views of the public. In this the Board was quite successful, receiving 65,958 written comments and taking 438 transcript pages of oral testimony.

Nonetheless, a number of comments criticize the Board's process: Some claim there should have been some pre-notice-and-comment notice and opportunity to comment; some criticize the length of the hearing (2 full days), the location of the hearing (Washington, DC), or the timing of the hearing (halfway through the comment period); some criticize the length of the comment periods (60 days plus 14 days).

1. The Pre-NPRM Process

The comment of the Chamber of Commerce of the United States of

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America (the Chamber) provides a representative example of criticism of the pre-NPRM process. The Chamber believes that the Board missed ''an opportunity to explore whether a consensus could have been reached'' on the rule among stakeholder groups through forums such as the American Bar Association's Labor and Employment Law Section. The Chamber concedes that stakeholders ''have widely divergent views,'' but argues that a consensus on at least some changes might have been reached. The Chamber suggests that the Board should withdraw the NPRM and publish a more open-ended Advanced Notice of Proposed Rulemaking.

The Chamber cites Executive Order 13563 Section 2(c) (''Improving Regulation and Regulatory Review''), 76 FR 51735, as support. Section 2(c) of the Executive Order states that ''[b]efore issuing a proposed regulation, each agency, where feasible and appropriate, shall seek the views of those who are likely to be affected * * *.'' *Id.* In the NPRM, the Board explained the decision to issue a set of specific proposals, rather than a more open-ended Advanced NPRM, by stating that ''public participation would be more orderly and meaningful if it was based on * * * specific proposals.'' 76 FR 36829. The Chamber incorrectly suggests the Board conceded that it violated the Executive Order, and questions whether the comment process actually was more orderly or meaningful. Some other comments suggest that the Board should have engaged in negotiated rulemaking, or that the pre-NPRM process was insufficiently transparent.[11]

The Board continues to believe that it has followed a lawful, fair, and open process that succeeded in eliciting broad and informed public participation to a greater extent than ever before in connection with the Board's representation (or unfair labor practice) case procedures.

An agency generally has discretion over its pre-NPRM procedures, including whether to use advanced NPRMs, negotiated rulemaking, or other pre-NPRM consultation. See *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council,* 435 U.S. 519, 543–44 (1978). Moreover, as recognized by the American Hospital Association (AHA), the Board is not directly subject to E.O. 13563, nor is its language pertaining to pre-NPRM procedures mandatory in any event. As explained in the NPRM, in this instance, the Board concluded that beginning the process of public comment by issuing a NPRM would be the most effective method of proceeding.

The course of proceedings since issuance of the NPRM has confirmed the Board's initial judgment. The notice of the two-day public hearing published in the **Federal Register** on June 27, 2011, specifically invited interested members of the public to appear and comment on the proposals set forth in the NPRM and to ''make other proposals for improving representation case procedures.'' 76 FR 37291. Yet at the public hearing, while the Board heard a considerable amount of valuable testimony concerning the specific proposals in the NPRM, it received almost no suggestions unrelated to those proposals. Similarly, in the NPRM, while the Board proposed specific rule language related to most of the problems it identified, in several areas the Board identified a problem or question and invited comment without proposing specific rule language. For example, the Board specifically invited comments on whether the Board should take any action related to the use of electronic signatures in relation to the showing of interest supporting certain forms of petitions. 76 FR 36812, 36819. The Board also specifically invited comments ''on whether any final amendments should include changes in the current blocking charge policy.'' 76 FR 36812, 36827. The NPRM specifically invited comments on whether the Board should change that policy in several respects or leave the policy unchanged. *Id.* While the Board received many meaningful comments on the specific proposals in the NPRM, it received very few comments in response to the more open-ended inquiries, and the comments that were received were less specific and less helpful in analyzing the procedural questions at stake.

The Board also is doubtful about the Chamber's suggestion that a broad consensus might have been reached through a different process. As the Chamber concedes, the labor-management bar is polarized on many of the relevant issues. Given the degree of polarization reflected both at the public hearing and in the comments, the Board continues to believe that following the notice-and-comment procedures set forth in the APA—and thereby giving formal notice of specific proposals to all members of the public at the same time in the **Federal Register** and permitting all members of the public to comment on those proposals through the same procedures and during the same time periods—was the fairest and soundest method of proceeding.

In sum, the Board's pre-NPRM process was lawful and appropriate.

2. The Length, Timing, and Location of the Hearing

The Board Members held a two-day public hearing in Washington, DC, approximately halfway through the initial comment period, i.e., about one month after publication of the NPRM and one month before the initial comment period closed. All Board Members heard five-minute statements from 66 individuals, representing diverse organizations and groups, and then actively questioned the speakers for an additional period of time.[12] This hearing was not legally required.

Some comments compare this proceeding to the hospital unit rulemaking and essentially argue that the Board should have held 14 days of hearings around the country over the course of years.[13] For example, the National Association of Manufacturers (NAM)—and many nearly identical form comments by member companies—claim that the ''relative rush'' of these hearings ''is a departure from past Board practice that will result in both an inadequate opportunity for stakeholders to address the merits of the rules and inadequate information and data for the Board to make a prudential judgment regarding the rules.''

Agencies are not bound to use the same procedures in every rulemaking proceeding. Otherwise, agencies could neither learn from experience, e.g., what rulemaking procedures are helpful and what procedures are simply wasteful, nor adopt procedures suited to the precise question at stake. The procedures the Board has employed in order to obtain public input on proposed rules have, in fact, varied considerably, and the Board has substantial discretion to use procedures suited to the matter under consideration. Indeed, the Board has adopted amendments to its representation case procedures without any notice or opportunity for comment or with opportunities considerably more

[11] See, e.g., joint comment of HR Policy Association and Society for Human Resource Management (collectively, SHRM); Greater Easley Chamber of Commerce; Georgia Association of Manufacturers (GAM).

[12] After the public hearing, the transcript of each speaker's testimony along with any Board questioning of the speaker was made part of the record of the rulemaking as a separate comment. Any such testimony discussed in this final rule is cited as follows: ''Testimony of [name of speaker].''

[13] See, e.g., Coalition for a Democratic Workplace (CDW); Council on Labor Law Equality (COLLE); SHRM. By contrast, scholars have described the Board's procedures in the earlier rulemaking as ''procedural overkill.'' See Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism,* 41 Duke L. J. 274, 319 (1991).

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limited than in the instant matter.[14] In contrast to the subject matter of the acute care hospital unit proceeding, the proposals at issue in this proceeding involve a matter uniquely within the Board's own expertise: the operation of the Board's own procedural rules.

The Board believes that the hearing not only exceeded the requirements of the APA, it was fair, appropriate, and useful. Holding the hearing in Washington, DC was appropriate because many of the Board's major stakeholders are either headquartered in DC or are represented by counsel in the city or who frequently appear in the city.[15]

The hearing was also properly noticed and appropriately timed during the initial comment period. The NPRM was published on June 22, 2011, and informed the public that the Board intended to hold a public hearing on July 18 and 19. A subsequent notice published in the **Federal Register** on June 27, 2011 informed the public of the details of the hearing. 76 FR 37291. In fact, the Board accommodated all parties who wished to appear at the hearing, even those whose requests to appear were made after the deadline.[16] That the public notice was sufficient to permit interested parties to appear is evidenced by the fact that 66 individuals appeared at the hearing, representing many major management and labor organizations as well as many other groups. No individual or organization informed the Board that it was unable to participate due to the shortness of time between the June 22 and June 27 notices and the hearing. The two-day hearing was held about a month after the NPRM was published, giving participants adequate time to carefully read the proposal, consult with each other and with clients, and develop detailed positions. And the five minutes that speakers were given was supplemented by substantial time for questioning and the opportunity for written comments. Some speakers gave 2,000 words or more of well-informed testimony during their allotted time. In total, the hearings resulted in more than 400 pages of transcript (promptly made available to the public on the Board's Web site [17]). The Board found that the speakers provided informed, thorough, and thoughtful analysis, and the back-and-forth dialogue with the Board Members demonstrated the wide-ranging familiarity of the speakers with the proposals.

Some comments suggest that the hearing should have been held after the comment period closed so that the speakers could address arguments presented in the written comments. But holding the hearing first made the subsequent written comments more informed, thoughtful, and technically sophisticated, and many commenters, such as the Chamber, took the opportunity to cite extensively from the hearing transcripts for support and to respond to arguments made at the hearing. The Board believes the chosen sequence—the hearing followed by the close of the initial comment period and then the reply period—produced more meaningful public comments than the proposed alternative because written comments are better suited to the technical issues at stake and thus appropriately came after the public hearing.

In sum, the Board believes that the two-day public hearing attended by all Board Members was highly valuable, was of an appropriate length, and was held at an appropriate time and in an appropriate location.

3. The Length and Timing of the Comment Periods

The Board provided an initial comment period of 60 days beginning June 22, followed by a reply comment period of 14 days that ended on September 6, 2011. No late comments were accepted.

COLLE describes the NLRB's comment period as ''the bare-minimum 60-day[s],'' but the APA provides no minimum comment period, and many agencies, including the Board in some recent rulemaking proceedings, have afforded comment periods of only 30 days. The agency has discretion to provide still shorter periods, and is simply ''encouraged to provide an appropriate explanation for doing so.'' Administrative Conference of the United States (ACUS), Recommendation 2011–2 at 3 (June 16, 2011). Indeed, for procedural rules, such as the final rule here, no comment period at all is required.

Sixty days has become the benchmark period for comments on significant substantive rules. *Id.* Countless NPRMs provide 60 days for comments.

Nevertheless, a number of comments opposing the rule assert that the comment period was inadequate. For example, SHRM characterized the comment period as ''hurried, abridged and clandestine.'' But the Montana Chamber of Commerce—though opposing the rule—states that ''[t]his 60-day window seems like a very reasonable timeframe to allow ample comments and statements from all interested parties, whether they are supportive of these sweeping changes or not.''

In practice, the Montana Chamber of Commerce proved correct on this point: 60 days was quite ample. The Board received hundreds of detailed, informed, and thoughtful comments. Many were submitted by the very same parties that asserted the comment period should have been longer, such as the 88-page comment—and hundreds of accompanying nearly identical form comments—submitted by SHRM and its members. The U.S. Chamber states that it needed more time to ''study Board data'' and conduct ''rigorous'' economic analysis. But the Chamber did provide detailed discussions of data and many studies in its comment. Although the desire for additional time to gather additional support and develop arguments is understandable, agencies must set some end to the comment period: ''Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently.'' ACUS 2011–2 at 3.

Fourteen days were given for reply comments. The Chamber suggested that 14 days was insufficient time to review tens of thousands of comments, and noted that some of the comments submitted were not available to the public until some time after the close of the initial comment period. Neither the APA nor any other law requires an opportunity to reply to initial public comments. Moreover, while some comments were not available to the public immediately upon the close of the initial comment period, the comments that were unavailable were largely identical ''postcard comments,'' tens of thousands supporting the proposal in general terms, and tens of thousands opposing the proposal in general terms.[18] And the purpose of the reply period was not to afford interested

[14] In its run-off election rulemaking proceedings, for example, the Board provided only two weeks for comments, with a short hearing on the final day of the comment period. 8 FR 10031–32 (1943).

[15] No party informed the Board that it wished to appear at the hearing but was unable to send a representative to Washington, DC.

[16] The Board did, however, limit organizations to presenting one speaker at the hearing.

[17] The hearing was also streamed live on the Board's Web site.

[18] By August 24, 2011, the day after the close of the initial comment period, 29,236 timely filed initial comments were available electronically for review. The Board believes, based on its staff's investigation, that initial comments that were not available at that time fall into one of three categories: (1) Timely filed form letters submitted by the AFL–CIO, (2) timely filed form letters submitted by Americans for Prosperity or CDW or mailed by individual businesses using a common form, and (3) late-filed comments submitted electronically.

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parties an opportunity to read and reply to all of the comments submitted, but to provide an opportunity to read the most significant comments and respond to the arguments raised in them.

This the Chamber and others did quite successfully within the 14 days provided. For example, the Service Employees International Union (SEIU) cited and replied to over twenty unique, detailed, and lengthy comments submitted by other parties. Others, such as the Association of Corporate Counsel (ACC), took the opportunity to focus on elaborating one particular issue of special importance. Both approaches were quite helpful, and served the purpose for which the Board afforded the reply period.

The over 65,000 comments submitted and the depth of analysis they provided are ample testament to the adequacy of the opportunities for public participation in the rulemaking process.

4. The Final Rule

In light of the procedural concerns voiced in some of the comments, it seems likely that some stakeholders will believe that the period of time between the close of the reply comment period and the issuance of the final rule was too short, and that the Board was required to spend additional time considering the comments. This concern is suggested by NAM in its reply comment, stating that ''failure to give due consideration to the public comments would nonetheless render * * * the rules * * * arbitrary and capricious * * *. Absent due consideration of all the comments, the Board would be unable to certify that it has examined and considered all relevant arguments and data.''

In order to allay this concern, the Board assures all those who provided comments that the Board, through its Members personally or staff acting at the Members' direction, read every non-duplicative comment.[19] The comments were coded so that all comments addressing specific issues could be electronically identified. All specific arguments raised in the comments were identified, grouped by subject matter, and analyzed. Through this process, the Board has read and carefully considered every relevant argument, datum, or suggestion in the comments.

Finally, the Board has decided to take additional time to deliberate concerning the majority of the proposals in the NPRM, including many of those that generated the most comments and controversy.

The Board thoroughly considered and deliberated about all substantive comments relevant to the final rule.

Some comments expressed the view that the rulemaking procedure suggested a fait accompli, or created an appearance of favoritism.[20] Any sense of a fait accompli could have mistakenly arisen only from the detailed specificity of most of the proposed amendments, as compared with the open-ended queries concerning several subjects. However, as explained above, the comments addressing the proposals accompanied by proposed rule text and detailed explanation far exceeded in number and quality those addressing the open-ended questions unaccompanied by such specifics, bearing out the Board's judgment that a more specific proposal would promote more useful public participation in the process. And contrary to any suggestion of favoritism, the process was completely transparent and provided multiple opportunities for any member of the public to participate. The process resulted in significant changes to the proposed rule as well as a decision not to proceed with all the proposals at this time. In short, the process was fair, open, and successful.

5. Board Membership

Some comments question whether a divided three-member Board can or should issue a final rule, arguing that the Board lacks the authority to do so or that such action would be contrary to the Board's traditions or otherwise imprudent.[21] Certain comments contend that a Board Member serving a recess appointment may not, or should not, participate in any action that represents a change in Board law or practice.[22] After careful consideration, the Board rejects these arguments.

Under the National Labor Relations Act, a lawful quorum of the Board consists of three Members (out of the five Members provided for by the statute). Section 3(b) of the Act expressly provides that:

> A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board * * *.

29 U.S.C. 153(b). See generally *New Process Steel L.P.* v. *NLRB,* __ U.S. __, 130 S.Ct. 2635, 2639–42 (2010) (analyzing quorum requirement). Rulemaking is one of the ''powers of the Board,'' as Section 6 of the Act provides. See 29 U.S.C. 156. Adoption of the final rule, then, reflects the proper exercise of the Board's powers by the majority of a lawful quorum of three Members.

Nothing in the text of the Act or its legislative history suggests that, even if the Board has a lawful quorum, certain Board powers may be exercised only if approved by at least three Members. Put somewhat differently, there is no statutory basis to argue that a three-Member quorum of the Board must act unanimously—as opposed to acting by majority vote as is typical—in order properly to exercise the Board's powers. During the many periods in which the Board consisted of only three Members, including the period since August 27, 2011, it routinely has issued non-unanimous decisions in adjudicated cases. See, e.g. *Arkema, Inc.,* 357 NLRB No. 103 (Oct. 31, 2011); *Allied Mechanical Services, Inc.,* 357 NLRB No. 101 (Oct. 25, 2011).

The Board does have a tradition of not overruling its own prior decisions through adjudication with fewer than three votes to do so. See *Hacienda Resort Hotel & Casino,* 355 NLRB No. 154, slip op. at 2, 2 n.1 (2010) (concurring opinion of Chairman Liebman and Member Pearce) (listing cases dating to 1985). This tradition—which is not unbroken[23]—is not based on the Act itself, nor has it been codified in a Board rule or statement of procedure.

While the rationale for this tradition does not appear to have been clearly set forth in any Board decision, it was recently articulated by a Federal appellate court. In *Hacienda Resort,* supra—where the Board had deadlocked 2–2 and thus decided the case under existing law, despite a prior court remand directing reconsideration—the U.S. Court of Appeals for the Ninth Circuit reversed the Board's decision, while acknowledging the Board's traditional approach to overruling precedent in adjudication:

> We recognize the Board's interest in protecting the stability of its legal precedent. Unlike other federal agencies, the NLRB

[19] Using electronic means, the Board identified all identical comments and read only one of each group of identical comments. More than 90 percent of the over 65,000 comments were duplicates, near duplicates, devoid of analysis, or irrelevant. In this connection, see ACUS 2011–1 ¶ 1(a)(1): While 5 U.S.C. 553 requires agencies to consider all comments received, it does not require agencies to ensure that a person reads each one of multiple identical or nearly identical comments.

[20] See, e.g., CDW; Indiana Chamber of Commerce.

[21] See, e.g., Chamber; SHRM; Associated Builders & Contractors (ABC).

[22] See, e.g., National Grocers Association (NGA); Testimony of Harold Weinrich.

[23] See *Mathews Readymix, Inc.,* 324 NLRB 1005, 1008 n. 14 (1997), *enforced,* 165 F.3d 74 (DC Cir. 1999) (two-member majority overrules precedent); *Service Employees Local 87 (Cresleigh Mgmt.*), 324 NLRB 774, 775 n.3 (1997) (same).

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promulgates nearly all of its legal rules through adjudication rather than rulemaking * * *. Under such a scheme, the Board's rules would be of little assistance to employers and unions in following the NLRA if the Board's rules interpreting the Act were subject to routine, frequent change. The Board reasonably has decided that requiring a three-member majority to overturn precedent provides for the necessary stability of its rules, and we defer to that judgment.

Local Joint Executive Bd. of Las Vegas v. *NLRB,* 657 F.3d 865, 872 (9th Cir. 2011).

The Ninth Circuit's statement underscores a critical aspect of the Board's tradition: It has been followed in the Board's adjudication of cases, as opposed to in notice-and-comment rulemaking. The notice-and-comment process of rulemaking does not implicate the same concerns about the stability of legal rules that adjudication does, because it does not permit ''routine, frequent change'' in the words of the court. The greater stability inherent in notice-and-comment rulemaking has been cited by ACUS in recommending increased use of rulemaking by the Board. See ACUS, Recommendation 91–5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 FR 33851 (July 24, 1991).

Whatever its limited legal weight may be, the Board's traditional practice with respect to overruling precedent through adjudication is simply not implicated here for several reasons. The final rule is the product of notice-and-comment rulemaking, not adjudication. Moreover, the final rule reverses no prior Board decisions. It amends rules that themselves are not the product of adjudication, and, indeed, were in large measure adopted without notice-and-comment rulemaking. Finally, the final rule is purely procedural. Procedural rules, governing such subjects as whether parties have a right to file a post-hearing brief, do not implicate the sorts of reliance interests that underlie the Board's tradition. Under all these circumstances, the Board construes its unwritten tradition of not overruling precedent in adjudication absent three votes to not apply here.

In addition, the Board rejects the argument that the presence of a Member serving on the Board under a recess appointment has any bearing on the adoption of the final rule. There is no basis in the Act, in administrative law, or in the Constitution for distinguishing between Members of the Board serving under a recess appointment and Members confirmed by the Senate. The Board itself has no rule, statement of procedure, or tradition that would bar a recess appointee from participating in an adjudication or a rulemaking or that requires some minimum number of Senate-confirmed Members to exercise the Board's powers. Notably, the Board has overruled precedent in cases where the majority consisted entirely of recess appointees. See *MV Transportation,* 337 NLRB 770 (2002). Recess appointees have been essential to a majority vote to overrule precedent in many decisions issued by prior Boards. See, e.g., *Randall Warehouse of Arizona,* 347 NLRB 591 (2006) (two recess appointees among three-member majority); *Dana Corp.,* 351 NLRB 434 (2007) (one recess appointee). If effective administration of the Act is the goal, treating recess appointees as lesser Members of the Board or deferring action until the Board has some particular number of Senate-confirmed Members is untenable.

In sum, the present Board has full authority to adopt the final rule.

6. The Dissent

The final rule has been approved by a two-Member majority of the Board. The Board currently has three Members, a lawful quorum under Section 3(b) of the Act, as explained above.

Member Hayes has effectively indicated his opposition to the final rule by voting against publication of the NPRM and voting against proceeding with the drafting of the final rule at the Board's public meeting on November 30, 2011. Although Member Hayes has not yet supplied a dissent or similar statement in connection with the final rule itself, the Board has authorized the publication of such a document in the **Federal Register**, together with any separate concurring opinion, when they are made available. The Board has delayed the effective date of the final rule so that Member Hayes will have over 90 days after he received a final draft of this final rule to write a dissent and have it published prior to the effective date of the rule. The Board believes that this procedure will provide Member Hayes with a reasonable period of time to express his views in a timely, formal, and public manner.

The Board has no desire to prevent Member Hayes from expressing his views in any manner he deems appropriate. Indeed, the Board has facilitated Member Hayes' expression of a dissenting view in earlier instances of rulemaking, including the initial stage of this proceeding.[24] The Board has also invited and attempted to facilitate Member Hayes' expression of his views to his fellow Board Members through all appropriate means, including at the public meeting on November 30. At the same time, under the circumstances involved in this rulemaking, the Board does not believe that it is required, either by law or agency practice, to delay the adoption and publication of a final rule in order to accommodate a dissenting Member.[25] Nothing in the APA compels that course of action, nor does the National Labor Relations Act demand it.[26]

Neither do the Board's rules, statements of procedure, internal operating procedures, or traditional practices, which do not address the internal process of rulemaking, compel such action. In its 76-year history, the Board—which has interpreted and administered the National Labor Relations Act primarily through adjudication—has engaged in notice-and-comment rulemaking only rarely.[27] The rarity of Board rulemaking explains why the sole internal Board rule establishing a timetable for decision-making addresses only the adjudication of cases. Executive Secretary's Memorandum No. 01–1 (''Timely Circulation of Dissenting/Concurring Opinions''), issued to Board staff on January 19, 2001, provides that a Board decision in an adjudicated case may issue without a dissent if 90 days have passed following the circulation of a majority-approved draft without action by the remaining Board Member or Members. Notably, the Memorandum provides that ''[f]or good cause, the Board has the discretion to allow departure from these procedures on a case-by-case basis.'' Like Memorandum

[24] Member Hayes dissented from the Board's Notice of Proposed Rulemaking (NPRM) in this proceeding, and his dissent was published as part of the NPRM. 76 FR 36812, 36829 (June 22, 2001) (dissenting view of Member Brian E. Hayes). Member Hayes also dissented from the Board's final rule regarding notification of employee rights under the National Labor Relations Act, and his dissent was published with the final rule. 76 FR 54006, 54037 (Aug. 30, 2011) (dissenting view of Member Brian E. Hayes). Member Hayes had earlier dissented from the NPRM in that proceeding. 75 FR 80410, 80415 (Dec. 22, 2010) (dissenting view of Member Brian E. Hayes).

[25] The Board's decision in this regard is informed by the possibility that after Member Becker's service ends at the end of the current congressional session, no later than January 3, 2012, the Board will be reduced to two Members, and under the Supreme Court's recent *New Process* decision, supra, may be unable to act on the proposed rule for a considerable period of time.

[26] See Jeffrey S. Lubbers, *The Potential of Rulemaking by the NLRB,* 5 FIU L. Rev. 411, 431 n.102 (2010) (''[T]he APA does not address the possibility of dissents in agency rulemakings, and agencies seem to have widely different practices in this regard.'').

[27] See generally Administrative Conference of the United States, Recommendation 91–5, *Facilitating the Use of Rulemaking by the National Labor Relations Board* (adopted June 14, 1991), 56 FR 33851 (July 24, 1991).

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No. 01–1, which superseded them, prior memoranda from the Executive Secretary addressing the circulation of individual opinions by Board Members refer only to the adjudication of cases and make no mention of rulemaking. Rather, the Board has treated each rulemaking proceeding as unique and adopted internal procedures suited to the particular matter. In any event, to the extent that the 90-day period for dissents reflected in Memorandum 01–1 could be regarded as establishing a traditional norm that applies not only to routine adjudication, but also to the rare rulemaking proceedings at the Board, the Board has honored that norm by authorizing a dissent to be submitted and published during the more than 90-day period between publication of the final rule and its effective date.[28]

The notice-and-comment rulemaking process, which the Board has followed in this proceeding, is distinct from adjudication in its iterative nature (a proposed rule, followed by a final rule) and the high degree of public participation it involves. The focus of the process is, in effect, a dialogue between the administrative agency and the public—not an intramural debate between or among agency officials. As explained, the final rule adopted today has been approved by a majority of a lawful quorum of the Board, in full compliance with the APA and other applicable statutes. That action follows both full public participation and extensive internal deliberations by the Members of the Board.

Member Hayes has in no respect been excluded from the rulemaking process. Rather, Member Hayes has had every opportunity to participate in the Board's extensive internal deliberations concerning the final rule and to express his views to the other Members of the Board and to the public. To a highly unusual, indeed, unprecedented and unfortunate, degree, the Board's internal deliberations have become public, although not disclosed by the Board itself. Those communications have already revealed that Member Hayes has been kept fully informed at every significant stage in the conception and development of the final rule (an undertaking of more than one year) and that he has been repeatedly invited to share his views with his fellow Board Members over the course of that process. Member Hayes was briefed on internal proposals to revise the Board's representation case procedures. He was provided with a draft NPRM and was offered a briefing before the NPRM was published (along with his dissent) on June 22, 2011.[29] When the Board held a public hearing on the proposed rule on July 18–19, 2011, Member Hayes attended and actively participated in questioning witnesses. Following the close of the initial public comment period (August 22, 2011) and of the period for reply comments (September 6, 2011), Member Hayes and his staff (which comprises more than 25 attorneys) had access to all public comments filed with the Board as soon as they were filed. When the Board's review and coding of comments began, Member Hayes was invited to have his staff participate. He did not respond to that invitation, and no member of his staff participated in the laborious comment-review process. Nevertheless, Member Hayes was specially provided with copies of those comments considered by the other Members and their senior staff to be the most extensive, detailed, and useful; with computer-generated reports identifying particular issues raised in the comments that had been coded ''most significant'' or ''significant'' by Board staff; with instructions on how to locate any of the more than 65,000 comments on the Board's shared computer system; and with lists of issues raised in the comments grouped by subject matter. On November 30, 2011, the Board held a public meeting to discuss the rulemaking, at which a majority voted to proceed to a final rule. Member Hayes attended, participated fully, and voted against proceeding.

In sum, Member Hayes has been afforded a full opportunity to participate in the deliberative process by which this final rule was developed. While the Board respects any Member's right to disagree and to express that disagreement at appropriate times and in an appropriate form, the Board perceives no basis—in law, in policy, or in tradition—for indefinitely postponing adoption of the final rule and for, in essence, permitting one Member to exercise what would amount to a minority veto over a proper exercise of the Board's rulemaking authority. Such a course of action would be plainly inconsistent with the operation of a multi-member independent agency that is, and always has been, governed by majority vote.

[28] While the Board construes its Memorandum governing its own internal, operating procedures not to apply to rulemaking, it also finds good cause to depart from those procedures in this proceeding in the manner and for the reasons explained in the text.

[29] 76 FR 36812, 36829 (June 22, 2001) (dissenting view of Member Brian E. Hayes).

III. Comments on General Issues

Before turning to comments on specific provisions of the final rule, the Board addresses a number of general issues: (a) The Board's rulemaking authority; (b) the procedural nature of the final rule; (c) the justification for any changes to the rules; (d) employers' opportunity to campaign; and (e) effects on employee representation and the economy.

A. Board Authority To Promulgate Election Rules

The Board's rulemaking authority is well established, as recognized by comments both opposing and supporting the proposed rule. For example, NAM states that ''it is undisputed that the Board has the authority to promulgate rules and regulations,'' and the American Federation of Labor and Congress of Industrial Organizations (AFL–CIO) states that ''[t]he NLRB has specific and express statutory authority to engage in rule-making to regulate its election process.''

Congress delegated both general and specific rulemaking authority to the Board. Generally, Section 6 of the National Labor Relations Act, 29 U.S.C. 156, provides that the Board ''shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act * * * such rules and regulations as may be necessary to carry out the provisions of this Act.'' In addition, Section 9(c), 29 U.S.C. 159 (c)(1), specifically contemplates election procedure rules, stating that elections will be held ''in accordance with such regulations as may be prescribed by the Board.''

As the Supreme Court unanimously held in *American Hospital Association* v. *NLRB,* 499 U.S. 606, 609–10 (1991), the Act authorizes the Board to adopt both substantive and procedural rules governing representation case proceedings. The Board's rules are entitled to deference. See *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.,* 467 U.S. 837, 843–44 (1984); *NLRB* v. *A.J. Tower Co.,* 329 U.S. 324, 330 (1946). Representation case procedures are uniquely within the Board's expertise and discretion, and Congress has made clear that the Board's control of those procedures is exclusive and complete. *See NLRB* v. *Bell Aerospace Co.,* 416 U.S. 267, 290 n.21 (1974); *AFL* v. *NLRB,* 308 U.S. 401, 409 (1940). ''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

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Board alone.'' *NLRB* v. *Waterman S.S. Corp.,* 309 U.S. 206, 226 (1940); see also *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137 (1971).

In *A.J. Tower,* 329 U.S. at 330, the Supreme Court noted 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 representative by employees.'' The Act enshrines a democratic framework for employee choice and, within that framework, charges the Board to ''promulgate rules and regulations in order that employees' votes may be recorded *accurately, efficiently and speedily.'' Id.* at 331 (emphasis added). ''[T]he determination of whether a majority in fact voted for the union must be made in accordance with such formal rules of procedure as the Board may find necessary to adopt in the sound exercise of its discretion.'' *Id.* at 333. As the Eleventh Circuit stated:

> We draw two lessons from *A.J. Tower:* (1) the Board, as an administrative agency, has general administrative concerns that transcend those of the litigants in a specific proceeding; and, (2) the Board can, indeed must, weigh these other interests in formulating its election standards designed to effectuate majority rule. In *A.J. Tower,* the Court recognized ballot secrecy, certainty and finality of election results, and minimizing dilatory claims as three such competing interests.

Certainteed Corp. v. *NLRB,* 714 F.2d 1042, 1053 (11th Cir. 1983). As explained above, the final rule is based upon just such concerns, specifically finality and the minimizing of dilatory claims.

Some comments allege that the Board lacks authority to issue these rules.[30] As discussed, the Supreme Court's interpretation of Section 6 clearly forecloses this argument.

In sum, the Board clearly has authority to amend its election rules.

B. The Final Rule Is Procedural

Rules of procedure are exempt from the requirement of notice and comment under the APA. See 5 U.S.C. 553(b)(3)(A). In the NPRM, the Board stated that the ''vast majority of the amendments proposed * * * are procedural in nature, and the Board was not required to proceed by notice and comment with respect to them.'' 76 FR 36812, 36828 (proposed June 22, 2011). But see *id.* at 36830 n. 63 (Member Hayes, dissenting). The final rule is wholly procedural. It does not change any substantive law and does not impose any new substantive rules of conduct on parties.

Moreover, the final rule amends rules of procedure applicable only in representation proceedings that are themselves exempt from the requirements of the APA. See 5 U.S.C. 554(a)(6). For both of these reasons, when the Board promulgated the regulations delegating authority under Section 9 of the Act to its regional directors in 1961, it concluded that the rulemaking provisions of the APA did not apply. See *Wallace Shops, Inc.,* 133 NLRB 36, 38–39 (1961).

C. Purpose of the Final Rule

Some comments received in response to the Board's NPRM argue that the Board failed to present sufficient justification for the proposed amendments. For example, SHRM asserts that the Board ''failed to articulate a legitimate justification for the significant changes set forth in the NPRM'' and that the proposed amendments are therefore arbitrary and capricious.[31] As discussed above, however, the amendments the Board has decided to adopt at this time are designed to streamline Board procedures in order to eliminate wholly unnecessary barriers to the expeditious resolution of questions concerning representation. They thus effectuate employee free choice and safeguard commerce from industrial strife. Furthering these statutory goals constitutes a legitimate and substantial justification for the Board's amendments of its representation case procedures. In addition, the amendments will reduce unnecessary litigation and thus the burdens of litigation both on parties and the Board. Finally, the amendments eliminate duplicative regulations. Furtherance of all of these objectives supports issuance of the final rule.

Numerous comments contend more generally that there is no need for revision of the Board's representation procedures because, as argued by NAM, there is no evidence contradicting the Board's own data showing that the present timeframes for processing representation cases are among the most expeditious in the Board's history, and further that the Board currently meets its own internal time targets for processing representation cases.[32] Both Congress and the Board have sought to improve the efficiency of representation case procedures over time, as discussed in detail in the NPRM. The amendments the Board has chosen to adopt represent a continuation of this incremental process, rather than a radical departure from Board practice as asserted by, for example, the CDW and Associated Builders and Contractors (ABC). Past improvements do not and should not preclude the Board's consideration and adoption of further improvements. Likewise, the current time targets set by the Board's General Counsel for the processing of representation petitions reflect the provisions of the Board's current rules. That the Board seeks to, and does, meet those targets in most instances is irrelevant to whether additional improvements may be made by amending the rules.

Many of these same comments, for example, those of Delhaize America, Associated General Contractors of America (AGCA), Society of Independent Gasoline Marketers of America, Indiana Chamber of Commerce, ABC, and Permanent Solutions Labor Consultants, also cite the rate of union success in elections as evidence that the current procedures are fair and not in need of revision. While the Board has considered these comments, so long as election results accurately reflect employees' free choice, the Board views the results as irrelevant to the question of whether its representation case procedures are fulfilling their statutory purpose as fully and efficiently as possible.

Contrasted with the comments endorsing the current system, primarily from employers and associated groups, comments from various labor organizations, including the AFL–CIO, SEIU, Laborers International Union of North America (LIUNA), and the International Brotherhood of Electrical Workers (IBEW), argue that the current system is subject to manipulation, causing significant pre-election delay and leading to petitions being withdrawn prior to an election in over 35 percent of cases, frustration of employee free choice, and avoidance of Board processes altogether. Many labor organizations cited research finding that a longer period between the filing of a petition and an election permits commission of more unfair labor practices with corresponding infringement upon employee free

[30] See, e.g., Testimony of Harold Weinrich; ACC.

[31] Many comments additionally charge that the Board's motives for issuing the rule are improper in that the Board seeks to act as an advocate for unions (rather than as a neutral overseer of the process), to drive up the rates of union representation, and to ''stack the deck'' against employers in union organizing campaigns. Similar concerns were raised by Member Hayes in his dissent to the NPRM. The Board responds that its reasons for issuing the rule are fully set forth in the NPRM and in this preamble.

[32] This point was also advanced by the AHA; American Council on Education (ACE); COLLE; CDW; Associated Oregon Industries; National Marine Manufacturers Association; The Bluegrass Institute; and the Chamber.

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choice, while a shorter period leads to fewer unfair labor practices.[33] The National Employment Law Project (NELP) asserts that low-wage workers are particularly susceptible to pre-election misconduct.

These comments reveal that the stakeholders in the Board's representation process have starkly divergent views of its efficiency and fairness. Labor organizations and employee advocacy groups view significant elements of the representation procedure as largely unsatisfactory, while the comments of individual employers and associated groups such as the GAM, the National Mining Association (NMA), and the PCA consistently assert that the current procedures work well.[34]

The Board, having carefully considered these pointedly contrasting comments, adopts neither position. The final rule is intended to continue the Board's course of incrementally improving its procedures in order to better perform its statutory functions within the framework established by Congress. The final rule is not intended to, and does not, alter the basic representation case procedures. Rather, as explained more fully below, each element of the final rule is intended to correct a specific, identified problem in the current procedures. Indeed, it is the Board's statutory duty to adapt and improve its processes based on experience and that is what the final rule accomplishes.

Other comments acknowledge that the Board's procedures have been subject to misuse in some cases, but suggest that such cases were rare and do not form an adequate basis for the Board's proposals. The National Retail Federation (NRF) and Printing Industries of America, Inc. (PIA), for example, suggest that the rules should be amended only to address the more egregious cases. Relatedly, many comments cite the high rate of voluntary election agreements (reached in over 90 percent of cases), which obviate the need for pre-election hearings, as evidence that the representation case procedures are working well in the overwhelming majority of cases. The Board has considered this view, but has concluded that the eight amendments adopted in the final rule address systemic problems in the representation case procedures, which affect not only contested cases that proceed to a pre-election hearing, but also those cases in which the parties enter into election agreements.

For example, without clear regulatory language giving the hearing officer authority to limit the presentation of evidence to that relevant to the existence of a question of representation, the possibility of using unnecessary litigation to gain strategic advantage exists in every case. That specter, sometimes articulated as an express threat according to some comments,[35] hangs over all negotiations of pre-election agreements. In other words, bargaining takes place in the shadow of the law, and so long as the law, as embodied in the Board's regulations, does not limit parties to presenting evidence relevant to the existence of a question of representation, some parties will use the threat of protracted litigation to extract concessions concerning the election details, such as the date, time, and type of election, as well as the definition of the unit itself. Comments by the United Food and Commercial Workers International Union (UFCW), LIUNA, AFT, NELP, and Retired Field Examiner Michael D. Pearson all point to the impact of that specter of unnecessary litigation on negotiations of pre-election agreements. The temptation to use the threat of unnecessary litigation to gain such strategic advantage is heightened by both the right to take up to seven days to file a post-hearing brief and the 25-day waiting period. Every experienced participant in the Board's representation proceedings who wishes to delay the conduct of an election in order to gain strategic advantage knows that once the hearing opens, at least 32 days (seven days after the close of the hearing and 25 days after a decision and direction of election) will pass before the election can be conducted. The incentive to insist on presenting evidence, even though there are no disputes as to facts relevant to the existence of a question of representation, is thus not simply the delay occasioned by the hearing process, but also the additional mandatory 32-day delay, not to mention the amount of time it will take the regional director to review the hearing transcript and write a decision—a task that has added a median of 21 days to the process over the past decade.

Many comments acknowledge that the expeditious resolution of questions concerning representation is a central purpose of the Act, but argue that the Board did not consider other statutory policies in proposing the amendments.[36] In fact, the Board did do so, both in proposing amendments to its rules in the NPRM and in deciding to proceed at this time with the eight amendments in the final rule. The Board considered the statute as a whole, as well as the various policies underlying its enactment and amendment. Most centrally, the Board considered the statutory requirement that the pre-election hearing be an ''appropriate hearing'' and the parties' constitutional, statutory, and regulatory rights in relation to the hearing. As explained in detail below, the final rule makes the hearing more, not less, ''appropriate'' to its statutory purpose. The final rule also fully respects the procedural rights of the parties. In fact, it permits the parties to fully exercise their procedural rights more efficiently and with less burden and expense. Similarly, the Board considered employees' statutory right under Section 7 to ''bargain collectively through representatives of their own choosing'' and ''to refrain from any or all such activities.'' 29 U.S.C. 157. As explained in detail below, the eight amendments adopted in the final rule do not establish inflexible time deadlines or mandate that elections be conducted in a set number of days after the filing of a petition. The time between petition and election will continue to be determined by whether the parties can reach a pre-election agreement, the scheduling of a hearing, the amount of evidence that must be received in order for the regional director to determine if a question of representation exists, the complexity of the issues and extent of the record the regional director must consider in reaching a decision, and the sound discretion of the regional director in setting an election date. Further, the amendments do not in any manner alter existing regulation of parties' campaign conduct or restrict freedom of speech. The amendments apply with equal force to both union-certification proceedings

[33] John Logan, Erin Johansson, & Ryan Lamare, ''New Data: NLRB Process Fails to Ensure A Fair Vote'' (2011), *http://laborcenter.berkeley.edu/laborlaw/NLRB_Process_June2011.pdf.;* Kate Bronfenbrenner & Dorian Warren, ''The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence'' (2011), *http://iserp.columbia.edu/sites/default/files/working_papers/working_paper_cover_2011-01-final.pdf.;* Kate Bronfenbrenner, ''No Holds Barred: The Intensification of Employer Opposition to Organizing'' (2009), *http://www.epi.org/page/-/pdf/bp235.pdf?nocdn=1;* Commission on the Future of Worker-Management Relations, ''The Dunlop Commission on the Future of Worker-Management Relations: Final Report'' (1994), available at *http://digitalcommons.ilr.cornell.edu/key_workplace/2/*(''Dunlop Commission Final Report''). Some comments, for example, from the Chamber and ABC, question the validity of such studies.

[34] Comments received from individuals largely reflect this divide.

[35] See American Federation of Teachers (AFT); IBEW; LIUNA.

[36] See, e.g., Assisted Living Foundation of America (ALFA); COLLE; SHRM; Seyfarth Shaw.

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and union-decertification proceedings. The Board has also carefully considered the possibility that the amendments might somehow reduce the time between the filing of the petition and the election so drastically as to threaten the communication, association, and deliberation needed by employees in order to truly exercise freedom of choice. It has concluded the amendments pose no such risk, as more fully explained below.

Finally, many comments argue that the proposed amendments did not address the most serious causes of delay in Board proceedings. Some comments point to delay in the Board's own adjudication of cases.[37] Other comments point to the Board's blocking charge policy.[38] Of course, an administrative agency, like a legislative body, is not required to address all procedural or substantive problems at the same time. It need not ''choose between attacking every aspect of a problem or not attacking the problem at all.'' *Dandridge* v. *Williams,* 397 U.S. 471, 486–487 (1970). Rather, the Board ''may select one phase of one field and apply a remedy there, neglecting the others.'' *FCC* v. *Beach Communications,* 508 U.S. 307, 316 (1993) (quoting *Williamson* v. *Lee Optical of Okla., Inc.,* 348 U.S. 483, 489 (1955)). ''[T]he reform may take one step at a time.'' *Id.*[39]

The Board is aware that, in too many instances, it has taken too long to decide both representation and unfair labor practice cases. The final rule takes steps to address those delays at the Board level by eliminating pre-election requests for review by the Board and making Board review of all regional directors' post-election dispositions discretionary. The first of the amendments will lead to fewer disputes coming before the Board, because many pre-election disputes will be rendered moot by the election or will be resolved by the parties post-election. It will also often permit the remaining pre-election disputes to be presented to the Board together with any post-election disputes and thus to be disposed of more efficiently. Similarly, making Board review of post-election dispositions discretionary will permit the Board to more promptly, and with less expenditure of time and other resources, dispose of post-election requests for review that do not raise substantial issues meriting Board review. The amendments will thus both directly speed Board processing of representation cases and, by reducing the number of such cases coming before the Board for full review, free Board resources to more promptly decide all cases.

The NPRM specifically asked for comments on various proposed revisions of the Board's blocking charge policy. While the Board received some comments relevant to the matter, it has decided to deliberate further before deciding what, if any, changes should be made in the policy, just as it has decided to deliberate further on many of the other proposals contained in the NPRM. As explained in the NPRM, the blocking charge policy is not codified in the current regulations. Rather, it is the product of adjudication and is described in the non-binding Casehandling Manual. See Casehandling Manual Sections 11730 to 11734.

As explained in section 11730 of the Casehandling Manual, ''The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted.'' There are significant exceptions to the general policy of having a charge ''block'' a petition. See Casehandling Manual Section 11731. Accordingly, the filing of an unfair labor practice charge does not automatically cause a petition to be held in abeyance. Furthermore, ''the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition.'' *Id.* at Section 11730.

Some of the comments that point to blocking charges as a serious source of delay argue that incumbent unions file such charges in order to delay decertification elections.[40] The General Counsel has in place procedures requiring the expedited investigation of blocking charges in an effort to ensure that non-meritorious charges do not delay elections. Under the agency's Impact Analysis system for prioritizing the processing of cases, blocking charge cases are designated as Category III (Exceptional) cases, which have the highest priority and the shortest time goals for disposition. See Casehandling Manual Section 11740. Recent improvement in case processing procedures in some regional offices appears to have contributed, at least in part, to a significant reduction in the number of decertification elections blocked by the filing of unfair labor practice charges. Thus, there were 112 decertification elections blocked by unfair labor practice charges in Fiscal Year (FY) 2007, 100 in 2008, 71 in 2009, 64 in 2010, and just 31 to date in 2011. The Board anticipates that there will be a further reduction in the number of decertification elections blocked by unfair labor practice charges, as well as a more expeditious processing of all blocking charges, as these best practices are adopted more uniformly. Nevertheless, the Board intends to continue to deliberate concerning the proposal to revise the blocking charge policy via rulemaking.

D. The Employer's Opportunity To Campaign

Many comments filed by employers and employer organizations argue that the proposed rule changes in the NPRM would drastically shorten the time between the filing of petitions and elections and thereby effectively reduce employers' opportunity to communicate with their employees concerning whether they should choose to be represented for purposes of collective bargaining. These comments make both legal and policy arguments based on that claim.

But many of these comments address the proposed adoption of amendments that have not been adopted as part of this final rule. For instance, most comments raising these arguments focus on the Board's proposals to: (1) Set pre-election hearings to open seven days from the notice of hearing absent special circumstances; (2) shorten the time period for production of a final voter list from seven days to two days following a regional director's approval of an election agreement or direction of an election; and (3) shorten the time period during which the Board's final notice of election must be posted prior to the election. None of the cited proposals is included in the final rule.

However, to the extent that the concerns about the employer's opportunity to campaign are relevant to the rule changes adopted today, the Board has concluded that the final rule will advance the statutory objective of promptly resolving questions of

[37] See, e.g., NAM; PIA.

[38] See, e.g., AHA; PIA; SHRM; Chamber; CDW; Professor Samuel Estreicher.

[39] These same principles have been applied to administrative action. See, e.g., *United Hosp.* v. *Thompson,* 383 F.3d 728, 733 (8th Cir. 2008) (the equal protection clause does not require the government to attack every aspect of the problem or refrain from regulating at all); *Great American Houseboat Co.* v. *U.S.,* 780 F.2d 741, 749 (9th Cir. 1986) (same).

[40] National Right to Work Legal Defense Foundation (NRTWLDF); Chamber. Between 2001 and 2010, the number of decertification elections conducted annually by the Board has ranged from 246 to 488 while the number of certification elections has ranged from 1,335 to 2,645. Of course, when a union files a petition seeking to be certified as the employees' representative, it can simply withdraw the petition if it does not want the election to take place.

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representation without in any way compromising employee free choice or any other statutory mandate or policy.

The final rule simply removes unnecessary barriers to prompt resolution of questions of representation by reducing needless litigation. It does not establish any rigid timelines for the conduct of elections. Under the final rule, how fast an election will occur will vary from case to case, just as it did under the prior rules. Variables affecting the timing will include (as in the past) whether the parties are able to reach a pre-election agreement; the scheduling of the pre-election hearing; the length of the hearing; the number and complexity of the issues the regional director must address in order to determine if there is a question of representation; and the regional director's exercise of discretion, considering the preferences of the parties, in setting the election date. Moreover, the final rule will apply to petitions seeking certification of a new representative, petitions seeking decertification of an existing representative, and employer petitions filed after a union requests recognition.

1. NLRA Section 8(c) and the First Amendment

Many employer comments contend that the rule changes reflected in the NPRM would be inconsistent with Section 8(c) of the Act[41] and the First Amendment.[42] But neither the proposed rule nor the more limited final rule in any way restricts the speech of any party.

Section 8(c) of the Act provides:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

29 U.S.C. 158(c). On its face, Section 8(c)'s only purpose is to prevent speech from ''constitut[ing] or be[ing] evidence of an unfair labor practice.'' Accordingly, the Board has repeatedly held that Section 8(c) applies only in unfair labor practice and not in representation proceedings. See, e.g., *Hahn Property Management Corp.,* 263 NLRB 586, 586 (1982); *Rosewood Mfg. Co., Inc.,* 263 NLRB 420, 420 (1982); *Dal-Tex Optical Co., Inc.,* 137 NLRB 1782, 1787 fn. 11 (1962). Because the final rule, which addresses representation case procedures, does not in any way permit the use of speech as evidence of an unfair labor practice, Section 8(c) is not implicated.

Nor does the final rule implicate concerns grounded in the First Amendment. Aside from the accurate statement that speech about unions is protected by the First Amendment,[43] the comments do not appear to argue that the proposed amendments would violate the First Amendment. In any event, neither the proposed nor the final rule restricts speech in any manner. The rule does not eliminate the opportunity for the parties to campaign before an election, nor does it impose any restrictions on campaign speech. As under the current rules, employers remain free to express their views on unionization whenever and as often as they desire, both before and after the petition is filed, so long as they refrain from threats or coercion. As the Supreme Court stated in 1941, ''The employer * * * is as free now as ever to take any side it may choose on this controversial issue.'' *NLRB* v. *Virginia Electric & Power Co.,* 314 U.S. 469, 477 (1941). Likewise, the rule does not impose any new limitations on union speech. Accordingly, the Board's effort to simplify and streamline the representation case process does not infringe the speech rights of any party. The comments do not contend that employers will be prevented from expressing their opinions on unionization, but only that, because there may be less time between petition and election in some cases, employers will have fewer opportunities to express their opinions before the Board concludes its investigation under Section 9. 29 U.S.C. 159. This does not rise to the level of an unconstitutional restriction on speech.

2. Congressional Inaction in 1959

ACC points out that Congress, in enacting the Labor-Management Reporting and Disclosure Act (LMRDA) in 1959, rejected a proposal that would have permitted an election to take place before a hearing when there were no issues warranting adjudication, so long as the election was not held sooner than 30 days after the petition was filed. The proposal, contained in the Senate version of the bill, would have permitted a so-called ''pre-hearing election,'' barred by the 1947 Taft-Hartley amendments to the Act. S. 1555, 86th Cong., 1st Sess. 705 (as passed by Senate, Apr. 25, 1959). The Senate Report on the bill in the prior session suggested that a 30-day period would provide a ''safeguard against rushing employees into an election where they are unfamiliar with the issues.'' S. Rep. No. 1684, 85th Cong., 2d Sess. 27–28 (1958). The House bill, however, never contained a parallel provision, and it was not enacted into law.

Nevertheless, ACC argues that the proposed amendments described in the NPRM are inconsistent with congressional intent because they do not guarantee a minimum of 30 days between petition and election. To the extent that ACC's argument bears on the final rule, the Board rejects it. Report language and statements of individual legislators on a provision that was not enacted in 1959 are entitled to little if any weight in assessing the meaning of legislation adopted in 1935 and amended in 1947. In fact, the Supreme Court has clearly stated that ''failed legislative proposals are a particularly dangerous ground on which to rest an interpretation of a prior statute'' because a bill can be proposed or rejected for any number of reasons.[44] *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers,* 531 U.S. 159, 169–70 (2001) (internal quotation marks omitted); see also *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.,* 511 U.S. 164, 187 (1994). Indeed, the rejection of the proposed amendment would more reasonably be understood as an indication that Congress did not believe a minimum time between petition and election is necessary. However, the legislative history of the LMRDA offers no guidance on why the provision was rejected, and Congress imposed no requirements in the LMRDA or at any other time concerning the length of time that must elapse between petition and election. Accordingly, the Board finds no indication in this legislative history that the final rule is in any way contrary to Congress's intent.

3. The Statutory Policy in Favor of Free Debate

Although it is clear that the proposed amendments implicate neither the First Amendment nor Section 8(c) of the Act, many comments nevertheless suggest that the amendments would leave employers with too little time to effectively inform their employees about the choice whether to be represented by

[41] See, e.g., SHRM; Sheppard, Mullin, Richter & Hampton LLP (Sheppard Mullin); and the National Retail Federation (NRF).

[42] See, e.g., NGA; Waste Connections; ALFA.

[43] *Thomas* v. *Collins,* 323 U.S. 516, 537–38 (1945).

[44] For this reason, the Board declines COLLE's similar suggestion to find relevant Congress' failure to pass the 1978 Labor Law Reform Act, versions of which provided for varying time frames for representation elections.

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a union.[45] They contend that the consequences of a union vote are longlasting and could significantly affect employees' livelihoods and careers, and therefore that ensuring that employees have sufficient time to hear from all sides is critical to the statutory objective of ensuring employee free choice.[46] Comments in favor of the amendments contend, on the other hand, that employers can and do communicate their views on unions to employees even before a petition has been filed and will continue to have sufficient time to do so after filing under the proposed amendment. Some of these comments also argue that a lengthy election campaign harms the prospects for successful collective bargaining.[47]

a. *NLRB v. Gissel Packing*

The Supreme Court's decision in *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969), which upheld the Board's authority to order an employer to bargain with a union that had not been certified as the result of an election, is relevant to this issue. In *Gissel,* the employers argued that the Board could not order an employer to bargain with the union, even when the union's majority support was demonstrated through employees' authorization cards and the employer's unfair labor practices had rendered a free and fair election impossible, because a union could solicit such cards before the employer had an adequate opportunity to communicate with employees. The Court rejected this argument:

> The employers argue that their employees cannot make an informed choice because the card drive will be over before the employer has had a chance to present his side of the unionization issues. Normally, however, the union will inform the employer of its organization drive early in order to subject the employer to the unfair labor practice provisions of the Act; the union must be able to show the employer's awareness of the drive in order to prove that his contemporaneous conduct constituted unfair labor practices on which a bargaining order can be based if the drive is ultimately successful. See, e. g., Hunt Oil Co., 157 NLRB 282 (1966); Don Swart Trucking Co., 154 NLRB 1345 (1965). Thus, in all of the cases here but [one,] the employer, whether informed by the union or not, was aware of the union's organizing drive almost at the outset and began its antiunion campaign at that time; and even in the [one] case, where the recognition demand came about a week after the solicitation began, the employer was able to deliver a speech before the union obtained a majority.

Id. at 603. The Supreme Court has thus recognized that the concern expressed in the comments ''normally'' does not arise even when there is no election and the organizing effort does not proceed beyond the signing of authorization cards.

b. *Chamber of Commerce v. Brown*

The Supreme Court recognized in *Chamber of Commerce v. Brown,* 554 U.S. 60 (2008), that the Act embodies a general ''congressional intent to encourage free debate on issues dividing labor and management.'' [48] *Id.* at 68 (quoting *Linn v. Plant Guard Workers,* 383 U.S. 53, 62 (1966) (a defamation case)). Some comments contend that this case demonstrates that the Board must now provide a definite period of time after the petition in which parties can campaign prior to the election. In fact, however, *Chamber of Commerce* v. *Brown* held only that the Act preempted a state law that prohibited the use of state funds to encourage or discourage employees from seeking representation. What the Court suggested in the quoted language is that Congress intended to leave speech concerning labor relations unregulated; in the Court's words, to ''shield a zone of activity from regulation.'' *Id.* The Court concluded that the California law at issue in *Brown* ''indirectly regulate[d] such conduct by imposing spending restrictions on the use of state funds.'' *Id.* at 69. In short, the Court held the state law regulated speech and was thus preempted. The final rule in no way regulates speech. It is fully consistent with congressional intent as articulated in *Brown.*

Even adopting the more expansive view of the statutory policy articulated in *Brown* urged by some comments—that Congress intended not only to insulate and protect speech concerning labor relations, but to affirmatively facilitate such speech—the final rule is fully consistent with that objective as explained below.

c. Employer Pre-Petition Knowledge

Numerous comments contend that any shortening of the time period between the petition and election will be detrimental to employers because employers are often unaware that an organizing campaign is underway until the petition is filed.[49] These comments contend that the union will have had a head start in the campaign because it will, necessarily, have already obtained authorization cards from at least 30 percent of employees in the petitioned-for unit, and will have been able to delay filing the petition for whatever amount of time it believed was advantageous in order to communicate with employees.[50] For example, the Chamber comments that union petitions ''catch[] many if not most employers off guard and ill-prepared to immediately respond * * *'' The Board was presented with no reliable empirical evidence, however, suggesting that employers are frequently unaware of an organizing drive before the filing of a petition,[51] and the Board's experience and recent scholarly research suggest the opposite.

First, Board precedent is replete with cases in which there was clear evidence that the employer was aware of the organizing campaign well before the petition was filed. For example, unions often give the employer formal notice of the campaign before filing the petition, either by demanding recognition or by providing the employer with a list of employees on the organizing committee.[52] In other cases, the employer's knowledge of the campaign is apparent from the fact that the employer committed unfair labor practices targeting employees' organizing activity before the filing of the petition.[53]

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[45] See Chamber; COLLE; SHRM; Seyfarth Shaw; Sheppard Mullin; Baker & McKenzie; John Deere Water; and PIA.

[46] See NGA; Retail Industry Leaders Association (RILA); Society of Independent Gasoline Marketers of America (SIGMA); Ranking Member Michael B. Enzi of the U.S. Senate Committee on Health, Education, Labor & Pensions, and Republican Senators; National Meat Association (NMA).

[47] See AFL–CIO and SEIU.

[48] 554 U.S. 60, 68 (2008).

[49] See, e.g., Chamber; CDW; National Ready-Mixed Concrete Association (NRMCA); Greater Raleigh Chamber of Commerce; Landmark Legal Foundation; and Vigilant.

[50] NGA; NMA. See also Spartan Motors, Inc.; Cook Illinois Corporation; Arizona Hospital and Healthcare Association; Constangy, Brooks & Smith, LLP; Sheppard Mullin; Ranking Member Michael B. Enzi of the U.S. Senate Committee on Health, Education, Labor & Pensions, and Republican Senators; Specialty Steel Industry of North America; International Foodservice Distributors Association; NAM; Chamber; NRTWLDF.

[51] COLLE acknowledges this in its comment.

[52] See, e.g., *Flamingo Hilton-Laughlin,* 324 NLRB 72, 76 (1997) (union informed employer of campaign and committee members on January 26 and filed petition on March 26), enf. granted in part, denied in part 148 F.3d 1166 (DC Cir. 1998); *Keco Industries,* 306 NLRB 15, 16 (1992) (union informed employer of campaign in January and filed petition on October 31); *Mariposa Press,* 273 NLRB 528, 533 (1984) (union informed employer of campaign on September 25 and filed petition on October 6); Comet Corp., 261 NLRB 1414, 1418, 1422 (1982) (union informed employer of campaign and committee members on July 23 and filed petition on August 23); *Quebecor Group, Inc.,* 258 NLRB 961, 964 (1981) (union informed employer of campaign on November 17 and filed petition on November 28).

[53] See, e.g., *Ryder Truck Rental,* 341 NLRB 761, 765 fn. 9, 766–67 (2004) (petition filed in December; in November, employer invited employees to report any harassment by union), enfd. 401 F.3d 815 (7th Cir. 2005); *Dlubak Corp.,* 307 NLRB 1138, 1141, 1147 (1992) (threats and discriminatory discharges occurred October 5–13; petition filed October 24),

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An empirical study conducted by Professors Kate Bronfenbrenner and Dorian Warren (and submitted with their comment) casts further doubt on the contention that employers are frequently unaware of a union campaign until the petition is filed.[54] The study concluded that in 47 percent of cases involving serious unfair labor practice allegations against employers that resulted in a settlement or a Board finding that the law was violated, the alleged unlawful conduct occurred before the petition was filed; in 60 percent of cases involving allegations of interrogation and harassment, the conduct occurred before the petition; and in 54 percent of cases involving allegations of threats and other coercive statements, the conduct occurred before the petition. Professor Warren testified at the public hearing that the researchers' review of the files in these cases indicated that the conduct resulting in the charge, whether it was actually unlawful or not, evidenced the employer's knowledge of the organizing campaign. Critics of the study contend that it inappropriately focuses on mere allegations of misconduct and that the category of ''charges won'' inappropriately includes settlements. The importance of the study's findings for present purposes, however, does not rest on whether or not the charges had merit, but rather on the fact that they were filed based on pre-petition conduct and that available information in the case files suggests the employer had pre-petition knowledge of the organizing campaign. The study's findings in that regard are consistent with the Board's experience, and no contrary study relying on empirical evidence was presented to the Board.

d. Employer Communications in the Absence of a Campaign

The foregoing authority casts doubt on the contention that ''many if not most'' employers are unaware of an organizing drive prior to the filing of a petition. But even in the absence of an active organizing campaign, employers in nonunionized workplaces may and often do communicate their general views about unionization to both new hires and existing employees.[55] Some comments suggest that, prior to receiving a petition, employers pay little attention to the issue of union representation, and that general efforts to inform and persuade employees about unionization in the absence of a petition would be time-consuming and expensive.[56] Although some employers may choose not to discuss unionization until a petition is filed, the Board's experience suggests that other employers do discuss unionization with their employees beforehand, often as soon as they are hired.[57] For example, some employers distribute employee handbooks or show orientation videos to all new employees that express the employer's view on unions or its desire that employees remain unrepresented.[58]

Several comments contend that an employer's general ability to communicate with employees regarding unions is not a complete substitute for the ability to communicate regarding a specific petition and a known petitioner.[59] The Board concludes that the opportunity for generalized communications together with the opportunities that will continue to exist post-petition under the final rule will ensure employee free choice even in those cases where employers are unaware of the organizing drive until the petition is filed.

Finally, even in the absence of any pre-petition campaign, employees have experience with the existing labor-management regime in their workplace, which informs their choice of whether to alter it. In unionized workplaces in which the incumbent union faces a decertification petition or a rival union petition, the incumbent union will be appropriately judged by its performance to date. Thus, eligible voters have a preexisting base of knowledge and experience with which to evaluate the incumbent. The same is true in workplaces where employees are unrepresented. Employees there have experience with labor-management relations in the absence of union representation. In both cases, employees base their choice, at least in part, on the relationship they are being asked to change.

e. Post-Petition Communication

Although the Board has concluded that the record does not establish that pre-petition employer ignorance of an organizing campaign is the norm, the Board accepts that, in at least some cases, employers may, in fact, be unaware of an organizing campaign until a petition is filed. For example, COLLE cites union campaign strategy

enfd. mem. 5 F.3d 1488 (3d Cir. 1993); *Spring City Knitting Co.,* 285 NLRB 426, 432, 449, 450, 456 (1987) (unfair labor practices occurred March 1, 14, and 29; petition filed May 3); *Well-Bred Loaf, Inc.,* 280 NLRB 306, 308, 317 (1986) (threats, interrogation, and unlawful discharges occurred August 22 and 23, at a time when union activity was already common knowledge; petition filed October 6); *Dilling Mechanical Contractors,* 318 NLRB 1140, 1143, 1156 (1995) (union informed employer of campaign on January 4, but employer had threatened employees with discharge in December if they engaged in union activity), enfd. 107 F.3d 521 (7th Cir. 1997), cert. denied 522 U.S. 862 (1997).

[54] The study was based on a random sample of 1,000 elections during the period 1999 through 2003 and a survey of 562 campaigns from that sample. See Bronfenbrenner & Warren, *supra* at 2.

[55] See comments of John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D.; Center for American Progress Action Fund.

[56] Fox Rothschild LLP; NMA; NRF.

[57] SHRM suggests that the proposed rule will cause more employers to express their views on employee representation prior to active campaigns. Given the number of petitions filed each year, the Board does not view this as likely. In any event, such expressive activity is consistent with the Act so long as it does not convey a threat or promise of benefit.

[58] See, e.g., *U-Haul Co. of California,* 347 NLRB 375, 378 (2006) (employee handbook, distributed to all new employees, included a section entitled, ''What about Unions?''; the section stated the employer's preference to be union-free and asserted that employees do not need a union or outside third party to resolve workplace issues); *SNE Enterprises,* 347 NLRB 472, 473 (2006) (employee handbook stated, ''The Company believes a union is not necessary and not in the best interest of either the Company or its Team Members.''), enfd. 257 Fed. Appx. 642 (4th Cir. 2007); *Overnite Transportation Co.,* 343 NLRB 1431, 1455 (2004) (employee handbook stated: ''It is important for you to know that the Company values union-free working conditions. We believe that true job security can come only from you and the management of this company working together in harmony to produce a quality product. A union-free environment allows this kind of teamwork to develop.''); *MEMC Electronic Materials, Inc.,* 342 NLRB 1172, 1188 (2004) (employee handbook stated that remaining ''union-free'' is an objective of the company); *Noah's New York Bagels,* 324 NLRB 266, 272 (1997) (section of employee handbook entitled ''Unions'' states: ''At Noah's Bagels we believe that unions are not necessary. We believe this for many reasons[.] First, there is no reason why you should have to pay union initiation fees, union dues, and union assessments for what you already have * * * Second, there is no reason why you or your family should fear loss of income or job because of strikes or other union-dictated activity. Third, we believe that the best way to achieve results is to work and communicate directly with each other without the interference of third parties or unions * * * The Federal government gives employees the right to organize and join unions. It also gives employees the right to say 'no' to union organizers and not join unions. Remember, a union authorization card is a power of attorney which gives a union the right to speak and act *for* you. If you should be asked to sign a union authorization card, we are asking you to say 'no.' ''); *American Wire Products,* 313 NLRB 989, 994 (1994) (employee handbook states, ''Our Company is a non-union organization and it is our desire that we always will be''; the same section also requests employees to direct union-related questions to a supervisor); *Heck's, Inc.,* 293 NLRB 1111, 1119 (1989) (employee handbook's ''Union Policy'' read: ''As a Company, we recognize the right of each individual Employee, their freedom of choice, their individuality and their needs as a worker and a fellow human being. For these reasons and others, we do not want any of our Employees to be represented by a Union * * * When you thoroughly understand Heck's liberal benefit programs, the desire to assist you in your job progress and willingness to discuss your job-related problems, you surely will agree there is no need for a union or any other paid intermediary to stand between you and your company.'') Thus, employees may be well aware of their employer's opposition to unions even before any campaign begins.

[59] See SHRM; COLLE; NAM; Seyfarth Shaw; and ALFA.

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documents that allegedly call for ''stealth'' campaigns. In such cases, the union may indeed have a ''head start'' in the campaign, in the sense that it begins communicating its specific message to the unit employees before the employer does so.[60]

In relation to the opportunities for post-petition communication, the Board notes initially that the final rule will apply to decertification elections as well as certification elections, and therefore that incumbent unions will suffer the same disadvantages in relation to a petitioner as will employers.[61] In fact, because unions typically do not have any on-going presence in the workplace, incumbent unions are much less likely to know about the circulation of a decertification petition than employers are to know about a union organizing drive.[62]

The Board finds, moreover, that as a general matter, employers are able to communicate their message to employees quickly and effectively. The median bargaining unit size from 2001 to 2010 was 23 to 26 employees. Given this relatively small size, effective communication with all voters can be accomplished in a short period of time.[63] In addition, some provisions of the Board's rules give a ''head start'' to the employer that, in the Board's view, more than counterbalances any perceived union advantage. For instance, under extant precedent, not altered by the final rule, the employer is not required to provide the union with the names and addresses of eligible voters until seven days after the Regional Director approves the parties' election agreement or issues a Decision and Direction of Election. After the filing of the petition and until that time—which, in contested cases over the last decade, is often at least six weeks—the employer is in many cases the only party that knows who all the eligible voters are likely to be and how to contact them. In addition to having a record of eligible employees' names, phone numbers, and email addresses, the employer knows their work locations and work schedules. Even after it provides the eligibility list to the other parties, the employer often remains the only party with access to all employees' contact information other than their home addresses.

Moreover, as noted in the testimony of Professor Joseph McCartin, the employer has unlimited access to employees during every workday and has the ability to compel employees to attend meetings on working time at the employer's convenience.[64] The employer can also communicate its views to employees while they are working, even in settings where the employees have no choice but to listen. See, e.g., *Frito Lay, Inc.,* 341 NLRB 515, 515 (2004) (''In the 2 months between the filing of the petition and the election, the Employer wanted to provide an opportunity for the employees to obtain information relevant to the drivers' upcoming voting decision. Because the Employer's ability to communicate with its drivers at the facility was constrained, the Employer sent 'guests' along on their runs to provide information and answer any questions the drivers might have. These 'ride-alongs' averaged approximately 10–12 hours, due to the length of the drivers' day runs, and each truckdriver averaged approximately 3 ride-alongs in the 2 months before the election.''). In fact, the employer can even compel such attendance outside employees' normal work hours and locations. See, e.g., *Curtin Matheson Scientific,* 310 NLRB 1090, 1090 (1993) (employer required employees to attend campaign meeting in hotel); *Ideal Elevator Corp.,* 295 NLRB 347, 351 (1989) (employer required all employees to attend meeting after working hours to listen to its president's speech).[65] Under current law, such compelled attendance at meetings at which employees are often expressly urged to vote against representation is generally neither objectionable nor an unfair labor practice.[66] The employer may require individual employees or small groups to attend such meetings at any time up until employees enter the polling area or

[60] See also comment of RILA, contending that ''stealth campaigns'' are common in the retail industry.

[61] SEIU argues that the time frames in the proposed amendments should not apply in cases involving decertification petitions, because employers can withdraw recognition in certain circumstances without having to go through the election process. To the extent that SEIU's comment is still relevant to the limited changes implemented by the final rule, the Board disagrees. Employers can also voluntarily recognize unions as the collective-bargaining representatives of their employees without going through the election process, yet the Board has a duty to expeditiously resolve questions concerning representation when employers will not voluntarily recognize unions. Thus, the NLRA provides a means for employees to engage in collective bargaining with their employer even if their employer would prefer not to do so. Similarly, the NLRA does not require employees to depend on their employer to end unwanted representation. The Board takes seriously its responsibility to expeditiously resolve questions concerning representation in the decertification context just as in an initial organizing context.

[62] Cf. *United Kiser Services,* 355 NLRB No. 55, slip op. at 1 (2010) (union representative only visited the represented shop four times over 17-month period); *Moeller Bros. Body Shop,* 306 NLRB 191, 191 (1992) (union official ''rarely'' visited respondent's body shop, including every three years for contract renewal negotiations); *Pullman Bldg. Co.,* 251 NLRB 1048, 1051–52 (1980) (union official visited worksite to commence investigation only after receiving complaint that employer was violating labor agreement), enfd. 691 F.2d 507 (9th Cir. 1982).

[63] RILA and NRF argue that sufficient time to campaign is particularly critical in the retail industry, where employees work on different shifts, often are seasonal or part-time, are less accessible during the workday because they are on the sales floor, and often are unavailable outside normal working hours due to other commitments. NRF contends, however, that more than 98 percent of all retailers employ fewer than 100 workers, and RILA contends that most petitions seek elections in single-store units and that front-line managers typically constitute 10 to 20 percent of the workforce in each store.

NRMCA makes a similar argument that its industry has unique features such as isolated plant locations, unpredictable delivery hours, and dispersed employees. But it, too, states that the vast majority of employers in the industry are small businesses. Therefore, most bargaining units in the retail and ready-mixed concrete industries are likely to be quite small, which should enable employer communication to take place in a relatively short period of time and, certainly, much more easily than union communication because unions often lack knowledge of all work locations, employee shifts and hours, and even the identity of all employees. In addition, as explained in the text, under extant precedent, these employers (and others) can require all employees to attend a meeting or multiple meetings outside their normal work hours, in a central location, in order to ensure they receive the employer's message prior to the election.

[64] A 1990 study of over 200 representation elections found that employers conducted mandatory meetings prior to 67 percent of the elections. John J. Lawler, Unionization and Deunionization: Strategy, Tactics, and Outcomes 145 (1990). A more recent study found that in 89 percent of campaigns surveyed, employers required employees to attend so-called ''captive audience'' meetings during work time and that the majority of employees attended at least five such meetings during the course of the campaign. Bronfenbrenner & Warren, *supra* at 6.

[65] The Board found the conduct at issue in these cases unlawful or objectionable for reasons unrelated to the time or location of the required meetings. Requiring employees to attend such campaign meetings outside their normal work hours without full compensation may constitute objectionable conduct. See *Comet Electric,* 314 NLRB 1215, 1216 (1994).

[66] See, e.g., *F.W. Woolworth Co.,* 251 NLRB 1111, 1113 (1980) (employer's attempt to further its campaign by conducting a mandatory meeting and by declaring that no questions would be answered in the course thereof was not unlawful), enfd. 655 F.2d 151 (8th Cir. 1981), cert. denied 455 U.S. 989 (1982); *Litton Systems, Inc.,* 173 NLRB 1024, 1030 (1968) (adopting the decision of the administrative law judge, who concluded: ''An employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management's noncoercive antiunion speech designed to influence the outcome of a union election.''); *S & S Corrugated Paper Machinery Co., Inc.,* 89 NLRB 1363, 1364 (1950) (''the 'captive audience' aspect of the Employer's speeches, otherwise protected by Section 8(c) of the amended Act, cannot form the basis for a finding that the Employer * * * *has interfered with the employees' free choice of a bargaining representative''); *Fontaine Converting Works Inc.,* 77 NLRB 1386, 1387 (1948) (employer did not violate the Act by ''compelling its employees to attend and listen to speeches on company time and property'').

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are waiting in line to vote.[67] Thus, for example, the Board has held that it is not objectionable for an employer's highest ranking officials to proceed systematically through the workplace less than 24 hours before a vote, urging each individual employee at his or her work station to vote against representation. See *Electro-Wire Products, Inc.* 242 NLRB 960, 960 (1979); *Associated Milk Producers, Inc.,* 237 NLRB 879, 880 (1978). Modern communications technology available in many workplaces permits employers to communicate instantly and on an on-going, even continuous basis with all employees in the voting unit. See, e.g., *Virginia Concrete Corp.,* 338 NLRB 1182, 1182 (2003) (employer sent ''Vote No'' message to ''mobile data units'' in employees' trucks in the final 24 hours before an election).[68] One classic empirical study of representation elections found that ''the employer who uses working time or premises to campaign against the union and denies those facilities to the union effectively communicates with a substantially greater proportion of the employees than does the union.'' Julius G. Getman et al., ''Union Representation Elections: Law and Reality'' 156 (1976). Because those who attend union meetings tend to already be union supporters, the employer, which can convene meetings of *all* employees on working time, ''has a great advantage in communicating with the undecided and those not already committed to it.'' *Id.* at 156–57.

In addition to the employer's earlier, more complete knowledge of voters' identity and whereabouts and ability to convene employees inside and outside the workplace during work and non-work time to campaign, the Board's usual practice is to hold the election itself ''somewhere on the employer's premises,'' unless there is ''good cause'' to do otherwise.[69] Because employers can ordinarily bar union representatives from their property,[70] this practice permits employers to campaign actively among employees on election day while barring the union from doing the same. Thus, the employer not only has greater access to employees throughout the representation process, but also ordinarily has the ''last word'' on election day. The Board has recognized that having the ''last, most telling word'' is a significant advantage in elections. *Peerless Plywood,* 107 NLRB at 429.

For these reasons, the Board does not believe that any reduction of the time between petition and election that results from the final rule will be unfair to any party or infringe on employee free choice.[71]

f. The Current Median Time of 38 Days

Many comments contend that there is no reason to adopt the proposed amendments because the current median time period between petition and election is 38 days. That time period, however, is simply a historical fact, and does not represent a considered judgment on the optimal duration of a campaign. It is not the result of a deliberate choice by Congress or any prior Board.

Moreover, because the 38 days is a median, the actual time from petition to election varies greatly from one case to another. By definition, a median of 38 days means that, in half of all cases, the time between petition and election is longer than 38 days. Most importantly for present purposes, the median time between petition and election in cases that proceed to hearing (the only cases directly affected by the final rule) has varied between 64 and 70 days over the past five years.

As explained in the NPRM, the current median reflects prior reforms enacted by Congress and adopted by the Board altering the procedures for resolving questions of representation. See 76 FR at 36813–14. Each of those changes had the effect of shortening the time period between the filing of the petition and the holding of an election. Thus, the length of the so-called ''critical period'' has never been static, and prior changes have not proven to be detrimental to employee free choice.

In other words, the current median period between petition and election is tied to factors having nothing to do with informing employees about unionization. To the extent current procedures impair the Board's ability to expeditiously resolve questions of representation and are not necessary to the fair and accurate performance of the Board's statutory duties to determine if a question of representation exists and, if so, to direct an election in order to answer the question, the Board has concluded that the procedures should be amended.

g. Other Issues Affecting the Appropriate Time Period between Petition and Election

Some comments, including that of Professor Samuel Estreicher, suggest that the employer needs sufficient time not only to campaign, but to retain counsel so that the employer understands the legal constraints on its campaign activity and does not violate the law or engage in objectionable conduct.[72] A number of comments specifically argue that any compression of the time period between the petition and election will be particularly difficult for small businesses, which do not have in-house legal departments and may not have ready access to either in-house or outside labor attorneys or consultants to counsel them on how to handle the campaign.[73] Similarly, some comments suggest that, to the extent the amendments result in a shorter period of time between the petition and the election, they will increase objections and unfair labor practice litigation, because employers will not have an opportunity to train managers on how to avoid objectionable and unlawful conduct. See Con-way Inc.; Bluegrass Institute; ATA.[74]

The Board believes that most of the rules governing campaign conduct are matters of common sense that are intuitively understood by employers and employees—the prohibition of threats and bribes, for example. Moreover, when the petition is served on the employer by the regional office, it is accompanied by a Notice to Employees, Form NLRB 666, which sets forth in understandable terms the central rules governing campaign conduct. In any event, the Board does not believe that any shortening of the

[67] An exception exists for ''massed assemblies,'' which are prohibited during the 24 hours before the election under *Peerless Plywood,* 107 NLRB 427, 429 (1953).

[68] As described in the NPRM, the Board's experience suggests employers are also increasingly using email to send campaign communications to their employees. 76 FR 36812, 36820 (June 22, 2011).

[69] See Casehandling Manual Section 11302.2.

[70] See *Lechmere, Inc.* v. *NLRB,* 502 U.S. 527, 538 (1992); *NLRB* v. *Babcock & Wilcox* Co., 351 U.S. 105, 112 (1956).

[71] The bipartisan Commission on the Future of Worker-Management Relations, U.S., concluded as follows after extensive study in 1994: ''The Commission believes the NLRB should conduct representation elections as promptly as administratively feasible. * * * Each side would continue to have ample time to express its views if the process were much shorter.'' Dunlop Commission Final Report, *supra* at 41.

[72] See also testimony of former Board Member Marshall Babson (emphasizing that the rules must balance the various competing interests).

[73] NRMCA; Indiana Chamber of Commerce; National Automobile Dealers Association; T&W Block Company; York Society for Human Resource Management; National Marine Manufacturers Association; Council of Smaller Enterprises; Bluegrass Institute; Landmark Legal Foundation; American Trucking Associations; testimony of Steve Jones; American Fire Sprinkler Association.

[74] Other comments, however, cite evidence indicating a positive correlation between the length of a campaign and unfair labor practice allegations. See SEIU; NELP; Ranking Member George Miller and Democratic Members of the U.S. House of Representatives Committee on Education and the Workforce; John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D. See also testimony of Professor Ethan Daniel Kaplan (citing similar results from a study in Canada).

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time between petition and election that results from the final rule will impair employers' ability to retain counsel in a timely manner.[75] In this regard, Russ Brown, an experienced labor-relations consultant, testified at the public hearing that his firm routinely monitors petitions filed in the regional offices and promptly offers its services to employers named in those petitions. In general, the well-documented growth of the labor-relations consulting industry undermines the contention that small businesses are unable to obtain advice quickly. Comments, such as the one cited above, indicate that it is a routine practice for labor-relations consultants to monitor petitions filed with the regional offices, so that the consultants may then approach the employers to offer their services.[76]

Other comments propose that the Board set a minimum number of days between the petition and the election. Cook-Illinois Corporation suggests a minimum of 21 days, subject to expansion or contraction by agreement of the parties. The Heritage Foundation proposes a minimum of 40 days.[77] In contrast, Professor Samuel Estreicher stated that he would not favor specifying a particular time period within which the election must be held. No such minimum exists in the Act or under the current rules.

For the same reasons that the Board has not set a maximum number of days between the petition and the election, it has declined to set a minimum. Congress provided that the Board should conduct ''an appropriate hearing upon due notice'' and determine if a question of representation exists prior to directing an election, but did not otherwise specify when the Board should conduct the election. Under the amended rules, as under the existing rules, the time it will take for the Board to perform that statutory function will vary. The Board believes that its duty is to perform its statutory functions as promptly as possible consistent with employee free choice. The Board has amended its rules in order to facilitate that objective, but even under the amended rules, which leave the ultimate decision about the setting of the election date within the sound discretion of the regional director after consultation with the parties, the Board does not believe it is likely or even feasible that it could perform its statutory functions in such a short period, and a regional director would set an election so promptly, that employee free choice would be undermined. The Board has thus decided to maintain the current practice of not setting either a maximum or a minimum number of days between petition and election via its rules.

Citing Member Hayes's dissent from the NPRM, some comments suggest that the amendments will provide for elections in as little as 10 days after the filing of the petition.[78] But neither the proposed amendments nor the more limited final rule contains any such requirement and, in practice, the final rule cannot lead to elections taking place within 10 days of the petition in a contested case. Moreover, the Board believes it is highly unlikely that, in any significant number of cases, the required procedural steps will be taken so quickly that a regional director could even have discretion to schedule an election close to 10 days after the filing of the petition.[79]

The Board discounts the argument made in some comments that the proposed rule improperly fails to give the employer sufficient time to refute unrealistic promises or ''correct any mischaracterizations or errors'' by union organizers.[80] For three decades, Board law has been settled that campaign misstatements—regardless of their timing—are generally insufficient to interfere with an election, unless they involve forged documents that render employees unable to evaluate the statements as propaganda. See *Midland National Life Insurance Co.,* 263 NLRB 127, 132 (1982) (noting that employees are capable of ''recognizing campaign propaganda for what it is and discounting it''). The Midland rule applies even if the misrepresentation takes place only a few days before the election. See, e.g., U-*Haul Co. of Nevada, Inc.,* 341 NLRB 195, 195 (2004) (document circulated by union two days before election did not amount to objectionable misrepresentation under *Midland*).

The Board also rejects the argument of Vigilant that a shorter period between petition and election will result in a greater number of mail-ballot elections and an accompanying increase in the potential for fraud and coercion. Nothing in the proposed or adopted rules alters the standard for determining when an election should be conducted by mail ballot. A regional director's determination of whether an election should be held manually or by mail is not informed by the number of days between the petition and the election. Rather, it is based on factors such as the desires of the parties and whether employees are ''scattered'' due to their geographic locations or work hours and whether there is a strike, lockout, or picketing in progress. See *San Diego Gas & Electric,* 325 NLRB 1143, 1145 (1998); Casehandling Manual Section 11301.2.

Baker & McKenzie contends that, to the extent the amendments will result in elections being held within 10 to 25 days after the petition, they are inconsistent with the Board's other notice provisions, which provide longer periods. For example, Baker & McKenzie notes that a respondent must post a remedial notice in an unfair labor practice case for 60 days or longer, and that the Board recently promulgated a

[75] Ranking Member Michael B. Enzi of the U.S. Senate Committee on Health, Education, Labor, and Pensions and Republican Senators assert that employers will significantly limit their use of legal counsel during organizing campaigns due to the Department of Labor's recent NPRM interpreting the advice exemption to the ''persuader'' disclosure requirement under the Labor-Management Reporting and Disclosure Act. See 76 FR 36178 (proposed June 21, 2011). However, the DOL's stated goal is publicizing the interactions between employers and covered entities, not stopping those interactions from taking place. See *id.* at 36182, 36190. In any event, the Board views such concerns as more properly directed to the DOL. The Board also wishes to make clear that—contrary to COLLE's suggestion—its actions have been in no way influenced by any actions of the DOL.

[76] See testimony of Russ Brown of the Labor Relations Institute (LRI), noting that the Labor Relations Institute's Web site ''is probably one of the leading sources of keeping up with just about every scrap of paper you guys push.'' The Web site, www.lrionline.com, includes a section entitled ''union avoidance'' and advertises online libraries that include a ''daily petition library'' with ''supplemental petition information available daily'' and an ''organizing library'' tracking ''union organizing activity.'' See also testimony of Michael D. Pearson, former field examiner (noting that consultants check the public filings of RC petitions on a daily basis to solicit business from employers); testimony of Professor Joseph McCartin (noting that a ''thriving industry of consultants has emerged'').

[77] CDW draws an analogy to the Older Workers Benefit Protection Act, 29 U.S.C. 626, which provides 45 days for employees to sign releases regarding age discrimination claims. CDW argues that this provision demonstrates the impropriety of forcing employees to make a decision on representation in less time than the current 38-day median. The Board does not find it instructive to compare an individual employee's permanent waiver of rights under a completely different statutory scheme with the election procedures at issue here involving groups of employees and, typically, an active campaign by several parties.

[78] See Chamber; COLLE.

[79] Even assuming that an election were to occur close to 10 days after the petition, under existing precedent, the union is only entitled to obtain the *Excelsior* list 10 days before the election. See *Mod Interiors,* 324 NLRB 164, 164 (1997); Casehandling Manual Section 11302.1. Thus, existing Board precedent contemplates that a union may only have the ability to contact all eligible voters for 10 days.

[80] Vigilant; Indiana Chamber of Commerce; John Deere Water; PIA; Greater Raleigh Chamber of Commerce; NMMA; Associated Oregon Industries; NAM; testimony of Michael Prendergast. T&W Block Company makes a related argument, contending that the failure to allow sufficient time would destabilize labor relations because employees would enter bargaining with unrealistic expectations.

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rule requiring employers to continuously post in the workplace a notice of employee rights under the Act. The Board does not agree that these other posting requirements are in any way inconsistent with the final rule. The notice postings required by the Board serve different purposes in different contexts—to inform employees of their general rights or to alleviate the impact of unlawful acts by an employer or union, rather than to communicate about a specific petition in a specific unit. Moreover, the time reasonably necessary for employees to obtain the message from a posted notice, and for that message to dissipate the effects of unfair labor practices, is different from the time needed for employees to receive information from employers and unions actively campaigning for their support. Finally, the existing notice-posting provision for elections, which is not altered by the final rule, requires that the notice be posted for only three days before the election. See NLRB Rules and Regulations Section 103.20(a). The Board thus rejects the ''one size fits all'' suggestion for time periods under the Act.

In addition to arguing that the rule fails to give employers sufficient time to deliver their campaign message, some comments contend that the rules do not give employees sufficient time to receive and evaluate that message and, if they so choose, to organize themselves to oppose union representation.[81] The comments argue that the final rule therefore runs afoul of the Act's policies of protecting employees' right to ''full freedom of association'' and ''encourag[ing] free debate'' on labor issues. 29 U.S.C. 151; *Chamber of Commerce* v. *Brown,* 554 U.S. at 68. They further argue that the final rule violates employees' Section 7 right to refrain from union activity, because this right ''implies an underlying right to receive information opposing unionization.'' *Chamber of Commerce* v. *Brown,* 554 U.S. at 68.

As explained above in the discussion of Section 8(c) and the First Amendment, *Chamber of Commerce* v. *Brown* did not involve the question of the appropriate time period between a petition and election, nor did the Court's general observations regarding speech indicate that any particular period of time is necessary for employees to receive information about the union. And the procedural rule adopted here does not police speech or limit employees' freedom of association. It also will not, as explained above, cause such a significant reduction in the time employers have to campaign or employees have to process campaign messages and organize for or against representation as to interfere with employees' freedom of choice or association.

A number of comments asserted that a lengthy election campaign tends to disserve the interests of both employees and employers. AFT cites anecdotal evidence from a lengthy campaign that demoralized workers and resulted in significant expenditures by the employer.[82] Several comments also note a correlation between the length of the campaign and the number of unfair labor practice complaints issued against the employer.[83] Another study indicated that protracted campaigns lead to a more conflict-ridden, adversarial work environment.[84] SEIU argues that the contentious pre-election environment often associated with long campaigns harms the prospects for future bargaining. NELP argues that low-wage workers stand to make significant improvements in their working conditions through unionization, yet these same workers are particularly vulnerable to retaliation for union activity, rendered more likely by long campaigns, and are also likely to become discouraged by complex bureaucratic processes.[85] The Board did not rely on any such assertions in proposing the amendments and does not do so in adopting the final rule.

Other comments suggest that the amendments will generate litigation because, if a party has less time to campaign between the petition and election, the party will ''assert as many defenses as possible'' or try to obtain a hearing simply to ''buy * * * more time'' before the election. AHA. SEIU's reply comment notes that there was no significant drop in the consent or stipulation rate following former General Counsel Fred Feinstein's initiative aimed at commencing all pre-election hearings between 10 and 14 days after the filing of the petition. Rather than undermining the rationale for the proposals, the suggestion that parties might use the pre-election hearing to delay the conduct of an election reinforces the need for the final rule. Both the ability and incentive for parties to attempt to raise issues and engage in litigation in order to delay the conduct of an election are reduced by the final rule.

E. Effects on Employee Representation and the Economy

Many comments do not address the substance of the proposed amendments, but instead speak generally in favor of, or in opposition to, labor unions and the process of collective bargaining. The Board observes that, by passing and amending the NLRA, Congress has already made the policy judgment concerning the value of the collective-bargaining process; the Board is not free to ignore or revisit that judgment. Rather, as explained in the NPRM, the amendments are intended to carry out the Board's statutory mandate to establish fair and efficient procedures for determining if a question of representation exists and for conducting secret-ballot elections. Accordingly, the Board will not engage in an analysis, invited by these comments, concerning the general utility of labor unions and the collective-bargaining process.

Other comments assert that the proposed amendments would lead to increased union representation and question the wisdom of adopting rules that would have such an effect in the middle of an economic recession. Again, the Board views these comments as questioning policy decisions already made by Congress.[86] Neither the

[81] See NRTWLDF; Seyfarth Shaw; ALFA; American Council on Education; CDW; NRMCA; Indiana Chamber of Commerce; Con-way; Specialty Steel; Americans for Limited Government; International Foodservice; testimony of Steve Jones; testimony of Charles I. Cohen; testimony of David Kadela; testimony of Harold Weinrich; testimony of Brett McMahon.

Some comments include a related argument that employees who are considered likely to oppose the union, and therefore were not involved in the pre-petition organizing campaign, may not know about the organizing drive until the petition is filed. See Seyfarth Shaw; ALFA.

[82] See also comment of Professor Paula Voos, contending, based on her 2010 study, that campaigns longer than 60 days resulted in a decline in shareholder wealth (as measured by changes in stock prices plus disbursement of dividends), but campaigns of 60 days or fewer did not.

[83] See John Logan, Ph.D., Erin Johansson, M.P.P., and Ryan Lamare, Ph.D. (summarizing their study, ''New Data: NLRB Process Fails to Ensure a Fair Vote,'' supra). See also SEIU; NELP; and Ranking Member George Miller and Democratic Members of the U.S. House of Representatives Committee on Education and the Workforce (citing Logan, Johanson, and Lamare study).

[84] See Dunlop Commission Final Report, *supra* at 38–41, cited in comment of SEIU. Another comment contends, but offers no supporting argument or empirical evidence, that elections on short notice will foster bad feelings between pro- and anti-union employees and between the union and management. See Norman Owen.

[85] See testimony of Professor Paul F. Clark (noting that employee organizing has become a ''minefield and a marathon'' due to sophisticated anti-union campaigns and delays).

[86] To the extent that comments suggest that the Board failed to consider the proposed rule's potential to increase the costs on small employers associated with increased unionization as part of its obligations under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.,* those comments are addressed in the Regulatory Flexibility Act section below.

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proposed amendments nor the final rule reflects a judgment concerning whether increased employee representation would benefit or harm the national economy. As explained in the NPRM and above, increasing the rate of employee representation is not the goal of the Board's proposed or final rule.

IV. Comments on Particular Sections

Part 101, Subpart C—Representation Cases Under Sec. 9(c) of the Act and Petitions for Clarification of Bargaining Units and for Amendment of Certifications Under Sec. 9(b) of the Act

In the NPRM, the Board proposed to eliminate redundant sections of its regulations contained in Subpart C of Part 101 describing representation case procedures. The relevant sections of Subpart C of Part 101 currently include an essentially complete restatement of the representation case procedure established in Subpart C of Part 102. As the Board noted in the NPRM, ''Describing the same representation procedures in two separate parts of the regulations may create confusion.'' 76 FR at 36819.

The final rule eliminates Subpart C of Part 101. A few, non-redundant portions are moved into Part 102. For example, the description of the pre-election conference is moved to § 102.69(a).

The Board received no significant comments opposing this proposal. Comments from a variety of viewpoints supported the Board's effort to eliminate redundant regulations.

As noted in the NPRM, § 101.1 states that the purpose of Part 101 is to provide the public with a statement of ''the general course and method by which the Board's functions are channeled and determined.'' [87] The purpose of a separate statement of the general course ''is to assist the public in dealing with administrative agencies,'' but should not be ''carried to so logical an extreme as to inconvenience the public.'' [88] The NPRM stated that codifying this statement in the Code of Federal Regulations risked confusing the public. Instead, the Board proposed to publish the statement in the **Federal Register** without codification. This accords with general administrative practice.[89] The NPRM contained an uncodified statement of the general course, 76 FR at 36817–18, and proposed that any final rule that might issue would also include an uncodified statement of the general course. A Statement of the General Course of Proceedings Under Section 9(c) of the Act is provided below.[90]

Prior § 101.18 provided, ''The evidence of representation submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have designated the petitioner, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.'' ALFA submits that revised § 102.61 should explicitly state that a proper showing of interest must include authorization cards or signatures from 30 percent of the employees in an appropriate unit. The final rule, however, does not revise § 102.61 as proposed or in any respect. To the extent that ALFA would still have the Board amend § 102.61 to specify the 30 percent figure, the Board declines to adopt this proposal. The Board's current rules and regulations set forth in Part 102 do not specify a precise threshold for the administratively required showing of interest. As explained in former § 101.18, the purpose of the showing of interest on the part of labor organizations and individual petitioners that initiate or seek to participate in a representation case is merely to determine whether there is sufficient employee interest in selecting, changing or decertifying a representative to warrant the expenditure of the agency's time, effort, and resources in conducting an election. See also Casehandling Manual Section 11020. As such, the purpose of the showing of interest is purely an administrative one; the size of the showing of interest in support of certification and decertification petitions that the Board currently requires is not compelled by the Act. As an administrative matter it is not litigable. *The Borden Co.,* 101 NLRB 203, 203 n.3 (1952); Casehandling Manual Section 11028.3. However, at this time, the Board has no intention of changing the size of the required showing of interest and the uncodified statement of the general course that follows states that the required showing remains 30 percent.[91]

Part 101, Subparts D and E—Unfair Labor Practice and Representation Cases Under Secs. 8(b)(7) and 9(c) of the Act and Referendum Cases Under Sec. 9(e)(1) and (2) of the Act

In the NPRM, the Board also proposed to eliminate its statement of procedures contained in Subparts D and E of Part 101 regarding unfair labor practice and representation cases arising under Sections 8(b)(7) and 9(c) of the Act and referendum cases arising under Section 9(e)(1) and (2) of the Act. The Board has decided to deliberate further regarding its proposal to eliminate these subparts that describe procedures for two specialized types of representation cases. Instead of eliminating these two subparts entirely, the final rule conforms the procedures described therein to the amendments set forth below.

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

Sec. 102.62 Election Agreements

In the NPRM, the Board proposed a number of amendments to § 102.62. The amendments were intended to clarify the terms used to describe the three types of pre-election agreements, to eliminate mandatory Board resolution of post-election disputes under a stipulated election agreement, to codify the requirement of the *Excelsior* list and to alter the content and timing of its provision to the petitioner,[92] and to alter the means of transmittal of the final notice of election. The Board has decided at this time to adopt only the proposed amendments to § 102.62 clarifying the terms used to describe pre-election agreements and eliminating mandatory Board resolution of post-

[87] See 5 U.S.C. 552(a)(1)(B). The original language of this provision stated that the section would ''amplify and supplement the[] rules of procedure.'' 12 FR 5651 (August 22, 1947).

[88] Tom C. Clark, Attorney General's Manual on the Administrative Procedure Act, 17, 19 (August 27, 1947).

[89] See, e.g., 26 CFR 601.702(a)(1)(ii) (''[T]he Commissioner publishes in the **Federal Register** from time to time a statement, which is not codified in this chapter, on the organization and functions of the IRS.'').

[90] The Board will also continue to publish, update, and make available on its Web site the detailed statement of representation case procedures set forth in its Casehandling Manual.

[91] The Board's form petition, Form NLRB 502 also states, and will continue to state, that the required showing of interest is 30 percent (see Form section 6(b)).

In response to comments that erroneously suggest that 30 percent is the threshold for resolving a question of representation, the Board reiterates here that if a question of representation exists, it is resolved by a majority of valid votes cast in an election.

[92] See *Excelsior Underwear, Inc.,* 156 NLRB 1236 (1966) (establishing requirement that employers must file a list of the names and addresses of all eligible voters with the regional director within seven days after a Board election has been agreed to or directed; the regional director then makes the information available to all parties in the case).

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election disputes under a stipulated election agreement.

The final rule's amendments to § 102.62(b) revise the contents of the stipulated election agreement. The revision eliminates parties' ability to agree to have post-election disputes resolved by the Board. The amendments provide instead that, if the parties enter into what is commonly referred to as a ''stipulated election agreement,'' [93] the regional director will resolve any post-election disputes subject to discretionary Board review. This procedure is consistent with the changes to § 102.69 described below making all Board review of regional directors' dispositions of post-election disputes discretionary in cases where parties have not addressed the matter in a pre-election agreement.[94]

As explained in the NPRM, the amendment makes the process for obtaining Board review of regional directors' dispositions of *post*-election disputes fully parallel to that for obtaining Board review of regional directors' dispositions of *pre*-election disputes. The Board perceived no reason why pre- and post-election dispositions should be treated differently in this regard, and the comments on this proposal offered no convincing reason.

The Board affirms the vast majority of post-election decisions made at the regional level, and many present no issue meriting full consideration by the Board. In some cases, for example, parties seek review of post-election decisions based on mere formulaic assertions of error below and without pointing to any facts or law in dispute.[95] Review as of right should not be granted in those situations. Others cases present only circumscribed, purely factual issues concerning which the Board is in no better position to reach a correct finding than the hearing officer (who heard the evidence) or the regional director.[96] Given the highly deferential standard that the Board employs in reviewing a hearing officer's post-election factual findings,[97] it is reasonable for the Board to require the party seeking review of such a finding to justify that review by showing that the standard for obtaining discretionary review is satisfied. There are other cases in which the regional director assumes the facts asserted by the objecting party but finds that no objectionable conduct occurred,[98] or where there is no dispute about the facts at all.[99] A discretionary system of review will provide parties with a full opportunity to contest those determinations. Another group of cases represent parties' efforts to seek reconsideration, extension, or novel application of existing Board law,[100] and there is equally no reason why a discretionary system of review will not fully provide that opportunity. Still other cases simply involve the application of well-settled law to very specific facts.[101] In short, for a variety of reasons, a substantial percentage of Board decisions in post-election proceedings are unlikely to be of precedential value because no significant question of policy is at issue. The final rule requires the party seeking review to identify a significant, prejudicial error by the regional director or some other compelling reason for Board review, just as the current rules require a party to do when seeking Board review of a regional director's pre-election decision.[102] The final rule will enable the Board to separate the wheat from the chaff, and to devote its limited time to cases of particular importance. Based on those considerations, the Board concludes that making review of regional directors' post-election decisions available on a discretionary basis, as is currently the case with pre-election review and some post-election review, will assist the Board in fulfilling its statutory mandate to promptly resolve questions concerning representation.

Several comments argue that if the Board were to adopt these amendments, it would be abdicating its statutory responsibility and function.[103] For example, SHRM argues that only Board Members, because they are appointed by the President and confirmed by the Senate, can make final decisions about these matters and that the regional directors, who are career civil servants, lack comparable authority and political legitimacy. Others state that denying aggrieved parties the right to appeal adverse determinations to the Board undermines due process protections. NAM contends that the Board is required to review conduct affecting election outcomes in order to safeguard employees' Section 7 rights. Similarly, other comments argue that conduct that could be the basis for setting aside an election goes to the essence of employee free choice and deserves de novo Board review.[104] Still other comments contend that, although Section 3(b) of the Act permits Board delegation to the regional directors of decisions pertaining to representation issues, those decisions must be reviewed by the Board upon request.

The Board is not persuaded by these comments. The arguments they advance apply equally to pre-election disputes, and yet the Board has since 1961 afforded only discretionary review of regional directors' dispositions of pre-election disputes even though a failure to request review pre-election or a denial of review precludes a party from raising the matter with the Board post-election. 29 CFR 102.67(f). Moreover, even under the current rules, specifically § 102.69(c)(4), if the regional director issues a decision concerning challenges or objections instead of a report in cases involving directed elections, an aggrieved party's only recourse is a request for review. Thus, the comments' objections apply to the current regulations as well as to the final rule.

Moreover, Section 3(b) of the NLRA does not support the conclusion expressed in those comments. Section 3(b) provides in part:

[93] Casehandling Manual Section 11084.

[94] The current rules governing Board review of regional directors' dispositions of post-election disputes appear on their face to provide for both mandatory and discretionary review depending on how the regional office processes the case. See 29 CFR 102.69(c)(3) and (4).

[95] See, e.g., *C&G Heating,* 356 NLRB No. 133, slip op. at 1 (2011).

[96] See, e.g., *Ruan Transport Corp.,* 13–RC–21909 (Nov. 30, 2010) (resolving intent of voter who marked an X in two boxes on ballot but ''nearly obliterated'' one of them with pen markings in lieu of erasure); *Multiband, Inc.,* 2011 WL 5101459, slip op. at n.2 (Oct. 26, 2011) (credibility).

[97] See *Stretch-Tex Co.,* 118 NLRB 1359, 1361 (1957).

[98] See, e.g., *Care Enterprises,* 306 NLRB 491 n.2 (1992).

[99] See, e.g., *CEVA Logistics U.S., Inc.,* 357 NLRB No. 60 (2011) (consequences of regional delay in forwarding Excelsior list).

[100] See, e.g., *1621 Route 22 West Operating Co., LLC d/b/a Somerset Valley Rehabilitation & Nursing Ctr.,* 357 NLRB No. 71 (2011); *Ace Car & Limousine Service, Inc.,* 357 NLRB No. 43 (2011).

[101] *Mental Health Ass'n, Inc.,* 356 NLRB No. 151 (2011) (whether employer's particular statements about bonuses constituted objectionable promise of benefit); *G&K Services, Inc.,* 357 NLRB No. 109 (2011) (whether employer's letter about health coverage constituted objectionable promise of benefit).

[102] See § 102.67(c), providing:

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

(1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.

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

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

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

[103] See Chamber; SHRM; CDW; COLLE; NACCO Materials Handling Group; Dassault Falcon Jet; Bluegrass Institute; John Deere Water.

[104] See, e.g., Dassault Falcon Jet.

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The Board is * * * authorized to delegate to its regional directors its powers * * * to determine [issues arising in representation proceedings], except that upon the filing of a request therefore with the Board by any interested person, the Board may review any action of a regional director delegated to him * * *, but such review shall not, unless specifically ordered by the Board, operate as a stay of any action taken by the regional director.

29 U.S.C. 153(b).

Since Congress adopted this provision in 1959 and the Board exercised its authority to delegate these functions to its regional directors in 1961, the Board's rules have provided that regional directors' dispositions of pre-election disputes are subject only to discretionary Board review. None of the comments suggest that the current rule as to pre-election disputes violates Section 3(b) or is otherwise improper.

In fact, the Supreme Court has upheld the Board's decision not to provide parties with a right to Board review of regional director's pre-election determinations, in a holding that clearly permits the Board to adopt the final rule's amendments concerning post-election review. In *Magnesium Casting Co.* v. *NLRB,* 401 U.S. 137 (1971), the employer filed a request for review of the regional director's decision and direction of election holding that certain individuals were properly included in the unit. The Board denied the petition on the ground that it did not raise substantial issues. In the subsequent ''technical 8(a)(5)'' unfair labor practice proceeding, the employer asserted that ''plenary review by the Board of the regional director's unit determination is necessary at some point,'' i.e., before the Board finds that the employer committed an unfair labor practice based on the employer's refusal to bargain with the union certified as the employees' representative in the representation proceeding. 401 U.S. at 140–41. However, the Court rejected the contention that Section 3(b) requires the Board to review regional directors' determinations before they become final and binding. Citing Congress's authorization of the Board to delegate decision-making in this area to its regional directors and the use of the clearly permissive word ''may'' in the clause describing the possibility of Board review, the Court held, ''Congress has made a clear choice; and the fact that the Board has only discretionary review of the determination of the regional director creates no possible infirmity within the range of our imagination.'' *Id.* at 142. Consistent with the purpose of the final rule here, the Supreme Court quoted Senator Goldwater, a Conference Committee member, explaining that Section 3(b)'s authorization of the Board's delegation of its decision-making authority to the regional directors was to ''expedite final disposition of cases by the Board, by turning over part of its caseload to its regional directors for final determination.'' *Id.* at 141 (citing 105 Cong. Rec. 19770). And undermining the comments' suggestion that regional directors lack authority, status, or expertise to render final decisions in this area, the Court further explained that the enactment of section 3(b) ''reflect[s] the considered judgment of Congress that the regional directors have an expertise concerning unit determinations.'' *Id.* [105]

The Board concludes that the language of Section 3(b), its legislative history, and the Supreme Court's decision in *Magnesium Casting* are dispositive of the statutory objections to the proposed amendment.

Some comments suggest that providing only discretionary review of regional directors' decisions will undermine the uniformity of election jurisprudence, with different regional directors issuing divergent opinions in similar cases and under similar circumstances. The comments contend that if those decisions are not reviewed by the Board as a matter of right, there is a risk that the regional office in which the employer's operations reside, rather than the merits of the parties' positions, will govern how the dispute is resolved. For example, Bluegrass Institute contends that discretionary Board review will result in less uniformity, the denial of due process, and diminished legitimacy in election processes. The Board disagrees.

Constitutional due process requires only one fair hearing and does not require an opportunity to appeal. The Supreme Court has so held even with respect to criminal cases. See *Evitts* v. *Lucey,* 469 U.S. 387, 393 (1985) (''Almost a century ago, the Court held that the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors. *McKane* v. *Durston,* 153 U.S. 684 * * * (1894).'').

Since 1961, regional directors have made pre-election determinations, and their decisions have been subject to only discretionary review through the request for review procedure. The same has been true of post-election determinations processed under § 102.69(c)(3)(ii). There is no indication that the quality of decision-making has been compromised by this procedure or that regional directors have reached inconsistent conclusions. Under the final rule, the same review process will apply to all cases involving post-election objections and challenges except where they are consolidated with unfair labor practice allegations before an administrative law judge. As it has done for over 50 years in respect to pre-election disputes, the Board will scrutinize regional directors' post-election decisions where proper requests for review are filed. One purpose of that review will be to determine if there is an ''absence of'' or ''a departure from, officially reported Board precedent,'' i.e., to ensure uniformity via adherence to Board precedent. See 29 CFR 102.67(c)(1). Thus, the discretionary review provided for in the final rule parallels that used by the Supreme Court to ensure uniformity among the circuit courts of appeals. See Supreme Court Rule 10. For these reasons, the Board does not believe that the final rule will lead to a lack of uniformity.

A few comments question the competence of regional personnel. For example, COLLE argues that ''Regional Directors can be dictatorial and imprudent to the rights of private parties in disputes before them'' and ''can exhibit irrational and unfair behavior and deprive parties of their rights to go to hearing and litigate legitimate issues under the Act.'' GM Life suggests that regional directors are unfamiliar with the legal process and will not follow proper procedures. Other comments contend that because hearing officers report directly to regional directors, appeal to the regional directors does not constitute meaningful review.

The Board's experience in reviewing the work of and supervising its regional directors gives no credence to these comments. Moreover, Congress expressed confidence in the regional directors' abilities when it enacted Section 3(b). As one comment in favor of the rule (Professor Joel Cutcher-Gershenfeld) noted, empowering regional directors to make final post-election rulings, as they now do in respect to pre-election matters, locates decisions with the individuals who have the greatest knowledge about and experience with representation case

[105] See also *St. Margaret Memorial Hosp.* v. *NLRB,* 991 F.2d 1146, 1154 (3d Cir. 1993); *Beth Israel Hosp. and Geriatric Ctr.* v. *NLRB,* 688 F.2d 697, 700–01 (10th Cir. 1982) (en banc); *Transportation Enterprises, Inc.* v. *NLRB,* 630 F.2d 421, 426 (5th Cir. 1980) (finding that ''decisions rendered by the regional offices of the NLRB which are not reviewed by the Board, for whatever reasons, are entitled to the same weight and deference as Board decisions, and will be given such unless and until the Board acts in a dispositive manner.'').

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procedures.[106] Similarly, the Chamber, although it generally opposes the proposals, notes the ''professionalism, experience and integrity'' of the regional directors and their staffs. Rather than detracting from their authority and legitimacy, the Board concludes that the regional directors' career status guarantees their neutrality and, in almost all cases, their extended service at the Board and thus extensive experience with and knowledge about representation case procedures and rules.

ALFA argues specifically that regional directors tend to uphold election results, and therefore a right to Board review should be retained if the Board wishes to discourage litigation via refusals to bargain. As noted above, the Board rejects the suggestions that regional directors are systematically biased in this or any other way, and repeats that it will scrutinize regional decisions' decisions when proper requests for review are filed.

Some comments contend that, if the proposals are adopted, employers will increasingly refuse to bargain with newly certified representatives in order to obtain judicial review of regional directors' determinations.[107] This argument is, at best, highly speculative. There is no evidence that this happened after the Board delegated adjudication of pre-election disputes to its regional directors in 1961 subject to only discretionary review by the Board, and the Board can see no reason why an increase in refusals to bargain would be more likely if Board review of post-election decisions is similarly made discretionary. The Board does not believe that judicial review through technical refusal to bargain will be more frequent when the Board denies review of a regional director's post-election decision than it is when the Board summarily affirms the same regional decision, as it often does now. See, e.g., *The Geist Co.,* 8–RC–17056 (Dec. 1, 2011); *The Memorial Hospital of Salem County,* 4–RC–21697 (Aug. 3, 2011); *Ashland Nursing & Rehabilitation Center,* 5–RC–16580 (May 31, 2011); *Banner Services Corp.,* 13–RC–21983 (May 25, 2011).

Several comments argue that the rule is contrary to the preferences of both employers and unions, as shown by the high rate of stipulated election agreements—providing for adjudication of post-election disputes by the Board—and the comparative rarity of consent election agreements—providing for a final decision by the regional director. AHA, SHRM, and ACE contend that parties prefer this form of pre-election agreement because it provides for Board disposition of post-election issues. As a corollary to this argument, some comments argue that eliminating automatic Board review will result in fewer pre-election agreements and thus more litigation.[108]

The Board believes for several reasons that the final rule will not create a disincentive for parties to enter into consent or stipulated election agreements. The final rule makes post-election Board review discretionary whether the parties enter into a stipulated election agreement or proceed to a hearing resulting in a decision and direction of election. Thus, parties who prefer Board review of post-election disputes will have no incentive to litigate concerning pre-election issues in order to gain such review. The Board believes that if parties genuinely prefer agreements that permit Board review, they will continue to enter into stipulated rather than consent election agreements in order to preserve their right to seek such review. Whether parties enter into any pre-election agreement or litigate disputes at a pre-election hearing under the final rule will depend on the same calculus of the likelihood of success, the importance of the issue, and the cost of litigation, that it does at present. In addition to avoiding the time and expense associated with a pre-election hearing, parties also gain certainty with respect to the unit description and the election date by entering into a stipulated election agreement. In short, parties will continue to have ample reason to enter into stipulated election agreements under the final rule, even though the final rule makes Board review of regional directors' dispositions of post-election disputes discretionary.

Some comments, such as that of Sheppard Mullin, express confusion about the rule and the request-for-review procedure. The grounds for granting a request for review under § 102.69(d)(3) of the final rule are identical to the grounds set forth in § 102.67(c) of the existing rules. The Board will continue to review cases involving issues of ''first impression'' or where there is ''conflicting or unsettled'' law in the same manner that it currently does under the pre-election request-for-review procedure. The Board is not aware of any concerns about the way it has evaluated requests for review in representation proceedings, and does not anticipate any in the future.

One comment questions whether ''the denial of review'' is subject to appeal to the federal courts. The Board's denial of review of a post-election request for review will be the final order in a representation proceeding under the final rule, as it is currently. However, orders in representation cases are not final orders for purposes of judicial review. Rather, an employer must refuse to bargain and commit a ''technical 8(a)(5)'' violation to secure court review of the Board's representation decisions. See 29 U.S.C. 159(d); *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 476–79 (1964). Under the current rules, if an employer refuses to bargain, it may obtain review of a regional director's pre-election rulings even if the Board denied review thereof, and the same will be true of post-election rulings under the final rule. Thus, there are no open questions about the Board's discretionary review process that will undermine confidence in its decisional processes.

Similarly, comments misinterpret the rule with respect to how regional decisions will be reviewed and how that review will affect the law. The final rule simply makes post-election dispositions reviewable under a discretionary standard, rather than as of right. The Board's rulings on post-election requests for review will be public and will be published on the Board's Web site, as will the underlying regional directors' decisions, just as rulings on pre-election requests for review are now. Thus, the public and labor law community will have full access to the Board's rulings.

In sum, the amendments to § 102.62(b) conform the review provisions of the stipulated election agreement to the amended review provisions for directed elections. Parties should not be able to get greater post-election Board review simply by virtue of the fact that there are no pre-election

[106] The Board also notes that regional directors make decisions concerning whether to prosecute charges of unfair labor practices under the Act, and those prosecutorial decisions often involve questions of employee status and questions of whether certain conduct is unlawful, both of which often parallel questions that arise in post-election representation proceedings. The courts have recognized that regional directors have expertise in determining what constitutes objectionable conduct. See, e.g., *NLRB* v. *Chicago Tribune Co.,* 943 F.2d 791, 794 (7th Cir. 1991), cert. denied, 504 U.S. 955 (1992).

[107] See Chamber; AHA; CDW; Baker & McKenzie.

[108] See, e.g., ALFA; SHRM. Constangy, Brooks & Smith (Constangy) contends that an employer entering into a stipulation will lose any rights to appeal pre-election unit issues and that this will have a negative effect on the Board's stipulation rate. The Board notes, however, that under current procedures, parties who enter into stipulated election agreements, by definition, agree about pre-election issues, and therefore waive any right to bring pre-election issues to the Board. Thus, the final rule does not change that aspect of stipulated election agreements.

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disputes. Under the final rule, all Board review of regional directors' dispositions of challenges and objections will be discretionary under the existing request-for-review procedure.

Sec. 102.63 Investigation of Petition by Regional Director; Notice of Hearing; Service of Notice; Withdrawal of Notice

In the NPRM, the Board proposed a number of amendments to § 102.63. The Board proposed that absent special circumstances, the regional director would set the pre-election hearing to begin seven days after service of the notice of hearing. The Board also proposed to require the employer to post an initial election notice to employees. The Board further proposed to require non-petitioning parties to complete Statements of Position. The Board has decided to take no action at this time on those proposals in order to permit more time for deliberation.

The amendments to § 102.63 conform this section to the remainder of the amendments.

Sec. 102.64 Conduct of Hearing

As explained in the NPRM, the proposed amendments to § 102.64 were intended to ensure that the pre-election hearing is conducted efficiently and is no longer than necessary to serve the statutory purpose of determining if there is a question of representation. The final rule largely embodies the proposed amendment to § 102.64(a).

In amended § 102.64(a), the Board expressly construes Section 9(c) of the Act, which specifies the purpose of the pre-election hearing. The statutory purpose of the pre-election hearing is to determine if there is a question of representation. A question of representation exists if a petition has been filed, as described in Section 9(c)(1) of the Act and § 102.60 of the Board's rules, concerning a unit appropriate for the purpose of collective bargaining or, in the case of a petition filed under Section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative.[109] If the regional director concludes, based on the record created at the hearing, that such a question of representation exists, the regional director should direct an election in order to resolve the question. If any party contends that an election is barred, under the terms of the Act or Board precedent, and that contention is contested, the regional director must also rule on the existence of such a bar prior to directing an election. [110]

Amended § 102.64(a) makes clear that disputes concerning individual employees' eligibility to vote and inclusion in the unit ordinarily need not be litigated or resolved before an election is conducted. Such disputes can be raised through challenges interposed during the election, if the disputed individuals attempt to cast a ballot, and both litigated and resolved, if necessary, post-election. The proposed rule provided:

> If, upon the record of the hearing, the regional director finds that such a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question and, subsequent to that election, unless specifically provided otherwise in these rules, resolve any disputes concerning the eligibility or inclusion of voters that might affect the results of the election.

The final rule provides:

> Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question.

The change in language is due to the final rule not adopting the ''20-percent rule'' as discussed below in relation to § 102.66. For that reason, the language, ''unless specifically provided otherwise in these rules,'' has been removed. As more fully explained in relation to § 102.66 below, the amendment expressly preserves the regional director's discretion to resolve or not to resolve disputes concerning individuals' eligibility to vote or inclusion in the unit until after the election. It also grants the hearing officer authority to exclude evidence concerning such disputes on the grounds that such evidence is not relevant to the existence of a question of representation.

The final rule defers, in order to permit further deliberation, a final decision concerning the proposed amendments to subsections (b) and (c) of § 102.64. Therefore, amended § 102.64(b) will provide, as is now provided in § 102.64(a), ''It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act.'' However, amended § 102.64(a) more clearly specifies the Board's or regional director's ''duties under Section 9(c) of the Act'' and thus gives clear guidance to hearing officers concerning what evidence is and is not necessary to develop a ''full and complete record'' upon which the Board or regional director can discharge those duties.

Few comments address the proposed amendment of § 102.64(a). Those that do question the construction of Section 9(c) of the Act on the grounds that litigation of disputes concerning individual employees' eligibility to vote and inclusion in the unit should be permitted pre-election. These comments are addressed below in relation to § 102.66.

Sec. 102.65 Motions; Interventions

The final rule adopts the proposed amendments of § 102.65(c) specifying the grounds for a request for special permission to appeal a ruling of the hearing officer or regional director to the Board. However, the final rule does not apply the new, narrower standard to requests for special permission to appeal a ruling of the hearing officer to the regional director.

The existing rules set forth no standard for the grant of a request for special permission to appeal. Consistent with the effort to avoid piecemeal appeal to the Board, as discussed above in relation to § 102.62 and below in relation to § 102.67, the amendments to § 102.65(c) specify narrow circumstances under which a request for special permission to appeal to the Board will be granted. The final rule specifies that special permission to appeal will be granted only under ''extraordinary circumstances where it appears that the issue will otherwise evade review.'' To further discourage piecemeal appeal, the final rule makes clear that a party need not seek special permission to appeal in order to preserve an issue for review post-election.

Consistent with Congress's intent as evidenced in Section 3(b) as well as

[109] A proper petition cannot be filed under Section 9(c)(1) and a question of representation cannot arise under the Act unless the employees in the unit are employed by an employer covered by the Act. Thus, if any party contests the Board's statutory jurisdiction or contends that the Board has declined to exercise its full, statutory jurisdiction over the employer, the regional director must resolve the resulting dispute based on the record of the pre-election hearing. Similarly, a proper petition under Section 9(c)(1)(A) can be filed by ''an employee or group of employees or any individual or labor organization.'' Thus, if a petition is filed by an entity and any party contends that the entity is not a labor organization, the regional director must resolve the resulting dispute based on the record of the pre-election hearing.

[110] The hearing officer will retain authority to develop the record relevant to any such contention using the ordinary procedures already in use, which are designed to avoid burdening the record with unnecessary evidence. For example, current rules give the hearing officer discretion to require a party to make an offer of proof before admitting evidence.

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ordinary practice in the courts and before administrative agencies, the final rule further specifies that neither the filing of a request for nor the grant of special permission to appeal will automatically stay proceedings or require the impounding of ballots unless specifically ordered by the regional director or the Board.

Few comments were submitted on this proposal. The American Health Care Association and the National Center for Assisted Living (jointly, AHCA) contend that the Board provides no examples of issues that would meet the standard for ''otherwise evades review.'' Constangy argues that limiting appeals to extraordinary circumstances, combined with preventing regional directors from staying proceedings to consider motions for reconsideration, will effectively result in the total preclusion of review of pre-election rulings, preventing appeal of legitimate disputes.

The Board disagrees with these concerns. ''Extraordinary circumstances'' is not the same as ''no circumstances.'' Cf. § 103.30(b) (''Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.''). The general rule in adjudication before both courts and agencies is that interlocutory appeals are not favored, and should be permitted only when the issues raised would evade review if not resolved before review of a final judgment. See 28 U.S.C. 1291, 1292(b) (2006); *Mohawk Industries, Inc.* v. *Carpenter,* 130 S. Ct. 599, 604–605 (2009); *Coopers & Lybrand* v. *Livesay,* 437 U.S. 463, 468–469 (1978).

As discussed above, Section 3(b) of the Act authorizes the Board to delegate to its regional directors power to resolve issues arising in representation proceedings, and the final rule is intended to further that delegation while maintaining appropriate procedures for those unusual cases that require interlocutory intervention.

AHCA and ALFA argue that special permission to appeal serves little purpose because it will not stay proceedings. But the final rule does not preclude a stay. Rather, it merely provides that neither the filing nor grant of a request for special permission to appeal shall result in an automatic stay. The regional director and Board remain free to grant a stay, either on their own or on request, under appropriate circumstances.

After deliberation, the Board has decided not to approve the application of this new, narrow standard for special permission to appeal to requests to appeal rulings of a hearing officer to the regional director. In the pre-election hearing, the hearing officer is developing a record upon which the regional director can make a decision. Moreover, the relation between hearing officers and regional director is, in practice, more informal than that between a trial and appellate court or between a regional director and the Board, with hearing officers not infrequently seeking advice from the regional director during a hearing. For these reasons, the final rule does not apply the new, narrow standard to requests for special permission to appeal rulings of hearing officers to the regional director.

The final rule also adopts the proposed amendment to § 102.65(e)(3). The Casehandling Manual provides in Section 11338.7 that a Board agent should exercise discretion in deciding whether to allow a vote under challenge when a party claims that changed circumstances justify a challenge to voters specifically excluded, or included, by the decision and direction of election. Accordingly, the final rule adopts the proposal in the NPRM that if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending.

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

In the NPRM, the Board proposed a number of amendments to § 102.66. The proposed amendments were designed to ensure that issues in dispute would be more promptly and clearly identified and that hearing officers could limit the evidence offered at the pre-election hearing to that which is necessary for the regional director to determine whether a question of representation exists. The NPRM proposed that hearing officers would follow a specified process to identify relevant issues in dispute. Thus, the NPRM provided that the hearing officer would open the hearing by reviewing, or assisting non-petitioning parties to complete, statements of position, and then would require the petitioner to respond to any issues raised in the statements of positions, thereby joining the issues. The NPRM further proposed that after the issues were joined, the hearing officer would require the parties to make offers of proof concerning any relevant issues in dispute, and would not proceed to take evidence unless the parties' offers created a genuine dispute concerning a material fact.

The Board also proposed that a party would be precluded from raising any issue that it failed to raise in its timely statement of position or to place in dispute in response to another party's statement, subject to specified exceptions.

The proposed amendments further provided that if, at any time during the hearing, the hearing officer determined that the only genuine issue remaining in dispute concerned the eligibility or inclusion of individuals who would constitute less than 20 percent of the unit if they were found to be eligible to vote, the hearing officer would close the hearing, and the director would permit those individuals to vote subject to challenge.

The Board also proposed in the NPRM that parties be permitted to file post-hearing briefs only with the permission of the hearing officer.

Finally, the NPRM proposed, consistent with existing practice, that a party that has been served with a subpoena may be required to file or orally present a motion to quash prior to the five days provided in Section 11(1) of the Act.

The Board received a great number of comments about the proposed amendments to § 102.66, particularly with respect to the statement of position form and the consequences of failing to complete it, the joinder and offer-of-proof procedure, and the so-called ''20-percent rule.'' The Board has decided to take no action at this time on those proposals or the proposal regarding subpoenas in order to permit more time for deliberation. The final rule adopts the proposals to amend § 102.66(a) and (d) to ensure that hearing officers presiding over pre-election hearings have authority to limit the presentation of evidence to that which is relevant to the existence of a question of representation and to give the hearing officer discretion in regard to the filing of post-hearing briefs.

Subsec. 102.66(a)

The proposed rule provided:

Rights of parties at hearing. Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other

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evidence relevant to any genuine dispute as to a material fact. The hearing officer shall identify such disputes as follows: * * *

The final rule provides:

> Rights of parties at hearing. Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence so long as such examination, cross-examination, and other evidence supports its contentions and is relevant to the existence of a question of representation or a bar to an election. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.[111]

The Board removed the language drawn from Federal Rule of Civil Procedure 56 in order to avoid the confusion evident in some comments concerning the role of the hearing officer. The substitute language makes clear that the hearing officer's role is the traditional one of admitting only evidence relevant to the matter at issue. The last sentence as well as the subsections of proposed § 102.66(a) and subsections (b), (c), and (d) are deleted because the final rule does not adopt the offer-of-proof, joinder, statement of position, or 20 percent rule provisions.

As explained in the NPRM, the final rule's amendment of § 102.66(a) together with the elimination of § 101.20(c) removes the basis of the Board's holding in *Barre National, Inc.,* 316 NLRB 877 (1995), that a hearing officer must permit full litigation of all eligibility issues in dispute prior to a direction of an election, even though the regional director and the Board need not resolve the issues prior to the election. Together with the amendment of § 102.64(a), the amendment of § 102.66(a) makes clear that, while the regional director must determine that a proper petition has been filed in an appropriate unit in order to find that a question of representation exists, the regional director need not decide all individual eligibility and inclusion questions (so long as they do not affect the type of election that must be conducted) and the hearing officer need not permit introduction of evidence relevant only to disputes concerning the eligibility and inclusion of individuals.

In its comment, Baker & McKenzie questioned how a hearing officer would determine whether proffered evidence was relevant to voter eligibility or voter inclusion as opposed to unit appropriateness. The same question arises under current procedures when both the regional director and the Board defer ruling on eligibility or inclusion questions until after the election. Thus, existing case law in which both regional directors and the Board have deferred deciding individual eligibility and inclusion questions until after an election will provide considerable guidance to hearing officers. Generally, individual eligibility and inclusion issues concern: (1) Whether individuals or groups of individuals, otherwise falling within the terms used to describe an appropriate unit, are nevertheless ineligible because they are excluded from the Act's definition of employee and (2) whether individuals or groups of individuals fall within the terms used to describe the unit. For example, if the petition calls for a unit including ''production employees'' and excluding the typical ''professional employees, guards and supervisors as defined in the Act,'' then the following would all be eligibility or inclusion questions: (1) Whether production foremen are supervisors, see, e.g., *United States Gypsum Co.,* 111 NLRB 551, 552 (1955); (2) whether production employee Jane Doe is a supervisor, see, e.g., *PECO Energy Co.,*322 NLRB 1074, 1083 (1997); (3) whether workers who perform quality control functions are production employees, see, e.g., *Lundy Packing Co.,* 314 NLRB 1042 (1994); and (4) whether Joe Smith is a production employee, see, e.g., *Allegany Aggregates, Inc.,* 327 NLRB 658 (1999).

For different reasons, the hearing officer must take evidence and the regional director must determine, prior to the election, whether any employees in an otherwise appropriate unit containing nonprofessionals are professionals. Under Section 9(b)(1) of the Act, any professionals in a unit containing both professional and nonprofessional employees must be given the choice of whether they wish to be represented in such a mixed unit. Because this requires special balloting procedures, see *Sonotone Corp.,* 90 NLRB 1236 (1950), the question of whether any employees included in the otherwise appropriate unit are professionals must be answered prior to the election.[112] Similarly, if a party contends that, under Board precedent, an eligibility standard different than the Board's ordinary standard should be used, the hearing officer may take such evidence as may be necessary to resolve that question since its resolution is a prerequisite to the conduct of the election.

Some comments on the proposed amendments argue that limiting evidence to that which is relevant to whether a question of representation exists is inconsistent with the statute's requirement that, absent an election agreement, the Board must hold an ''appropriate hearing'' prior to conducting an election.[113] The Board disagrees. Section 9(c)(1) of the Act provides in pertinent part:

> Whenever a petition shall have been filed, * * * the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

Thus, as explained above in relation to § 102.64, the statutory purpose of the pre-election hearing is to determine whether a question of representation exists. The amendments to §§ 102.64(a) and 102.66(a) are entirely consistent with Section 9(c)'s requirement that ''an appropriate hearing'' be held before the election is conducted. The two amendments are consistent with Section 9(c) because both permit parties to introduce all evidence at the pre-election hearing that is relevant to whether a question of representation exists. Indeed, the amendment to § 102.66(a) expressly vests parties with a right to present evidence ''so long as such examination, cross-examination, and other evidence supports its contentions and is relevant to the existence of a question of representation or a bar to an election.'' Nothing in Section 9(c) or any other section of the Act requires the Board to permit parties

[111] In the proposed rule, the last two sentences were in a separate subsection (e).

[112] Although some comments argue the same would be true of the question of whether any employees in a unit containing non-guards are guards, the Board disagrees. The Act does not require any special election procedures for guards equivalent to what Section 9(b)(1) requires for professionals. While Section 9(b)(3) precludes the Board from finding that a ''mixed unit,'' i.e., one containing both guards and nonguards, is appropriate, if any party contends that an individual in an otherwise appropriate unit of nonguards is a guard, the regional director can find the unit excluding guards appropriate and, if the individual attempts to cast a ballot, he or she can be permitted to vote subject to challenge and the question can be resolved after the election.

[113] See Americans for Limited Government; Constangy. Other comments argue generally that Section 9(c) requires the Board to conduct a pre-election hearing on issues concerning eligibility and inclusion. See GAM; AHA; ALFA; COLLE; CDW; NMA.

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to introduce evidence at a pre-election hearing that is not relevant to whether a question of representation exists.

The final rule's amendment of §§ 102.64(a) and 102.66(a) is also consistent with the final sentence of current § 102.64(a), which the final rule does not amend, though the sentence will now appear in § 102.64(b). That sentence provides that the hearing officer's duty is ''to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director *may discharge their duties under section 9(c) of the Act.''* (Emphasis added.) A hearing officer ensures ''a full and complete record upon which the Board or the regional director may discharge their duties under Section 9(c) of the Act'' when he or she permits parties to present evidence which is relevant to the existence of a question of representation. The Board's duty under Section 9(c) is to conduct a hearing to determine if a question of representation exists and, if such a question exists, to direct an election to answer the question and to certify the results. The final rule expressly allows the hearing officer to create a record permitting the regional director to do precisely that.

In short, the effect of the amendments is simply to permit the hearing officer to prevent the introduction of evidence that is not needed in order to determine if a question of representation exists. By definition, if the hearing officer excludes evidence that is not relevant to whether a question of representation exists, the hearing officer is not impeding the ability of the regional director or the Board to discharge their respective duties under Section 9(c) of the Act.

SHRM argues that ''[u]nder current NLRB procedural rules, a party is guaranteed the right to submit evidence in support of its position at the hearing.'' The Board acknowledges that the current language in §§ 102.66(a) and 101.20(c), when read in isolation, could have been construed to mean that parties have a right to present evidence regarding issues that do not relate to whether a question of representation exists. But that is why the Board is amending § 102.66(a) and eliminating § 101.20(c). Put simply, it is administratively irrational to require the hearing officer at a pre-election hearing to permit parties to present evidence that relates to matters that need not be addressed in order for the hearing to fulfill its statutory function of creating a record upon which the regional director can determine if a question of representation exists. In other words, it is administratively irrational to require the hearing officer to permit the introduction of irrelevant evidence.

SHRM cites *Barre-National, Inc.,* 316 NLRB 877 (1995), in which the Board relied on §§ 102.66(a) and 101.20(c) in holding that the hearing officer erred by preventing an employer from presenting evidence at a pre-election hearing regarding the eligibility of 24 line and group leaders to vote in an election directed in a unit of production, maintenance, and warehouse employees.[114] The employer sought to present evidence that the line and group leaders were supervisors. In support of its conclusions that the hearing officer erred by excluding the evidence and the regional director erred by permitting the disputed employees to vote subject to challenge, the Board quoted the portion of § 102.66(a), which then read:

> Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, and any party and the hearing officer shall have power to call, examine, and cross examine witnesses and to introduce into the record documentary and other evidence.

The Board also quoted the portion of § 101.20(c), which then read:

> The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions.

Based on its reading of these two provisions, the Board concluded, ''Section 102.66(a) of the Board's Rules and Section 101.20(c) of the Board's Statements of Procedure entitle parties at such hearings to present witnesses and documentary evidence in support of their positions.'' 316 NLRB at 878.[115] The Board held in *Barre-National,* ''Under all the circumstances, the pre-election hearing held in this case did not meet the requirements of the Act and the Board's rules and Statements of Procedures.'' *Id.* Because of the use of the conjunctive ''and'' rather than the disjunctive ''or'' and the fact that nothing in Section 9(c) of the Act can possibly be understood to give parties a right to litigate questions of individual eligibility or inclusion prior to an election,[116] *Barre-National* cannot be read to rest on a construction of the Act, but only on the Board's reading of §§ 102.66(a) and 101.20(c). The final rule's amendment of § 102.66(a) and elimination of § 101.20(c) make clear that parties are entitled to present evidence in support of their contentions only if the evidence is relevant to the existence of a question of representation, which it was not in *Barre-National.* The Board will no longer follow *Barre-National* under the amended rules.

Moreover, as explained in the NPRM, the result in *Barre-National* is even less administratively rational given the Board's acknowledgement in that case that an entitlement to litigate issues at the pre-election hearing is distinct from any claim of entitlement to a decision on all issues litigated at the hearing, and that ''reviewing courts have held that there is no general requirement that the Board decide all voter eligibility issues prior to an election.'' *Id.* at 879 n.9. The United States Court of Appeals for the Second Circuit similarly held that ''the determination of a unit's composition need not be made before the election.'' *Sears, Roebuck & Co.* v. *NLRB,* 957 F.2d 52, 55 (2d Cir. 1992). As stated in the NPRM, the Board has consistently sustained regional directors' decisions to defer resolution of individual employees' eligibility to vote until after an election (in which the disputed employees may cast challenged ballots). See, e.g., *Sears, Roebuck,* 957 F.2d at 54–55. The Second Circuit has explained that the regional director has ''the prerogative of withholding a determination of the unit placement of [a classification] of employees until after the election.'' *Id.* at 56. In *Northeast Iowa Telephone Co.,* 341 NLRB 670, 671

[114] The 24 disputed individuals would have constituted 8–9 percent of the unit if included. 316 NLRB at 878.

[115] The Board also cited the second sentence of § 102.64(a), but, as explained above, that sentence provides no support for the holding in *Barre-National.*

[116] After the vote on the Taft-Hartley amendments in 1947, Senator Taft placed in the record a ''Supplementary Analysis of the Labor Bill as Passed.'' 93 Cong. Rec. 7000 (June, 12, 1947). In that analysis, Senator Taft explained that the Conference Committee had revised the amendments of Section 9(c)(4) of the Act to eliminate a provision permitting ''pre-hearing elections.'' *Id.* at 7002. The Supplementary Analysis then stated, ''That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. It is the function of hearings in representation cases to determine whether an election may properly be held at the time, and if so, to decide questions of unit and eligibility to vote.'' *Id.* The Board does not believe that Senator Taft's vague reference to ''eligibility to vote'' was intended to encompass the types of questions concerning individual eligibility or inclusion discussed above as opposed, for example, to the general eligibility formula to be used in an election. See, e.g., *Alaska Salmon Industry,* 61 NLRB 1508, 1511–12 (1945) (changing eligibility formula for seasonal industries). In any event, the statement of a single legislator, even the Act's principal sponsor, made after the dispositive vote, cannot alter the plain meaning of the language in Section 9(c)(1), particularly in light of the Board's longstanding construction of the Act not to require that it ''decide'' such individual eligibility questions prior to an election. See *Barre-National,* 316 NLRB at 878 n. 9.

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(2004), the Board characterized this procedure as the ''tried-and-true 'vote under challenge procedure.' '' See also *HeartShare Human Services of New York, Inc.,* 320 NLRB 1 (1995), enforced, 108 F.3d 467 (2d Cir. 1997). The Eighth Circuit has stated that ''deferring the question of voter eligibility until after an election is an accepted NLRB practice.'' *Bituma Corp.* v. *NLRB,* 23 F.3d 1432, 1436 (8th Cir. 1994). Even when a regional director resolves such a dispute pre-election, the Board, when a request for review is filed, often defers review of the resolution, permitting the disputed individuals to vote subject to challenge. See, e.g., *Silver Cross Hospital,* 350 NLRB 114, 116 n.10 (2007); *Medlar Elec., Inc.,* 337 NLRB 796, 796 (2002); *Interstate Warehousing of Ohio, LLC,* 333 NLRB 682, 682–83 (2001); *Orson E. Coe Pontiac-GMC Truck, Inc.,* 328 NLRB 688, 688 n.1 (1999); *American Standard, Inc.,* 237 NLRB 45, 45 (1978). In short, the Board has concluded that it serves no statutory or administrative purpose to require the hearing officer to permit pre-election litigation of issues that both the regional director and the Board are entitled to, and often do, defer deciding until after the election and that are often rendered moot by the election results. The final rule thus eliminates wholly unnecessary litigation that serves as a barrier to the expeditious resolution of questions of representation.

Some comments argue that permitting the hearing officer to exclude evidence related to individual eligibility and inclusion issues will deprive the decision-makers of an adequate record.[117] The Board does not believe that the final rule will deprive the regional director, the Board, or the courts of appeals of an adequate record to review. It is true that the record will not include evidence that the hearing officer found was not relevant, but that is the case now and is the case with respect to any hearing or trial court record developed in front of an officer or judge who applies ordinary rules of relevance. The final rule does not amend Section 102.68 of the Board's Rules and regulations, which provides that:

> The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, notice of hearing with affidavit of service thereof, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the regional director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the regional director or to the Board, and the decision of the regional director, if any.

Moreover, if the regional director finds that the record is not sufficient to determine whether a question of representation exists or any other matter that must be addressed prior to directing an election, the regional director can reopen the record and remand the proceeding to the hearing officer.

Some comments make a more specific point concerning the need for an adequate record upon which the regional director can determine whether the petitioned-for unit is an appropriate unit as required by the Act.[118] These comments suggest that if an employer declines to take a position on the appropriateness of the petitioned-for unit and the hearing officer exercises the authority to limit the employer's examination, cross-examination, and introduction of evidence to that which ''supports its contentions'' under § 102.66(a), the regional director and Board may be deprived of an adequate record upon which to fulfill their statutory duty to determine if the proposed unit is appropriate. The Board believes that these comments misunderstand the effect of the amendment. First, as explained in the NPRM, hearing officers have this same authority to limit parties' participation in the hearing under the current rules. See 76 FR 36823; *Bennett Industries Inc.,* 313 NLRB 1363 (1994); *Allen Health Care Services,* 332 NLRB 1308 (2000); Casehandling Manual Section 11217. Second, even if the hearing officer exercises the authority to limit an employer's presentation of evidence under these circumstances, both the petitioner and the hearing officer will retain the right to introduce the evidence needed to make the required determination concerning the unit. That evidence may include testimony adduced from the employer's owners, managers, or supervisors as witnesses, called under subpoena or otherwise, and documents obtained from the employer. Third, the final rule, like the current rules, merely vests the hearing officer with discretion to limit a party's participation in the hearing as it relates to issues concerning which the party has not taken a position. The hearing officer remains free to permit such participation if the officer concludes it is necessary to develop a complete record. The Board has concluded that employers who are unable or unwilling to take a position concerning the appropriateness of a proposed unit of their own employees are unlikely to provide assistance to the hearing officer in the development of an adequate record upon which to address that question. The Board has further concluded that not vesting hearing officers with clear authority to limit such employers' participation in the hearing under those circumstances threatens the hearing officer's ability to control the proceedings and avoid burdening the record.

Some comments criticize the Board's statement of position, joinder, offer-of-proof, preclusion, and 20-percent proposals on the ground that assigning the hearing officer to manage the revised process would be inconsistent with the limits on the role of the hearing officer contained in Section 9(c)(1) of the Act or beyond the capacity of the Board's current hearing officers.[119] The Board does not respond to these comments at length because the Board is taking no action on those proposals at this time.

To the extent the authors of the comments would criticize the final rule on the same grounds, the Board would find them to be unpersuasive. The hearing officer's role under the amendments is limited to the traditional one of controlling the hearing and preventing the record from being burdened by irrelevant evidence. *See Mariah, Inc.,* 322 NLRB 586, 586 n.1 (1996) (hearing officer acted consistent with his role of ensuring that the record is both complete and concise in refusing to permit the introduction of irrelevant evidence at the pre-election hearing). The hearing officer may limit the presentation of evidence based on relevance but cannot render a decision or make any form of recommendation. Thus, the final rule is fully consistent with Section 9(c)(1). Moreover, if upon transmission of the record to the regional director, the director believes the record is insufficient to render a decision on a particular issue relevant to determining whether a question of representation exists or in any other respect, the director may reopen the record for presentation of additional evidence before the hearing officer relevant to that issue.[120]

The Board is also confident that its hearing officers can fully and competently perform their role under the final rule. Currently, the regional

[117] See, e.g., AHA.

[118] AHA argues that it would be unfair to preclude employers from introducing evidence given that some evidence must be accepted concerning this issue.

[119] ALFA; SHRM; Bluegrass Institute; NMA; ACE; AHCA; NAM; Center on National Labor Policy (CNLP).

[120] The Board also notes in this regard that, as explained in relation to § 102.65(c), the final rule does not adopt the narrowed standard for special permission to appeal rulings of the hearing officer to the regional director.

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directors assign either field attorneys or field examiners as hearing officers. Field attorneys must possess a J.D. degree and be an active member of a bar. Field examiners must possess a B.A. degree. The Board has traditionally provided written guidance to hearing officers as well as periodic training. Hearing officers also participate in a video training program that covers the subject of conducting a hearing as well as relevant professional development programs. There is also an almost 500-page publication entitled *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings,*[121] which is periodically updated and made available to hearing officers (and the public on the Board's Web site). Hearing officers are also routinely given feedback on their conduct of hearings by the staff members assigned to assist the regional director in drafting the resulting decision as well as by the regional director. The Board intends to continue to provide these types of assistance, feedback, and training. Finally, the qualifications of hearings officers are not set by statute or regulation. To the extent the regional directors or the Board find that the existing hearing officers cannot competently perform the role assigned them under the final rule, the Board will provide necessary training or alter the qualifications for service as a hearing officer.

Some comments criticize the Board's statement of position, joinder, offer-of-proof, preclusion, and 20-percent proposals on the ground that the proposals would violate the parties' rights to due process of law by limiting the evidence they could introduce at the pre-election hearing.[122] The Board does not respond to these comments at length because the Board is taking no action on those proposals at this time.

To the extent the authors of the comments would criticize the final rule on the same grounds, the Board would find them to be unpersuasive. Most importantly, the final rule does not limit any party's right to present evidence, but merely gives the hearing officer and regional director discretion to defer introduction of such evidence until after the election. Moreover, a party has no right to present irrelevant evidence under the Act, the APA, or the Constitution. *See Mariah, Inc.,* 322 NLRB at 586 n.1 (hearing officer acted consistent with his role in ensuring that the record is both complete and concise in refusing to permit the introduction of irrelevant evidence at the pre-election hearing); *National Mining Ass'n* v. *DOL,* 292 F.3d 849, 873–74 (DC Cir. 2002) (the APA ''empowers agencies to 'exclu[de] * * * irrelevant, immaterial, or unduly repetitive evidence' as 'a matter of policy' '') (citation omitted); *U.S.* v. *Maxwell,* 254 F.3d 21, 26 (1st Cir. 2001) (although a criminal defendant ''has a wide-ranging right to present a defense, * * * this does not give him a right to present irrelevant evidence''); *U.S.* v. *Vazquez-Botet,* 532 F.3d 37, 51 (1st Cir. 2008) (same). Accordingly, parties have no right to present irrelevant evidence at a pre-election hearing, which is not governed by the APA's formal adjudication provisions. See 5 U.S.C. 554 (a)(6); In *re Bel Air Chateau Hospital, Inc.,* 611 F.2d 1248, 1252–1253 (9th Cir. 1979) (representation case proceedings exempt from APA formal adjudication requirements); *NLRB* v. *Champa Linen Service Co.,* 437 F.2d 1259, 1262 (10th Cir. 1971) (same). The Board believes that the final rule merely codifies evidentiary limits that trial court judges routinely apply and thus is fully consistent with the requirement of an ''appropriate hearing,'' the APA, and the due process clause.

A number of comments suggest that Section 9(c) requires a hearing regardless of whether material facts are in dispute.[123] But, as under the current rules, the final rule provides for a pre-election hearing in all cases where the parties have not entered into an election agreement resolving all possible pre-election disputes. Section 9(c) does not require an evidentiary hearing in every case. Rather, it requires ''an appropriate hearing.'' If the parties come to the hearing and the hearing officer determines that there are no disputes that must be resolved prior to the election (because, for example, all parties agree on the record that the Board has jurisdiction and that the only dispute concerns the supervisory status of one individual in a unit that all parties agree on the record is appropriate), an appropriate hearing does not require introduction of further evidence. See *United States* v. *Storer Broadcasting,* 351 U.S. 192, 205 (1956); *accord American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F.2d 624, 628 (en banc), *cert. denied,* 385 U.S. 843 (1966). In fact, the Board concludes that a hearing where irrelevant evidence is introduced is an inappropriate hearing.

Several comments criticize the proposed 20-percent rule on policy grounds. For example, some comments argue that it is unfair to defer resolution of supervisory status questions, because employers need to know who their supervisors are so they know who they can require to campaign against employee representation.[124] Similarly, comments argue that employers need to know which employees are eligible to vote so they know whom to address concerning the question of representation.[125] Numerous comments additionally express the position that deferral of eligibility questions under the 20-percent rule would impair employee rights. More specifically, many comments assert that deferral would deprive employees of knowledge about the precise parameters of the bargaining unit, thereby depriving them of the right to cast an informed ballot,[126] or impeding their ability to determine whether they share a community of interest with the other voters.[127] Similarly, a number of comments express the view that deferral of eligibility issues would engender confusion among the voting employees.[128] Other comments generally suggest that the deferral of eligibility issues would increase the likelihood that disputed individuals would refrain from voting in an election. For example, a number of comments express the position that employees, faced with the prospect of having their votes challenged, might simply refrain from voting,[129] some as a result of a concern that—particularly in smaller units—they could be easily identified as the individuals whose votes determined the outcome of the

[121] Office of the General Counsel, National Labor Relations Board, *Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings* (Sept. 2003).

[122] Constangy; SHRM; Sheppard Mullins; NRF; Kuryakyn Holding LLC (Kuryakyn); NMMA; CNLP.

[123] See SHRM; CNLP.

[124] Seyfarth Shaw; Council of Smaller Enterprises (COSE); Constangy; Indiana Chamber of Commerce; COLLE; RILA. SHRM also suggests that deferring resolution of supervisory status questions might somehow threaten attorney-client communications if counsel communicates with an individual the employer believes is a supervisor who is later held not to be a supervisor. This same concern exists under the current procedures as explained above. Moreover, the test the Board uses to determine who is a supervisor under the Act is not and need not be the same as the various tests used to determine if attorney communications to an individual employed by the attorney's client are privileged.

[125] See, e.g., PIA.

[126] See, e.g., Testimony of Eric Schweitzer; Testimony of David Burton; GAM; Constangy; ACC; Anchor Planning Group; Kruchko & Fries; NRF; Baker & McKenzie; COLLE; Indiana Chamber of Commerce. IBEW, in contrast, states that, in its experience, employee voters are motivated primarily by whether they desire representation and not by precisely which employees will be in the unit.

[127] See, e.g., Associated Oregon Industries; COSE; Seyfarth Shaw; Kuryakyn; NMMA; John Deere Water; NACCO Materials Handling Group; Graphtec America; Baker & McKenzie.

[128] See, e.g., SHRM; Seyfarth Shaw; ACE; AHA; ALFA; Spartan Motors.

[129] See, e.g., Pinnacle Health Systems; PIA; Arizona Hospital and Healthcare Association.

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election.[130] Finally, with respect specifically to the deferral of supervisory status questions, several comments generally express concern that employees with disputed supervisory status would not know whether they could appropriately speak in favor of or against union representation, attend union meetings, or sign authorization cards,[131] and SHRM asserts that employees would be chilled in the exercise of their Section 7 and First Amendment rights.

However, in this final rule the Board has determined not to adopt the 20-percent rule at this time, or make any change to the status quo concerning the regional director's or Board's discretion to defer deciding or the parties' right to agree to defer litigation concerning such questions until after the election. Prior to the amendments, regional directors were free to decide individual eligibility questions if they wished to do so or to defer such decisions until after the election and direct that disputed individuals vote subject to challenge. The same is true under the final rule. Although the amendments permit the hearing officer to exclude evidence that is not relevant to determining whether a question of representation exists–and thereby permit the hearing officer to exclude evidence regarding individual eligibility questions–the hearing officer is free to permit the introduction of such evidence and the regional director is free to direct that such evidence be admitted if he or she resolves to decide the individual eligibility questions at issue.

In any event, the Board is not persuaded by the policy argument that it should permit litigation of all individual supervisory status questions—even though such questions are ordinarily irrelevant to the statutory purpose of the hearing—on the grounds that resolution of such questions is necessary for an employer effectively to campaign against union representation. Most fundamentally, while the question of whether particular individuals are supervisors as defined in the Act has generated considerable litigation, the question exists only at the margin. In the Board's experience, in virtually every case, even where there is uncertainty concerning the supervisory status of individual employees, the employer nevertheless has in its employ managers and supervisors whose status is not disputed and is undisputable.[132]

The policy argument contained in these comments is also based on a set of faulty premises. First, as explained above and in the NPRM, employers have no right to a pre-election decision concerning individual eligibility under the current rules. Second, even under the current rules, a regional director cannot issue a decision on any eligibility question until well after the filing of the petition because a hearing must be noticed (no sooner than five business days after the notice), the hearing must be completed, and the regional director must issue a decision. Thus, for a substantial part of any campaign, including a substantial part of the ''critical period'' between the filing of the petition and the election, employers will not yet have a regional director's decision even in those cases where one issues pre-election. Third, again under the current rules, even if the regional director makes a decision concerning an individual eligibility question, it is subject to a request for review by the Board. The Board rarely rules on such requests until shortly before the election and, sometimes, not until after the election. See, e.g., *Mercedes-Benz of Anaheim,* Case 21–RC–21275 (May 18, 2011) (day before the election); *Caritas Carney Hospital,* Case 1–RC–22525 (May 18, 2011) (after the election); *Columbus Symphony Orchestra, Inc.,* 350 NLRB 523, 523 n.1 (2007) (same); *Harbor City Volunteer Ambulance Squad, Inc.,* 318 NLRB 764, 764 (1995) (same); *Heatcraft, Div. of Lennox Indus., Inc.,* 250 NLRB 58, 58 n.1 (1980) (same). Fourth, the problem identified by the employer comments is even more acute for unions, which must obtain a showing of interest prior to filing a petition. If the union asks employees to help gather a showing of interest and the employees are later determined to be supervisors, the Board may hold the showing of interest to be tainted and overturn election results favoring union representation on that ground. See *Harborside Healthcare Inc.,* 343 NLRB 906 (2004). That problem cannot possibly be solved through any form of post-petition, pre-election hearing. Fifth, under the Act itself, even if a regional director's decision and final Board decision are rendered prior to an election, the Board decision is potentially subject to review in the courts of appeals and the court of appeals' decision cannot be rendered pre-election. See 29 U.S.C. 159(d) and 160(e); *Boire* v. *Greyhound Corp.,* 376 U.S. 473, 476–79 (1964).[133] Thus, the uncertainty with which the comments are concerned exists under the current rules and cannot be fully eliminated.

Nor does the Board agree that the proposed amendments improperly deprive employees of the ability to make an informed choice in the election. As explained above, under the amendments, as under the current rules, the regional director must determine the unit's scope and appropriateness prior to the direction of the election. Accordingly, at the time they cast their ballots, the voting employees will be fully informed as to the scope of the unit, and will be able to fully assess the extent to which their interests may align with, or diverge from, other unit employees. Although the employees may not know whether particular individuals ultimately will be deemed eligible or included and therefore a part of the bargaining unit, that is also the case under the Board's current rules, as explained above, and when the parties agree to permit disputed employees to vote subject to challenge. In addition, as pointed out by SEIU in its comments, a similar choice has confronted voters in mixed professional/non-professional units since 1947, when Congress amended the Act to provide that a majority of the professional employees must vote separately to be part of such a mixed unit and the results of that separate vote, which takes place simultaneously with the vote in the entire unit, are not known when employees cast their ballots. See Section 9(b)(1); *Sonotone Corp.,* 90 NLRB at 1241–42. In that context, the Board has held, ''Such a procedure * * * presents the employees with an informed choice.'' *Pratt & Whitney,* 327 NLRB 1213, 1218 (1999).

Many comments cite the courts of appeals' decisions in *NLRB* v. *Beverly Health and Rehabilitation Services,* 120 F.3d 262 (4th Cir. 1997) (unpublished per curiam opinion), and *NLRB* v. *Parsons School of Design,* 793 F.2d 503 (2d Cir. 1986). As explained in the NPRM, those two decisions represent the minority view in the courts. The

[130] See, e.g., LRI; Anchor Planning Group; Bluegrass Institute.

[131] See, e.g., Seyfarth Shaw; ACE; Sheppard Mullin.

[132] See, e.g., *McAlester General Hospital,* 233 NLRB 589, 589–90 (1977) (noting that even without considering employees whose supervisory status was in dispute, employer employed one supervisor for every eight unit employees and, if the employer filled open supervisory positions, it would employ one supervisor for every three unit employees).

[133] ALFA expressed concern that if an alleged supervisor is permitted to vote subject to challenge, the results of the election might be set aside pursuant to an objection citing the presence of a supervisor in the polling area if the individual is found to be a supervisor after a post-election hearing. As explained above, this scenario can arise under the current procedures. See, e.g., *Sorenson Lighted Controls,* 286 NLRB 969, 989 (1987). The Board is not aware of any case holding such conduct *per se* objectionable under these circumstances and the existence of the new rules would be a factor the Board would consider if such an objection arises in the future.

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majority of the courts of appeals have upheld the Board's vote-and-impound procedures and upheld election results even when the eligibility or inclusion of certain employees was not resolved until after the election.[134] Moreover, under the final rule, the hearing officer and regional director have discretion to permit litigation and to resolve eligibility and inclusion questions that might significantly change the size or character of the unit, thus addressing the courts' concerns in both *Beverly* and *Parsons.* In addition, as explained in the NPRM, the courts' concern in both of those cases was that voters were somehow misled when the regional director defined the unit in one way prior to the election and the Board revised the definition after the election. The final rule would actually prevent exactly that form of change in unit definition from occurring, by deferring both a regional director's decision, in most instances, and a Board decision until after the election and permitting disputed employees to vote subject to challenge. Thus, employees will not in any manner be misled about the unit. Rather, they will cast their ballots understanding that the eligibility or inclusion of a small number of individuals in the unit has not yet been determined. Finally, as proposed in the NPRM, the Board could, even prior to or without adopting the relevant proposed rule, revise its final notice of election to inform employees that specified employees are voting subject to challenge, what that means, and how their status will be resolved. See *Sears, Roebuck,* 957 F.2d at 55 (regional director permitted employees in one classification to vote subject to challenge and included section in notice which ''detailed the special voting posture of the automotive floor sales employees and the circumstances for including their votes'').

PIA and Bluegrass Institute suggest that deferring resolution of individual eligibility questions until after the election threatens the secrecy of the ballot and that employees who are permitted to vote subject to challenge are less likely to vote because they fear that the parties will learn how they voted. However, even if the amendments to §§ 102.64(a) and 102.66(a) and the elimination of § 101.20(c) lead to more disputes concerning individual eligibility being deferred until after the election, the Board is not persuaded that the final rule threatens the secrecy of the ballot or voter turnout. The courts have upheld the Board's current practice of deferring individual eligibility questions under most circumstances. Moreover, the ballots cast by the employees directed to vote subject to challenge are not counted if they are not determinative. Accordingly, ballot secrecy is preserved in those cases. Even if challenged ballots are determinative, the ballots are not counted if the employees who cast them are ultimately found to be ineligible after the post-election hearing. And, even if the ballots cast by such individuals are determinative and a post-election hearing results in the individuals who cast them being found eligible, the ballots are not opened and counted one by one, but rather the ballots of all individuals found to be eligible are ''thoroughly mixed'' before being opened and counted. *See* Casehandling Manual Section 11378. Accordingly, the Board believes that it is only in cases where there is just one determinative challenge or where all of the potentially determinative challenged ballots are marked in the same way that the parties will learn how the employees voted. However, that is both rare and inherent in any system that permits challenges, including the current system. Thus, even if regional directors were prohibited from deferring individual eligibility issues, which is not the case currently, parties would still have a right to challenge voters for good cause at the polls and the commenters' concern would remain.[135]

Finally, the Board is unaware of any significant differences between the turnout of employees whose eligibility to vote has not been disputed or has been resolved prior to the election and employees permitted to vote subject to challenge. The case law demonstrates that even in cases where only a single individual is permitted to vote subject to challenge, the individual is not necessarily deterred from voting. See, e.g., *NLRB* v. *Cal-Western Transport,* 870 F.2d 1481, 1483, 1486 (9th Cir. 1989) (regional director permitted single employee to vote subject to challenge and he did so); *NLRB* v. *Staiman Brothers,* 466 F.2d 564, 565 (3d Cir. 1972) (deciding vote cast by single employee permitted to vote subject to challenge by agreement of the parties).

Finally, balanced against any asserted employer or employee interests in pre-election litigation of individual eligibility or inclusion questions is the statutory interest in prompt resolution of questions of representation. As explained above and in the NPRM, permitting the litigation of such matters imposes serious costs, and no comments on the NPRM convinced the Board otherwise. It plainly frustrates the statutory goal of expeditiously resolving questions of representation, and it frequently imposes unnecessary costs on the parties and the government. As explained in the NPRM, it often results in unnecessary litigation and a waste of administrative resources as the eligibility of potential voters is litigated (and in some cases decided), even when their votes end up not affecting the outcome of the election. If a majority of employees votes against representation, even assuming all the disputed votes were cast in favor of representation, the disputed eligibility questions become moot. If, on the other hand, a majority of employees chooses to be represented, even assuming all the disputed votes were cast against representation, the Board's experience suggests that the parties are often able to resolve the resulting unit placement questions in the course of bargaining once they are free of the tactical considerations that exist pre-election and, if they cannot do so, either party may file a unit clarification petition to bring the issue back before the Board. See *New York Law Publishing Co.,* 336 NLRB No. 93, slip op. at 2 (2001) (''The parties may agree through the course of collective bargaining on whether the classification should be included or excluded. Alternatively, in the absence of such an agreement, the matter can be resolved in a timely invoked unit clarification petition.''). As the Eighth Circuit observed, ''The NLRB's practice of deferring the eligibility decision saves agency resources for those cases in which eligibility actually becomes an issue.'' *Bituma Corp.* v. *NLRB,* 23 F.3d 1432, 1436 (8th Cir. 1994). The Sixth Circuit similarly found that ''[s]uch a practice enables the Board to conduct an immediate election.'' *Medical Center at Bowling Green* v. *NLRB,* 712 F.2d 1091, 1093 (6th Cir. 1983).

NRTWLDF argues that application of the 20-percent rule at the hearing might cast into question the regional office's earlier, administrative determination that the petition was accompanied by an adequate showing of interest. Whether or not that is the case, the final rule does not adopt the 20-percent rule. Moreover, the concern expressed in the comment

[134] See, e.g., *Sears, Roebuck & Co.* v. *NLRB,* 957 F.2d 52 (2d Cir. 1992); *Nightingale Oil Co.* v. *NLRB,* 905 F.2d 528, 533–34 (1st Cir. 1990); *NLRB* v. *Clark Distributing,* 917 F.2d 24 (6th Cir. 1990) (unpublished); *Prudential Ins. Co. of America* v. *NLRB,* 832 F.2d 857, 861 (4th Cir. 1987).

[135] The Board also notes that to the extent the amendments do result in more individuals casting challenged ballots than under the current rules, the amendments may well have the effect of making it less likely that parties will be able to discover how particular individuals voted.

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could equally be expressed about the current procedures under which regional directors and the Board routinely defer ruling on eligibility questions without revisiting the adequacy of the showing of interest. In addition, the final rule leaves the hearing officer and regional director with discretion, respectively, to permit introduction of evidence and to rule pre-election if the eligibility questions involve a large percentage of the unit. When the deferred questions concern only a small percentage of the unit, the concern expressed by NRTWLDF is unlikely to arise. Furthermore, the required showing of interest is purely an internal administrative matter, as explained in current § 102.18(a): ''it being the Board's experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has been designated by at least 30 percent of the employees.'' The adequacy of the showing is non-litigable. *The Borden Co.,* 101 NLRB 203, 203 n. 3 (1952) (''the question of the sufficiency of the showing of interest * * * [is a matter] for administrative determination and not subject to litigation by the parties); Casehandling Manual Section 11028.3. Finally, given that the only consequence of the possible scenario envisioned by NRTWLDF is, in rare cases, the conduct of an election which would not otherwise have been conducted, the Board does not believe that that possibility weighs heavily against the efficiencies gained by affording the hearing officer discretion not to take evidence concerning individual eligibility and inclusion questions.

Some comments criticize the 20-percent rule on the grounds that it will lead to more post-election litigation and result in more overturned elections as a result of post-election rulings concerning the eligibility of employees.[136] Similarly, two comments raise the concern that because the bargaining obligation attaches at the time of the tally, employers will be required to invest time and money in bargaining with a union that has questionable representative status.[137] These comments misunderstand the proposals. As under the current rules, if decisions concerning individuals' eligibility or inclusion are deferred until after the election, the individuals will vote subject to challenge. If their votes are not potentially outcome determinative, the matter will not be litigated, thus decreasing the total amount of litigation. If their votes are potentially outcome determinative, the matter will be litigated and the resolution may affect the results of the election, but it will not lead to the results of the election being overturned. As under the current procedures, post-election proceedings concerning challenged ballots will proceed and conclude promptly at the regional level. As explained above and below in relation to §§ 102.62(b) and 102.69, any Board review of the disposition will be expedited by the final rule.

Finally, a few comments argue that deferral of voter eligibility questions will create more issues for the parties to address during first contract negotiations. As explained above, this already happens under the current rules, when the regional director or the Board defers decision on the questions and does not decide them post-election because the votes of the disputed individuals were not potentially outcome determinative. The Board does not believe addressing such questions will complicate bargaining, particularly when the parties can file a timely unit clarification petition if they are unwilling or unable to resolve the matter.

Subsection 102.66(d)

The NPRM proposed amending §§ 102.67 and 102.66(d) to vest the hearing officer with discretion to control the filing, subjects, and timing of any post-hearing briefs. The final rule adopts this proposal.

The NPRM explained that, given the often recurring and uncomplicated legal and factual issues arising in pre-election hearings, briefs are not necessary in every case to permit the parties to fully and fairly present their positions or to facilitate prompt and accurate decisions. Yet under existing §§ 102.67(a) and 101.21(b), in nearly all cases parties are afforded a right to file briefs at any time up to seven days after the close of the hearing.[138] By exercising that right or even by simply declining to expressly waive that right until after the running of the seven-day period, parties can potentially delay the issuance of a decision and direction of election and the conduct of an election for purely tactical reasons.

Various comments, including those of SHRM, AHA, AHCA and ALFA, oppose the proposed amendment on the ground that briefs are needed to sum up the evidence presented at the pre-election hearing. SHRM and ACE point out that this cannot be done as effectively in oral argument at the close of the hearing because the full transcript is ordinarily not yet available. Bruce E. Buchanan argued that briefs serve to narrow the issues in dispute and identify relevant case law. The AFL–CIO points out that the current Casehandling Manual recognizes that briefs are not necessary or even of assistance in every case. Section 11242 provides, ''Before the close of the hearing, the hearing officer should encourage the parties to argue orally on the record rather than to file briefs.'' [139]

Having considered these comments, the Board has concluded that post-hearing briefing is not required or even helpful in every case. In this regard, it is important to note that amended § 102.66(d) does not prevent parties from filing post-hearing briefs. Rather, it simply vests the hearing officer with discretion to permit or not permit such filings and to otherwise control the content and timing of any post-hearing briefs. Moreover, in every case, parties aggrieved by a decision of the regional director will have a right to file a brief in support of their request for review. Thus, in every representation case that proceeds to a pre-election hearing, a party aggrieved by a ruling of a hearing officer or decision of the regional director will have had the opportunity to file at least one and sometimes two briefs before the close of the case. Finally, in relation to the need for a transcript before parties can adequately sum up the evidence, the Board notes that the average pre-election hearing lasts for less than one day.

It also bears mentioning that, even under the current rules, parties do not enjoy a right to file post-hearing briefs in certain kinds of representation cases. For example, the Board's current rules do not permit the filing of briefs absent ''special permission'' after a pre-election hearing conducted under Sections 8(b)(7) and 9 of the Act. See 29 CFR 101.23(c). Similarly, there is no right to file post-hearing briefs after a hearing on challenges or objections. See Casehandling Manual Section 11430;

[136] See Associated Oregon Industries; Kuryakyn; Bluegrass Institute; NMMA.

[137] See COSE; Constangy.

[138] Despite the current regulations, the Board has denied review of a direction of election when one argument made by the party requesting review was that the hearing officer had refused to permit post-hearing briefs. *Unifirst Corp.,* Case 5–RC–15052 (Aug. 16, 2000). The Board reasoned that the party had showed no prejudice and was able to fully present its substantive argument in the request for review. *Id.* at n.1.

[139] The AFL–CIO also points out that a preference for oral argument in lieu of briefing was among the ''best practices'' identified by the Board's General Counsel in a 1997 report. See G.C. Memo. 98–1, ''Report of Best Practices Committee—Representation Cases December 1997,'' at 10, 28 (''It is considered a best practice that the hearing officer should solicit oral argument in lieu of briefs in appropriate cases since in some cases briefs are little, if any, assistance to the Regions and may delay issuance of the decision.'').

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Guide for Hearing Officers in NLRB Representation and Section 10(K) Proceedings at 167 (''In a hearing on objections/challenges, the parties do not have a right to file briefs. To the extent that briefs are not necessary and would interfere with the prompt issuance of a decision, they should not be permitted.'').

GAM argues that the proposal denies due process. In response, the Board points out that the final rule does not deny any party's right to file at least one post-hearing brief with the Board before the close of the representation proceeding. Moreover, the rule permits the filing of a post-hearing brief with the regional director with leave of the hearing officer. Combined with the right to file a pre-hearing brief or to file a hearing brief before the close of the hearing and to present closing, oral argument in every case, the opportunities for the filing of post-hearing briefs provided in the final rule do not deprive any party of due process nor are they inconsistent with the statutory requirement of an ''appropriate hearing.'' In *Morgan* v. *United States,* 298 U.S. 468 (1936), the Supreme Court considered the essential element of the ''full hearing'' required by the Packers and Stockyards Act, 7 U.S.C. 310. The Court held that the requirement of a full hearing was not met if the decision-maker was an individual ''who has not considered evidence or argument.'' *Id.* at 481. However, the Court also made clear that the ''requirements are not technical,'' that ''[e]vidence may be taken by an examiner,'' and that [a]rgument may be oral or written.'' *Id.* See also *Abbott Laboratories* v. *NLRB,* 540 F.2d 662, 665 n.1 (4th Cir. 1976) (''With respect to proceedings before the hearing officer, the Board ruled that its hearing officer was not required, either by statute or the due process clause, to accept posthearing briefs since the parties had the opportunity to express their views in writing both before and after the case was referred to the hearing officer * * * We see no error of fact or law in these rulings.''); *Lim* v. *District of Columbia Taxicab Commission,* 564 A.2d 720, 726 (DC App. 1989) (''there exists no due process right * * * to file a brief'').

The APA and its legislative history contain evidence of Congress's intent not to require that the Board permit post-hearing briefing after every pre-election hearing. Enacted in 1946, Section 8 of the APA, 5 U.S.C. 557(c), provides that in formal agency adjudication:

> Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—
>
> (1) proposed findings and conclusions; or
>
> (2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and
>
> (3) supporting reasons for the exceptions or proposed findings or conclusions.

But Section 5(6) of the APA, 5 U.S.C. 554(a)(6), specifically exempts from the category of formal adjudication those cases involving ''the certification of worker representatives.'' The courts have held that this exemption applies to both pre- and post-election hearings. See *In re Bel Air Chateau Hospital, Inc.,* 611 F.2d 1248, 1252–1253 (9th Cir. 1979); *NLRB* v. *Champa Linen Service Co.,* 437 F.2d 1259, 1262 (10th Cir. 1971). The Senate Committee Report explained that the exemption was inserted into the APA because the Board's ''determinations rest so largely upon an election or the availability of an election.'' S. Rep. No. 752, 79th Cong., 1st Sess. 16 (1945). The committee also pointed to ''the simplicity of the issues, the great number of cases, and the exceptional need for expedition.'' Senate Committee on the Judiciary Comparative Print on Revision of S. 7, 79th Cong., 1st Sess. 7 (1945).

While Section 9 of the NLRA was amended in 1947 to adopt the current version of Section 9(c), the APA was not amended and continues to exempt representation cases from its formal adjudication requirements. In fact, between 1964 and 1966, Congress considered removing all the exceptions contained in Section 5 from the APA, but decided not to do so. In 1965, the Board's Solicitor wrote to the Chairman of the Senate Subcommittee on Administrative Practice and Procedure objecting strenuously to removal of the exemption for representation cases. The Solicitor specifically objected that ''election case handling would be newly freighted and greatly retarded by * * * [s]ubmission to the hearing officer of proposed findings of fact and conclusions of law.'' Administrative Procedure Act: Hearings on S. 1663 Before the Subcomm. on Admin. Practice and Procedure of the Comm. on the Judiciary, 88th Cong., 2d Sess. 532 (1964) (letter submitted by William Feldesman, NLRB Solicitor, May 11, 1965). The Solicitor concluded, ''After Congress has done so much to help speed the processing of election cases to avoid the dangers of delay, this would hardly be the time to inaugurate procedural changes which serve dilatory ends and have the potential to cause that bottleneck the Board has for years been attempting to prevent.'' *Id.* at 534. In 1966, the Senate Committee on the Judiciary reported out a bill containing a provision, not ultimately enacted, that would have removed all the exemptions. But the Committee Report carefully explained, ''It should be noted, however, that nonadversary investigative proceedings which Congress may have specified must be conducted with a hearing, are not to be construed as coming within the provisions of section 5(a) because of the deletion of the exemptions. An example of such a proceeding would be certification of employee representatives proceedings conducted by the National Labor Relations Board.'' S. Rep. No. 1234, 89 Cong., 2d Sess. 12–13 (1966).

SEIU suggests amending the proposed rule to require that any briefing be completed within 14 days of the close of the hearing. The Board has considered this suggestion and decided that the hearing officer who has heard the evidence introduced at the hearing and considered the parties' request to file a post-hearing brief is in the best position to determine if briefing should be permitted, what subjects any briefing should address, and when briefs should be filed.

Sec. 102.67 Proceedings Before the Regional Director; Further Hearing; Action by the Regional Director; Review of Action by the Regional Director; Statement in Opposition; Transfer of Case to the Board; Board Action

In the NPRM, the Board proposed a number of amendments to § 102.67. The Board proposed that the regional director defer deciding eligibility questions involving less than 20 percent of the unit and instead permit the disputed individuals to vote subject to challenge. The Board also proposed to give the regional director discretion to issue a direction of election with findings and a statement of reasons to follow no later than the tally of the ballots. The Board further proposed to make changes with respect to the *Excelsior* list and the final notice of the election, and to eliminate the regional director's authority to transfer a case to the Board for decision at any time. The Board has decided to take no action at this time on those proposals in order to permit more time for deliberation.

In the NPRM, the Board also proposed amendments to the current pre-election request-for-review procedure and the accompanying 25-day waiting period. Under the current rules, the parties are required to request Board review within 14 days of a regional director's decision

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and direction of election or be deemed to have waived any arguments that were or could have been made concerning rulings at the pre-election hearing or the decision and direction of election. § 102.67(f); see, e.g., *A.S. Horner, Inc.,* 246 NLRB 393, 394–95 (1979). In addition, the regional director generally schedules the election no sooner than 25 days after the direction of election so that the Board has an opportunity to rule on any request for review that may be filed. § 101.21(d). But a request does not automatically stay the election, which proceeds as scheduled in almost all cases. If the Board has not yet ruled on the request at the time of the election, as is not infrequently the case, the election is held and the ballots impounded until the Board can rule. Even if the Board grants the request, the Board almost never stays the election and the same vote-and-impound procedure is used.

The Board proposed to eliminate the pre-election request-for-review procedure in the NPRM and instead permit parties to file any such request after the election, when it could be consolidated with any request for review of the director's disposition of post-election disputes arising out of challenges or objections. In the NPRM, the Board explained that the amendment would eliminate unnecessary litigation because many issues raised through pre-election requests for review are either rendered moot by the election results or are resolved by agreement of the parties post-election. In addition, the Board explained, permitting parties to consolidate, in a single filing, requests that the Board review pre- and post-election rulings will result in efficiencies for the parties and the Board.

The Board also proposed eliminating the 25-day waiting period because, even under the current rules, it serves little purpose in light of the vote-and-impound procedure, and its stated purpose is eliminated by the elimination of the pre-election request for review.

The final rule adopts both these proposals.

The final rule's elimination of the pre-election request for review and consolidation of all Board review (except via a request for special permission to appeal) post-election conforms Board procedures with the ordinary rules in both federal and state courts. As the Supreme Court has explained, consolidating appellate review in a single proceeding subsequent to a final order avoids unnecessary litigation and expense. ''Trial court errors become moot if the aggrieved party nonetheless obtains a final judgment in his favor, and appellate courts need not waste time familiarizing themselves anew with a case each time a partial appeal is taken.'' *Mitchell* v. *Forsyth,* 472 U.S. 511, 544 (1985). In contrast, the Court explained in a later decision, ''An interlocutory appeal * * * risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary.'' *Johnson* v. *Jones,* 515 U.S. 304, 309 (1995). Countless court of appeals decisions contain the same reasoning for limiting interlocutory appeal. See, e.g., *Armendariz* v. *Penman,* 75 F.3d 1311, 1316 (9th Cir. 1996) (''[P]iecemeal litigation * * * risks the creation of unnecessary appellate work by presenting issues for review which could have been avoided entirely if trial had proceeded.'').

Relatively few comments took issue with the proposed elimination of the pre-election request for review, as noted by SEIU in its reply comment. Those that did—for example, SHRM, AHA, and ACE—generally commented that in cases where review would otherwise have been granted, the proposed rule would result in elections being run unnecessarily, causing both the Board and the parties to incur unnecessary expense. The comments pose the example of a regional director failing to find a bar to the conduct of an election, and thereby erroneously directing an election. But this example aptly illustrates the flaw in the argument. Even under the current rules, if a regional director finds no contract bar and directs an election, and a party files a request for review that the Board grants, the election will typically be held and the ballots impounded prior to Board resolution of the issue. See, e.g., *VFL Technology Corp.,* 329 NLRB 458, 458 (1999); *Western Pipeline, Inc.,* 328 NLRB 925, 925 n.1 (1999). Thus, the same expenses may be unnecessarily incurred under current procedures. See, e.g., *Mercy General Health Partners Amicare Homecare,* 331 NLRB 783, 785–86 (2000) (Board directed that impounded ballots not be counted and that second election be held after ruling on pre-election request for review post-election). Moreover, given the small number of requests for review filed each year, and the extraordinarily small percentage of regional directors' decisions that are ultimately reversed,[140] the number of cases of the type described in these comments is likely to be insignificant. Finally, under the final rule a party may file a request for special permission to appeal and request a stay under appropriate circumstances.

Some comments argue that deferring review of issues that were previously raised in a pre-election request for review until after the election will result in the Board addressing more issues subsequent to the opening of the ballots.[141] However, this is no different from current practice when the regional director and the Board rule on challenged ballots or objections. Moreover, it is a necessary correlate of waiting to see if the dispute is rendered moot by the election results. Thus, it is parallel to the situation in appellate courts that consider evidentiary and other interlocutory rulings only as part of an appeal from a final order, i.e., knowing how the case was decided.

Some comments contend that the proposed rule will not expedite commencement of bargaining but will simply shift review until after the election.[142] The Board disagrees. In the Board's experience, many pre-election disputes are either rendered moot by the election results or can be resolved by the parties after the election and without litigation once the strategic considerations related to the impending election are removed from consideration. Accordingly, the Board believes that the current system is inefficient and imposes unnecessary costs on the parties and the government by requiring parties to litigate, and the Board to rule on, issues that are frequently rendered moot by the election results. In sum, the Board believes that the final rule will not simply shift litigation from before elections to after, but rather will significantly reduce the total amount of litigation.

AHA comments that the Board's own failings in timely processing requests is not a basis for eliminating the right of parties to review. But the final rule does not eliminate any party's right to request review. The rule simply eliminates the obligation to request review pre-election in order to preserve an issue, and permits any issue that would previously have been raised pre-election to be raised through a single, more efficient, post-election request for review.

[140] From 2004 to 2009, review was granted pursuant to less than 12 percent of requests, and less than 5 percent of regional directors' decisions were reversed.

[141] See, e.g., PIA; COLLE; ACE.

[142] See, e.g., Testimony of Michael Prendergast; AHA; Seyfarth Shaw.

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Moreover, if a party believes that pre-election review is essential to preserve an issue for review, it can file a request for special permission to appeal. Finally, the Board is entitled to and must consider its own adjudicative and administrative capacities and past performance in evaluating its procedural rules. The elimination of pre-election request for review will, as explained above, reduce the number of disputes reaching the Board. The Board will, therefore, be able to dispose of those disputes that do reach it more promptly.

Others suggest that limiting pre-election review will mean that the parties will be unsure who is a supervisor during the pre-election campaign.[143] This objection is addressed at length above in relation to § 102.66. But the current pre-election review procedures do not entitle the parties to a final Board determination on such matters prior to the election and rarely result in such a determination. Even in the very rare cases where the Board both grants review and rules on the merits prior to the election, as explained above, the ruling typically is issued only days before the election, i.e., well into the critical period between petition and election, and thus does not serve the purpose the comments suggest will be thwarted if the pre-election request for review is eliminated.

Very few comments specifically object to the elimination of the 25-day waiting period. Indeed, there is near consensus that this period serves little purpose.[144] In support of the proposed rule, several comments observe that parties typically do not use the waiting period to request review and that a single post-election review process eliminates use of the Board's processes to achieve tactical delays.[145]

Some comments, such as the hearing testimony of Jay P. Krupin, maintain that the 25-day period serves an important purpose because the ''rules of the game'' are not set until the decision and direction of election, so the parties are not sure which voters they need to persuade or which employees can speak on behalf of the employer until the decision issues. However, the stated purpose of the 25-day period is not to give parties an opportunity to campaign. Section 101.21(d) states only that the 25-day waiting period is ''to permit the Board to rule on any request for review which may be filed.'' Moreover, the concern raised in this comment is addressed at length above in § 102.66. Finally, the regional director retains discretion to consider any significant changes in the scope of the unit that result from the decision and direction of election in setting the election date.

A few comments observe that the waiting period serves a purpose in the small minority of cases where the Board finds that a request for review has merit. These comments suggest that a waiting period would be appropriate where a pre-election request for review is actually filed. AHCA and ALFA suggest an alternative to the proposed rule, whereby the Board would ask parties whether they intend to file a request for review. If they answer affirmatively, then and only then would the regional director wait at least 25 days to hold the election. If adopted, however, that proposal would give parties the ability to delay elections for tactical purposes. Moreover, in many cases, the delay would still be wholly unnecessary when the issue raised in the pre-election request for review is rendered moot by the election results. Finally, even where a request for review is granted and eventually found to have merit, there is little reason that the request should be filed pre-election or that the election should be delayed so that the Board can consider it, because the election almost always proceeds using the vote-and-impound procedures before the Board's decision on the merits issues.

Some comments argue that the elimination of the 25-day waiting period, combined with other proposed amendments, interferes with employers' right to free speech under Section 8(c) of the Act and the First Amendment and undermines the free discussion of the question of representation essential to employee free choice. As explained above, these objections have little continuing relevance now that the Board has determined to deliberate further about several of the other proposed amendments. To the extent the objections still have force, they are addressed at length above in Section III, D.

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

In the NPRM, the Board proposed to amend § 102.69 to (1) require that a party filing objections simultaneously file a description of the evidence supporting its objections, (2) require that the regional director set any hearing on determinative challenged ballots or objections to begin 14 days after the tally or as soon thereafter as practicable, (3) codify the regional director's discretion to dispose of both determinative challenges and objections through an investigation without a hearing when they raise no substantial and material factual issues, (4) establish a uniform procedure when a hearing is conducted, and (5) make Board review of regional directors' post-election dispositions discretionary. The final rule adopts proposals (3), (4), and (5).

The final rule codifies existing practice permitting the regional director to investigate determinative challenges and objections by examining evidence offered in support thereof to determine if a hearing is warranted.[146] The final rule also creates a uniform procedure in those cases in which there are potentially outcome-determinative challenges or objections which the regional director determines raise substantial and material factual issues that require a hearing. Adopting the procedure currently contained in § 102.69(d) and (e), the final rule provides that, in such cases, the regional director shall provide for a hearing before a hearing officer who shall, after such hearing, issue a report containing recommendations as to the disposition of the issues. Within 14 days after issuance of such a report, any party may file exceptions with the regional director and the regional director will dispose of the exceptions. If no exceptions are filed to such report, the

[143] See, e.g., Testimony of Harold Weinrich.

[144] See Testimony of Professor Samuel Estreicher; SEIU reply.

[145] See Professor Joel Cutcher-Gershenfeld; Ranking Member George Miller and Democratic Members of the U.S. House of Representatives Committee on Education and Workforce; IBEW; Thomas Meiklejohn.

[146] At least one comment argues that the amendments improperly permit regional directors to administratively dismiss objections without a hearing, thereby denying parties the right to a hearing and the ability to create a record for subsequent review. However, regional directors may administratively dismiss objections and challenges without a hearing under the current rules where they do not raise substantial and material issues that would warrant setting aside the election. 29 CFR 102.69(d). This well-settled practice avoids wasteful litigation, is no different from a trial court granting a motion to dismiss, and has been approved by the courts of appeals. See *NLRB* v. *Bata Shoe Co.,* 377 F.2d 821, 826 (4th Cir. 1967); *NLRB* v. *Air Control Products of St. Petersburg, Inc.,* 335 F.2d 245, 249 (5th Cir. 1964); *Puerto Rico Aqueduct & Sewer Auth.* v. *EPA,* 35 F. 3d 600, 605–06 (1st Cir. 1994) (''To force an agency fully to adjudicate a dispute that is patently frivolous, or that can be resolved in only one way, or that can have no bearing on the disposition of the case, would be mindless * * *.''); Fenn C. Horton III, *The Requirements of Due Process in the Resolution of Objections to NLRB Representation Elections,* 10 J. Corp. L. 493, 495–509 (1985). The amendments specify in § 102.69(e) what constitutes the record in such no-hearing cases, just as they specify what constitutes the record in cases that proceed to a hearing.

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regional director decides the matter upon the expiration of the period for filing such exceptions. Consistent with the changes described above in relation to § 102.62(b), the final rule makes Board review of regional directors' resolutions of post-election disputes discretionary in cases involving directed elections as well as those involving stipulated elections, unless challenges and objections are consolidated with unfair labor practice charges for hearing before an administrative law judge.[147] The Board anticipates that this change will leave a higher percentage of final decisions concerning disputes arising out of representation proceedings with the Board's regional directors, who are members of the career civil service.

Finally, the amendments clarify in § 102.69(e)(1)(ii) that in a proceeding conducted pursuant to § 102.69 in which no hearing is held, the record will include any decision and direction of election and the record previously made as defined in § 102.68. As discussed above, pursuant to the amendments to § 102.69, parties may file requests for review of the regional director's decision and direction of election after the election, but the timing depends on whether there are also objections and challenges. In a case involving objections or determinative challenges, the request for review is due 14 days after the regional director issues his decision resolving them. Section 102.69(g)(1)(i) currently provides that in cases where a hearing is held on objections and challenges, the record includes the record previously made as defined in § 102.68. Absent objections and challenges, the amendments provide that the request for review of the decision and direction of election is due 14 days after the tally of ballots is prepared. Because there may be no post-election hearing, either because there were no objections or determinative challenges or because the director disposed of them without a hearing, the amendments clarify in § 102.69(e)(1)(ii) that if a party files a request for review of the decision and direction of election but no post-election hearing on objections and challenges is held, the record will similarly include the decision and direction of election and the record made at the pre-election hearing as defined in § 102.68.

Some comments question whether the Board will resolve nondeterminative challenges post-election. The final rule maintains the status quo in this regard: the Board will not address nondeterminative challenge ballots at a post-election hearing, though parties may bring the matter to the Board by filing a timely unit clarification petition if they are unable to resolve the resulting question of whether particular employees are in the bargaining unit (''unit placement'' questions) by agreement. See, e.g., *Orson E. Coe Pontiac-GMC Truck, Inc.,* 328 NLRB 688, 688 n.1 (1999):

> Under standard Board practice, when a classification of employees votes under challenge and their challenged ballots would not be determinative of the election results, the ensuing certification contains a footnote to the effect that they are neither included nor excluded. Casehandling Manual section 11474. Even though there was no occasion to resolve the issue in a ballot challenge hearing, the issue need not stay unresolved. If the parties do not subsequently agree on whether to add the car prep/finisher technician to the unit, the matter can be resolved in a timely invoked unit clarification proceeding. *See Kirkhill Rubber Co.,* 306 NLRB 559 (1992); *NLRB* v. *Dickerson-Chapman, Inc.,* 964 F.2d 493, 496–497, 500 fn. 7 (5th Cir. 1992).

AHA argues that permitting parties to resolve such issues in bargaining is ''disrespectful'' of employee Section 7 rights because it makes eligibility a ''bargaining chip.'' Yet, as many of the comments in support of the amendments indicate, parties currently engage in precisely such bargaining regarding the inclusion or exclusion of particular individuals and classifications before the election, when they negotiate an election agreement defining the appropriate unit, and after the election, when they often resolve both determinative and nondeterminative challenges by agreement.[148] In relation to AHA's concern that deferring such matters to bargaining runs counter to the goal of promoting labor peace, the Board believes that labor peace is more likely to be promoted if parties are permitted to voluntarily resolve their differences, particularly when the parties remain free to bring a timely unit clarification petition before the Board if they do not reach agreement.

Many comments criticize the proposal to make Board review of regional directors' post-election determinations discretionary in cases involving directed elections. These comments are fully addressed above in relation to § 102.62.

Bluegrass Institute suggests, however, that the 20-percent rule renders discretionary Board review of the regional directors' post-election determinations inappropriate. It argues that the Board's current rules guarantee parties Board review of eligibility questions deferred in the pre-election decision, and therefore the provision making Board review of the director's post-election determinations discretionary constitutes a material change. The Board disagrees. Under the final rule, if eligibility disputes are deferred using the vote-and-challenge procedures, the hearing officer's recommendations on determinative challenges will in all cases be subject to exceptions to the director, and a party may thereafter file a request for review with the Board. This parallels how such matters are handled under the current rules when a hearing officer's recommendations go to the director. Thus, Section 11366.2 of the Board's Casehandling Manual provides with respect to challenges to voters in the context of a directed election, ''If the Regional Director directs that the hearing officer's recommendations be made to the Regional Director, then exceptions to the hearing officer's report will be filed with him/her * * *. The Regional Director must thereafter rule in a supplemental decision upon the hearing officer's report and such exceptions as may be filed. The Regional Director's supplemental decision is subject to a request for review to the Board.'' [149] Moreover, under the current rules, if a regional director resolves eligibility questions on the merits in his or her decision and direction of election, the parties are able to challenge the decision only by filing a request for review with the Board. The comment does not explain why a party should have a greater right to Board review if the regional director decides

[147] The final rule clarifies that when objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to a stipulated election agreement or a direction of election, (1) any request for review of the regional director's decision and direction of election is due within 14 days after issuance of the administrative law judge's decision; and (2) the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision. The final rule also clarifies that if the election was conducted pursuant to a consent or full consent agreement, and the objections and challenges have been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing his decision, sever the representation case and transfer it to the regional director for further processing, as is done currently.

The final rule uses the single term, ''decision,'' to describe the regional director's disposition of challenges and/or objections in place of the two terms, ''report'' and ''decision,'' used in the current rules.

[148] Even after certification, the scope of the bargaining unit remains a permissible subject of bargaining. See *The Idaho Statesman* v. *NLRB,* 836 F.2d 1396, 1405 (D.C. Cir. 1988).

[149] It is only when regional directors direct that hearing officer reports go to the Board that parties currently have the right to Board review. See Casehandling Manual Section 11366.2.

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eligibility questions after the election than if the regional director decides them prior to the election, and the final rule corrects this anomaly.

Citing Member Hayes' dissent to the NPRM, PIA and others argue that the deferral of litigation from the pre-election phase to the post-election phase is likely to lengthen the period between the election and final certification, which will lengthen the period during which the employer is uncertain whether it can unilaterally change its employees' working conditions. See *Mike O'Connor Chevrolet,* 209 NLRB 701, 703 (1974). As shown, however, the Board believes that the final rule will not simply shift litigation from before the election to after the election. Rather, the Board believes that the amendments will significantly reduce the total amount of litigation, because the current rules require parties to litigate issues that are often rendered moot by the election results. Moreover, the Board anticipates that permitting it to deny review of regional directors' resolution of post-election disputes, i.e., when a party's request raises no compelling grounds for granting such review, will eliminate the most significant source of administrative delay in the finality of election results. The Board anticipates that the final rule will thus reduce the period of time between the tally of votes and certification of the results and thus the period during which employers are uncertain about their duty to bargain.

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

The amendments in these two subparts merely conform their provisions to the amendments in Subpart C described above.

V. Comments on Other Statutory Requirements

A. The Regulatory Flexibility Act

The Regulatory Flexibility Act of 1980 (''RFA''), 5 U.S.C. 601 *et seq.,* requires agencies promulgating proposed rules to prepare an initial and final regulatory flexibility analysis and to develop alternatives, wherever possible, when the regulations will have a significant impact on a substantial number of small entities. The purpose of the RFA is to ensure that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' E.O. 13272, 67 FR 53461 (''Proper Consideration of Small Entities in Agency Rulemaking''). An agency is not required to prepare an initial regulatory flexibility analysis or a final regulatory flexibility analysis for a proposed rule if the agency head certifies that the rule will not have a significant economic impact on a substantial number of small entities. 5 U.S.C. 605(b).[150] To so certify, the agency must publish the certification in the **Federal Register** and include ''a statement providing the factual basis for such certification.'' *Id.* Based on the factual statement and analysis below, the Board concludes that the final rule will not have a significant economic impact on a substantial number of small entities. Accordingly, the Board's Chairman has certified to the Chief Counsel for Advocacy of the Small Business Administration (''SBA'') that the proposed amendments will not have a significant economic impact on a substantial number of small entities.

The RFA does not define either ''significant economic impact'' or ''substantial'' as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, ''what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact. The agency is in the best position to gauge the small entity impacts of its regulation.'' SBA Office of Advocacy, ''A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act'' at 17 (available at *http://www.sba.gov/sites/default/files/rfaguide.pdf*) (''SBA Guide'').

The Board determined that the proposed rule would not have an impact on a substantial number of small entities within the meaning of 5 U.S.C. 605(b). 76 FR 36833–34. The same is true for the final rule. According to the United States Census Bureau, there were approximately 6 million businesses in the United States with employees in 2007. Of those, the Small Business Administration's Office of Advocacy estimates that all but some 18,300 were small businesses with fewer than 500 employees.[151] Nearly all of those 5,981,700 small employers are subject to the Board's jurisdiction.[152] However, the Board concludes that the final rule will not have an impact on the vast majority of the small employers because only entities that are actually parties to representation proceedings under the NLRA are subject to the rule. Fewer than 4,000 representation proceedings were initiated during each of the past five years, and the Board has conducted fewer than 2,500 elections during each of those years.[153] Thus, between 2006 and 2010, the final rule would have applied to fewer than 4,000 small entities per year.[154] The Board believes that this pattern will continue into the foreseeable future. The final rule is thus likely to have an impact on fewer than 4,000 small entities per year, which is less than one-tenth of one percent of the small employers in the country.[155] Moreover, the affected entities are not concentrated in one or a few sectors, but are distributed among every sector and industry subject to the Board's jurisdiction.[156] Because one-tenth of one

[150] The RFA requires analysis of a final agency rule only where notice and comment rulemaking was required. 5 U.S.C. 604(a). As explained above, the final rule is a procedural rule for which notice and comment rulemaking was not required under the APA, 5 U.S.C. 553(b)(3)(A). Therefore, no analysis under the RFA need be performed. Nevertheless, the Board chose to undertake the threshold analysis contemplated by Section 605 of the RFA.

[151] U.S. Small Business Administration, FAQs, *http://web.sba.gov/faqs* (select ''Advocacy Small Business Statistics and Research'') (SBA Office of Advocacy estimates based on data from the U.S. Department of Commerce, Bureau of the Census, and trends from the U.S. Department of Labor, Bureau of Labor Statistics, Business Employment Dynamics).

[152] The principal private sector employers exempt from the Board's jurisdiction are employers of agricultural laborers and firms covered by the Railway Labor Act, 45 U.S.C. 151. See 29 U.S.C. 152(2) & (3). Employers whose connection to interstate commerce is so slight that they do not satisfy the Board's discretionary jurisdictional standards are also treated as exempt. *See* 29 U.S.C. 164(c); NLRB, *An Outline of Law and Procedure in Representation Cases, http://www.nlrb.gov/sites/default/files/documents/44/rc_outline_2008_full.pdf.*

[153] *See* NLRB Graphs & Data, Petitions and Elections, *http://www.nlrb.gov/graphs-data* (including charts documenting that the total number of election petitions filed between the years of 2006 and 2010 is 3359, 3064, 3170, 2725, and 2977 and the total number of elections is 2159, 1913, 1938, 1621, and 1817).

[154] Although the number of petitions has fluctuated over the last 10 years, rising to as many as 5,347 in 2002, even that number constitutes only a very small percentage of the total number of small entities, and so would also fail to reach the significant number threshold in the statute. *See id.*

[155] CNLP comments that the Board failed to properly define small entities. It argues that the median size of petitioned-for units is 23–26 employees, and therefore half of the Board's elections involve employers with 25 or fewer employees. But a unit does not necessarily and does not typically include all the employees of the employer. Moreover, CNLP misunderstands the proper inquiry for certification under the RFA. The question is whether the rule has a significant impact on a substantial number of small entities, not whether most of the entities so affected (no matter how few in number) are small entities. Finally, the Board has used an extremely inclusive definition of small entity, including all employers not excluded by the Small Business Administration's definition.

[156] Following the recommendation of the SBA Office of Advocacy, the Board identified the total

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percent of small entities is not a substantial number of small entities, the Board concludes that the final rule will not impact a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

In response to the Board's proposed rule, some of the comments argue that the rule would affect many more than the approximately 4,000 small entities estimated by the Board. The comments argue that the rule imposes burdens on all employers, because each must, for example, read and understand the rules, train human resources and management staff concerning the rules, educate their employees about the rules, and find or hire labor counsel to provide advice concerning the rules. Comments of this type were submitted by the Chamber, NAM, and NRF, among others. NAM also opined that the rule will lead to increased numbers of election petitions, and NRF posited that the rule would change employers' typical reactive approach to election petitions to proactive employee education about unionization.

The Board disagrees with these comments. First, the comments are based primarily on elements of the proposed rule not adopted in the final rule. Thus, the final rule does not impose any reporting or recordkeeping requirements on employers. Second, the RFA does not require an agency to consider these types of speculative and wholly discretionary employer expenditures. Rather, the RFA requires an agency to consider the direct burden that compliance with a new regulation will likely impose on small entities. *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' as the impact of compliance with the proposed rule on regulated small entities''); *accord White Eagle Co-op. Ass'n* v. *Conner,* 553 F.3d 467, 478 (7th Cir. 2009); *Colorado State Banking Bd.* v. *Resolution Trust Corp.,* 926 F.2d 931, 948 (10th Cir. 1991). This construction of the RFA is supported by Section 603 of the RFA, which lists the items to be included in an initial regulatory flexibility analysis (if one is required). Section 603 states that such an analysis ''shall describe the impact of the proposed rule on small entities.'' 5 U.S.C. 603(a). And Section 603(b) describes the ''impact'' by stating that ''[e]ach initial regulatory flexibility analysis * * * shall contain * * * a description of the projected *reporting, recordkeeping and other compliance requirements* of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record[.]'' 5 U.S.C. 603(b)(4) (emphasis added). Section 604 further corroborates the Board's conclusion, as it contains an identical list of requirements for a final regulatory analysis (if one is required). 5 U.S.C. 604(a)(4). Guidance from the Small Business Administration also supports this construction of the RFA because it cites only direct, compliance-based costs as examples of financial burdens that agencies must consider:

> (a) Capital costs for equipment needed to meet the regulatory requirements; (b) costs of modifying existing processes and procedures to comply with the proposed rule; (c) lost sales and profits resulting from the proposed rule; (d) changes in market competition as a result of the proposed rule and its impact on small entities or specific submarkets of small entities; (e) extra costs associated with the payment of taxes or fees associated with the proposed rule; and (f) hiring employees dedicated to compliance with regulatory requirements.

SBA Guide at 34.

Thus, nothing in the RFA, its prior construction, or SBA guidance suggests that the Board must consider the speculative and wholly discretionary expenditures that an employer which is not party to a representation proceeding may choose to incur. Instead, the ''impact'' analysis required under the RFA must consider only direct compliance costs. The final rule imposes no such costs on small entities not party to a representation proceeding. There will be no ''reporting, recordkeeping and other compliance requirements'' for these small entities. *See* 5 U.S.C. 603(b)(4) & 604(a)(4). And the final rule imposes on them no mandatory capital costs, mandatory costs of modifying existing processes, no costs of lost sales or profits, and no costs of changed market competition. SBA Guide at 34. For small entities not party to representation proceedings, there are no costs associated with taxes or fees and no costs for additional employees dedicated to compliance, as no compliance requirements exist. *Id.* Finally, there is no reason why a small entity not party to a representation proceeding would hire or otherwise retain employees dedicated to compliance with the final rule any more than it would have done so under the prior rules. Of course, employers may train their managerial and supervisory staff and educate their employees as they wish, but compliance with the final rule does not require such action.[157] For all of these reasons, the Board reaffirms its certification on the grounds that the final rule will not have an impact on a substantial number of small entities.

Moreover, even if the Board assumed that the final rule would have an impact on a substantial number of small entities, the final rule will not have a significant economic impact within the meaning of 5 U.S.C. 605(b). 76 FR 36833–34.

In the NPRM, the Board explained, ''the Board estimates that the net effect of the proposed amendments could be to decrease costs for small entities. While certain of the proposed amendments—when viewed in isolation—could result in small cost increases, those costs should be more than offset by the many efficiencies in the Board's representation procedures created by the proposed amendments.'' 76 FR 36833. The final rule adopts none of the proposed amendments that could have resulted in small cost increases for parties to representation proceedings. Therefore, as shown below, each of the amendments adopted in the final rule will either reduce the cost of being a party to a representation proceeding or have no economic impact on such parties.

First, the final rule amends § 102.64 in order to expressly construe Section 9(c) of the NLRA and state that the statutory purpose of a pre-election hearing is to determine if a question of representation exists. That amendment has no economic impact except in relation to the amendment of § 102.66(a), infra.

Second, the final rule amends § 102.66(a) and eliminates § 101.20(c) (along with all of Part 101, Subpart C) in order to ensure that hearing officers presiding over pre-election hearings have the authority to limit the presentation of evidence to that supporting a party's contentions and relevant to the existence of a question

number of affected employers within each industry using the NAICS categories. In no category did the percentage of affected employers rise above half of one percent. In the largest category, utilities, only 0.28 percent of all employers were parties to a representation proceeding. *See* Seventy Fourth Annual Report of the NLRB, *https://www.nlrb.gov/sites/default/files/documents/119/nlrb2009.pdf* (NLRB data); U.S. Census Bureau, North American Industry Classification System. *http://censtats.census.gov/cbpnaic/cbpnaic.shtml* (select ''United States'' in the first drop down box for national data).

[157] The Chamber states that it does ''not know how many employers would undertake such [education] efforts.'' Other similar comments also lack factual support, including NRF's assertion that this rule will require employers to preemptively educate their employees. Similarly, the suggestion of COLLE, that the Board must prove that employers will not engage in additional training in response to the final rule, is misguided, because any such activity would be undertaken voluntarily and is not required by the final rule.

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concerning representation. These amendments will lower the cost of participating in representation proceedings by reducing litigation at the pre-election hearing. While some disputes that would have been litigated at the pre-election hearing will still be litigated at the post-election hearing, many will be rendered moot by the results of the election or resolved by the parties once they are free of the tactical consideration of the impending election.

Third, the final rule amends § 102.66(d) to afford hearing officers presiding over pre-election hearings discretion over the filing of post-hearing briefs, including over the subjects addressed and the time for filing. Presenting oral argument in lieu of a post-hearing brief will reduce the cost of participating in representation proceedings.

Fourth, the final rule amends §§ 102.67 and 102.69 to eliminate the requirement that parties' file a pre-election request for review of a regional director's decision and direction of election in order to preserve issues for review, and defer all requests for Board review until after the election, when any such request can be consolidated with a request for review of any post-election rulings. Because many issues concerning which parties would previously have filed a pre-election request for review are rendered moot by the election results and because, even when they are not, filing a single consolidated request for review when a party wishes to seek review concerning both pre- and post-election rulings results in efficiencies, eliminating the pre-election request for review will reduce the cost of participating in representation proceedings.

Fifth, the final rule eliminates the regulatory direction in § 101.21(d) (again, along with all of Part 101, Subpart C) that the regional director should ordinarily not schedule an election sooner than 25 days after the decision and direction of election in order to give the Board an opportunity to rule on a pre-election request for review. This will have no direct impact on the cost of participating in representation proceedings.

Sixth, the final rule amends § 102.65 to make explicit and to narrow the circumstances under which a request for special permission to appeal to the Board will be granted. For the same reasons explained above in relation to eliminating the pre-election request for review, limiting this form of interlocutory appeal will reduce the cost of participating in representation proceedings.

Seventh, the final rule amends §§ 102.62(b) and 102.69 to create a uniform procedure for resolving potentially outcome-determinative challenges and election objections in stipulated and directed election cases and to provide that Board review of regional directors' resolution of such disputes is discretionary. This will have no direct impact on the cost of participating in representation proceedings.

Eighth, the final rule eliminates redundant part 101, subpart C of its regulations. This will have no direct impact on the cost of participating in representation proceedings.

The remainder of the final rule's amendments conform other sections of the Board's Rules and Regulations to the eight amendments described above. This will have no direct impact on the cost of participating in representation proceedings.

The Chamber asserts that the Board failed to calculate the costs of compliance with the proposed rule with sufficient particularity. The Chamber's comment focuses on the costs of the proposed notice posting, completion of the statement-of-position form, and the shortening of certain deadlines within the representation case process. It suggests that these costs would constitute a significant economic impact. The comment does not include numerical estimates of such costs, and, in any event, the final rule largely does not adopt the proposals pointed to in the Chamber's comment. Moreover, under the RFA Section 607, ''an agency may provide * * * more general descriptive statements if quantification is not practicable or reliable.'' [158] Administrative guidance explains that, ''[s]uch a standard is not required for section 605 certifications, but some agencies use section 607 as a model for preparing certifications.'' [159] Because quantification was not practical or reliable in relation to most of the proposed amendments, the Board followed § 607 and provided a general descriptive statement in the NPRM and has done the same here.

For the two separate reasons explained above, the Board concludes the final rule will not have a significant economic impact on a substantial number of small entities.

B. Paperwork Reduction Act

In the NPRM, the Board explained that the ''proposed amendments would not impose any information collection requirements'' and, accordingly, the proposed amendments ''are not subject to the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 et seq.'' No substantive comments were received relevant to the Board's analysis of its obligations under the PRA.

The final rule does not adopt any of the proposed amendments regarding the contents of petitions, notice postings, the statement of position, or employee or eligibility lists, and so there are no longer any even arguable information collection requirements in the final rule. The Board therefore concludes that the final rule is not subject to the PRA.

C. Congressional Review Act

This rule is not a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996 (Congressional Review Act). This rule will not result in an annual effect on the economy of $100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based companies to compete with foreign-based companies in domestic and export markets. The Board has, in any event, determined that the effective date of the rule will be 120 days after the rule is published in the **Federal Register**.

VI. Statement of the General Course of Proceedings Under Section 9(c) of the Act

A. Representation Case Petitions

Petitions may be filed in representation cases for many different reasons. For example, a union may file a petition for certification because it seeks to become the collective-bargaining representative of an employer's employees. An employer may file a petition to determine the majority status of the union demanding recognition as the representative of the employer's employees. If there is already a certified or currently recognized representative, an employee may file a decertification petition to oust the incumbent representative. Or, a party may file a petition for clarification of the bargaining unit or for amendment to reflect changed circumstances, such as changes in the incumbent representative's name or affiliation.

Petition forms are available on the Board's Web site and in the Board's regional offices. The petition must be in writing and signed, and must either be notarized or contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are

[158] 5 U.S.C. 607; see also *Alenco Communications, Inc.* v. *FCC,* 201 F.3d 608, 625 (5th Cir. 2000).

[159] SBA Guide, supra, at 10 n. 34.

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true and correct to the best of his or her knowledge and belief. The petition is filed with the regional director for the regional office in which the proposed or actual bargaining unit exists. Petition forms provide, among other things, for a description of the contemplated or existing appropriate bargaining unit, the approximate number of employees involved, and the names of all labor organizations that claim to represent the employees. A petitioner seeking certification as the collective-bargaining representative or seeking to decertify an incumbent representative must supply, within 48 hours after filing but in no event later than the last day on which the petition might timely be filed, evidence of employee interest in an election. Such evidence is usually in the form of cards, which must be dated, authorizing the labor organization to represent the employees or authorizing the petitioner to file a decertification petition. If a petition is filed by an employer, the petitioner must supply, within 48 hours after filing, proof of a demand for recognition by the labor organization named in the petition and, in the event the labor organization named is the incumbent representative of the unit involved, a statement of the objective considerations demonstrating reasonable grounds for believing that the labor organization has lost its majority status.

The petitioner may file the petition by fax, by mail, or in person at one of the NLRB's regional offices.

B. Pre-Hearing Withdrawals and Dismissals; Notice of Hearing

Upon receipt of the petition in the Regional Office, it is docketed and assigned to a Board agent to investigate (1) whether the employer's operations affect commerce within the meaning of the Act, (2) the existence of a bona fide question concerning representation in a unit of employees appropriate for the purposes of collective bargaining within the meaning of the Act, (3) whether the election would effectuate the policies of the Act and reflect the free choice of employees in the appropriate unit, and (4) whether, if the petitioner is a labor organization seeking recognition or an employee seeking decertification of an incumbent representative, there is sufficient evidence of employee interest in an election. The evidence of interest submitted by the petitioning labor organization or by the person seeking decertification is ordinarily checked to determine the number or proportion of employees who have demonstrated interest, it being the Board's administrative experience that in the absence of special factors the conduct of an election serves no purpose under the statute unless the petitioner has demonstrated interest among at least 30 percent of the employees. However, in the case of a petition by an employer, no proof of representation on the part of the labor organization claiming a majority is required, and the regional director proceeds with the case if other factors require it unless the labor organization withdraws its claim to majority representation. The Board agent attempts to ascertain from all interested parties whether the grouping or unit of employees described in the petition constitutes an appropriate bargaining unit. The petition may be amended at any time prior to hearing and may be amended during the hearing in the discretion of the hearing officer upon such terms as he or she deems just.

The petitioner may request to withdraw its petition if the investigation discloses, for example, that the petitioner lacks an adequate showing of interest. The regional director may request that the petitioner withdraw the petition if further processing at that time is inappropriate because, for example, a written contract covering the petitioned-for unit is currently in effect. If, despite the regional director's recommendations, the petitioner refuses to withdraw the petition, the regional director may dismiss it. The petitioner may within 14 days request review of the regional director's dismissal by filing such request with the Board in Washington, DC; if it accepts review, the Board may sustain the dismissal, stating the grounds of its affirmance, or may direct the regional director to take further action.

If, however, the regional director determines that the petition and supporting documentation establish reasonable cause to believe that a question of representation affecting commerce exists and that the policies of the Act will be effectuated, then the regional director issues a notice of a pre-election hearing at a time and place fixed therein to the parties named in the petition. Along with the notice of hearing, the regional director serves a copy of the petition on the unions and employer filing or named in the petition and on other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

C. Voluntary Election Agreements

Elections can occur either by agreement of the parties or by direction of the regional director or the Board. In many cases, the parties, with Board agent assistance, are able to reach agreement regarding the election details, thereby eliminating the need for the regional director or the Board to issue a formal decision and direction of election. By entering into an election agreement, the parties may, depending upon when the agreement is reached, avoid the time and expense of participating in a hearing.

The Board has devised and makes available to the parties three types of informal voluntary procedures through which representation issues can be resolved without recourse to formal procedures. Forms for use in these informal procedures are available in the regional offices. One type of informal procedure is the consent election agreement with final regional determination of post-election disputes. Here, the parties agree with respect to the appropriate unit, the payroll period to be used in determining which employees in the appropriate unit shall be eligible to vote in the election, and the type, place, date, and hours of balloting. The consent election is conducted under the direction and supervision of the regional director. This form of agreement provides that the rulings of the regional director on all questions relating to the election, such as the validity of challenges and objections, are final and binding. The regional director issues to the parties a certification of the results of the election, including a certification of representative where appropriate, with the same force and effect as if issued by the Board.

A second type of informal procedure is commonly referred to as the stipulated election agreement with discretionary Board review. Like the consent agreement above, the parties agree on the unit, payroll period to be used in determining voter eligibility, and election details, but provide that they may request Board review of the regional director's resolution of post-election disputes. The stipulated election is conducted under the direction and supervision of the regional director.

The third type of informal procedure is referred to as the full consent-election agreement with final regional director determination of pre- and post-election disputes. Here, the parties agree that all pre-election and post-election disputes will be resolved with finality by the regional director. For example, the parties agree that if they are unable to informally resolve disputes arising with respect to the appropriate unit or other election details, those issues will be presented to, and decided with finality by, the regional director after a hearing. Upon the close of the hearing, the entire

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record in the case is forwarded to the regional director. After review of the record, the regional director issues a final decision, either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the regional director. Similarly, all matters arising after the election, including determinative challenged ballots and objections to the conduct of the election, are decided with finality by the regional director. The regional director issues to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board.

D. Formal hearing

If the parties have not entered into a voluntary election agreement, a hearing must be held to determine if a question of representation affecting commerce exists before a regional director or the Board may direct an election to resolve that question. The regional director may at any time transfer the case to the Board for decision, but until such action is taken, it will be presumed that the regional director will decide the case. In the event the regional director decides the issues in a case, the decision is final subject to the review procedure set forth in the Board's Rules and Regulations.

The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the regional office but may be another qualified agency employee. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the hearing officer is to ensure that the record contains as full a statement of the pertinent facts as may be necessary for determination of whether a question of representation exists. A question of representation exists if a petition as described in Section 9(c) of the Act has been filed concerning a unit appropriate for the purposes of collective bargaining or, in the case of a petition filed under Section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. Each party is afforded full opportunity to present its respective positions and to prove the significant facts supporting its positions, so long as the evidence a party seeks to introduce supports its contentions and is relevant to the existence of a question of representation or a bar to an election. In most cases a substantial number of the relevant facts are undisputed and stipulated.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection is waived by further participation in the hearing. A party need not seek special permission to appeal a hearing officer's ruling to preserve an issue for review after the election. The filing of a request for special permission to appeal does not stay an election and does not result in impounding of ballots unless specifically ordered by the Board.

At the close of the hearing, parties are permitted to make oral arguments on the record. Parties are permitted to file post-hearing briefs only with special permission of the hearing officer. The hearing officer specifies the time for filing such briefs, and may limit the subjects to be addressed in post-hearing briefs. If the regional director transfers the case to the Board for decision, parties may file post-hearing briefs with the permission of the Board.

Upon the close of the hearing, the entire record in the case is forwarded to the regional director or, upon issuance by the regional director of an order transferring the case, to the Board in Washington, DC. The hearing officer also transmits an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the issues.

E. Regional Director Pre-Election Determinations; Requests for Review

After the pre-election hearing closes, the regional director may proceed to review the record of the hearing and any post-hearing briefs to determine whether a question of representation affecting commerce exists concerning a unit appropriate for the purposes of collective bargaining or, in the decertification context, concerning a unit with an incumbent representative. The regional director may decide either to direct an election, dismiss the petition, or reopen the hearing. Or, in cases involving novel or complex issues, the regional director may transfer the case to the Board for decision. In that event, the record is forwarded to the Board, and if the Board directs an election, the election is held under the supervision of the regional director in the same manner as if the regional director had directed the election.

If the regional director directs an election, a party may request review of the direction after the election in the manner described below. If the regional director dismisses a petition, a party may file a request for review with the Board within 14 days after service of the decision dismissing the petition in the manner specified in the Board's Rules and Regulations. Any party may file with the Board a statement in opposition to a request for review, within the time periods and in manner specified in the Board's Rules and Regulations. The Board will grant a request for review only where there are compelling reasons to do so. The parties may, at any time, waive their right to request review. Failure to request review precludes such parties from relitigating, in any subsequent related unfair labor practice proceeding, any issue that was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action, which also precludes relitigating any such issues in any subsequent related unfair labor practice proceeding.

F. Election Procedure; Challenges and Election Objections; Requests for Review of Directions of Elections; Requests for Review of Regional Director Dispositions of Challenges and Objections

1. Election Procedure; Challenges; and Objections

Unless otherwise directed by the Board, all elections are conducted under the supervision of the regional director in whose region the proceeding is pending. All elections shall be by secret ballot. The regional director determines the details incident to the conduct of the election. A Board agent usually arranges a pre-election conference at which the parties check the list of voters and attempt to resolve any questions of eligibility. Also, prior to the date of election, the holding of such election is publicized by the posting of official notices in the employer's facility whenever possible or in other places, or by the use of other means considered appropriate and effective. These notices reproduce a sample ballot and outline such election details as the date of the election, location of polls, time of voting, and eligibility rules. When an election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe, and the ballots are marked in the secrecy of a voting booth. The

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parties' authorized observers and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. If such a person is permitted to vote, his or her ballot is segregated, and, if the challenge is not resolved before the tally, impounded. Board agents, in the presence and with the assistance of the parties' authorized representatives, count and tabulate the ballots promptly after the closing of the polls. Elections are decided by a majority of the valid votes cast. Voter challenges may be resolved by agreement before the tally. A complete tally of the ballots is made available to the parties upon the conclusion of the count. If the number of unresolved challenged ballots is insufficient to affect the results of an election in which an individual or labor organization is certified, the unit placement of any such individuals may be resolved by the parties in the course of collective bargaining or may be determined by the Board if a timely unit clarification petition is filed.

Within seven days after the tally of ballots has been prepared, a party may file objections to the conduct of the election or to conduct affecting the results of the election. Parties have an additional seven days to file their evidence in support of objections. A party must timely file objections and the supporting evidence even if there are determinative challenges.

2. Requests for Review of Decisions and Directions of Elections

If the election has been conducted pursuant to a regional director's decision and direction of election, any party may file a request for review of that decision with the Board in the manner specified in the Board's Rules and Regulations. In the absence of election objections or potentially determinative challenges, the request for review of the decision and direction of election must be filed within 14 days after the tally of ballots has been prepared. In a case involving election objections or potentially determinative challenges, the request for review must be filed within 14 days after the regional director's decision on challenged ballots and/or objections, and may be combined with a request for review of that decision as described below, unless the hearing on objections and determinative challenges has been consolidated with an unfair labor practice proceeding before an administrative law judge. In such cases, the request for review of the decision and direction of election must be filed within 14 days after issuance of the administrative law judge's decision. Any party may file with the Board a statement in opposition to the request for review within the time periods and in the manner specified in the Board's Rules and Regulations. The Board will grant a request for review only where there are compelling reasons to do so. If no request for review is filed, the decision and direction of election is final and shall have the same effect as if issued by the Board. A party may, at any time, waive its right to request review. Failure to request review precludes such a party from relitigating, in any subsequent related unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action, which also precludes relitigating any such issues in any subsequent related unfair labor practice proceeding.

3. Certification in Absence of Objections, Determinative Challenges and Requests for Review

If no timely objections are filed, if the challenged ballots are insufficient in number to affect the results of the election, if no runoff election is to be held, and if no request for review of any decision and direction of election is filed, the regional director issues to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board, and the proceeding is closed.

4. Disposition of Objections and Determinative Challenges

The initial procedures for handling objections to the conduct of the election or to conduct affecting the results of the election, as well as determinative challenges, are the same regardless of whether the election was directed by a regional director or held pursuant to the parties' agreement. The regional director has discretion to conduct an investigation or set the matters for a hearing without an investigation.

If timely objections are filed and the regional director determines that the party's supporting evidence would not constitute grounds for overturning the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director issues a decision disposing of the objections and challenges and a certification of the results of the election, including certification of representative where appropriate.

If timely objections are filed to the conduct of the election or to conduct affecting the results of the election and the regional director determines that the party's supporting evidence could be grounds for overturning the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director issues a notice of hearing before a hearing officer, unless the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge.

If the regional director issues a notice of hearing before a hearing officer, the hearing officer issues a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues following the hearing. Within 14 days after issuance of the hearing officer's report, any party may file exceptions to it with the regional director. A party opposing the exceptions may file an answering brief within the time periods and in the manner specified in the Board's Rules and Regulations.

The regional director then decides the matter and issues a certification of the results of the election, including certification of representatives where appropriate. The parties' appeal rights with respect to the regional director's decision on challenged ballots or objections depend upon whether the parties agreed to waive any appeal prior to the election. If the election has been held pursuant to a stipulated election agreement or a direction of election, a party may, within 14 days from the date of issuance of the regional director's decision, file with the Board a request for review of such decision, which may be combined with a request for review of the regional director's decision to direct the election. Any party may file with the Board a statement in opposition to the request for review. The procedures for filing such requests for review and any statements in opposition thereto are contained in the Board's Rules and Regulations. If no request for review is filed, the decision is final and has the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review precludes such parties from relitigating, in any subsequent related unfair labor practice proceeding, any issue that was, or could have been, raised in the representation proceeding. Denial of a request for review constitutes an affirmance of the regional director's action that also precludes relitigating any such issues in any subsequent related unfair labor practice proceeding.

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In cases where the election was conducted pursuant to either of the two types of consent election agreements, the regional director's decision regarding the election objections and determinative challenges is final, and includes a certification of the results of the election, including certification of representative where appropriate.

If the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge and the election was conducted pursuant to one of the two types of consent agreements, the administrative law judge, upon issuing his decision, severs the representation case and transfers it to the regional director for further processing. If, however, the regional director consolidates the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge and the election was conducted pursuant to a stipulated election agreement or a decision and direction of election, the provisions of § 102.46 of the Board's Rules and Regulations govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

G. Runoff Elections

If the election involves two or more labor organizations and if the election results are inconclusive because no choice on the ballot received the majority of valid votes cast, a runoff election is held as provided in the Board's Rules and Regulations.

List of Subjects

29 CFR Part 101

Administrative practice and procedure, Labor management relations.

29 CFR Part 102

Administrative practice and procedure, Labor management relations.

In consideration of the foregoing, the National Labor Relations Board amends Chapter I of title 29, Code of Federal Regulations, as follows:

PART 101—STATEMENTS OF PROCEDURES

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

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

Subpart C— [Removed and Reserved]

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

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

■ 3. Revise § 101.23 to read as follows:

§ 101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).

(a) A representation petition [1] involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that:

(1) The employer's operations affect commerce within the meaning of the Act;

(2) Picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the Act;

(3) Subparagraph (C) of that section of the Act is applicable to the picketing; and

(4) The petition has been filed within a reasonable period of time not to exceed 30 days from the commencement of the picketing. In these circumstances, the member of the Regional Director's staff to whom the matter has been assigned investigates the petition to ascertain further: the unit appropriate for collective bargaining; and whether an election in that unit would effectuate the policies of the Act.

(b) If, based on such investigation, the Regional Director determines that an election is warranted, the Director may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may, after the election, file a request for review of a regional director's decision to direct the election within the time periods specified and as described in 29 CFR 102.69. If it is determined that an election is not warranted, the Director dismisses the petition or makes other disposition of the matter. Should the Regional Director conclude that an election is warranted, the Director fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in 29 CFR102.69.

(c) If the Regional Director believes, after preliminary investigation of the petition, that there are substantial issues which require determination before an election may be held, the Director may order a hearing on the issues. This hearing is followed by Regional Director or Board decision and direction of election, or other disposition. The procedures to be used in connection with such hearing and posthearing proceedings are the same, insofar as they are applicable, as those described in 29 CFR 102.64, 102.65, 102.66, 102.67, 102.68, and 102.69, and the statement of the general course.

(d) Should the parties so desire, they may, with the approval of the Regional Director, resolve the issues as to the unit, the conduct of the balloting, and related matters pursuant to informal consent procedures, as described in 29 CFR 102.62(a) and the statement of the general course.

(e) If a petition has been filed which does not meet the requirements for processing under the expedited procedures, the Regional Director may process it under the procedures set forth in subpart C of 29 CFR Part 102 and the statement of the general course.

■ 4. Revise § 101.25 to read as follows:

§ 101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure

If it is determined after investigation of the representation petition that further proceedings based thereon are not warranted, the Regional Director, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If it is determined that the petition does not meet the requirements for processing under the expedited procedure, the Regional Director advises the petitioner of the determination to process the petition under the procedures described in subpart C of 29 CFR Part 102 and the statement of the general course. In either event, the Regional Director informs all the parties of such action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the Regional Director's action. Such party must request such review promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the Regional Director. Neither the request for review by the Board, nor the Board's grant of such review, operates as a stay of the action taken by the Regional Director,

[1] The manner of filing of such petition and the contents thereof are the same as described in 29 CFR 102.60 and 102.61 and the statement of the general course of proceedings under Section 9(c) of the Act published in the **Federal Register**, except that the petitioner is not required to allege that a claim was made on the employer for recognition or that the union represents a substantial number of employees.

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unless specifically so ordered by the Board.

Subpart E—Referendum Cases Under Section 9(e) (1) and (2) of the Act

■ 5. Revise § 101.28 to read as follows:

§ 101.28 Consent agreements providing for election.

(a) The Board makes available to the parties three types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are commonly referred to as consent-election agreement with final regional director determinations of post-election disputes, stipulated election agreement with discretionary Board review, and full consent-election agreement with final regional director determinations of pre- and post-election disputes. Forms for use in these informal procedures are available in the Regional Offices.

(b) The procedures to be used in connection with a consent-election agreement with final regional director determinations of post-election disputes, a stipulated election agreement with discretionary Board review, and a full consent-election agreement with final regional director determinations of pre- and post-election disputes are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course in connection with similar agreements in representation cases under section 9(c) of the Act, except that no provision is made for runoff elections.

■ 6. Revise § 101.29 to read as follows:

§ 101.29 Procedure respecting election conducted without hearing.

If the Regional Director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the Regional Director makes available to the parties a tally of ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as is described in subpart C of 29 CFR Part 102 and the statement of the general course in connection with the postelection procedures in representation cases under section 9(c) of the Act, except that no provision is made for a runoff election. If no such objections are filed within 7 days and if the challenged ballots are insufficient in number to affect the results of the election, the Regional Director issues to the parties a certification of the results of the election, with the same force and effect as if issued by the Board.

■ 7. Revise § 101.30 to read as follows:

§ 101.30 Formal hearing and procedure respecting election conducted after hearing.

(a) The procedures are the same as those described in subpart C of 29 CFR Part 102 and the statement of the general course respecting representation cases arising under section 9(c) of the Act. If the preliminary investigation indicates that there are substantial issues which require determination before an appropriate election may be held, the Regional Director will institute formal proceedings by issuance of a notice of hearing on the issues which, after hearing, is followed by Regional Director or Board decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served on the petitioner, the employer, and any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be another qualified Agency official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions that are relevant to the issue of whether the Board should conduct an election to determine whether the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of the Act, desire that such authority be rescinded. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the Regional Director or the Board, together with an informal analysis by the hearing officer of the issues and the evidence but without recommendations. Post-hearing briefs are filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. If the case is transferred to the Board after the close of the hearing, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board any post-hearing brief previously filed with the regional director. The parties may also request to be heard orally. Because of the nature of the proceeding, however, permission to argue orally is rarely granted. After review of the entire case, the Board issues a decision either dismissing the petition or directing that an election be held. In the latter event, the election is conducted under the supervision of the Regional Director in the manner described in 29 CFR 102.69 and the statement of the general course.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as is described in connection with the postelection procedures in representation cases under section 9(c) of the Act.

PART 102—RULES AND REGULATIONS, SERIES 8

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

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

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

■ 9. Revise § 102.62 to read as follows:

§ 102.62 Election agreements.

(a) Consent election agreements with final regional director determinations of post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the regional director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the regional director. Such agreement, referred to as

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a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70 except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

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

(c) Full consent election agreements with final regional director determinations of pre- and post-election disputes. Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the regional director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the regional director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66 and 102.67 to determine if a question concerning representation exists. Upon the conclusion of such a hearing, the regional director shall issue a decision. The rulings and determinations by the regional director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the regional director shall be conducted under the direction and supervision of the regional director. The method of conducting such election shall be consistent with the method followed by the regional director in conducting elections pursuant to §§ 102.69 and 102.70, except that the rulings and determinations by the regional director of the results thereof shall be final, and the regional director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, provided further that rulings or determinations by the regional director in respect to any amendment of such certification shall also be final.

■ 10. Revise § 102.63 to read as follows:

§ 102.63 Investigation of petition by regional director; notice of hearing; service of notice; withdrawal of notice.

(a) After a petition has been filed under § 102.61(a), (b), or (c), if no agreement such as that provided in § 102.62 is entered into and if it appears to the regional director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein. A copy of the petition shall be served with such notice of hearing. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion.

(b) After a petition has been filed under § 102.61(d) or (e), the regional director shall conduct an investigation and, as appropriate, he may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a notice of hearing before a hearing officer at a time and place fixed therein; or take other appropriate action. If a notice of hearing is served, it shall be accompanied by a copy of the petition. Any such notice of hearing may be amended or withdrawn before the close of the hearing by the regional director on his own motion. All hearing and posthearing procedure under this paragraph (b) shall be in conformance with §§ 102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in § 102.62(a), the regional director's action shall be final, and the provisions for review of regional director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by § 102.71. The regional director's dismissal shall be by decision, and a request for review therefrom may be obtained under § 102.67, except where an agreement under § 102.62(a) is involved.

■ 11. Revise § 102.64 to read as follows:

§ 102.64 Conduct of hearing.

(a) The purpose of a hearing conducted under section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a petition as described in section 9(c) of the Act has been filed concerning a unit appropriate for the purpose of collective bargaining or, in the case of a petition filed under section 9(c)(1)(A)(ii), concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning individuals' eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted. If, upon the record of the hearing, the regional director finds that a question of representation exists and there is no bar to an election, he shall direct an election to resolve the question.

(b) Hearings shall be conducted by a hearing officer and shall be open to the public unless otherwise ordered by the hearing officer. At any time, a hearing officer may be substituted for the hearing officer previously presiding. It shall be the duty of the hearing officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the regional director may discharge their duties under section 9(c) of the Act.

(c) The hearing officer may, in his discretion, continue the hearing from

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day to day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice.

■ 12. Revise § 102.65 to read as follows:

§ 102.65 Motions; interventions.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. An original and two copies of written motions shall be filed and a copy thereof immediately shall be served on the other parties to the proceeding. Motions made prior to the transfer of the case to the Board shall be filed with the regional director, except that motions made during the hearing shall be filed with the hearing officer. After the transfer of the case to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. *Provided, however,* That carbon copies of typewritten matter shall not be filed and if submitted will not be accepted. Eight copies of such motions shall be filed with the Board. The regional director may rule upon all motions filed with him, causing a copy of said ruling to be served on the parties, or he may refer the motion to the hearing officer: *Provided,* That if the regional director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in § 102.71. The hearing officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to him as hereinabove provided, except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the regional director or the Board, as the case may be.

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

(c) All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in § 102.66(c). Unless expressly authorized by the Rules and Regulations, rulings by the regional director or by the hearing officer shall not be appealed directly to the Board, but shall be considered by the Board on appropriate request for review pursuant to §§ 102.67 (b), (c), (d), and 102.69 or whenever the case is transferred to it for decision: *Provided, however,* That if the regional director has issued an order transferring the case to the Board for decision such rulings may be appealed directly to the Board by special permission of the Board. Nor shall rulings by the hearing officer be appealed directly to the regional director unless expressly authorized by the Rules and Regulations, except by special permission of the regional director, but shall be considered by the regional director when he reviews the entire record. Requests to the regional director, or to the Board in appropriate cases, for special permission to appeal from a ruling of the hearing officer or the regional director, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the regional director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the regional director. The Board will not grant a request for special permission to appeal except in extraordinary circumstances where it appears that the issue will otherwise evade review. No party shall be precluded from raising an issue at a later time based on its failure to seek special permission to appeal. If the Board or the regional director, as the case may be, grants the request for special permission to appeal, the Board or the regional director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall, unless otherwise ordered by the Board, operate as a stay of an election or any action taken or directed by the regional director or require the impounding of ballots.

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

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any regional director or hearing officer with respect to any matter which could have been but was not raised pursuant to any other section of these rules: *Provided, however,* That the regional director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing *de novo,* the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the regional director or the Board believes should have been taken at the hearing will be taken at any further hearing.

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

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a regional director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to permit the moving party to challenge the ballots of such employees even if they are specifically included in the

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direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

■ 13. Revise § 102.66 to read as follows:

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

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary and other evidence so long as such examination, cross-examination, and other evidence supports its contentions and is relevant to the existence of a question of representation or a bar to an election. The hearing officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

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

(c) *Subpoenas.* The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the Regional Director if made prior to hearing, or with the hearing officer if made at the hearing. Applications for subpoenas may be made ex parte. The Regional Director or the hearing officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the regional director who may either rule upon it or refer it for ruling to the hearing officer: *Provided, however,* That if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the hearing officer. Notice of the filing of petitions to revoke shall be promptly given by the regional director or hearing officer, as the case may be, to the party at whose request the subpoena was issued. The regional director or the hearing officer, as the case may be, shall revoke the subpoena if, in his opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The regional director or the hearing officer, as the case may be, shall make a simple statement of procedural or other grounds for his ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(d) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Post-hearing briefs shall be filed only upon special permission of the hearing officer and within the time and addressing the subjects permitted by the hearing officer. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the regional director together with the brief. No reply brief may be filed except upon special leave of the regional director.

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

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

■ 14. Revise § 102.67 to read as follows:

§ 102.67 Proceedings before the regional director; further hearing; action by the regional director; review of action by the regional director; statement in opposition; transfer of case to the Board; Board action.

(a) *Proceedings before regional director.* The regional director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as he may deem proper, to determine whether a question concerning representation exists in a unit appropriate for purposes of collective bargaining, and to direct an election, dismiss the petition, or make other disposition of the matter.

(b) *Directions of elections; dismissals; requests for review.* A decision by the regional director upon the record shall set forth his findings, conclusions, and order or direction. The decision of the regional director shall be final: *Provided, however,* That within 14 days after service of a decision dismissing a petition any party may file a request for review of such a dismissal with the Board in Washington, DC: *Provided, further,* That any party may, after the election, file a request for review of a regional director's decision to direct an election within the time periods specified and as described in § 102.69.

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

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

(i) The absence of; or

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

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

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

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

(d) *Contents of request.* Any request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity or recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (c)(2) of this section, and other grounds where appropriate, said request must contain a summary of all evidence or rulings bearing on the issues together with page

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citations from the transcript and a summary of argument. But such request may not raise any issue or allege any facts not timely presented to the regional director.

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

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

(g) *Grant of review; briefs.* The granting of a request for review shall not stay the regional director's decision unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 14 days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the regional director and/or other briefs which shall be limited to the issues raised in the request for review. Where review has been granted, the Board will consider the entire record in the light of the grounds relied on for review. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(h) *Transfer.* In any case in which it appears to the regional director that the proceeding raises questions which should be decided by the Board, he may, at any time, issue an order, to be effective after the close of the hearing and before decision, transferring the case to the Board for decision. Such an order may be served on the parties upon the record of the hearing.

(i) *Briefs.* If any case is transferred to the Board for decision after the parties have filed briefs with the regional director, the parties may, within such time after service of the order transferring the case as is fixed by the regional director, file with the Board the brief previously filed with the regional director. No further briefs shall be permitted except by special permission of the Board.

(j) *Board action.* Upon transfer of the case to the Board, the Board shall proceed, either forthwith upon the record, or after oral argument or the submission of briefs, or further hearing, as it may determine, to decide the issues referred to it or to review the decision of the regional director and shall direct a secret ballot of the employees or the appropriate action to be taken on impounded ballots of an election already conducted, dismiss the petition, affirm or reverse the regional director's order in whole or in part, or make such other disposition of the matter as it deems appropriate.

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

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

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

■ 15. Revise § 102.69 to read as follows:

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

(a) *Election procedure; tally; objections.* Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the regional director in whose Region the proceeding is pending. All elections shall be by secret ballot. Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the regional director, whose decision shall be final, have its name removed from the ballot: *Provided, however,* That in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the regional director, disclaiming any representation interest among the employees in the unit. A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit. When the election is conducted manually, any party may be represented by observers of its own selection, subject to such limitations as the regional director may prescribe. Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in the election. The ballots of such challenged persons shall be impounded. Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties. Within 7 days after the tally of ballots has been prepared, any party may file with the regional director an original and five copies of objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor. Such filing must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. A person filing objections by facsimile pursuant to § 102.114(f) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile pursuant to

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§ 102.114(f). The Regional Director will cause a copy of the objections to be served on each of the other parties to the proceeding. Within 7 days after the filing of objections, or such additional time as the Regional Director may allow, the party filing objections shall furnish to the Regional Director the evidence available to it to support the objections.

(b) *Requests for review of directions of elections.* If the election has been conducted pursuant to § 102.67, any party may file a request for review of the decision and direction of election with the Board in Washington, DC. In the absence of election objections or potentially determinative challenges, the request for review of the decision and direction of election shall be filed within 14 days after the tally of ballots has been prepared. In a case involving election objections or potentially determinative challenges, the request for review shall be filed within 14 days after the regional director's decision on challenged ballots, on objections, or on both, and may be combined with a request for review of that decision as provided in paragraph (d)(3) of this section. *Provided, however,* That if the hearing on objections and determinative challenges has been consolidated with an unfair labor practice proceeding before an administrative law judge, the request for review of the decision and direction of election shall be filed within 14 days after issuance of the administrative law judge's decision. The procedures for such request for review shall be the same as set forth in § 102.67(c) through (g), and (k), insofar as applicable. If no request for review is filed, the decision and direction of election is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

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

(d)(1)(i) *Decisions without a hearing.* If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the regional director determines that the party's supporting evidence would not constitute grounds for overturning the election if introduced at a hearing, and the regional director determines that any determinative challenges do not raise substantial and material factual issues, the regional director shall issue a decision disposing of objections and determinative challenges, and a certification of the results of the election, including certification of representative where appropriate.

(ii) *Notices of hearing.* If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the regional director determines that the party's supporting evidence could be grounds for overturning the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election and raise substantial and material factual issues, the regional director shall prepare and caused to be served on the parties a notice of hearing at a place and time fixed therein: *Provided, however,* that the regional director may consolidate the hearing concerning objections and determinative challenges with an unfair labor practice proceeding before an administrative law judge. In any proceeding wherein the election has been held pursuant to § 102.62(a) or (c) and the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the administrative law judge shall, after issuing his decision, sever the representation case and transfer it to the regional director for further processing.

(iii) *Hearings; hearing officer reports; exceptions to regional director.* Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable, except that, upon the close of such hearing, the hearing officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 14 days from the date of issuance of such report, file with the regional director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the regional director. Within 7 days from the last date on which exceptions and any supporting brief may be filed, or such further time as the regional director may allow, a party opposing the exceptions may file an answering brief with the regional director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the regional director. The regional director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the regional director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case.

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

(3) *Requests for review of regional director decisions in stipulated or directed elections.* If the election has been held pursuant to §§ 102.62(b) or 102.67, the decision of the regional director shall include a certification of the results of the election, including certification of representative where appropriate. Within 14 days from the date of issuance of the regional director's decision on challenged ballots or on objections, or on both, any party may file with the Board in Washington, DC, a request for review of such decision which may be combined with a request for review of the regional director's decision to direct an election as provided in §§ 102.67(b) and 102.69(b). The procedures for post-election requests for review shall be the same as set forth in § 102.67(c) through (g), and (k), insofar as applicable. If no request for review is filed, the decision is final and shall have the same effect as if issued by the Board. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding.

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Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding. *Provided, however,* That in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to § 102.62(b) or § 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the administrative law judge's decision.

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

(ii) *Record in case with no hearing.* In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the regional director in his decision, any briefs or other legal memoranda submitted by the parties, any other motions, rulings or orders of the regional director, as well as any decision and direction of election and the record previously made as defined in § 102.68 Materials other than those set out above shall not be a part of the record, except as provided in paragraph (e)(3) of this section.

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

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

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

(g) *Format of filings with regional director.* All documents filed with the regional director under the provisions of this section shall be filed double spaced, on 8½ by 11-inch paper, and shall be printed or otherwise legibly duplicated. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the regional director by motion, setting forth the reasons therefor, filed not less than 5 days, including Saturdays, Sundays, and holidays, prior to the date the brief is due. Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

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

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

■ 16. Amend § 102.77 by revising paragraph (b) to read as follows:

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

* * * * *

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

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

■ 17. Revise § 102.85 to read as follows:

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

Where a petition has been filed pursuant to § 102.83 and it appears to the regional director that the petitioner has made an appropriate showing, in such form as the regional director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, he shall proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer: *Provided, however,* That in any case in which it appears to the regional director that the proceeding raises questions which cannot be decided without a hearing, he may issue and cause to be

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served on the parties a notice of hearing before a hearing officer at a time and place fixed therein. The regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the regional director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the regional director or, upon grant of a request for review, by the Board.

■ 18. Revise § 102.86 to read as follows:

§ 102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing, including transfer of the case to the Board, shall be governed, insofar as applicable, by §§ 102.63 through 102.69 inclusive.

Signed in Washington, DC on December 16, 2011.

Mark Gaston Pearce,

Chairman.

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