Attorney General's Manual

on the

Administrative Procedure Act

Prepared by the
United States Department of Justice
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1947

II

SECTION 3—PUBLIC INFORMATION

The purpose of section 3 is to assist the public in dealing with administrative agencies by requiring agencies to make their administrative materials available in precise and current form. Section 3 should be construed broadly in the light of this purpose so as to make such material most useful to the public. The public information requirements of section 3 do not supersede the Federal Register Act (44 U.S.C. 301 *et seq.*). They are to be integrated with the existing program for publication of material in the Federal Register and the Code of Federal Regulations. The Federal Register Regulations (11 F.R. 9333) govern the manner in which documents are to be prepared prior to submission to the Division of the Federal Register. All materials issued under section 3(a) of the Act will be included in the Code of Federal Regulations and should be prepared accordingly. The Division of the Federal Register is prepared to offer assistance to the agencies in this respect.

AGENCIES SUBJECT TO SECTION 3

This section, unlike the other provisions of the Act, is applicable to all agencies of the United States, excluding Congress, the courts, and the governments of the Territories, possessions, and the District of Columbia. Every agency, whether or not it has rule making or adjudicating functions, must comply with this section. Section 2(a), defining agencies, states specifically that even the exemption for the functions enumerated in the last sentence of that section does not extend to section 3. Accordingly, agencies performing temporary war functions must comply with this section.

EXCEPTIONS TO REQUIREMENTS OF SECTION 3

Two exceptions have been made to section 3, namely:

"(1) *Any function of the United States requiring secrecy in the public interest.*" This would include the confidential operations of any agency, such as the confidential operations of the Federal Bureau of Investigation and the Secret Service and, in general, those aspects of any agency's law enforcement procedures the disclosure of which would reduce the utility of such

formal rules of practice), it was not necessary to republish them. Appropriate citations were frequently made to such previously published materials. Under section 3(a)(3), publication in the Federal Register is required of substantive rules (and statements of general policy and interpretations formulated and adopted by the agency for the guidance of the public) issued on and after September 11, 1946.

The Federal Register of September 11, 1946, Part II, appearing in four sections and containing 986 pages, contains the material prepared by Government agencies in initial compliance with section 3.

SECTION 3(a)—RULES

Section 3(a) directs each agency to "separately state and currently publish in the Federal Register" its organization, procedures and substantive rules.

SEPARATE STATEMENT

The three classes of material—organizational, procedural, and substantive rules—must be published in the Federal Register under separate and appropriate headings. Such separate statement, however, should not be carried to so logical an extreme as to inconvenience the public. For example, if an agency grants public benefits, it would be proper to include in the substantive rules relative to those benefits a statement as to the form to be used in applying for such benefits and the place of filing; however, the same procedural information must also be set forth or referred to in the separate statement of the agency's procedure. This may be accomplished by inserting in the procedural statement a notation to the effect that the procedure for obtaining public benefits may be found at a designated part of the substantive rules relative to such benefits.

DESCRIPTION OF ORGANIZATION

Section 3(a)(1) requires that every agency shall separately state and currently publish in the Federal Register "(1) descriptions of its central and field organization including delegations by the agency of final authority and the established places at which, and methods whereby, the public may secure information or make submittals or requests." It is only delegations of *final* authority

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2011-1

Legal Considerations in e-Rulemaking

Adopted June 16, 2011

Agencies are increasingly turning to e-Rulemaking to conduct and improve regulatory proceedings. "E-Rulemaking" has been defined as "the use of digital technologies in the development and implementation of regulations"[1] before or during the informal rulemaking process, i.e., notice-and-comment rulemaking under the Administrative Procedure Act (APA). It may include many types of activities, such as posting notices of proposed and final rulemakings, sharing supporting materials, accepting public comments, managing the rulemaking record in electronic dockets, and hosting public meetings online or using social media, blogs, and other web applications to promote public awareness of and participation in regulatory proceedings.

A system that brings several of these activities together is operated by the eRulemaking program management office (PMO), which is housed at the Environmental Protection Agency and funded by contributions from partner Federal agencies. This program contains two components: Regulations.gov, which is a public website where members of the public can view and comment on regulatory proposals, and the Federal Docket Management System (FDMS), which includes FDMS.gov, a restricted-access website agency staff can use to manage their internal files and the publicly accessible content on Regulations.gov. According to the Office of Management and Budget, FDMS "provides . . . better internal docket management functionality and the ability to publicly post all relevant documents on regulations.gov (e.g., Federal Register

[1] Cary Coglianese, E-Rulemaking: Information Technology and the Regulatory Process at 2 (2004) (working paper), http://lsr.nellco.org/upenn_wps/108.

documents, proposed rules, notices, supporting analyses, and public comments)."[2] Electronic docketing also provides significant costs savings to the Federal government, while enabling agencies to make proposed and final regulations, supplemental materials, and public comments widely available to the public. These incentives and the statutory prompt of the E-Government Act of 2002, which required agencies to post rules online, accept electronic comments on rules, and keep electronic rulemaking dockets,[3] have helped ensure that over 90% of agencies post regulatory material on Regulations.gov.[4]

Federal regulators, looking to embrace the benefits of e-Rulemaking, face uncertainty about how established legal requirements apply to the web. This uncertainty arises because the APA, enacted in 1946, still provides the basic framework for notice-and-comment rulemaking. While this framework has gone largely unchanged, the technological landscape has evolved dramatically.

The Conference has therefore examined some of the legal issues agencies face in e-Rulemaking and this recommendation provides guidance on these issues. The Conference has examined the following issues:

- *Processing large numbers of similar or identical comments.* The Conference has considered whether agencies have a legal obligation to ensure that a person

[2] OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, FY 2009 REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE E-GOVERNMENT ACT OF 2002, at 10 (2009), http://www.whitehouse.gov/sites/default/files/omb/assets/egov_docs/2009_egov_report.pdf.

[3] *See* Pub. L. 107-347 § 206.

[4] Improving Electronic Dockets on Regulations.gov and the Federal Docket Management System: Best Practices for Federal Agencies, p. D-1 (Nov. 30, 2010), http://www.regulations.gov/exchange/sites/default/files/doc_files/20101130_eRule_Best_Practices_Document_rev.pdf. Some agencies rely on their own electronic docketing systems, such as the Federal Trade Commission (which uses a system called CommentWorks) and the Federal Communications Commission, which has its own electronic comment filing system (http://fjallfoss.fcc.gov/ecfs/).

reads every individual comment received, even when comment-processing software reports that multiple comments are identical or nearly identical.

- *Preventing the publication of inappropriate or protected information.* The Conference has considered whether agencies have a legal obligation to prevent the publication of certain types of information that may be included in comments submitted in e-Rulemaking.
- *Efficiently compiling and maintaining a complete rulemaking docket.* The Conference has considered issues related to the maintenance of rulemaking dockets in electronic form, including whether an agency is obliged to retain paper copies of comments once they are scanned to electronic format and how an agency that maintains its comments files electronically should handle comments that cannot easily be reduced to electronic form, such as physical objects.
- *Preparing an electronic administrative record for judicial review.* The Conference has considered issues regarding the record on review in e-Rulemaking proceedings.

This recommendation seeks to provide all agencies, including those that do not participate in Regulations.gov, with guidance to navigate some of the issues they may face in e-Rulemaking.[5] With respect to the issues addressed in this recommendation, the APA contains sufficient flexibility to support e-Rulemaking and does not need to be amended for these purposes at the present time. Although the primary goal of this recommendation is to dispel some of the legal uncertainty agencies face in e-Rulemaking, where the Conference finds that a practice is not only legally defensible, but also sound policy, it recommends that agencies use it.

[5] This report follows up on previous work of the Administrative Conference. On October 19, 1995, Professor Henry H. Perritt, Jr. delivered a report entitled "Electronic Dockets: Use of Information Technology in Rulemaking and Adjudication." Although never published, the Perritt Report continues to be a helpful resource and is available at: http://www.kentlaw.edu/faculty/rstaudt/classes/oldclasses/internetlaw/casebook/electronic_dockets.htm.

It bears noting, however, that agencies may face other legal issues in e-Rulemaking, particularly when using wikis, blogs, or similar technological approaches to solicit public views, that are not addressed in this recommendation. Such issues, and other broad issues not addressed herein, are beyond the scope of this recommendation, but warrant further study.[6]

RECOMMENDATION

Considering Comments

1. Given the APA's flexibility, agencies should:

(a) Consider whether, in light of their comment volume, they could save substantial time and effort by using reliable comment analysis software to organize and review public comments.

(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.

(2) Agencies should also work together and with the eRulemaking program management office (PMO), to share experiences and best practices with regard to the use of such software.

[6] The Conference has a concurrent recommendation which focuses on issues relating to the comments phase of the notice-and-comment process independent of the innovations introduced by e-Rulemaking. *See* Administrative Conference of the United States, Recommendation 2011-2, *Rulemaking Comments.*

(b) Work with the eRulemaking PMO and its interagency counterparts to explore providing a method, including for members of public, for flagging inappropriate or protected content, and for taking appropriate action thereon.

(c) Work with the eRulemaking PMO and its interagency counterparts to explore mechanisms to allow a commenter to indicate prior to or upon submittal that a comment filed on Regulations.gov contains confidential or trade secret information.

(d) Confirm they have procedures in place to review comments identified as containing confidential or trade secret information. Agencies should determine how such information should be handled, in accordance with applicable law.

Assessing Privacy Concerns

2. Agencies should assess whether the Federal Docket Management System (FDMS) System of Records Notice provides sufficient Privacy Act compliance for their uses of Regulations.gov. This could include working with the eRulemaking PMO to consider whether changes to the FDMS System of Records Notice are warranted.

Maintaining Rulemaking Dockets in Electronic Form

3. The APA provides agencies flexibility to use electronic records in lieu of paper records. Additionally, the National Archives and Records Administration has determined that agencies are not otherwise legally required, at least under certain circumstances, to retain paper copies of comments properly scanned and included in an approved electronic recordkeeping system. The circumstances under which such destruction is permitted are governed by each agency's

records schedules. Agencies should examine their record schedules and maintain electronic records in lieu of paper records as appropriate.

4. To facilitate the comment process, agencies should include in a publicly available electronic docket of a rulemaking proposal all studies and reports on which the proposal for rulemaking draws, as soon as practicable, except to the extent that they would be protected from disclosure in response to an appropriate Freedom of Information Act request.[7]

5. Agencies should include in the electronic docket a descriptive entry or photograph for all physical objects received during the comment period.

Providing Rulemaking Records to Courts for Judicial Review

6. In judicial actions involving review of agency regulations, agencies should work with parties and courts early in litigation to provide electronic copies of the rulemaking record in lieu of paper copies, particularly where the record is of substantial size. Courts should continue their efforts to embrace electronic filing and minimize requirements to file paper copies of rulemaking records. The Judicial Conference should consider steps to facilitate these efforts.

Complying With Recordkeeping Requirements in e-Rulemaking

7. In implementing their responsibilities under the Federal Records Act, agencies should ensure their records schedules include records generated during e-Rulemaking.

[7] *See also* Exec. Order No. 13,563, § 2(b), 76 Fed. Reg. 3,821 (Jan. 18, 2011) (requiring agencies to provide timely online access to "relevant scientific and technical findings" in the rulemaking docket on regulations.gov).

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Administrative Conference Recommendation 2011-2

Rulemaking Comments

Adopted June 16, 2011

One of the primary innovations associated with the Administrative Procedure Act ("APA") was its implementation of a comment period in which agencies solicit the views of interested members of the public on proposed rules.[1] The procedure created by the APA has come to be called "notice-and-comment rulemaking," and comments have become an integral part of the overall rulemaking process.

In a December 2006 report titled "Interim Report on the Administrative Law, Process and Procedure Project for the 21st Century," the Subcommittee on Commercial and Administrative Law of the United States House of Representatives' Committee on the Judiciary identified a number of questions related to rulemaking comments as areas of possible study by the Administrative Conference.[2] These questions include:

- Should there be a required, or at least recommended, minimum length for a comment period?
- Should agencies immediately make comments publicly available? Should they permit a "reply comment" period?
- Must agencies reply to all comments, even if they take no further action on a rule for years? Do comments eventually become sufficiently "stale" that they could not support a final rule without further comment?

[1] 5 U.S.C. § 553; *see also* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514 (1989) (describing the "notice-and-comment procedures for rulemaking" under the APA as "probably the most significant innovation of the legislation").

[2] SUBCOMM. ON COMMERCIAL & ADMIN. LAW OF THE COMM. ON THE JUDICIARY, 109TH CONG., INTERIM REP. ON THE ADMIN. LAW, PROCESS AND PROCEDURE PROJECT FOR THE 21ST CENTURY at 3–5 (Comm. Print 2006).

- Under what circumstances should an agency be permitted to keep comments confidential and/or anonymous?
- What effects do comments actually have on agency rules?

The Conference has studied these questions and other, related issues concerning the "comment" portion of the notice-and-comment rulemaking process. The Conference also has a concurrent recommendation that deals with separate matters, focusing specifically on legal issues implicated by the rise of e-rulemaking. *See* Administrative Conference of the United States, Recommendation 2011-1, *Legal Considerations in e-Rulemaking*.

The Conference believes that the comment process established by the APA is fundamentally sound. Nevertheless, certain innovations in the commenting process could allow that process to promote public participation and improve rulemaking outcomes more effectively. In this light, the Conference seeks to highlight a series of "best practices" designed to increase the opportunities for public participation and enhance the quality of information received in the commenting process. The Conference recognizes that different agencies have different approaches to rulemaking and therefore recommends that individual agencies decide whether and how to implement the best practices addressed.

In identifying these best practices, the Conference does not intend to suggest that it has exhausted the potential innovations in the commenting process. Individual agencies and the Conference itself should conduct further empirical analysis of notice-and-comment rulemaking, should study the effects of the proposed recommendations to the extent they are implemented, and should adjust and build upon the proposed processes as appropriate.

RECOMMENDATION

1. To promote optimal public participation and enhance the usefulness of public comments, the eRulemaking Project Management Office should consider publishing a document explaining what types of comments are most beneficial and listing best practices for parties submitting comments. Individual agencies may publish supplements to the common document describing the qualities of effective comments. Once developed, these documents should be made publicly available by posting on the agency website, Regulations.gov, and any other venue that will promote widespread availability of the information.

2. Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. As a general matter, for "[s]ignificant regulatory action[s]" as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.[3]

3. Agencies should adopt stated policies of posting public comments to the Internet within a specified period after submission. Agencies should post all electronically submitted comments on the Internet and should also scan and post all comments submitted in paper format.[4]

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[3] *See also* Administrative Conference of the United States, Recommendation 93-4, *Improving the Environment for Agency Rulemaking* (1993) ("Congress should consider amending section 553 of the APA to . . . . [s]pecify a comment period of 'no fewer than 30 days.'"); Exec. Order No. 13,563, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 18, 2011) ("To the extent feasible and permitted by law, each agency shall afford the public a meaningful opportunity to comment through the Internet on any proposed regulation, with a comment period that should generally be at least 60 days.").

[4] *See also* Office of Information & Regulatory Affairs, Memorandum for the President's Management Council on Increasing Openness in the Rulemaking Process—Improving Electronic Dockets at 2 (May 28, 2010) ("OMB expects agencies to post public comments and public submissions to the electronic docket on Regulations.gov in a timely

4. The eRulemaking Project Management Office and individual agencies should establish and publish policies regarding the submission of anonymous comments.

5. Agencies should adopt and publish policies on late comments and should apply those policies consistently within each rulemaking. Agencies should determine whether or not they will accept late submissions in a given rulemaking and should announce the policy both in publicly accessible forums (*e.g.*, the agency's website, Regulations.gov) and in individual Federal Register notices including requests for comments. The agency may make clear that late comments are disfavored and will only be considered to the extent practicable.[5]

6. Where appropriate, agencies should make use of reply comment periods or other opportunities for receiving public input on submitted comments, after all comments have been posted. An opportunity for public input on submitted comments can entail a reply period for written comments on submitted comments, an oral hearing, or some other means for input on comments received.[6]

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manner, regardless of whether they were received via postal mail, email, facsimile, or web form documents submitted directly via Regulations.gov.").

[5] *See, e.g.*, Highway-Rail Grade Crossing; Safe Clearance, 76 Fed. Reg. 5,120, 5,121 (Jan. 28, 2011) (Department of Transportation notice of proposed rulemaking announcing that "[c]omments received after the comment closing date will be included in the docket, and we will consider late comments to the extent practicable").

[6] *See also* Administrative Conference of the United States, Recommendation 76-3, *Procedures in Addition to Notice & the Opportunity for Comment in Informal Rulemaking* (1976) (recommending a second comment period in proceedings in which comments or the agency's responses thereto "present new and important issues or serious conflicts of data"); Administrative Conference of the United States, Recommendation 72-5, *Procedures for the Adoption of Rules of General Applicability* (1972) (recommending that agencies consider providing an "opportunity for parties to comment on each other's oral or written submissions); Office of Information & Regulatory Affairs, Memorandum for the Heads of Executive Departments and Agencies, and of Independent Regulatory Agencies, on Executive Order 13,563, M-11-10, at 2 (Feb. 2, 2011) ("[Executive Order 13,563] seeks to increase participation in the regulatory process by allowing interested parties the opportunity to react to (and benefit from) the comments, arguments, and information of others during the rulemaking process itself.").

7. Although agencies should not automatically deem rulemaking comments to have become stale after any fixed period of time, agencies should closely monitor their rulemaking dockets, and, where an agency believes the circumstances surrounding the rulemaking have materially changed or the rulemaking record has otherwise become stale, consider the use of available mechanisms such as supplemental notices of proposed rulemaking to refresh the rulemaking record.

Daily Labor Report®

Source: Daily Labor Report: News Archive > 2011 > May > 05/03/2011 > Special Report > Representation Elections: Number of NLRB Elections Held in 2010 Increased Substantially From Previous Year

85 DLR B-1

Representation Elections

Number of NLRB Elections Held in 2010 Increased Substantially From Previous Year

The number of resolved representation elections conducted by the National Labor Relations Board in 2010 increased substantially from the previous year, according to NLRB data analyzed by BNA PLUS, BNA's research division.

At the same time, the number of elections won by unions also increased, while the percentage of union wins decreased somewhat.

According to preliminary data, NLRB conducted 1,666 elections in 2010, up from 1,321 elections in 2009. Unions won 1,126 of those elections in 2010, an increase from 908 wins the previous year.

The union win rate of 67.6 percent in 2010 is down slightly from 68.7 percent the year before. Unions have won more than half of all representation elections in each of the past 14 years.

The number of workers eligible to vote in the elections also increased to 108,312 in 2010, up from 73,902 in 2009. Unions organized 70,333 workers through NLRB elections in 2010, up from 50,131 in 2009.

The NLRB statistics do not reflect the full extent of organizing being conducted by unions since many unions organize through neutrality and card-check recognition agreements and other methods.

The union win rate in decertification elections continued to decline in 2010, with unions prevailing in 93 of 239 resolved decertification elections, or 38.9 percent, down from 104 of 255 decertification elections, or 40.8 percent in 2009. This is the second consecutive year that the number of decertification elections and the union win rate declined.

Elections by Union Affiliation

Unions affiliated with the AFL-CIO won 517 of 741 representation elections held in 2010, or 69.8 percent, compared with 66.7 percent in 2009, when they won 363 of 544 elections.

Unions in the Change to Win federation, which was formed in mid-2005, won 441 NLRB elections, or 60.7 percent of the 726 elections they participated in last year. In 2009, they won 371 of 605 elections, or 61.3 percent of those in which they participated.

Of the 10 most active unions, the International Brotherhood of Teamsters again led all other unions by participating in 431 elections in 2010, up from 373 elections in 2009. The union won 251 elections in 2010, up from 231 the previous year, but the win rate decreased to 58.2 percent in 2010 from 61.9 percent in 2009.

The Service Employees International Union ranked a distant second by participating in 157 elections, winning 106 or 67.5 percent in 2010. SEIU participated in 99 elections in 2009, winning 70 or 70.7 percent. SEIU has consistently participated in the second largest number of elections each year after IBT, except for 2009.

The United Food and Commercial Workers ranked third in 2010, participating in 106 elections, winning 56 or 52.8 percent. In 2009, UFCW participated in 109 elections, winning 60 or 55 percent.

Unions participating in the next highest number of elections, in order, were the International Association of Machinists with 101 elections, the International Brotherhood of Electrical Workers with 92 elections, and the International Union of Operating Engineers with 77 elections.

The Laborers' International Union was the most successful of the 10 most active unions, winning 84.4 percent of the NLRB elections in which it participated. The Machinists ranked second, winning 73.3 percent of its elections, followed by the United Steelworkers (70.2 percent), SEIU and the Operating Engineers (67.5 percent), the Teamsters (58.2 percent), and the United Auto Workers (57.7 percent).

SEIU Organized the Most Workers

For the first time since 2006, SEIU organized the most workers—14,343, followed by IBT with 11,919, and UFCW with 3,267. Also, for the first time since 2007, IBT did not organize the most workers out of the top five active unions.

Independent unions won 63.9 percent of the 266 elections in which they participated last year, compared with 74.9 percent of 235 elections in 2009.

By bargaining unit size, unions had the greatest organizing successes among very small and very large units. Unions won 70.6 percent of the 1,116 elections held in units of fewer than 50 workers, and 76.2 percent of 21 elections held in units of 500 workers or more.

Unions won 50 percent or more of the elections held in all industries in 2010, except communications only (47.8 percent) and wholesale (48.1 percent). The industry with the highest number of wins was construction (80.9 percent), followed by finance, insurance, and real estate (76.9 percent), mining (76.2 percent), health care services only (71 percent), services (70.6 percent), retail (64 percent), transportation, communications, and utilities (62.7 percent), and manufacturing (55.0 percent).

The number of elections increased in the two states that held the most elections in 2010. Unions participated in 221 elections in New York in 2010, up from 201 in 2009, while in California workers participated in 192 elections, up from 122 the year before.

By Michelle Amber

The accompanying BNA graphics illustrate highlights of the research findings. The full report, which includes additional tables involving elections by industry, unit size, state, and white collar employees, is available for $115 per copy from BNA PLUS by calling 800-372-1033, option 5, then option 3 or may be ordered on the BNA PLUS Web site at http://bnaplus.bna.com/LaborReports.aspx. Detailed election statistics also are available by calling or e-mailing BNA PLUS at bnaplus@bna.com.

Table 1 NLRB Representation Elections 2006 – 2010, by Union Affiliation

Union Affiliation/Year		Number of Resolved Elections: Held	Won by Union	Union Not Chosen	Percent of Elections Won by Union	Number of Employees Eligible to Vote: In All Elections	In Elections Won by Union
Total Elections	2006	1,657	1,019	638	61.5%	112,121	59,412
	2007	1,524	924	600	60.6	102,610	58,953
	2008	1,616	1,081	535	66.9	106,248	70,143
	2009	1,321	908	413	68.7	73,902	50,131
	2010	1,666	1,126	540	67.6	108,312	70,333
Totals		**7,784**	**5,058**	**2,726**	**65.0%**	**503,193**	**308,972**
AFL-CIO Unions	2006	765	463	302	60.5%	49,519	22,543
	2007	708	421	287	59.5	49,098	25,203
	2008	667	429	238	64.3	39,646	21,025
	2009	544	363	181	66.7	23,958	13,877
	2010	741	517	224	69.8	40,207	24,298
Totals		**3,425**	**2,193**	**1,232**	**64.0%**	**202,428**	**106,946**
Change to Win Unions	2006	734	411	323	56.0%	52,344	26,105
	2007	677	358	319	52.9	45,968	23,520
	2008	741	454	287	61.3	54,116	36,250
	2009	605	371	234	61.3	39,881	25,261
	2010	726	441	285	60.7	54,457	30,902
Totals		**3,483**	**2,035**	**1,448**	**58.4%**	**246,766**	**142,038**
Independent Unions	2006	252	145	107	57.5%	22,127	10,416
	2007	212	144	68	67.9	17,896	10,006
	2008	269	199	70	74.0	19,038	12,877
	2009	235	176	59	74.9	16,356	11,030
	2010	266	170	96	63.9	23,974	14,658
Totals		**1,234**	**834**	**400**	**67.6%**	**99,391**	**58,987**

Note: Does not include decertification elections. Union affiliation numbers add up to more than the overall total due to multi-union elections.

Note: The Change to Win federation formed in 2005. For the purposes of this report, unions are not considered CTW affiliates if they are also affiliated with the AFL-CIO. Unions affiliated with Change to Win include the Carpenters & Joiners (CJA), effective June 27, 2005; the Service Employees (SEIU) and the Teamsters (IBT), effective July 25, 2005; the Food & Commercial Workers (UFCW), effective July 29, 2005; UNITE HERE, effective Sept. 14, 2005; the Farm Workers (UFW), effective Jan. 1, 2006; and the Laborers (LIUNA), effective June 1, 2006. The Carpenters and Joiners (CJA) disaffiliated from CTW effective Nov. 1, 2008. UNITE HERE disaffiliated from CTW and re-affiliated with the AFL-CIO effective Sept. 17, 2009. LIUNA disaffiliated from CTW and re-affiliated with the AFL-CIO effective Oct. 1, 2010.

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Table 2 NLRB Representation Elections 2006 – 2010, by Union Affiliation

Union Affiliation/Year		Number of Resolved Elections: Held	Won by Union	Union Not Chosen	Percent of Elections Won by Union	Number of Employees Eligible to Vote: In All Elections	In Elections Won by Union
International Brotherhood of Teamsters (IBT)	2006	424	209	215	49.3%	20,649	8,045
	2007	410	201	209	49.0	23,149	11,059
	2008	399	234	165	58.6	21,919	13,860
	2009	373	231	142	61.9	21,151	14,427
	2010	431	251	180	58.2	22,131	11,919
Totals		**2,037**	**1,126**	**911**	**55.3%**	**108,999**	**59,310**
Service Employees (SEIU)	2006	167	120	47	71.9%	22,576	14,989
	2007	138	100	38	72.5	13,645	8,800
	2008	161	116	45	72.0	14,612	11,140
	2009	99	70	29	70.7	11,806	7,954
	2010	157	106	51	67.5	23,082	14,343
Totals		**722**	**512**	**210**	**70.9%**	**85,721**	**57,226**
Food & Commercial Workers (UFCW)	2006	118	64	54	54.2%	9,575	2,960
	2007	85	38	47	44.7	7,469	3,511
	2008	125	69	56	55.2	14,605	9,567
	2009	109	60	49	55.0	5,205	1,921
	2010	106	56	50	52.8	7,745	3,267
Totals		**543**	**287**	**256**	**52.9%**	**44,599**	**21,226**
Operating Engineers (IUOE)	2006	107	69	38	64.5%	2,540	1,052
	2007	119	76	43	63.9	2,844	1,624
	2008	101	66	35	65.3	2,320	1,023
	2009	72	42	30	58.3	1,760	674
	2010	77	52	25	67.5	1,332	739
Totals		**476**	**305**	**171**	**64.1%**	**10,796**	**5,112**

Note: Does not include decertification elections. Union affiliation numbers add up to more than the overall total due to multi-union elections.

Note: The Change to Win federation formed in 2005. For the purposes of this report, unions are not considered CTW affiliates if they are also affiliated with the AFL-CIO. Unions affiliated with Change to Win include the Carpenters & Joiners (CJA), effective June 27, 2005; the Service Employees (SEIU) and the Teamsters (IBT), effective July 25, 2005; the Food & Commercial Workers (UFCW), effective July 29, 2005; UNITE HERE, effective Sept. 14, 2005; the Farm Workers (UFW), effective Jan. 1, 2006; and the Laborers (LIUNA), effective June 1, 2006. The Carpenters and Joiners (CJA) disaffiliated from CTW effective Nov. 1, 2008. UNITE HERE disaffiliated from CTW and re-affiliated with the AFL-CIO effective Sept. 17, 2009. LIUNA disaffiliated from CTW and re-affiliated with the AFL-CIO effective Oct. 1, 2010.

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Table 2 - continued NLRB Representation Elections 2006 – 2010, by Union Affiliation

Union Affiliation/Year		Number of Resolved Elections: Held	Won by Union	Union Not Chosen	Percent of Elections Won by Union	Number of Employees Eligible to Vote: In All Elections	In Elections Won by Union
Electrical Workers (IBEW)	2006	113	75	38	66.4%	5,031	2,349
	2007	92	49	43	53.3	3,252	1,280
	2008	114	61	53	53.5	4,066	1,391
	2009	80	47	33	58.8	3,347	1,637
	2010	92	52	40	56.5	5,301	1,637
Totals		**491**	**284**	**207**	**57.8%**	**20,997**	**8,294**
International Association of Machinists (IAM)	2006	127	90	37	70.9%	11,763	5,319
	2007	119	84	35	70.6	6,731	2,795
	2008	90	67	23	74.4	4,896	1,854
	2009	93	74	19	79.6	3,976	2,913
	2010	101	74	27	73.3	3,944	1,985
Totals		**530**	**389**	**141**	**73.4%**	**31,310**	**14,866**
United Steelworkers (USW)	2006	70	30	40	42.9%	8,002	1,728
	2007	71	32	39	45.1	7,763	2,009
	2008	58	31	27	53.4	3,728	1,056
	2009	38	20	18	52.6	2,883	546
	2010	47	33	14	70.2	3,504	1,834
Totals		**284**	**146**	**138**	**51.4%**	**25,880**	**7,173**
Laborers International Union (LIUNA)	2006	67	39	28	58.2%	1,647	938
	2007	45	18	27	40.0	1,754	375
	2008	38	27	11	71.1	1,478	1,061
	2009	18	6	12	33.3	959	262
	2010	32	27	5	84.4	1,659	1,186
Totals		**200**	**117**	**83**	**58.5%**	**7,497**	**3,822**

Note: Does not include decertification elections. Union affiliation numbers add up to more than the overall total due to multi-union elections.

Note: The Change to Win federation formed in 2005. For the purposes of this report, unions are not considered CTW affiliates if they are also affiliated with the AFL-CIO. Unions affiliated with Change to Win include the Carpenters & Joiners (CJA), effective June 27, 2005; the Service Employees (SEIU) and the Teamsters (IBT), effective July 25, 2005; the Food & Commercial Workers (UFCW), effective July 29, 2005; UNITE HERE, effective Sept. 14, 2005; the Farm Workers (UFW), effective Jan. 1, 2006; and the Laborers (LIUNA), effective June 1, 2006. The Carpenters and Joiners (CJA) disaffiliated from CTW effective Nov. 1, 2008. UNITE HERE disaffiliated from CTW and re-affiliated with the AFL-CIO effective Sept. 17, 2009. LIUNA disaffiliated from CTW and re-affiliated with the AFL-CIO effective Oct. 1, 2010.

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Representation Elections 2006 – 2010, by Union Affiliation

ıer of Resolved Elections			Percent of Elections Won by Union	Number of Employees Eligible to Vote	
Held	Won by Union	Union Not Chosen		In All Elections	In Elections Won by Union
39	17	22	43.6%	3,910	1,470
44	25	19	56.8	11,642	8,092
20	13	7	65.0	1,954	613
18	8	10	44.4	519	244
26	15	11	57.7	2,104	652
147	**78**	**69**	**53.1%**	**20,129**	**11,071**
30	11	19	36.7%	2,536	278
16	14	2	87.5	901	822
33	18	15	54.5	3,541	2,388
18	13	5	72.2	1,055	1,003
20	11	9	55.0	863	461
117	**67**	**50**	**57.3%**	**8,896**	**4,952**

ı numbers add up to more than the overall total due to multi-union elections.

urposes of this report, unions are not considered CTW affiliates if they are also affiliated with the AFL-CIO. Unions affiliated with Change to Win include the e Employees (SEIU) and the Teamsters (IBT), effective July 25, 2005; the Food & Commercial Workers (UFCW), effective July 29, 2005; UNITE HERE, effective 5; and the Laborers (LIUNA), effective June 1, 2006. The Carpenters and Joiners (CJA) disaffiliated from CTW effective Nov. 1, 2008. UNITE HERE disaffiliated)09. LIUNA disaffiliated from CTW and re-affiliated with the AFL-CIO effective Oct. 1, 2010.

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Table 3 NLRB Decertification Elections 2006 – 2010, by Union Affiliation

Union Affiliation/Year		Number of Resolved Elections: Held	Won by Union	Union Not Chosen	Percent of Elections Won by Union	Number of Employees Eligible to Vote: In All Elections	In Elections Won by Union
Total Elections	2006	374	128	246	34.2%	23,483	13,603
	2007	332	121	211	36.4	24,754	12,230
	2008	283	137	146	48.4	23,380	16,547
	2009	255	104	151	40.8	16,324	9,031
	2010	239	93	146	38.9	13,519	7,345
Totals		**1,483**	**583**	**900**	**39.3%**	**101,460**	**58,756**
AFL-CIO Unions	2006	177	56	121	31.6%	10,804	5,045
	2007	146	56	90	38.4	11,204	6,077
	2008	123	57	66	46.3	12,436	10,030
	2009	112	46	66	41.1	5,807	2,577
	2010	104	38	66	36.5	5,539	2,707
Totals		**662**	**253**	**409**	**38.2%**	**45,790**	**26,436**
Change to Win Unions	2006	185	66	119	35.7%	12,759	8,219
	2007	166	54	112	32.5	12,730	5,592
	2008	139	72	67	51.8	9,237	5,927
	2009	119	47	72	39.5	8,403	5,194
	2010	106	46	60	43.4	5,807	3,283
Totals		**715**	**285**	**430**	**39.9%**	**48,936**	**28,215**
Independent Unions	2006	21	6	15	28.6%	1,858	339
	2007	23	11	12	47.8	1,085	561
	2008	25	9	16	36.0	2,431	1,050
	2009	26	11	15	42.3	2,040	1,260
	2010	29	7	22	24.1	1,648	475
Totals		**124**	**44**	**80**	**35.5%**	**9,062**	**3,685**

Note: Union affiliation numbers add up to more than the overall total due to multi-union elections.

Note: The Change to Win federation formed in 2005. For the purposes of this report, unions are not considered CTW affiliates if they are also affiliated with the AFL-CIO. Unions affiliated with Change to Win include the Carpenters & Joiners (CJA), effective June 27, 2005; the Service Employees (SEIU) and the Teamsters (IBT), effective July 25, 2005; the Food & Commercial Workers (UFCW), effective July 29, 2005; UNITE HERE, effective Sept. 14, 2005; the Farm Workers (UFW), effective Jan. 1, 2006; and the Laborers (LIUNA), effective June 1, 2006. The Carpenters and Joiners (CJA) disaffiliated from CTW effective Nov. 1, 2006. UNITE HERE disaffiliated from CTW and re-affiliated with the AFL-CIO effective Sept. 17, 2009. LIUNA disaffiliated from CTW and re-affiliated with the AFL-CIO effective Oct. 1, 2010.

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Terrific, particularly on breaking news issues
— **P. Lantingan**

Hi Jim and Phil, I would like to thank your team on our recent victory over the IAFF in our election on Friday. We won with about 2/3 of the votes in our favor. I could not have done it without the great work of Scott Michel. He got to the root of the problem almost immediately and got me headed in the right direction. Thanks again for your expert help.
— **W. Woodcock**

Your web site and newsletter are informative and answer many questions of what to expect and how

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MEMORANDUM

To: Craig, Kent, Jeff, Steve, and Joel
From: Bob
Re: Public Availability of Initial Comments Filed by August 22
Date: November 10, 2011

You asked me to determine at what point comments filed by the deadline of 8/22/11 were actually available online to those who wished to review them in order to file reply comments. Because of the large number of comments and the limitations of the computer programs we have used, it is not possible to answer this question with 100% certainty. As discussed below, however, I believe that the Board can be confident that entities opposing the rule that wanted to file reply comments had access to all the initial comments that might have affected the substance of their replies by 8/24/11.

Background

There are a total of 65,958 document files in the system. The total number of comments, however, is no more than 65,955. That is because the system includes one corrupted file, one file that is merely a copy of the Federal Register notice for the rule, and one file that is a duplicate of the NAM comment, which was submitted both via Regulations.gov and via delivery to the ES office. There very well may be other duplicate comments, but likely not many.

The table on the following page shows, as best I can determine, how many documents were received in the system, and when they were posted to Regulations.gov. Documents filed through Regulations.gov are "received" in the system immediately. Documents mailed or delivered to the Executive Secretary's office need to be added to the system manually before they are counted as having been received.

Documents filed online through Regulations.gov are generally "posted," and therefore available to the public to review, the same day they are received or the next day. Documents filed by mail or delivery are posted after they are received by being manually uploaded. The lag time between the "received" and "posted" dates for such comments varied depending on whether the documents were paper copies or groups of digital files submitted on a CD. But, in either case, a large number of comments that were timely filed by 8/22 via mail or hand delivery were received and posted after 8/24.

Date	Number Received	Number Posted/Available
8/22	28,951	22,259
8/23	29,157	29,137
8/24	29,760	29,236
8/25	32,803	
8/26	51,321	
8/27	51,324	
8/28	51,327	
8/29	51,338	
8/30	51,353	
8/31	51,358	
9/1	51,360	
9/2	51,364	51,362
9/3	51,365	
9/4	51,365	
9/5	51,407	
9/6	51,433	
9/7	51,577	51,577
9/21	51,579	51,579
9/26		
9/27	65,957	
9/28		65,957
9/29	65,958	65,958

Analysis

All comments that were timely filed via the web were posted and available for review by Tuesday, 8/23/11. The total of 29,236 comments posted by 8/24/11 consists mostly of such comments.

Based on painstaking review of the comments themselves, all but at most (and probably considerably less than) 87 comments posted after Wednesday, 8/24 (other than the NAM duplicate comment) fall into one of the following four categories:

1. Timely filed form letters submitted by the AFL-CIO (c. 21,992). (See attached example.)
2. Timely filed form letters submitted by Americans for Prosperity (c. 12,385) or the Coalition for a Democratic Workplace (c. 1,875), or mailed by individual businesses working from a form supplied by a business organization (at least 256). (See attached examples.)
3. Late filed comments submitted via the web. Regulations.gov had no way to distinguish between a late filed initial comment and a timely filed reply comment. We ultimately decided to accept and post all of these comments, but the posting was delayed while the issue was considered.
4. Reply comments.

The documents in categories 3 and 4 obviously need not and should not have been considered in preparing reply comments. The comments in categories 1 and 2 would not have been significant for the preparation of reply comments.

It appears that a significant portion of the 87 comments unaccounted for in these specific totals are letters from businesses. The ones I have reviewed so far seem to be based on a form letter and rarely exceed a page in length.

Conclusion

29,236 timely filed initial comments were available for review by 8/24/11. While a large number of timely filed initial comments were not available for public review until 9/2/11 or even later, virtually all of these comments were either form letters collected or solicited by organizations supporting the management point of view on the rules or form letters collected by the AFL-CIO. Thus, any comment that a management side organization would have wanted to review prior to submitting a reply comment was available for review at least 11 days prior to the 9/6/11 deadline for submitting reply comments.

AFL-CIO 21,992

National Labor Relations Board
2120 L Street Northwest
Washington, DC 20037-1527

Dear National Labor Relations Board:

As a working person, I support your proposed rule to help level the playing field so workers can make their own choice about whether to form a union.

This is a fundamental right under U.S. and international law. But too many CEOs, with their armies of lawyers and anti-union consultants, exploit loopholes in the law to harass, intimidate and even fire workers who want a union.

This year we have seen unprecedented state-level attacks on working families and the worst economy for working people since the Great Depression. I welcome your rule to improve the process for working people trying to form unions. Please continue to protect the path unions provide for so many working families to good jobs, the middle class and the American Dream.

Thank you again.

joe kincade
326bn. funk rd.
boyertown, PA 19512

Americans for Prosperity
12,385

National Labor Relations Board
1099 14th Street. NW
Washington. DC 20570

Re: Notice of Proposed Rulemaking. Representation Case Procedures. RIN 3142-AA08

This proposed rule is an affront to worker rights and a naked power play by union bosses who have undue influence on the recess-appointed Democratic majority on the Board. The rule would needlessly increase tension in the workplace and undermine the ability of American companies to create jobs.

The current median of 38 days before an election is reasonable and gives both sides an opportunity to explain the facts and ensure workers understand the high stakes in a representation election. Shortening it to as little as 10 days would prevent employers from educating workers and result in workers being forced into unions.

In addition. the rule's disclosure provisions would force confidential employee information. including phone numbers and email addresses. to be made available to union organizers. This is a dangerous invasion of privacy. and would open the door to harassment and intimidation of workers. These activities disrupt businesses. undermining economic growth.

Coming at a time when the NLRB's acting general counsel is suing four states to overturn state constitutional protections for secret ballot voting and is accusing Boeing of an unfair labor practice for moving to a right to work state. it is clear that this rule is part and parcel of an effort to force workers into unions they do not want to join.

I urge you to withdraw the rule.

Brett Arbaugh
. SC 29803

Coalition for a Democratic Workplace
1,875

Friday. July 22nd. 2011 11:22 AM

From:
Mr. Tim Callander
self
37029 S. Little McDonald Dr.
Perham. MN 56573
701-367-8308
teall@eot.com

To:
Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street. NW
Washington. DC 20570

Re: Notice of Proposed Rulemaking. Representation Case Procedures
RIN 3142-AA08

Dear Mr. Heltzer:

I am writing to request that the National Labor Relations Board immediately withdraw the above-referenced Notice of Proposed Rulemaking. The proposed rule is completely unnecessary and would infringe on my rights as an employer and my employees' rights. create further tension between labor and management and. most importantly. make it much harder for me to create jobs.

The proposal would make drastic and unnecessary changes to the long-standing procedures for conducting union representation elections in an effort to promote unionization at the expense of my right to communicate with my employees and their right to make an informed choice about union representation. My understanding is that I could find myself facing a representation election in as little as 10 days after the union filing of a petition. as opposed to the current median of 38 days before an election. I would need to spend the majority of the ten days finding and retaining legal counsel so I can understand my rights and don't accidentally violate the law. This would leave me with almost no opportunity to talk to my employees about union representation or respond to promises union organizers may have made to secure union support. even though many of those promises may be completely unrealistic. Not only is this unfair to my employees and me. but it also promises to destabilize future relations as parties would enter a bargaining relationship with unrealistic expectations. As President Obama recently observed. "We can't afford to have labor and management fighting all the time. at a time when we're competing against Germany and China and other countries that want to sell

goods all around the world." The new election rules would do exactly what the President is warning against.

Also, allowing me so little time to respond to a union petition and requiring me to file complex new documents, with practically no margin for error, would trample my due process rights. Under current rules, after a petition is filed I can retain a lawyer, figure out which employees the union wants to represent, make a simple list of names and addresses, and then make sure my employees get both sides of the story before they vote. Under the new rules, I have only seven days to find a lawyer and put together a hastily compiled legal statement. If I fail to include to a legal argument in that statement, it has been waived forever.

I am also very concerned that the new rules would force me to turn over confidential information about my employees, including phone numbers and email addresses. The rules don't make it clear if I would have to provide home or work contact information, or both. Many people have unlisted phone numbers and use personal email addresses for online shopping and banking. Forcing me to disclose this information is irresponsible, dangerous and unfair to my employees. And providing work phone numbers and emails would almost guarantee solicitation and distraction during working time. This has never been allowed in union campaigns and would disrupt and harm my business.

Finally, not only are the changes completely unfair to my employees and me, they are completely unnecessary. As your own Acting General Counsel noted in an official report, the Board's performance using the current election system is "outstanding," with a median of 38 days from petition to election, and a majority of elections are being won by unions.

The proposed rule represent a devastating blow to my free speech and due process rights and will deprive my employees' rights to make an informed decision about union representation. For these reasons, I respectfully urge the Board to withdraw the proposed rulemaking in its entirety.

Respectfully submitted.

Mr. Tim Callander
self
37029 S. Little McDonald Dr.
Perham, MN 56573
701-367-8308
tcall@eot.com

Business Form - 256
writing to oppose - 10 day election

July 28, 2011

Chairwoman Wilma B. Liebman
National Labor Relations Board
1099 14th Street NW
Washington, DC 20570-0001

Dear Chairwoman B. Liebman:

I am writing to oppose the NLRB's proposed rule to reduce the time for union-organizing elections to as little as 10 days.

When workers vote to organize a union, the election should involve a fair exchange of information from both unions and employers. The NLRB's current election processes allow for this robust debate. But, shortening the timeline would deny employers an opportunity to express their views, leaving employees with only the union bosses side of the issue to consider before they cast their ballot.

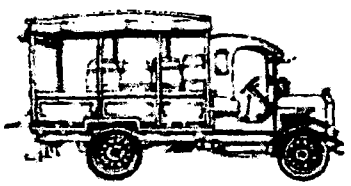
This is clearly an example of changing the rules of the game to get the outcome you desire.

There is no evidence that workers are rejecting unionization; instead, workers are rejecting unionization because they have weighed the pros and cons of joining a union. Having an average 38 days gives workers a good opportunity to do this.

Shortening the election period will also impose a significant burden on business owners, giving them only a few days to respond to the claims being made by union organizers.

I strongly oppose this proposed rule. In this struggling economy, we should be focused on job creation, not advancing Big Labor's agenda.

Sincerely,
Jackie Oates
18789 Chaplains Chapel Rd
Bridgeville, DE 19933-4247



Bay Area Beverage Company

(510) 965-6120
FAX (510) 965-6323

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C.

I am writing to oppose the proposed rule on Representation Case Procedures or what I see as proposed 'Quick-Snap' election rules.

The Quick-Snap elections rules would give employers like me as few as 10 days to communicate with their employees between the time they learn that a union is trying to organize the workforce and the election. With the rules in place, unions could begin organizing a workforce secretly and then ambush an employer once enough signatures are collected. This is unfair and unwarranted and I urge you to oppose this proposed rule.

The NLRB's current election processes allow for healthy and adequate debate between unions and employers. The median number of days for union elections in 2010 was very prompt, taking only about 38 days. Shortening the timeline would deny employers an opportunity to express their views, leaving employees with only the union's side of the issue to consider before they cast their ballot. Employees need to hear from all sides when making the important decision whether or not they should join a labor union. Employees also deserve enough time to consider any decision that has such a huge impact on them and their families. Shortening the election period will also impose a significant burden on business owners, giving them only a few days to respond to the claims being made by union organizers.

Through these proposed regulations, the NLRB is attempting to fix a problem that simply does not exist and would be implementing the most dramatic changes to labor election rules in 75 years. Again, this is unfair and unwarranted and I urge you to oppose this proposed rule.

As a employer, I strongly oppose this proposed rule. In this struggling economy, we should be focused on job creation, not killing jobs.

Sincerely,

Tom J. Louderback
700 National Court
Richmond, CA 94804
tj@bayareabev.com

BGC
BROOKSHIRE
GROCERY COMPANY

scan

August 10, 2011

PETE LEUNG
Senior Vice President - Brookshire Foods Operations

1600 WSW Loop 323
P.O. Box 1411
Tyler, Texas 75710-1411
903.534.3000
brookshires.com

Mr. Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570

Re: Proposed Rule Governing Representation Case Procedures: RIN 3142-AA08

Dear Mr. Heltzer:

The purpose of my letter is to provide comments in response to the National Labor Relations Board's (NLRB) proposed rulemaking that would make significant changes to procedures now in place for elections on the important question of whether or not employees wish to be represented by a union.

In brief, the NLRB proposes to make changes that will dramatically shorten the time frame for union elections from the current average of 38 days to between 10 to 21 days. In my view, this compressed time frame is inadequate and unfair to employees as it will deny them the opportunity to hear from their employer so that they can make an informed decision regarding union representation.

The NLRB proposed rules, if implemented, will hurt smaller grocery store operations in our industry since these entities normally do not have the resources and legal expertise to understand all the nuances of a union election under an abbreviated time frame. Quite frankly, I see no reason to change current election time frames. They are working extremely well for both employers and the unions. In fact, unions won almost 68 percent of all NLRB conducted elections in 2010.

Additionally, I am opposed to the rules proposed requirement that employers would have to provide the union with the names and addresses of all employees plus their phone numbers, email addresses and other sensitive information. My concern here is that my employees will be inundated with emails and phone calls from union organizers. Some of my associates have unlisted phone numbers which they do not wanted shared without side entities for any purpose. To do so would be an invasion of their privacy. Why is all this information suddenly needed especially when the Board has stated since 1966 that the names and addresses of employees is all that is needed?

Finally, the NLRB proposal will substantially limit the opportunity for a full evidentiary hearing or Board review on contested issues such as appropriate unit, voter eligibility and election misconduct. As such, these changes are detrimental to an employer and will likely result in increased costly litigation that would drag out the election process rather than expediting it.

In closing, I see no need to for the Board's proposed changes to the current election rules and therefore, respectfully urge the NLRB to withdraw the rulemaking from any further consideration.

Sincerely,

Pete Leung

PL/do

RULES

OF THE

Supreme Court of the United States

ADOPTED JANUARY 12, 2010

EFFECTIVE FEBRUARY 16, 2010

Rule 9. Appearance of Counsel

1. An attorney seeking to file a document in this Court in a representative capacity must first be admitted to practice before this Court as provided in Rule 5, except that admission to the Bar of this Court is not required for an attorney appointed under the Criminal Justice Act of 1964, see 18 U. S. C. § 3006A(d)(6), or under any other applicable federal statute. The attorney whose name, address, and telephone number appear on the cover of a document presented for filing is considered counsel of record, and a separate notice of appearance need not be filed. If the name of more than one attorney is shown on the cover of the document, the attorney who is counsel of record shall be clearly identified. See Rule 34.1(f).

2. An attorney representing a party who will not be filing a document shall enter a separate notice of appearance as counsel of record indicating the name of the party represented. A separate notice of appearance shall also be entered whenever an attorney is substituted as counsel of record in a particular case.

Part III. Jurisdiction on Writ of Certiorari

Rule 10. Considerations Governing Review on Certiorari

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual

course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;

(c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Rule 11. Certiorari to a United States Court of Appeals Before Judgment

A petition for a writ of certiorari to review a case pending in a United States court of appeals, before judgment is entered in that court, will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court. See 28 U. S. C. § 2101(e).

Rule 12. Review on Certiorari: How Sought; Parties

1. Except as provided in paragraph 2 of this Rule, the petitioner shall file 40 copies of a petition for a writ of certiorari, prepared as required by Rule 33.1, and shall pay the Rule 38(a) docket fee.

2. A petitioner proceeding *in forma pauperis* under Rule 39 shall file an original and 10 copies of a petition for a writ of certiorari prepared as required by Rule 33.2, together with an original and 10 copies of the motion for leave to proceed *in forma pauperis*. A copy of the motion shall precede and be attached to each copy of the petition. An in-

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U.S. Small Business Administration

FAQS: FREQUENTLY ASKED QUESTIONS

Advocacy Small Business Statistics and Research

1. **What is a small business?**

The Offce of Advocacy defines a small business as an independent business having fewer than 500 employees. (The definition of "small business" used in government programs and contracting varies by industry; see **www.sba.gov/size.)**

2. **How important are small businesses to the U.S. economy?**

Small firms:

- Represent 99.7 percent of all employer firms.
- Employ half of all private sector employees.
- Pay 44 percent of total U.S. private payroll.
- Generated 65 percent of net new jobs over the past 17 years.
- Create more than half of the nonfarm private GDP.
- Hire 43 percent of high tech workers (scientists, engineers, computer programmers, and others).
- Are 52 percent home-based and 2 percent franchises.
- Made up 97.5 percent of all identified exporters and produced 31 percent of export value in FY 2008.
- Produce 13 times more patents per employee than large patenting firms.

Source: U.S. Dept. of Commerce, Census Bureau and Intl. Trade Admin.; Advocacy-funded research by Kathryn Kobe, 2007 (www.sba.gov/advo/research/rs299.pdf) and CHI Research, 2003 (www.sba.gov/advo/research/rs225.pdf);U.S. Dept. of Labor, Bureau of Labor Statistics.

3. **How many small businesses are there?**

In 2009,there were 27.5 million businesses in the United States, according to Office of Advocacy estimates. The lastest available Census data show that there were 6.0 million firms with employees in 2007 and 21.4 million without employees in 2008. Small firms with fewer than 500 employees represent 99.9 percent of the total (employers and nonemployers), as the most recent data show there were about 18,311 large businesses in 2007.

Source:Office of Advocacy estimates based on data from the U.S. Dept. of Commerce, Census Bureau, and trends from the U.S. Dept. of Labor, Bureau of Labour Statistics, Business Employment Dynamics.

4. **What is small firms' share of employment?**

Small businesses employ about half of U.S. workers. Of 120.6 million nonfarm private sector workers in 2007, small firms employed 59.9 million and large firms employed 60.7 million.About half of small firm employment is in second-stage companies (10-99 employees), and half is in firms that are 15 years or older. Small firms' share of employment in rural areas is slightly higher that in urban areas; their share of part-time workers (22 percent) is similar to large firms' share (19 percent). Small firms'

employment share remains steady since some small firms grow into large firms over time.

Source:U.S.Dept. of Commerce, Census Bureau: Statistics of U.S. Businesses, Current Population Survey and Business Dynamics Statistics; and the Edward Lowe Foundation (http://youreconomy.org).

5. **What share of net new jobs do small businesses create?**

Small firms accounted for 65 percent (or 9.8 million) of the 15 million net new jobs created between 1993 and 2009.
Much of the job growth is from fast-growing high-impact firms, which represents about 5-6 percent of all firms and are on average 25 years old.

Source: U.S. Dept. of Labor, Bureau of Labor Statistics, Business Employment Dynamics; Advocacy-funded research by Zoltan Acs, William Parsons and Spencer Tracy, 2008 (www.sba.gov/advo/research/rs328.pdf)

6. **How many businesses open and close each year?**

An estimated 552,600 new employer firms opened for business in 2009, and 660,900 firms closed. This amounts to an annual turnover of about 10 percent. Nonemployer firms have turnover rates three times as high, mostly because it is much easier for them to go into business and cease operations.

Starts and Closures of Employer Firms, 2005-2009

Category	2005	2006	2007	2008	2009
Births	644,122	670,058	668,395	626,400e	552,600e
Closures	565,745	599,333	592,410	663,900e	660,900e
Bankruptcies	39,201	19,695	28,322	43,546	60,837

Notes: e = Advocacy estimate.Bankruptcies include nonemployer firms.

Source: U.S. Dept. of Commerce, Census Bureau; Administrative Office of the U.S. Courts; U.S. Dept. of Labor, Business Employment Dynamics (BED). Estimates based on Census data and BED trends.

7. **What is the survival rate for new firms?**

Seven out of 10 new employer firms survive at least 2 years, half at least 5 years, a third at least 10 years, and a quarter stay in business 15 years or more.
Census data report that 69 percent of new employer establishments born to new firms in 2000 survived at least 2 years, and 51 percent survived 5 or more years. Survival rates were similar across states and major industries. Bureau of Labour Statistics data on establishment age show that 49 percent of establishments survive 5 years or more; 34 percent survive 10 years or more; and 26 percent survive 15 years or more.

Source: U.S Dept. of Commerce, Census Bureau, Business Dynamics Statistics; U.S. Dept of Labour, Bureau of Labor Statistics, BED.

8. **How are credit conditions for small firms?**

Credit conditions are improving. In mid-2010, commercial banks began to ease the tight lending conditions on small businesses that had begun in early 2007. And credit has continued to flow, as loans under $1 million totalled $695 billion in FY 2009. Also, after declining over the past few years, venture capital investment dollars increased in mid-2010.

Source: Federal Reserve Board, Senior Loan Officer Opinion Survey and Call Report data; National Venture Capital Association.

9. **How are small businesses financed?**

Small businesses rely heavily upon owner investment and bank credit, averaging about $80,000 a year for young firms. Startups rely about equally on owners' cash injections into the business and bank credit; young firms receive about three-quarters of their funds from banks via loans, credit cards, and lines of credit. One-tenth of startups and about a third of young firms do not use capital injections.

Source: Kauffman Foundation, *An Overview of the Kauffman Firm Survey: Results from the 2004–2008 Data,* (Alicia Robb, E.J. Reedy, Janice Ballou, David DesRoches, Frank Potter, Zhanyun Zhao), May 2010.

10. **How do regulations affect small firms?**

The smallest firms (fewer than 20 employees) spend 36 percent more per employee than larger firms to comply with federal regulations. The disparity is greatest in two areas: very small firms spend four and a half times as much per employee to comply with environmental regulations and three times more per employee on tax compliance than their largest counterparts.

Annual Cost of Federal Regulations by Firm size

Type of Regulations	Cost per Employees for Firms with: Fewer than 20 Employees	20-499 Employees	500 or More Employees
All Regulations	$10,585	$7,454	$7,755
Economics	4,120	4,750	5,835
Tax Compliance	1,584	1,294	883
Occupational Safety and Home-Land Security	781	650	520

Source: *The Impact of Regulations Costs on Small Firms*, an Advocacy-funded study by Nicole Crain and Mark Crain, 2010 (www.sba.gov/advo/research/rs371tot.pdf).

11. **Whom do I contact about regulations?**

To learn about pending regulation, visit Advocacy's Regulatory Alerts webpage, www.sba.gov/advo/laws/law_regalerts.html; to comments on pending regulations, email advocacy@sba.gov. To report unfair regulatory enforement, contact SBA's National

Ombudsman at ombudsman@sba.gov.

12. **What is the role of women, minority, and veteran entrepreneurs?**

Of the 27.1 million nonfarm businesses in 2007, women owned 7.8 million businesses, which generated $1.2 trillion in revenues, employed 7.6 million workers, and paid $218 billion in payroll. Another 4.6 million firms were were 50 percent woman owned. Minorities owned 5.8 million firms, which generated $1 trillion in revenues and employed 5.9 million people. Hispanic Americans owned 8.3 percent of all U.S. businesses; African Americans, 7.1 percent; Asian Americans, 5.7 percent; American Indians and Alaska Natives, 0.9 percent; and Native Hawaiian or other Pacific Islanders, 0.1 percent. Veterans owned 2.4 million businesses in 2007, generating $1.2 trillion in receipts; another 1.2 million firms were 50 percent veteran owned. About 7 percent of veteran business owners had service-connected disabilities in 2002.

In 2008, the overall rate of self-employment (unincorporated and incorporated) was 9.8 percent, and the rate was 7.1 percent for women, 7.2 percent for Hispanic Americans, 4.7 percent for African Americans, 9.7 percent for Asian Americans and Native Americans, and 13.6 percent for veterans.Service-disabled veterans had lower self-employment rates than non-service-disabled veterans.

Source: U.S. Dept. of Commerce, Census Bureau, Survey of Business Owners; Advocacy-funded reserach by Open Blue Solutions, 2007 (www.sba.gov/advo/research/rs291.pdf) and Office of Advocacy. *The Small Business Economy* (Table A.13, www.sba.gov/advo/research/sbe.html).

13. **At what rates are the self-employed taxed?**

Of the 15.5 million individuals whose primary occupation was self-employment (incorporated and unincorporated), the median personal marginal federal tax rate was 10 percent in 2008. Only 4.1 percent of the self-employed were in the marginal tax bracket of 33 percent or more.

Source: U.S. Dept. of Commerce, Census Bureau, Current Population Survey, March Supplement (special tabulation).

14. **What research exists on the cost and availability of health insurance?**

A Kaiser Family Foundation study confirmed the connection between firm size and offering health insurance. The survey shows that about half of businesses with 3–9 workers offer health benefits to their employees. The ratio grows to about three-fourths for firms with 10–24 employees, to almost 90 percent for firms with 25–49 employees, and to 98 percent for firms with 200 employees or more. Almost two-thirds of workers take health insurance coverage when offered. Overall in 2008, small firm employees were almost twice as likely as large firm employees to be uninsured (25.1 percent vs. 13.6 percent, respectively).

Source: Kaiser Family Foundation and the Health Research and Educational Trust, *Employer Health Benefits 2010 Annual Survey*; Employee Benefit Research Institute, *Sources of Health Insurance and Characteristics of the Uninsured: Analysis of the March 2009 Current Population Survey.*

15. **How can I get more information?**

For more information, visit Advocacy's website: www.sba.gov/advo. Specific points of interest include:

- Economic research: www.sba.gov/advo/research.
- Firm size data: www.sba.gov/advo/research/data.html.
- Lending:www.sba.gov/advo/research/lending.html.
- Small business profiles by state and territory: www.sba.gov/advo/research/profiles.
- *The Small Business Advocate* newsletter: www.sba.gov/advo/newsletter.html.

For email delivery of Advocacy's newsletter, press,regulatory news, and research, sign up at http://web.sba.gov/list.For RSS feeds, visit www.sba.gov/advo/rsslibrary.html. Direct questions to (202) 205-6533 or advocacy@sba.gov.

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SBA
Office of Advocacy
www.sba.gov/advo

Advocacy: the voice of small business in government

A Guide for Government Agencies

How to Comply with the Regulatory Flexibility Act

Implementing the President's Small Business Agenda and Executive Order 13272

June 2010

- A brief economic and technical statement on the regulated community, describing some of the following types of information:[33]
    a) The diversity in size of regulated entities
    b) Revenues in each size grouping
    c) Profitability in each size grouping

2) Economic impacts on small entities
- A fair, first estimate of expected cost impacts, or a reasonable basis for assuming costs would be *de minimis* or insignificant within all economic or size groupings of the "small" regulated community
- The rationale for the certification decision, based on the analysis presented

3) Significant economic impact criteria
- The criteria used to examine whether first-estimate costs are significant

4) Substantial number criteria
- The criteria used to examine whether the entities experiencing significant impacts constitute a substantial number of entities in any of the regulated size groupings

5) Description of assumptions and uncertainties
- The sources of data used in the economic and technical analysis[34]
- The degree of uncertainty in the cost estimates, when uncertainty is large

6) Certification statement

"Factual basis" requirement for certification

What is a "factual basis?" The Office of Advocacy interprets the "factual basis" requirement to mean that, at a minimum, a certification should contain a description of the number of affected entities and the size of the economic impacts and why either the number of entities or the size of the impacts justifies the certification.

The agency's reasoning and assumptions underlying its certification should be explicit in order to elicit public comment. Again, agency certifications in final rules are subject to

[33] When an agency does not have quantitative data to support its certification, the agency should explain why such data are not available and request comments.

[34] Section 607 of the RFA directs agencies to provide a "quantifiable or numerical description of the effects of the proposed rule or alternatives to the proposed rule" and allows a qualitative approach if "quantification is not practical or reliable." Thus, agencies are expected to make reasonable efforts to acquire quantitative or other information to support analysis of the rules under sections 603 and 604 of the RFA. Such a standard is not required for section 605 certifications, but some agencies use section 607 as a model for preparing certifications. With regard to certification analyses, EPA wisely advises its rulewriters to employ the same approach: use quantitative analysis unless the "information necessary to conduct a quantitative analysis is not reasonably available." *Revised Interim Guidance for EPA Rulewriters: Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act*, Regulatory Management Division, EPA Office of Policy, p. 20 (March 29, 1999). This guidance is currently under revision.

Using the NAICS classifications, SBA defines small businesses in terms of firm revenues or employees. Different criteria may be helpful to agencies in assessing the composition of a small entity sector. The IRS categorizes firm (corporation and partnership) size by assets. Industry associations apply some or all of these three criteria (revenues, employment, and/or assets) and often add to or replace them with their own technical criteria. In addition to SBA definitions, federal regulators may use any one or multiple criteria to identify their universes of small regulated entities.[52]

Definition of "significant" and "substantial"

The agency's second step in a threshold analysis is to determine whether there is a significant economic impact on a substantial number of small entities. The RFA does not define "significant" or "substantial." In the absence of statutory specificity, 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 regulations.

Significance should not be viewed in absolute terms, but should be seen as relative to the size of the business, the size of the competitor's business, and the impact the regulation has on larger competitors. For example, a regulation may be significant solely because the disparity in impact on small entities may make it more difficult for them to compete in a particular sector of the economy than large businesses. This may relate to their ability to pass costs through to customers or to reduce the marginal cost of such a regulation to an insignificant element of their production functions.

One measure for determining economic impact is the percentage of revenue or percentage of profits affected. For example, if the cost of implementing a particular rule represents 3 percent of the profits in a particular sector of the economy and the profit margin in that industry is 2 percent of gross revenues (an economic structure that occurs in the food marketing industry, where profits are often less than 2 percent), the implementation of the proposal would drive many businesses out of business (all except the ones that beat a 3 percent profit margin). That would be a significant economic impact.

However, the economic impact does not have to completely erase profit margins to be significant. For example, the implementation of a rule might reduce the ability of the firm to make future capital investment, thereby severely harming its competitive ability, particularly against larger firms. This scenario may occur in the telecommunications industry, where a regulatory regime that harms the ability of small companies to invest in needed capital will not put them out of business immediately, but over time may make it impossible for them to compete against companies with significantly larger capitalizations. The impact of that rule would then be significant for smaller telecommunications companies.

[52] The SBA definitions here are found in § 3(a)(2) of the Small Business Act and are not the RFA definitions referenced above.

As a default, section 601 of the RFA requires agencies to use size standards set by the SBA in determining whether businesses are small businesses. SBA's Office of Size Standards set these standards using the North American Industry Classification System (NAICS).[100] Agencies must identify each of the affected classes according to their NAICS code. Once the agency has identified all the affected industries by code, it can use the NAICS code in combination with the U.S. Census data[101] to gain an estimate of the number of entities in each class. To help agencies with this element of the IRFA, the Office of Advocacy provides a full listing of NAICS codes along with the U.S. Census data for each class on its web page.[102]

If the agency determines that the existing SBA size standards for small businesses are not appropriate, the RFA permits the agency, after notice and comment, to establish one or more alternative definitions of a small entity that are appropriate for the rule.[103] The RFA requires an agency to consult with the Office of Advocacy when performing an RFA analysis using a different small business size standard than that provided by the SBA.[104]

Estimating compliance requirements

For the fourth element of the IRFA, the agency must describe and estimate the compliance requirements of the proposed rule.[105] This is one of the two most important elements in the IRFA, because the alternatives the agency examines in the IRFA will be designed to minimize these compliance burdens. Provision of a list in the IRFA enables small entities to more easily identify potential burdens and tailor their comments in the rulemaking process to those burdens that most affect them without wading through many *Federal Register* pages.

As stated by the RFA, some of the costs the agency must describe in the IRFA include the costs of any recordkeeping; professional expertise, such as lawyer, accountant, or engineering, needed to comply with recordkeeping; and reporting requirements. Section 603 also requires that the agencies examine other compliance requirements, which may include, for example, the following: (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.

Since all rules are different and impose different compliance requirements, the RFA contemplates that agencies will prepare analyses to determine all significant long- and

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[100] *See http://www.sba.gov/size/.*
[101] *See http://www.census.gov/.*
[102] Office of Advocacy, Economic Statistics and Research (visited Sept. 26, 2002), *http://www.sba.gov/advo/stats/us99_n6.pdf.*
[103] See the size standard discussion in Chapter 1.
[104] 5 U.S.C. § 601(3).
[105] *Id.*at § 603(b)(4).

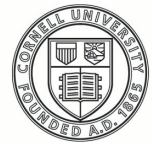
2008 County Business Patterns
United States
Major Industry

NAICS code	NAICS code description	Paid employees for paid period including March 12	Payroll($1,000) First-quarter	Payroll($1,000) Annual	Total establishments
------	Total for all sectors	114,509,626	1,227,571,160	4,855,545,239	7,433,465
11----	Forestry, fishing, hunting, and Agriculture Support	153,829	1,167,043	5,121,795	21,679
21----	Mining, quarrying, and oil and gas extraction	604,653	11,345,323	41,861,246	26,897
22----	Utilities	641,552	15,918,776	54,237,370	17,312
23----	Construction	5,967,128	66,883,872	280,943,245	712,977
31----	Manufacturing	11,632,956	138,779,079	549,635,989	308,934
42----	Wholesale trade	5,827,769	84,810,603	334,158,368	419,758
44----	Retail trade	14,802,767	85,877,446	355,492,525	1,076,645
48----	Transportation and warehousing	4,159,604	40,637,020	164,542,803	210,088
51----	Information	3,288,109	59,688,942	225,100,667	135,726
52----	Finance and insurance	6,171,240	142,748,039	460,665,302	488,909
53----	Real estate and rental and leasing	2,036,590	20,411,323	81,115,067	351,047
54----	Professional, scientific, and technical services	7,839,965	128,538,262	527,047,828	842,566
55----	Management of companies and enterprises	2,853,450	74,134,092	264,706,019	51,574
56----	Administrative and Support and Waste Mang and Remediation Sr	9,060,987	70,019,864	289,826,188	383,623
61----	Educational services	3,200,553	25,490,438	105,190,541	88,777
62----	Health care and social assistance	17,531,142	170,757,061	735,531,215	799,271
71----	Arts, entertainment, and recreation	2,010,339	13,380,905	61,178,717	122,857
72----	Accommodation and food services	11,443,293	42,873,408	179,480,284	635,239
81----	Other services (except public administration)	5,264,429	34,036,336	139,346,566	722,701
99----	Industries not classified	j	73,328	363,504	16,885

NAICS code	NAICS code description	Total Estab	Number of Establishments by Employment-size class: 1-4	5-9	10-19	20-49	50-99	100-249	250-499	500-999	1000 or more
------	Total for all sectors	7,433,465	4,061,137	1,402,819	948,601	638,496	213,820	120,614	29,922	11,383	6,673
11----	Forestry, fishing, hunting, and Agriculture Support	21,679	14,903	3,693	1,802	852	256	136	26	7	4
21----	Mining, quarrying, and oil and gas extraction	26,897	13,437	4,348	3,747	3,121	1,162	716	242	87	37
22----	Utilities	17,312	6,863	2,746	2,370	2,596	1,379	888	280	144	46
23----	Construction	712,977	478,740	110,366	65,485	39,940	11,671	5,208	1,119	315	133
31----	Manufacturing	308,934	115,521	54,287	47,604	45,281	21,727	16,467	5,162	2,024	861
42----	Wholesale trade	419,758	220,144	80,570	58,751	39,749	12,408	6,050	1,478	453	155
44----	Retail trade	1,076,645	488,565	270,857	171,002	91,018	29,385	21,063	4,218	496	41
48----	Transportation and warehousing	210,088	119,519	31,637	24,230	19,921	7,711	4,854	1,309	632	275
51----	Information	135,726	68,776	21,333	18,615	14,614	6,431	3,906	1,241	561	249
52----	Finance and insurance	488,909	291,119	101,117	53,985	26,532	8,181	4,869	1,641	945	520
53----	Real estate and rental and leasing	351,047	252,526	58,640	24,935	10,434	2,793	1,276	292	104	47
54----	Professional, scientific, and technical services	842,566	587,603	117,883	73,320	41,311	12,563	6,852	1,895	742	397
55----	Management of companies and enterprises	51,574	19,576	7,621	7,336	7,701	3,975	3,111	1,262	630	362
56----	Administrative and Support and Waste Mang and Remediation Sr	383,623	227,169	56,383	39,323	31,387	14,460	9,806	3,034	1,272	789
61----	Educational services	88,777	41,436	14,249	12,392	11,548	4,910	2,683	705	446	408
62----	Health care and social assistance	799,271	363,994	185,411	123,714	74,218	25,283	18,782	4,120	1,776	1,973
71----	Arts, entertainment, and recreation	122,857	73,379	17,043	12,820	11,377	4,772	2,587	549	211	119
72----	Accommodation and food services	635,239	215,603	110,459	131,482	131,297	36,697	8,247	884	374	196
81----	Other services (except public administration)	722,701	446,090	153,707	75,478	35,568	8,055	3,113	465	164	61
99----	Industries not classified	16,885	16,174	469	210	31	1	0	0	0	0

Source: <b>U.S. Census Bureau

Code Definition:
A: 0-19 employees
B: 20-99 employees
C: 100-249 employees
E: 250-499 employees
F: 500-999 employees
G: 1,000-2,499 employees
H: 2,500-4,999 employees
I: 5,000-9,999 employees
J: 10,000-24,999 employees
K: 25,000-49,999 employees
L: 50,000-99,999 employees
M: 100,000 or more employees
S: Withheld because estimate did not meet publication standards
D: Withheld to avoid disclosing data for individual companies data are included in higher level totals



12-1-1994

The Dunlop Commission on the Future of Worker-Management Relations - Final Report

U.S. Commission on the Future of Worker-Management Relations
Commission on the Future of Worker-Management Relations

The Dunlop Commission on the Future of Worker-Management Relations

Final Report

The Dunlop Commission On the Future of Worker-Management Relations: Final Report

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Preface

The Commission on the Future of Worker-Management Relations was announced by Secretary of Labor Robert B. Reich and Secretary of Commerce Ronald H. Brown on March 24, 1993 to report on the following questions:

1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?

2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?

3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and government regulatory bodies?"

On June 2, 1994 the Secretaries of Labor and Commerce released the Fact Finding Report of the Commission and an Executive Summary.

After release of the Fact Finding Report, the Commission consulted widely through public hearings, working parties comprised of several members of the Commission, and it received a variety of views in correspondence, studies and articles from representatives of business groups, labor organizations, professional associations, academics, women's organizations, civil rights and other interested groups, and individuals. This material is included in the public record of the Commission which was closed on November 14, 1994 by notice in the Federal Register. By this consultative process the Commission has sought to receive the widest possible comments on its Fact Finding Report as well as proposals for its conclusions and recommendations for this, its final report.

The Commission held four additional national hearings after the issuance of its Fact Finding Report in Washington, D.C., making a total of 21 public hearings, including the 11 national and six public hearings in various cities around the country held previously. In the four most recent public hearings, the Commission followed the practices developed in It's regional hearings to encourage representatives of organizations or individuals to volunteer to make

presentations or to file written statements, should adequate time for all not be available. The agenda of each of these four sessions and a listing of those who testified and their affiliations are presented in Appendix B.

The Commission appreciates the assistance of the various organizations and individuals that helped to organize and make presentations to the Commission and it's working parties.

A total of 57 persons testified before the Commission in its four hearings in July to September 1994, making a total of 411 witnesses in the 21 public hearings.
The transcripts of the four hearings after the Fact Finding report run to 823 pages, making a total of 4,681 pages for all public hearings before the Commission.

The Commission has received since May 1994 a number of studies and presentations outside of public hearings that provide additional information to its fact-finding phase. More than 160 statements have been received since the Fact Finding Report that have been entered in the public record of the Commission. Among these items are the following:

(1) United States General Accounting Office, Workplace Regulations, Information on Selected Employer and Union Experiences, Vols. I and II, June 1994.

(2) Industrial Relations Counselors, Inc., Report on the IRC Survey of Employee Involvement, August 1994, and Results of the ORC Survey on the Use of Alternative Dispute Resolution (ADR) in Employment Related Disputes, November 1994.

(3) Princeton Survey Research Associates, Worker Representation and Participation Survey, Top-Line Results, October, 1994.

(4) U.S. Department of Labor, Report on the American Workforce, 1994; Women's Bureau, Working Women Count, A Report to the Nation, 1994.

(5) American Civil Liberties Union, The Private Arbitration of Employment Disputes, November 1994.

A working party of the Commission has continued to meet with a designated committee of the Small Business Council of the Chamber of Commerce to receive views and perspectives on the Fact Finding Report. Another working party met with

representatives of ten organizations reflecting the interests of low-wage workers and received a statement of potential Administrative and Regulatory Initiatives to Protect Contingent Workers, October 1994.

A further working party of the Commission met on several occasions to receive the further views of a group of women's organizations that had also testified before the Commission. Representatives of labor and management organizations under the Railway Labor Act have met on occasions with still another working party of the Commission. Meetings have also been held with a number of representatives of the civil rights community.

The Chair of the Commission had held a series of meetings with the Enforcement Council of the Department of Labor and a number of its component agencies to secure data on staffing, and on the flow and volume of investigations, complaints, cases and litigation in the administration of employment laws within the purview of these agencies with reference to the third mission statement of the Commission. The National Labor Relations Board and its General Counsel has provided similar data. Discussions have been held also with the Chairman of the Equal Employment Opportunity Commission and the EEOC ADR Task Force. The cooperation of these agencies is appreciated.

The Commission has received a further letter from the Republican members of the House Committee on Education and Labor dated September 29, 1994. (See p. 111, note 5, of the Fact Finding Report for reference to the first letter.)

The Commission deliberated on all the above information from a variety of perspectives, the Commission reached broad agreement on the issues it was charged to address. A separate perspective by Commissioner Fraser on some aspects of employee involvement is included in Section II.

This report of the Commission is focused on the three questions of its Mission Statement, considering each question separately but also recognizing that these issues and the Commission's recommendations constitute a highly interdependent whole.

In making its legislative recommendations, the Commission has not proposed explicit statutory language. Similarly, in recommendations to administrative agencies and to private parties it has proposed specific approaches rather than the language of a regulation.

A number of more specialized issues were raised in testimony and statements to the Commission that it has not had the time nor specialized information to consider fully. These are significant issues to the workers and managers involved and deserve more detailed attention and conclusions than the Commission has had the time or resources to provide. Among these questions are the status of agricultural workers under the National Labor Relations Act, as amended, and the system of labor-management relations in the building and construction industry under these statutes and subsequent NLRB and court decisions. Further, the Commission has considered only in Section VII some of the issues raised by worker-management relations in a few types of relationships among those popularly designated as contingent. The Commission reports this unfinished business that deserves further and ongoing consideration.

The Commission has sought the views of a wide range of employers and employer associations, representatives of unions, professional associations, women's groups, civil rights organizations and academics regarding how to deal with the problems and challenges of the modern workplace. In addition, the Commission believes it is also significant to hear how workers themselves and their supervisors view their workplace beyond the reports of their attitudes from managers or unions. Thus, the Commission welcomes the findings of the Worker Representation and Participation Survey. This survey provides a detailed and in-depth analysis of workplace practices and the attitudes and views in workplaces on many issues pertinent to the Commission's charges. Appendix A presents a brief summary of the survey procedures and highlights of its findings.

The Department of Commerce provided assistance to the Commission through Under Secretary for Economic Affairs Everett Ehrlich. Within the Department of Labor, Roland Droitsch, Deputy Assistant Secretary, Office of Policy and Budget, coordinated a portion of the Commission's work. Assistance was also provided by Seth Harris, Executive Director of the Department's Enforcement Council, on matters related to this area. Legal research support was given to the Commission by Andrew Levin and Janet Herold. The Commission received comprehensive administrative and related support from staff of the Office of Small Business and Minority Affairs. Ms. Artrella Mack and Mrs. Betty Cooper-Gibson provided effective service in the technical preparation of this report. The Commission is deeply appreciative.

Report and Recommendations: Executive Summary

The Commission on the Future of Worker-Management Relations was appointed by Secretary of Commerce Ronald H. Brown and Secretary of Labor Robert B. Reich to address three questions:

1. What (if any) new methods or institutions should be encouraged, or required, to enhance work-place productivity through labor-management cooperation and employee participation?

2. What (if any) changes should be made in the present legal framework and practices of collective bargaining to enhance cooperative behavior, improve productivity, and reduce conflict and delay?

3. What (if anything) should be done to increase the extent to which work-place problems are directly resolved by the parties themselves, rather than through recourse to state and federal courts and governmental bodies?"

Over its twenty months of work, the Commission heard testimony and evaluated the experiences of many employers and employees, and received advice for answering its charge from many groups and individuals. This testimony, and various survey and other evidence, guides the recommendations and suggestions that we offer to the Secretaries, and to the nation.

As reported in the Commission's May 1994 Fact-Finding Report, there is a solid base of experience on which to build more cooperative and productive workplace relations in the United States -- the innovative partnerships in collective bargaining and the array of employee involvement programs operating in many workplaces across the country. There are also disconcerting patterns -- increased earning inequality, difficulties for contingent workers, increased litigation, rigid and complex regulations, and conflict in union organizing campaigns.

Our recommendations build on the positive experiences with productive and cooperative worker-management relations, support their adoption in additional employment settings, and encourage further experimentation and learning. At the same time we face squarely and propose remedies for the problems of too much conflict, litigation, inequality, and regulatory complexity.

We take an integrated approach to modernizing American labor and employment law and administration for the future. Taken together, these recommendations give workers and managers the tools and flexibility to do what they say they want to do and are capable of doing to improve workplace performance. We recommend flexibility in employee participation while insuring respect for workers' rights to choose unions, if desired. We encourage the development and use of fair systems for resolving disputes quickly closest to their source without going to court or to a government agency. We propose to modernize labor law to deliver through a prompt and simplified process what the law promises: a free choice for workers on whether or not to join a union of their choosing. Our proposals define employees and employers in ways consistent with economic reality. We encourage continued learning and dialogue among private and public sector leaders to improve the quality of policy making on employment issues.

The Commission could not address all the problems or proposed solutions presented to us. This does not imply that those left out are unimportant or not valid. Instead, some need to be left to other groups and to further discussion. Moreover, the recommendations we offer here are presented as starting points for improving the workplace experiences and results for all Americans.

The full set of recommendations are contained in the separate sections of this report. Here we present fifteen key conclusions and recommendations as they relate to each of our three charges.

1. New Methods or Institutions to Enhance Workplace Productivity

The evidence presented to the Commission is overwhelming that employee participation and labor-management partnerships are good for workers, firms, and the national economy. All parties want to encourage expansion and growth of these developments. To do so requires removing the legal uncertainties affecting some forms of employee participation while safeguarding and strengthening employees' rights to choose whether or not they wish to be represented at the workplace by a union or professional organization. Accordingly we recommend:

(1) Clarifying the National Labor Relations Act (NLRA) and its interpretation by the National Labor Relations Board (NLRB) to insure nonunion employee participation programs are not found to be unlawful simply because they involve

discussion of "terms and conditions" of work or compensation as long as such discussion is incidental to the broad purposes of these programs. At the same time, the Commission reaffirms the basic principle that these programs are not a substitute for independent unions. The law should continue to make it illegal to set up or operate company-dominated forms of employee representation.

(2) Updating the definitions of supervisor and manager to insure that only those with full supervisory or managerial authority and responsibility are excluded from coverage of the law. We further recommend that no individual or group of individuals should be excluded from coverage under the statute because of participation in joint problem-solving teams, self-managing work groups, or internal self-governance or dispute resolution processes.

(3) Reaffirming and extending protections of individuals against discrimination for participating in employee involvement processes and for joining or drawing on the services of an outside labor or professional organization.

These recommendations are linked to those that follow in important ways. In addition to eliminating the legal uncertainties associated with many of the forms of employee participation underway today, these changes allow and encourage use of worker-management participation in applying government regulations to the workplace and resolving disputes through private resolution procedures. Moreover, these changes remove the threat that workers might lose the protections of collective bargaining by taking on supervisory or managerial responsibilities. These changes, therefore, should open up workplaces to a variety of new experiments with employee participation and labor-management partnerships and bring the benefits of these innovations to more workers and workplaces.

2. Changes in Collective Bargaining to Enhance Cooperation and Reduce Conflict and Delay

The evidence reviewed by the Commission demonstrated conclusively that current labor law is not achieving its stated intent of encouraging collective bargaining and protecting workers' rights to choose whether or not to be represented at their workplace. Rectifying this situation is important to insure that these rights are realized for the workers who wish to exercise them, to de-escalate workplace conflicts, and to create an overall climate of trust and cooperation at the workplace and in the broader

labor and management community. Accordingly, the Commission recommends:

(4) Providing for prompt elections after the NLRB determines that sufficient employees have expressed a desire to be represented by a union. Such elections should generally be held within two weeks. To accomplish this objective we propose that challenges to bargaining units and other legal disputes be resolved after the elections are held.

Beyond the reversal of the Supreme Court's decision in Lechmere so that employees may have access to union organizers in privately-owned but publicly-used spaces such as shopping malls, access questions are best left to the NLRB. The Commission urges the Board to strive to afford employees the most equal and democratic dialogue possible.

(5) Requiring by statute that the NLRB obtain prompt injunctions to remedy discriminatory actions against employees that occur during an organizing campaign or negotiations for a first contract.

(6) Assisting employers and newly certified unions in achieving first contracts through an upgraded dispute resolution system which provides for mediation and empowers a tripartite advisory board to use a variety of options to resolve disputes ranging from self-help (strike or lockout) to binding arbitration for relatively few disputes.

(7) Encouraging railroad and airline labor and management representatives to implement their stated willingness to seek their own solutions for improving the performance of collective bargaining in their industries.

These changes are essential to de-escalating the level of conflict, fear, and delays that now too often surround the process by which workers decide whether or not to be represented on their jobs. We distilled our recommendations down to these basic and simplified changes in the law and procedures from an extensive array of proposals offered to the Commission in this area. Therefore, it is vitally important to monitor the effects of these recommendations over time to see if they are adequate to achieve the goals stated in our national labor law and shared by the American public.

3. Increase the Extent to which Workplace Problems are Resolved by the Parties.

The Commission's findings and recommendations regarding workplace regulations, litigation, and dispute resolution fall into three categories: (1) encouraging development of high quality private dispute resolution procedures, (2) encouraging experimentation with workplace self-regulation procedures in general and with specific reference to workplace safety and health, and (3) protecting the employment rights and standards of contingent workers.

The Commission endorses and encourages the development of high quality alternative dispute resolution (ADR) systems to promote fair, speedy, and efficient resolution of workplace disputes. These systems must be based on the voluntary acceptance of the parties involved. The courts and regulatory agencies should hold these systems accountable for meeting high quality standards for fairness, due process, and accountability to the goals and remedies established in the relevant law. The Commission also encourages experimentation with internal responsibility systems for adapting workplace regulations to fit different work settings. Accordingly, we recommend:

(8) Encouraging regulatory agencies to expand the use of negotiated rule making, mediation, and alternative dispute resolution (ADR) procedures for resolving cases that would otherwise require formal adjudication by the agency and/or the courts.

(9) Encouraging experimentation and use of private dispute resolution systems that meet high quality standards for fairness, provided these are not imposed unilaterally by employers as a condition of employment.

(10) Encouraging individual regulatory agencies (e.g., OSHA, Wage and Hour Division, EEOC, etc.) to develop guidelines for internal responsibility systems in which parties at the workplace are allowed to apply regulations to their circumstances.

America's workplaces must be made safer and more healthful and workers' compensation costs need to be reduced. Workplace safety and health is an ideal starting point for experimenting with internal responsibility systems for meeting public policy objectives, given the long-standing and widespread experience with employee participation and labor-management committees in safety and health matters and the shared interests all parties have in improving safety

and health outcomes. Evidence presented to the Commission shows that properly structured joint committees and participation plans can significantly improve safety and health protection. Accordingly, we recommend:

(11) Developing safety and health programs in each workplace that provide for employee participation. Those workplaces that demonstrate such a program is in place with a record of high safety and health performance would receive preferential status in OSHA's inspection and enforcement activities.

The growth of various forms of contingent work poses opportunities for good job matches between workers with differing labor force attachments and employers needing flexibility in response to changing market conditions. At the same time, some contingent work arrangements relegate workers to a second class status of low wages, inadequate fringe benefits, lack of training and, most importantly, loss of protection of labor and employment laws and standards. This is a very complex set of developments for which adequate data are not yet available to do more than address the most obvious problems. Our recommendations are therefore cautious in this area, recognizing the need to continue to monitor and evaluate the labor market experiences of all forms of contingent work and to derive policy recommendations as these data and analyses become available. Accordingly, we recommend:

(12) Adopting a single definition of employer for all workplace laws based on the economic realities of the employment relationship. Furthermore, we encourage the NLRB to use its rule-making authority to develop an appropriate doctrine governing joint employers in settings where the use of contract arrangements might otherwise serve as a subterfuge for avoiding collective bargaining or evading other responsibilities under labor law.

(13) Adopting a single definition of employee for all workplace laws based on the economic realities of the employment relationship. The law should confer independent contractor status only on those for whom it is appropriate -- entrepreneurs who bear the risk of loss, serve multiple clients, hold themselves out to the public as an independent business, and so forth. The law should not provide incentives for misclassification of employees as independent contractors, which costs federal and state treasuries large sums in uncollected social security, unemployment, personal income, and other taxes.

Implementing the recommendations in this report would open up employment policy and practice to a period of experimentation and opportunities for further learning. To channel this learning into constructive policy making we recommend:

(14) Creating a National Forum on the Workplace involving leaders of business, labor, women's, and civil rights groups to continue discussing workplace issues and public policies. In addition, we recommend establishment of a national Labor-Management Committee to discuss issues of special concern to the future of collective bargaining and worker-management relations. We encourage development of similar forums in communities, states, and industries to further promote grass roots experimentation and learning.

(15) Improving the data base for policy analysis of workplace developments, evaluation of labor-management experiments in the private sector, and for assessment of the economic condition of contingent workers. This requires amalgamation of existing data sets within the NLRB and Department of Labor, and among these and other agencies as well as coordination of research on workplace topics for the National Forum and other interested parties.

The Challenges Ahead

From the views presented to us emerged a vision of the Workplace of the 21st Century that is shared widely across all sectors of society and the workforce. These goals appear at the end of this Executive Summary. Achieving some of them requires updating and modernizing labor and employment law; others can be addressed through changes in administrative processes to give more power and flexibility to the parties at the workplace to govern their relationships and solve problems closest to the source. All will require leadership and sustained commitment to learning and experimentation on the part of individual workers and the labor and management leaders who shape employment practices. We urge that progress toward achievement of these goals be assessed systematically on a continuous basis and the results shared widely with the American public.

We can summarize the challenges facing America to improve the quality and performance of workplace relations quite simply. They are to sustain the momentum underway in the most innovative workplaces, to bring these innovations to and share their benefits among more workers and managers,

and to overcome the countervailing forces that stand in the way of achieving the goals of the 21st Century workplace. We see three such countervailing forces, two of which are reflected directly in the charges to this Commission and in our recommendations.

The first of these countervailing forces is the high level of conflict and tension surrounding the process by which workers decide whether or not to be represented by a union for the purpose of collective bargaining. Our recommendations should result in a significant de-escalation of these conflicts and a restoration of workers' promised rights in this area, and thereby improve the overall climate for cooperative labor-management relations.

The second countervailing force is the frustration that managers experience in trying to respond to complex workplace regulations and mounting litigation, and that workers experience in trying to enforce their legal rights on the job. Our recommendations provide workers and managers with the tools and flexibility to replace the command and control system of regulation and the litigious system for enforcing rights with opportunities for greater self-governance and private, high quality, dispute resolution.

The third force limiting the momentum toward higher quality workplaces was highlighted in our Fact Finding Report but its solution lies well beyond the mandate of this Commission. We refer here to the widening earnings inequality and stagnant real earnings that have characterized the American labor market over the past ten to fifteen years. While the Commission makes no direct recommendations focused on this serious problem, a number of our recommendations should contribute to reducing this growing disparity. Among these recommendations are our support for increased training at the workplace; increased opportunities for employee participation to enhance productivity, quality, and worker development; protections against the use of contractors or contingent workers to evade responsibilities under labor and employment law; and changes to provide workers the opportunity for representation and collective bargaining if they want it.

The recommendations of this Report are designed to contribute to the achievement of the goals and relationships required for the 21st Century workplace.

Goals for the 21st Century Workplace

1. Expand coverage of employee participation and labor-management partnerships to more workers and more workplaces and to a broader array of decisions.

2. Provide workers an uncoerced opportunity to choose, or not to choose, a bargaining representative and to engage in collective bargaining.

3. Improve resolution of violations of workplace rights.

4. Decentralize and internalize responsibility for workplace regulations.

5. Improve workplace safety and health .

6. Enhance the growth of productivity in the economy as a whole.

7. Increase training and learning at the workplace and related institutions.

8. Reduce inequality by raising the earnings and benefits of workers in the lower part of the wage distribution.

9. Upgrade the economic position of contingent workers.

10. Increase dialogue and learning at the national and local levels.

III. Worker Representation and Collective Bargaining

1. GENERAL OBSERVATIONS

(1) The Role of Unions in Society

The preamble to the National Labor Relations Act declares it to be the policy of the United States to `encourage the practices and procedure of collective bargaining and [to] protect ... the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and condition of their employment or other mutual aid or protection.'

The Collective Bargaining Forum, a group of leading corporate chief executives and national labor leaders, reflecting on this policy, has stated:

"The institution of collective bargaining is an integral part of American economic life and has proved capable of helping our society adjust through periods of prosperity and recession. A democratic society must provide workers with effective rights to join and be represented by unions of their own choosing."<Footnote: New Directions for Labor and Management, The Collective Bargaining Forum, Washington, D.C.: U.S. Department of Labor, 1988.>

Unions contribute to the economic health of the nation by `leveling the field between labor and management,' as Senator Orrin Hatch has stated. `If you didn't have unions,' Senator Hatch continued," it would be very difficult for even enlightened employers to not take advantage of workers on wages and working conditions because of rivals."<Footnote: Business Week, May 23, l994, p.70.> Indeed, as we noted in the Fact Finding Report, and as the President's Council of Economic Advisors also has concluded, the recent decline in the proportion of workers represented by unions has `contributed to the rise in inequality' in the United States.

Unions likewise contribute to the political health of the nation by providing a legitimate and consistent voice to working people in the broader society. As former Secretary of State George P. Shultz has stated, `free societies and free trade unions go together.' Societies that lack a vibrant labor movement which will `really get up on its hind legs and fight about freedom' are sorely wanting.<Footnote: Quoted in Leonard Silk, New York Times, Dec. 13, 1992, p.

D2. >

The import of the worst features of political campaigns into the workplaces by managers and unions creates confrontation and is not conducive to achieving the goals outlined in Section I. The Commission remains persuaded that, as we said in our Fact Finding Report, `All participants -- employees, management, and unions - would benefit from reduction in illegal activity and de-escalation of a conflictual process that seems out of place with the demands of many modern workplaces and the need of workers, their unions, and their employers.' (p. 141)

The Commission cannot hope to do more than propose first steps on the necessary road to achieving a new direction and approach to labor-management relations. The process of change will require a long, sustained effort. But we believe that American society -- management, labor, and the general public -- does support the principle that workers have the right to make a free, uncoerced and informed choice as to whether to join a union and to engage in collective bargaining. Our recommendations seek to, as we said at the outset, `turn down the decibel count' and to effectuate this fundamental principle of our democracy.

(2) Established Collective Bargaining Relationships

Not all aspects of collective bargaining are in need of repair. The Fact Finding Report concluded that `In most workplaces with collective bargaining, the system of labor-management negotiations works well' (p.64). Mr. Howard Knicely, speaking for the Labor Policy Association, would elevate this observation to a principal finding: `collective bargaining where it exists, is working very well.'

The majority of managers and workers with experience under collective bargaining agree with this assessment. Both the Worker Representation and Participation Survey and others before it report that about 90 percent of union members would vote to retain their membership if asked. Approximately 70 percent rate their experience with their union as good or very good. Sixty-four percent of the managers surveyed agreed that the union in their companies makes the work lives of its members better. When asked how the union relationship affects their companies, managers' views vary considerably. Twenty-seven percent believe the union helps their company's performance; 38 percent believe it hurts performance, and 29 percent believe the union neither helps nor hurts organizational performance. By a

two to one margin (32 to 16 percent) managers report that in recent years their relations with unions have become more cooperative rather than confrontational.

In general, though there are notable exceptions, collective bargaining appears to be adapting to its changing economic and social setting. Work stoppages have declined significantly, many grievance procedures are experiencing more settlements through informal discussions or mediation without resort to arbitration. The AFL-CIO's February 1994 report, The New American Workplace: A Labor Perspective,<Footnote: The New American Workplace: A Labor Perspective, AFL-CIO, Washington, D.C., February, 1994.> is a significant statement endorsing workplace cooperation and labor-management partnerships.

A number of collective bargaining agreements in 1994 extend the frontiers of labor-management partnerships to new issues, new levels of decision-making, and new workers. Among the more notable recent examples are the Levi-Strauss and Amalgamated Clothing and Textile Worker agreement governing manufacturing innovations in union and non-union facilities, the Bath Iron Works and International Association of Machinists agreement providing for significant restructuring of jobs, training, and pay systems among multiple trades, and the NYNEX and Communications Workers of America agreement that provides for voluntary procedures governing the organizing of new work units and the negotiation and arbitration of initial contracts.

Innovations such as these need to be encouraged and extended to more bargaining relationships. But additional changes will be needed in the attitudes and policies of many labor organizations and managers if the goals of the workplace of the future outlined in Section I are to be achieved. One area in need of greater focus is the responsiveness of workplace practices to the needs of working women. A large scale survey of working women published by the Women's Bureau of the Department of Labor in October 1994 reported that, while most women are breadwinners and many are the sole support of their households, `they are not getting the pay and benefits commensurate with the work they do, the level of responsibility they hold, or the societal contribution they make.'<Footnote: Working Women Count, The Women's Bureau, U.S. Department of Labor, 1994, p. 5.See, the testimony of Susan Bianchi-Sands and associates on July 25, 1994, and Judith L. Lichtman and a panel of women's organizations and Gloria Johnson for the AFL-CIO and the Coalition of Union Women on September 29, 1994.>

Collective bargaining will need to continue to evolve and adapt in the future as the diversity of the workforce increases in terms of gender, race, ethnic background, education, and location of work. The Women's Bureau Survey, the Worker Representation and Participation Survey, and many others document the desire of workers for more say over a wide range of workplace issues as well as a desire for cooperative rather than conflictual processes for addressing their concerns.

It is in the national interest to encourage continued growth in the range of issues and workplaces governed by cooperative labor-management partnerships. The Commission believes that existing collective bargaining relationships are progressing in this direction, and considers it important that new bargaining relationships achieve this same level of cooperation and effectiveness as soon as possible.

(3) New Collective Bargaining Relationships<Footnote: For the detailed policy proposals of representatives of labor organizations and managements, see the transcript of September 8, l994 including the statement, `Recommendations of the AFL-CIO to the Commission on the Future of Worker-Management Relations Concerning Changes in the National Labor Relations Act and Related Laws,' (28 pages).>

The Fact Finding Report of the Commission documented the findings of the Commission (pp. 77-79) with respect to new organizing situations.

1. American society -- management, labor, and the general public -- supports the principle that workers have the right to join a union and to engage in collective bargaining if a majority of workers so desire.

2. Representation elections as currently constituted are highly conflictual for workers, unions, and firms. This means that many new collective bargaining relationships start off in an environment that is highly adversarial.

3. The probability that a worker will be discharged or otherwise unfairly discriminated against for exercising legal rights under the NLRA has increased over time. Unions as well as firms have engaged in unfair labor practices under the NLRA. The bulk of meritorious charges are for employer unfair practices.

4. Consistent with other surveys reported earlier, the

Worker Representation and Participation Survey found that 32 percent of unorganized workers would vote to join a union if an election were held at their workplace. Eighty-two percent of those favoring unionization (and 33 percent of all non-union workers) believe a majority of their fellow employees would vote to unionize.

5. Roughly a third of workplaces that vote to be represented by a union do not obtain a collective bargaining contract with their employer.

Together these facts document the need to improve the process by which workers decide whether or not to be represented at the workplace and engage in collective bargaining.<Footnote: The Commission considered a proposal to increase the NLRA's jurisdictional floors in view of the substantial increase in wages and prices since the floors were set in the statute in 1959. The Commission raised this issue by letter with each major business organization and the AFL-CIO. Most of the organizations that responded opposed increasing the jurisdictional amounts.>

2. RECOMMENDATIONS

The Commission believes that several revisions in the laws governing the representation process will render employee decisions about whether to engage in collective bargaining simpler, more timely, and less conflictual, thus making this institution more accessible to those employees who want it. Here is what we recommend:

1. Representation elections should be held before rather than after legal hearings about issues such as the scope of the bargaining unit. The elections should be conducted as promptly as administratively feasible, typically within two weeks.

2. The injunctions provided for in section 10(l) of the Act should be used to remedy discriminatory actions against employees that occur in organizing campaigns and first contract negotiations.

3. Employers and newly certified unions should be assisted in achieving first contracts by a substantially upgraded dispute resolution program. The program should feature mediation and a tripartite advisory board empowered to implement options ranging from self-help (strikes or lockouts) to binding arbitration for the relatively few disputes that warrant it.

(1) Prompt Certification Elections

The Commission's Fact Finding Report confirmed that the process by which workers decide whether or not to engage in collective bargaining is among the most contentious aspects of American labor relations. In order to have a union certified as their representative, American workers must seek an NLRB election to determine whether a majority of an appropriate bargaining unit wishes to be represented by the union. Before holding an election, the Board must address legal issues raised by the employer and union, most importantly, the scope of the bargaining unit, and inclusion or exclusion of particular employees therein. Either party has a right to a formal hearing on these matters, which causes a substantial delay. NLRB General Counsel Frederick Feinstein told the Commission that the automatic available it of such hearing procedures means that a party seeking delay `can safely assume' that it will be able to push an election back three to six months. In practice, it takes an average of seven weeks for workers to secure a vote from the time their petition is filed.

During this time, the union and employer typically face off in a heated campaign. The government has been hesitant to regulate the two sides too closely during these contests in order to preserve the parties' freedom of speech. Both sides often hurl allegations, distortions, and promises that poison the relationship and make it difficult to achieve a collective bargaining agreement in cases where the workers vote to unionize. The Fact Finding Report revealed that in recent decade’s employer unfair labor practices during these campaigns have risen: both in terms of the ratio of unfair labor practice charges against employers to the number of elections and the percentage of such charges found to have merit. In particular, discharges of union activists are up: the data show that improper dismissals occur in one of every four elections. American workers are afraid of this prospect: 79 percent say it is likely that employees who seek union representation will lose their jobs, and 41 percent of nonunion workers say they think they might lose their own jobs if they tried to organize. This fear is no doubt one cause of the persistent unsatisfied demand for union representation on the part of a substantial minority of American workers. The Worker Representation and Participation Survey reported that 32 percent of nonunion workers would vote for a union and think their co-workers would too.

The Commission believes the NLRB should conduct representation elections as promptly as administratively feasible. A lengthy, political-style election campaign serves no useful purpose in the labor-management context. Each side would continue to have ample time to express its views if the process were much shorter. Furthermore, much of the conflict that mars the election process would be eliminated if the process was shortened, which would set the stage for a more cooperative employer-union relationship if the employees voted in favor of collective bargaining.

The requirement that the Board hold pre-election legal hearings prevents it from expediting the election process in a significant way. General Counsel Feinstein, who has initiated a major effort to conduct elections more promptly, testified that the best he can hope for under current law is to hold most elections within seven weeks and all elections within eight weeks. The Commission considers this inadequate. We conclude that the Board should conduct elections as promptly as administratively feasible, typically no later than two weeks after a petition is filed. To accomplish this, the Board must hold inquiries and hearings on contested issues after the election (with any disputed ballots sealed in the interim). The Commission has been assured by the NLRB that it would be perfectly feasible as a logistical matter to conduct the vast majority of elections in less than two weeks, as long as the appropriate changes are made in the governing law and the Board reorganizes its staff and resources to undertake this important task.<Footnote: The NLRB is in the process of deciding whether it may conduct pre-hearing elections on its own authority. The Commission takes no position on this legal question of the Board's authority.>

Such a change would not only facilitate prompt elections and eliminate a major locus of labor-management conflict, it would also afford substantial administrative savings. Currently, many Board hearings are held despite the absence of significant legal issues, simply because one of the parties seeks a tactical advantage. There are two principal tactical reasons why parties demand hearings. The first is to give one party an advantage in the election by excluding or including particular employees based on how they are likely to vote. The need for such hearings would be reduced under our proposal because a party that would seek a pre-vote hearing under the current system in order to gain a bargaining unit more likely to vote its way would not be interested in a post-election hearing as long as it either (1) won the election or (2) lost it by a margin greater than the number of disputed voters it had hoped to include.

The second tactical reason parties seek hearings is to delay the election in order to increase their chances of a favorable outcome. The Commission believes that a system is poorly designed if it gives parties an incentive and opportunity to seek delay for its own sake. Hearings motivated by a desire to delay the election would obviously be eliminated altogether in a system that allowed hearings only after the election had taken place.

The simple design change of holding prompt elections, before rather than after certification hearings, is pivotal to our recommendations for improving the representation process. In addition to reducing delay and conflict, this reform would diminish the need for government regulation of the labor-management relationship and make the government more customer-friendly. The NLRB would be more customer-friendly because employees seeking elections would get them quickly, without a spate of confusing litigation, and usually with much less conflict between the union and the employer. As for regulation, in addition to eliminating the need for many hearings, as described above, pre-hearing elections would reduce the need for oversight of the parties' conduct during the election campaign. Such regulation has always been extremely controversial because it involves property and speech rights. The need for it is diminished to the extent that a protracted election campaign and concomitant pitched battle between the antagonists are cut down to a reasonable size.

We encourage employers and unions who desire a cooperative relationship to agree to determine the employees' majority preference via a `card check.' Card checks are particularly appropriate vehicles for enhancing worker-management cooperation when a union already represents part of an employer's workforce and the parties seek a non-conflictual way to determine whether additional employees want that same form of representation. Card check agreements build trust between union and employer and avoid expending public and private resources on unnecessary election campaigns. Such agreements are a classic example of potential or former adversaries creating a win-win situation for themselves. The opportunity to gain representation rights via a simple majority sign-up gives the union an incentive to cooperate with the employer to make the workplace more efficient. In return, the employer gains the cooperation of the employee representative as partner in efforts to improve productivity and flexibility, and often improved morale and reduced turnover as well.

(2) Timely Injunctive Relief for Discriminatory Actions

The Fact Finding Report identified several areas of concern about the tools available to the NLRB to remedy violations of the Act. The Board can obtain injunctions against unions (for organizational or secondary boycotts) far more easily and swiftly than it can against employers, particularly for discriminatory discharges of union supporters. In general, the remedies the Board may prescribe against employers are remedial and reparative rather than deterrent, and the sanctions against employers for violating labor law are far weaker than analogous penalties for breaking other federal employment statutes. The increase in discriminatory discharges documented in the Fact Finding Report indicates that the remedies available to the Board do not provide a strong enough disincentive to deter unfair labor practices of some employers during certification elections and first contract campaigns.

The Commission believes expedited injunctive relief offers a first step toward improving compliance with the Act. In our judgment, this is not only the most effective, least litigious, and least costly path, it will also complement the holding of representation elections as promptly as administratively feasible. The combination of prompt elections and immediate injunctive relief against discriminatory actions would eliminate much of the incentive for engaging in discriminatory behavior. An injunction not only undoes the harm caused by the illegal act, but also weakens the position of the discriminator by making it look bad and the other side look effective in the eyes of the employees. The Commission believes this `backfire' effect would provide the greatest disincentive for wrongdoing.

Under current law the Board has two principal sources of authority for seeking injunctions: NLRA sections 10(j) and (l). Only the slower and weaker of these two provisions, section 10(j), is available to remedy the general range of employer and union unfair labor practices. The swift, automatic, and thus more effective section 10(l) applies only to certain union-side violations. Section 10(l) is the more powerful instrument for two principal reasons: (1) it is mandatory, whereas section 10(j) is discretionary; (2) it is faster, both because it is triggered by an unfair labor practice charge whereas section 10(j) requires a formal unfair labor practice complaint, and because the Board must give section 10(l) cases `priority over all other cases.' As a result of these differences, NLRB General Counsel Feinstein told the Commission that section 10(l) cases take the Board five days to process, whereas section 10(j) cases

take 65 days or more just to get into court, let alone to secure an injunction from the judge.

The Commission recommends that Congress make section 10(l) injunctive relief available not only to employers harmed by union secondary boycotts, but also to employees who are victims of employer discriminatory actions from the beginning of an organizing effort to the signing of a first contract. The timely use of injunctions in these situations will help abate many of the problems the Commission was instructed to address. Most obviously, injunctions that can be obtained within days rather than months will reduce delay. Quick resolution of unfair labor practice charges during the crucial election and first contract period will also increase labor-management cooperation by preventing disputes from starting and then festering. Prompt injunctive relief will remove the coercive effect on employee free choice. The increased efficacy of this remedy will deter discriminatory behavior as well as rectify it, and will increase respect for the NLRB among the general public and its primary constituency -- American workers.

(3) Resolution of First Contract Disputes

The Commission believes that once a majority of workers has voted for independent union representation for purposes of collective bargaining, the debate about whether a bargaining relationship is to be established should be over. At this point, the parties' energies and the public's resources should turn to creating an effective ongoing relationship that is suited to the needs of their workplace. Every effort should be made to ensure that a satisfactory agreement is concluded and that the process used to reach that agreement leads to the development of a cooperative bargaining relationship.

The Fact Finding Report noted that one-third or more of certified units fail to reach a first contract, and that strikes taking place in first contract negotiations tend to be longer and to result in fewer settlements than strikes occurring in established bargaining relationships. Moreover, evidence from studies presented to the Commission document that the probability of achieving a first contract is reduced in settings where unfair labor practices or other hard bargaining tactics are carried over from the election campaign into the contract negotiation process. Clearly, improvements in the effectiveness of the first contract negotiation process are called for.

However, in developing a proposal one must guard against

reducing the parties' incentives to negotiate a realistic agreement. Care should be taken to avoid any chance that unworkable or harmful terms are imposed on the parties by a neutral who is uninformed about the issues or unaccountable to the parties or the public. Several witnesses pointed out to the Commission that negotiations sometimes fail because one side or the other holds out for numerous, unrealistic proposals. The process must encourage parties to reach their own agreements, accept the possibility that a strike or lockout may be the most appropriate way to address unrealistic expectations or demands, and allow for the use of arbitration if in the judgment of experienced and respected professionals this is the best way to assure that an initial agreement will be achieved.

The Commission received a number of proposals for improving the first contract negotiation process. Some witnesses suggested that arbitration be required of all first contract disputes that remain unresolved after a specified period of time. Others proposed requiring arbitration if the NLRB finds one of the parties to be bargaining in bad faith or engaged in other unfair labor practices. The Commission finds both of these options unsatisfactory. The first would reduce the incentives of the parties to negotiate on their own. The second suffers from severe administrative difficulties, because NLRB procedures for determining whether or not bad faith bargaining has occurred are already time consuming and would be newly taxed if arbitration became available as a remedy. Moreover, it is often difficult to determine whether a violation of good faith bargaining law has occurred, as opposed to permissible hard bargaining about the issues. Most important, the Commission believes that if worker-management cooperation is to be increased, the focus must shift from determining blame and assessing punishment to facilitating agreement wherever possible.

The Commission offers the following as a first contract dispute resolution system that meets the above objectives. An employer and newly certified union would have early access to the services of the Federal Mediation and Conciliation Service or private mediation. A tripartite First Contract Advisory Board would be established to review disputes not settled by negotiations or mediation. The Advisory Board would be empowered to use a wide range of options to resolve disputes, including referring them back to the parties to negotiate with the right to strike or lockout, further mediation or fact finding, or use of arbitration in the form that is judged to be best suited to the circumstances of the particular case. The

`certification year' (in which the union's majority status is presumed) would begin when the Advisory Board decides which course to take.

Making arbitration available in first contract cases is crucial to the overall representation system. The Commission believes it will be necessary to invoke arbitration only rarely, but the prospect of its use in situations where one side or the other has been recalcitrant in negotiations will motivate the parties to reach mutually acceptable compromises. Maximizing the number of such voluntary agreements is the goal of any dispute resolution system, and is vitally important at this stage in the development of an enduring and cooperative labor-management relationship.

(4) Employee Access to Employer and Union Views on Independent Representation

The Commission received many proposals to modify current rules governing employee access to employer and union views on collective bargaining. We affirm the important role such access plays in employee decision-making about collective bargaining. It is a central tenet of U.S. labor policy that employees should be free to make an informed and uncoerced choice as to whether or not they wish independent representation at work. The `effectiveness' of that right, as the Supreme Court has stated, `depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others."<Footnote: Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (l972).>

The Commission is aware that there is an imbalance in this area. The ability of employers to present their views to employees is assured at the workplace. Employers have daily contact with employees and are free to express their views from the date of hire. Employers may distribute written material to their employees and post materials in the workplace. Employers also may require employee attendance at so called `captive audience' meetings to hear the employer's point of view. In addition, the employer may devote as much work time as it desires to supervisory activity advising employees about the employer's position, including one-on-one or small group meetings between supervisors and employees. Indeed, supervisors who refuse to participate in the company's campaign against union representation for the employees may be discharged for their refusal.

By contrast, employees have little access to the union at

work -- the one place where employees naturally congregate. Union representatives are typically excluded from the worksite altogether and are all but uniformly excluded from the meetings held by the employer. Even non-working areas which are accessible to the general public -- such as parking lots or cafeterias -- are off-limits to the union organizer.

In order to make up for these restrictions, the union is given a list of employee names and addresses so it can contact workers at home. But the names of the constituents the union seeks to represent become available only if the union is able to achieve the 30 percent level of support necessary to secure an election, and then only 10-20 days before the election (in what typically is a fifty-day campaign). Efforts to communicate with workers when they leave the worksite and disperse into the community are far more costly and far less likely to succeed in reaching the workforce than worksite communications. As the Supreme Court has stated, the workplace is `a particularly appropriate place' for work-related communications `because it is the place where employees clearly share common interest and where they additionally seek to persuade fellow workers in matters affecting their union organizational life and other matters related to their status as employees.' <Footnote: Eastex, Inc. v. NLRB, 437 U.S. 556, 574 (l978).>

The Commission has come to the conclusion that, as Professor Matthew Finkin testified, `the law should allow the widest practicable dissemination to employees of their statutory rights and of the availability of representation. It does not.' However, we are also cognizant of the difficulty of regulating the access issue.

As a first step, Congress should reverse the Supreme Court's decision in Lechmere v. NLRB<Footnote: 112 S.Ct. 841 (1992).> so that employees may have access to union organizers in privately-owned but publicly-used spaces such as shopping malls. It runs counter to our democratic traditions to bar advocates of independent union representation from these areas. What is more, in practice Lechmere harms not only advocates for unions but also those of other causes, because of the way this decision interacts with the other legal requirement that the employer can not have discriminatory solicitation rules. This means that, in order to keep union representatives from having contact with employees, many mall owners have barred groups like the Salvation Army and the Girl Scouts as well. Congress should make it clear that labor groups and others have a right of

access to this form of `public-private' space, which has taken over the role of Main Street in so many American communities.

Further revisions of the rules relating to access are best left to the considered judgment of the NLRB. We note that the Board has significant leeway in this area, and has not visited it in a fundamental way in three decades.<Footnote: See General Electric Co., 156 N.L.R.B. 1222 (1966).> We encourage the Board to examine its current practice carefully to determine the extent to which it provides employees a fair opportunity to hear a balanced discussion of the relevant issues. Should the prompt election system we recommend be enacted, the Board may need to tailor the access rules to fit new circumstances. In any event, we urge the Board to strive to afford employees the most equal and democratic dialogue possible.

(5) Conclusion

Employee freedom of choice about whether to have independent union representation for purposes of collective bargaining remains one of the cornerstones of a flexible system of worker-management cooperation in our democratic society, whatever portion of the workforce decides to avail itself of this form of participation. A labor relations environment marked by prompt, pre-hearing elections, effective injunctive relief for discriminatory reprisals in the representation process, and flexible dispute resolution of first contract negotiations, including arbitration where necessary, will provide American workers greater freedom to choose collective bargaining if that is what they want. Taking these steps is an integral part of an effort to reduce conflictual relations and to reform the regime governing workplace participation. Employee free choice about independent union representation serves both as guarantor of the integrity of employee involvement plans in non-union facilities and as a voluntary worker-management alternative to direct federal regulation of the employment relationship.