April 18, 2018

National Labor Relations Board
1016 Half Street SE
Washington, DC 20570-0001

Re: NLRB Request for Information Regarding Representation Election Regulations – 2014 Election Rule

To Whom It May Concern:

The American Home Furnishings Alliance is pleased to submit these comments in response to the NLRB's Request for Information Regarding Representation Election Regulations.

The American Home Furnishings Alliance is a non-profit trade association representing more than 400 members, including 241 manufacturers and importers of residential furniture goods. These members manage a sophisticated global supply chain spanning factories in 31 states and seven foreign countries, employing over 50,000 production workers in the United States and claiming a 29% share of the United States residential furniture market with shipments totaling more than $9.7 billion every year for United States households. The 15 largest domestically-owned manufacturers and importers of residential furniture for the United States market are AHFA members.

Background.

The final Rule was issued by the National Labor Relations Board ("Board" or "NLRB") that modifies procedures relating to union representation elections. The Rule went into effect on April 14, 2015. It stated that the public purpose of the new Rule was to "remove unnecessary barriers to the fair and expeditious resolution of questions concerning representation." The background to the Rule asserted that expeditious resolution of questions concerning representation is central to statutory design. Implicit in the assumptions leading to the Rule, is the suggestion of organized labor that quicker elections would be fairer and more representative of employee free choice.

It is submitted that only one of the original purposes of the new Rule have been met. The median timeframe for conducting secret ballot elections has dropped from approximately 38 days to approximately 24 days. In all other ways, it is submitted that the new Rule has not met its goals,

and indeed has been counter-productive and inconsistent with the American tradition of democratic elections, as well as the history and public policies set forth in the National Labor Relations Act.

Summary Response To Questions.

1. Should the 2014 election Rule be retained without change? – No.

2. Should the 2014 election Rule be retained with modifications? – No.

3. Should the 2014 election Rule be rescinded? - Yes.

The new Rule has had the opposite effect anticipated by organized labor.

Implicit in the enthusiasm of organized labor for the new Rule was the plan or hope that with quicker elections, more employees would vote in union representation elections, and that the elections would be "fairer" in the eyes or organized labor and thus would result in a higher union win rate. According to official data from the National Labor Relations Board website (NLRB.gov, New & Outreach, Graphs & Data, Petitions & Elections), in FY 2015, which began October 1, 2014, there were 1,574 representation elections held. Of those elections held, 1,120 or 71% were won by the union. In those elections, 91,874 employees voted on union representation (NLRB.gov, Election Report for Cases Closed).

In the first full fiscal year following the institution of the Rule, there were 1,396 elections held, of which 1,014 (73%) were won by the union. In FY 2017, only 1,366 representation elections were held, with only 940 (69%) won by the union. The number of eligible voters on union representation dropped to 73,982 in FY 2016, and 79,750 in FY 2017. The number of employees voting for unions dropped to 36,716 in FY 2016, and only slightly increased to 37,631 in FY 2017.

The important "win rate" for organized labor in these elections remained virtually unchanged during all three years. It did not increase under the new Rule.

The data shows that the new Rule has resulted in less union elections, less employees voting for unions, and less employees voting in secret ballot elections. The union "win" rate is virtually unchanged.

Thus, the NLRB data clearly refutes that the new Rule changes the representative nature of union elections or that quicker elections adds to more employees voting at a higher percentage for union representation. As a matter of fact, the number of workers organized in 2016 was the lowest in four years under the new Rule.

The new Rule, which has reduced the time period before an election from approximately 38 days to 24 days, is inconsistent with American democratic traditions and legislative voting periods.

The 24-day period between the time of the filing of an election petition and the union election is not consistent with national (both in federal and state elections in all 50 states) and worldwide standards for fair elections. On average, Americans have several months between the time a candidate is selected for election in a primary and the date of the general election. For example, looking at the upcoming federal Senate and House elections, which will be held on November 6, 2018, the **latest** that any state has a primary election is early September 2018: September 12, 2018 (Rhode Island), September 11, 2018 (New Hampshire), September 6, 2018 (Delaware), and September 4, 2018 (Massachusetts). (See Exhibit 1.) Votes in those states still have at least 8 weeks to seek and obtain information that informs their votes before election day. Voters in other states have an even longer period to gather information before they vote. Several states (Arkansas, Georgia, Idaho, Indiana, Kentucky, Nebraska, North Carolina, Ohio, Oregon, Pennsylvania, West Virginia) have primaries as early as May. Two states (Texas, and Illinois) have primaries as early as March.

In the case of the U.S. Presidential Election, voters have over 3 months from the dates of party conventions in July until Election Day in early November to make the important decision about who they will vote for.

In Canada, the federal elections can happen faster than in the U.S., but voters still have at least 36 days to consider how they will vote. An election in Canada begins officially when the Prime Minister asks the Governor General (or the Lieutenant Governor, in the case of a province) to dissolve Parliament or the legislature and to authorize the writs of election. This is the beginning of the "writ period" of the election campaign, when the laws that govern the conduct of an election start to be applied by the election officers. This period begins the date that the writ is "dropped" and does not end officially until the writs are returned along with the names of the candidates who won the most votes on "polling day." The Canada Elections Act states that federal election campaigns must be a minimum of 36 days but does not state a maximum period. The length of a writ period in the provinces ranges from province to province.

Likewise, elections in Great Britain have a more compressed schedule than those in the U.S., but voters in Great Britain have a minimum of 38 days to consider political parties and their candidates in a general election. In Germany, voters have even more time to make their decisions--candidates for the national elections must be proposed by their respective parties no later than 90 days before the election day of periodic elections of the Bundestag.

Two former Democrat Presidents of the United States, including Presidents Obama and Kennedy, have advocated that longer periods of time were required between a petition's filing and the election to "safeguard against rushing employees into an election where they are unfamiliar with the issues." John F. Kennedy's statement at 79 Fed. Reg., at 7342. More recently, on March 25, 2014, President Obama addressed similar "rushed" election issues, and referring to what was happening in Crimea, stating that he was rejecting "the notion that a referendum sloppily organized in the course of two weeks would "somehow be a valid process."

Thus, a short timeframe between a petition for a union election and the balloting itself being utilized under the new Rule violates democratic notions historically accepted among democratic institutions.

Such "rushed" union elections violate the policies of the National Labor Relations Act, as well as applicable legal precedents.

In the 1947 Taft-Hartley amendments, Congress guaranteed the right of employees covered by the Act "to refrain from any and all [collective] activities . . . ." § 7, 29 U.S.C. § 157. The Taft-Hartley amendments further added § 8(c) to the Act, which protects the right of employers to engage in speech on union-related issues prior to an election. The U.S. Supreme Court has characterized § 8(c) as reflecting a "policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust and wide-open debate in labor disputes." *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2009).

In its *Excelsior Underwear, Inc.* ruling 156 N.L.R.B. 1236 (1966), the Board found that a lack of information in a representation election impedes employees' exercise of choice and sought to maximize the "likelihood that all the voters will be exposed to the arguments for, as well as against, union representation." *Id.* at 1240-41. The U.S. Supreme Court endorsed this rationale in *NLRB v. Wyman-Gordon, Co.*, 394 U.S. 759-767 (1969).

The NLRA protects the rights of both employers and employees to engage in "uninhibited, robust, and wide-open debate in labor disputes." *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67-68 (2008) (reviewing § 8(c) of the NLRA, 29 U.S.C. § 158(c)).

The allowance of as few as eleven (11) days between a filing an election petition and a union election is inconsistent with the long history of the NLRA and other democratic institutions in allowing free and open debate. Federal and state elections in the U.S. and in the democratic world would not allow such a short period of time. The Rule must be changed to be consistent with Western and democratic traditions, as well as the free speech policies of the National Labor Relations Act.

The long history of the Labor Act shows that it was intended to allow employees to know the identity of eligible voters in the election.

The NLRA requires the Board to investigate any elections petition and "provide for an appropriate hearing upon due notice" before the election is held. 29 U.S.C. § 159(c)(1). Longstanding rules of the Labor Board required resolution of any voter eligibility issues. 29 C.F.R. § 102.66(a) (replaced effective April 14, 2015); 79 Fed. Reg. at 74, 309. Remarks of Senator Taft during the legislative history of the Taft-Hartley amendments to the NLRA maintain that the function of hearings in representation cases was to determine questions of voting unit composition and eligibility to vote. Supplementary Analysis of the Labor Bill as Passed, 93 Cong. Reg. 6858, 6860 (June 12, 1947). A number of prior NLRB cases, including *Barre-National, Inc.*, 316 NLRB 877, 879 n.9 (1995), have held that § 9(c) of the NLRA entitle employers to contest individual voter

eligibility in a pre-election hearing. *See also* North Manchester Foundry, Inc., 328 NLRB 372 (1999); Angelica Healthcare Services Group, 315 NLRB 1320 (1995); Avon Products, Inc., 262 NLRB 46, 48-49 (1982).

It is important that voters know who will be voting in an election in order to determine their voting choices. The new Rule, in contrast, provides that eligibility issues need not address the issues of individuals eligibility vote prior to the election. 79 Fed. Reg. 74, 384. Under the new Rule, disputes concerning individuals' eligibility vote or inclusion in an appropriate unit ordinarily are not resolved before the election is conducted.

Thus, the bottom line is that the voters in these type elections under the new Rule do not have time to hear, learn, debate and consider the campaign issues, nor do they know who is going to be eligible to vote in the election. Some courts have indicated that it violates the NLRA and basic due process not to allow employees to know the specifics of a voting unit. *See* NLRB v. Beverly Health and Rehabilitation, 120 F.3d 262 (4th Cir. 1997), and cases cited therein. Indeed, one would think that the voting unit in which a collective bargaining agreement might be negotiated, would be one of the most important considerations in the employee's choice of voting for or against a labor organization. The new Rule is both contrary to the statute and to the history of the NLRA.

The new Rule sets forth highly technical procedural requirements that would violate due process under any legal standard utilized in judicial proceedings.

The injection of highly-technical pleading and notice requirements in the Rule has taken away the ability of labor organizations and smaller employers to utilize the Rule without high-priced attorney specialists. The entire federal court system, and that of almost every state, has abandoned technical pleading requirements in favor of "notice" pleading, like the NLRB's prior procedures that have served the parties well for many, many years. Worst, the technical pleading requirements are accompanied by a penalty of subsequent waiver and loss of appeal rights that do not serve the policies of the Labor Act.

Further, limiting the time period to seven (7) days between the Notice of Hearing and the hearing presents a strained and unrealistic sequence of events, as the following actions must be accomplished within that 7-day timeframe. All parties must review the petition and attached documents, investigate the requirements as well as the facts of the situation, find counsel or other representatives, file technical Statements of Position upon penalty of waiver of rights to a hearing or of any appeal, prepare offers of proof, review and file appropriate voting lists, which may include not only names and addresses but also email addresses and telephone numbers not only of the proposed voting unit, but of alternative voting units and of any classifications to be excluded, prepare offers of proof and other witnesses, and attempt to enter into a consent or a stipulated election. Such short timeframes combined with technical requirements upon penalty of waiver, would not satisfy the due process requirements of any court system, state or federal.

In contrast, the system used for many, many years by the NLRB was "user-friendly" and allowed the Board to assist the parties overcoming any technical problems, and was based on fact finding

rather than a highly legalistic, adversarial, summary-judgment-type proceeding following technical pleading requirements abandoned many years ago by the federal and state court systems.

The rushed nature of the procedures for an election is also in contrast not only to those of other federal agencies, state and federal courts, but to the procedures utilized by the NLRB in unfair labor practice cases.

Conclusion

As a result of the Taft-Hartley Act, there was a significant shift in the emphasis of federal labor law to "a more balanced statutory scheme that added restrictions on unions and also guaranteed certain freedoms of speech and conduct to employers and individual employees." Higgins, The Developing Labor Law at 41 (6th Ed. 2012). Further, most experts interpret the Act, as amended by the 1947 Taft-Hartley Amendments, to "represent a fundamental change in philosophy, which rejects outright the policy of encouraging collective bargaining." Archibald Cox, Some Aspect of the Labor Management Relations Act of 1947, 61 Harv. L. Rev. 1 (1947). In order to meet the statutory requirements of fairness and neutrality, the NLRB should set union election dates consistent with widely-recognized standards among democratic societies of allowing a sufficient amount of time for the voters to learn about the candidates, examine the issues, and basically enjoy the rights of free speech guaranteed by the statute, as well as the First Amendment. Since 2001, the NLRB has set a median target of 42 days from petition filing to election, and this target has been routinely met or bettered since then. 79 Fed. Reg. 24434. Unions thrived in this user-friendly environment, and were not prejudiced by the operation of the former procedures, as they won a substantial majority of elections conducted. Only a tiny percentage of such elections suffered from significant delays. The cumulative effect of the new Rule is to deprive employers and employees enough time to communicate with each other and fully understand the complicated issues involved in union elections. And, for employees, their votes count for more, as a practical matter, than any political election they will ever have.

The statute is designed to "assure to employees the fullest freedom in exercising the rights guaranteed by [the Act]. 29 U.S.C. § 159(b). This right includes the "right" to "refrain from" engaging in union activity. *Id.* § 157. The Board has repeatedly found, as set forth herein, that a lack of information in a representation election impedes employees' exercise of choice and the Board wants to maximize the "likelihood that all voters will be exposed to the arguments for, as well as against, union representation." *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1240-41 (1966). Rejecting these policies, including those that both employers and employees have the right to engage in "uninhibited, robust and wide-open debate in labor disputes," *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67-68 (2008), the Board majority in 2014 finds that such debate should be as limited to as few as 11 days, which is totally inconsistent with democratic societies around the world. The prior version of the regulations brought a much more sensible approach that the NLRB "will normally not schedule an election until a date between the 25th and 30th days after the date of the decision [determining the voters and directing the election]." 29 C.F.R. § 101.21(d) (2014). Such procedures are consistent with the comments by then-Senator John F.

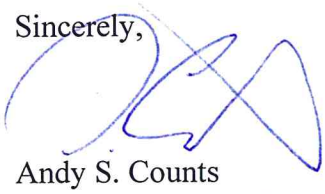
Kennedy, declaring the necessity of a 30-day waiting period as a "safeguard against rushing employees into an election."

It is clear that under the new Rule, every attention is being given to rushed elections, to the detriment of every other policy. The rushed elections are inconsistent with those of democratic nations, and contrary to the deliberative period considered essential to democratic institutions. The outcomes of such elections under the new Rule have not changed, as unions continue to win approximately 71% of elections both before and after institution of the new Rule. Surprisingly, however, the number of elections, the number of voters in elections, and the number of votes for unions under the new Rule have not increased, but instead have decreased.

In short, there is no justification for the new Rule and it should be rescinded.

Thank you for the opportunity to respond.

Sincerely,



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