

April 18, 2018

VIA ELECTRONIC FILING

Roxanne Rothschild
Deputy Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570

**Re: Comment Submission regarding Representation-Case Procedures,
29 CFR Parts 101 and 102, RIN 3142-AA12**

Dear Ms. Rothschild:

Greenberg Traurig, LLP submits this correspondence in response to the National Labor Relations Board's request for information from the public regarding the representation election regulations at 29 CFR Parts 101 and 102 ("the Election Regulations"), adopted by the Board's final rule and published on December 15, 2014 ("the Election Rule").

One of our clients in the energy industry, who employs thousands of employees at both unionized and non-union facilities, wishes to remain anonymous but has asked us to take the opportunity to comment upon the three questions presented by the Board on its behalf. These comments are not submitted on behalf of the firm or the firm's clients generally.

Question 1

It is our client's position that the Election Rule modified long-standing and well-established principles of Board law without sufficient justification. As a result, and for the many reasons set forth herein, the Election Rule should not be retained.

Questions 2 and 3

Our client advocates for the Board to rescind the Election Rule and revert to the Election Regulations in effect prior to the Election Rule's adoption. It endorses the position that the Board has the authority to reconsider past decisions and rules and to revise, replace and rescind such decisions and rules with proper notice and comment in accordance with applicable federal law. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009); *Motor Vehicle Manufacturers Ass'n of U.S., Inc. v. State Farm Mutual Automobile*

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Insurance Co., 463 U.S. 29, 42 (1983); *National Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1038-39, 1043 (D.C. Cir. 2012).

Our client supports rescinding the Election Rule for the reasons specifically outlined below:

The Election Rule's Timing of Elections is Unreasonable

- Section 8(c) of the National Labor Relations Act guarantees speech rights, and protects the “expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form,” provided there is no “threat of reprisal or force or promise of benefit.” 29 U.S.C. § 158(c). However, the Election Rule significantly restricts these rights. The period prior to an election is a vital time for an employer to exercise its speech rights. Employers are prejudiced by the Election Rule, because they are currently required to analyze a petition and implement a communications plan within days of learning about the petition. As a result of the Election Rule, employers are hindered in their ability to provide information to their employees regarding an election and fully explain the pros and cons of union representation before the election takes place. This is a particular challenge for our client, which employs a large number of employees in remote locations.

The Election Rule's Excelsior List Requirements are Burdensome

- Under the prior rule, employers were required to provide an *Excelsior* list to the Region within seven (7) calendar days. The turnaround time, as a result of the Election Rule, has been reduced to two (2) business days. Potential bargaining units at this particular employer may contain hundreds of employees. Gathering and producing the required information within such a short time period is burdensome, and has the potential to distract the Company and its supervisors from operations, interfere with its ability to focus on critical safety practices, and affect its ability to protect the safety of its employees.
- Specifically, the Election Rule now requires employers to provide the Region and the union with each employee's full name, home address, personal email address if available, personal home and cellphone numbers if available, work location, shifts, and job classification. 29 CFR §§ 102.62(d), 102.67(l). This is true even if the information is solely in the possession of front-line supervisors who work a variety of shifts, some also in remote locations. Gathering the phone numbers and personal email addresses from these front-line supervisors is a complicated and burdensome task, and may not be possible in some cases.
- The Election Rule now allows a union to campaign directly to employees in an invasive manner, by contacting them at their personal email addresses and cell phones without their consent. Our client respects the privacy rights of its employees and objects to the requirement to provide this information. Additionally, we note the current rules do not provide penalties for misuse of employees' personal information.

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The Election Rule Fails to Provide for an Appropriate Pre-Election Hearing

- The Election Rule requires an employer to file a position statement by noon the business day before the hearing. An employer must raise all issues that it wishes to litigate, and must identify any individuals in classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest. This prejudices employers because they must respond quickly and they risk forfeiting the right to pursue certain legal issues not included in the position statement.
- The Election Rule is flawed in that many disputes regarding voter eligibility are left unsolved until after an election. For example, the Election Rule in many cases postponed the evaluation of an employee's supervisor status until after the election. *See, e.g.,* 29 CFR §§ 102.64(a), 102.66(a). Leaving issues such as supervisory status unresolved (i) makes it unclear whether certain employees' actions will be attributable to the employer, (ii) makes it unclear whether certain employees' votes will count, (iii) undermines the employer's ability to present an effective campaign, and (iv) affects the employees' ability to make informed decisions. The Election Rule fails to provide an "appropriate" hearing upon due notice as required by Section 9(c)(1) of the Act, and deprives interested parties of a full and adequate opportunity to present evidence on all substantial issues prior to the election.

For all of these reasons, our client supports rescinding the Election Rule in its entirety and reverting to the Election Regulations that were in effect prior to the Election Rule's adoption. In the alternative, it supports retaining the Election Rule and modifying it consistent with the comments outlined above.

Very truly yours,

s/ Charles S. Birenbaum

Charles S. Birenbaum

Jamie R. Rich