



April 18, 2018

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

**RE: Comments of the Society for Human Resource Management and the Council on Labor Law Equality in Response to the Request for Information Regarding Representation-Case Procedures, 29 CFR Parts 101 and 102 (RIN 3142-AA12)**

On behalf of its members, the Society for Human Resource Management and the Council on Labor Law Equality submit these comments in response to the National Labor Relations Board’s (“NLRB” or the “Board”) Request for Information regarding Representation—Case Procedures, 29 CFR parts 101 and 102 (the “Amended Rules”).<sup>1</sup>

**I. Interest of the Commenting Parties**

The Society for Human Resource Management (SHRM) is the world’s largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States. Since its founding, one of SHRM’s principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to the realities of the workplace. The substantial majority of SHRM’s members are covered by the National Labor Relations Act (“NLRA” or “Act”) and have an interest in the Act and its administration, including representation case procedures. SHRM presented testimony and submitted written comments regarding the Board’s 2011 proposed election rules, as well as the 2014 rules.

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<sup>1</sup> SHRM and COLLE incorporate, by reference, the hearing position statements, testimony, and comments which they previously submitted in response to the Board’s 2011 Notice of Proposed Rulemaking, Representation-Case Procedures, 76 Fed. Reg. 36,812, as well as the Board’s 2014 Notice of Proposed Rulemaking, Representation-Case Procedures, 79 Fed. Reg. 7,318.

The Council on Labor Law Equality (“COLLE”) is a trade association founded over thirty years ago for the purpose of monitoring and commenting on developments in the interpretation of the NLRA and related statutes. COLLE represents employers in virtually every business sector. Through the filing of amicus briefs and other forms of participation (such as regulatory comments), COLLE provides a specialized and continuing business community effort to maintain a balanced approach in the formulation of national labor policy on issues that affect a broad cross-section of American industry. COLLE is the nation’s only brief-writing association devoted exclusively to issues arising under the NLRA and related statutes, and in recent decades has filed amicus briefs in nearly every significant labor case before the National Labor Relations Board, the federal courts of appeals, and the U.S. Supreme Court.

## **II. Introduction**

The Board should rescind or modify the Amended Rules because they have unnecessarily upset the delicate labor-management balance that Congress established in the NLRA by providing unique advantages to labor unions during the election process at the expense of employers and employees. The Amended Rules’ myopic and unwarranted focus on speed comes at a significant cost to the impartial union election process envisioned by Congress, and unfairly burdens the ability of employers and employees to discuss the advantages and disadvantages of representation. For instance, the Amended Rules:

- stifle full and robust debate in the workplace by requiring employers to satisfy burdensome requirements in unrealistic timeframes during the critical campaign period.
- violate employees’ privacy by requiring the involuntary disclosure of confidential employee contact and work-related information.
- prevent employees from knowing, in certain cases and before they head into the voting booth, with which of their co-workers they will ultimately be grouped for collective bargaining purposes.
- limit employers’ ability to know and identify who their statutory representatives are before the election by eliminating almost all pre-election representation hearings where such issues were previously resolved.

This is just a sampling of the Amended Rules’ failures in practice. As demonstrated in more detail below, the Amended Rules undermine employers’ statutorily-protected rights to communicate with employees, deprive employees of essential information on election day, and often further delay the ultimate question of whether employees want to be represented by a union. Therefore, the Board should rescind or make significant changes to the Amended Rules in order to make them more fair and consistent with Congressional intent, as discussed below.

### **III. The Board Should Rescind or Modify The Amended Rules Because They Unfairly Manipulate the Election Process, Violate Employee Privacy And Are Contrary to The Policies Set Forth in The Act**

As SHRM and COLLE commented in 2011 and 2014, the previous five-week median time frame between the filing of the petition and the election was fair to all stakeholders. Employers had adequate time to communicate to employees, learn about their obligations under the Act, and retain counsel, if needed. Unions could continue to discuss with employees the advantages of unionization in a relatively short – but reasonably finite – campaign period. Finally, employees had sufficient time to understand and evaluate the merits of both sides of the unionization discussion. While the Amended Rules do not establish a specific, prescribed number of days within which to hold the union election, they limit – in piecemeal fashion – employers’ time to address issues at every step in the process. The Board has dramatically shortened the campaign period from a median of 37 days to just 23 days, while offering no policy reason as to why this timeframe is optimal or beneficial to all stakeholders.

In his dissent in *UPS Ground Freight*, then-Chairman Miscimarra outlined some examples of the Amended Rules’ unfair, unnecessary, and burdensome requirements:

- (i) dramatically accelerating litigation timetables; (ii) denying reasonable requests for modest extensions of time; (iii) giving the party a mere 7 days (extended here by one business day) to prepare a comprehensive Statement of Position; (iv) giving the party a mere 8 days (also extended here by one business day) to prepare and present testimony and documentary evidence in a hearing; (v) requiring a party to participate in the hearing for an extended period of time, on a single day, beyond normal business hours; (vi) denying a party’s request to adjourn the hearing, at roughly 7 p.m., in order to permit the party to prepare its oral argument overnight; and (vii) giving a party a mere 30 minutes, at the end of a long hearing day, to prepare its oral argument.<sup>2</sup>

*UPS Ground Freight* serves as an example of the failures of the Amended Rules, and illustrates why the Board’s emphasis on getting to an election as quickly as possible has been counterproductive: although an expedited election was held according to the Board’s truncated time frame and the employee vote was held quickly, these votes were not certified for nearly 18 months.<sup>3</sup> This was because the parties litigated various issues that perhaps could have been disposed of earlier had the election process proceeded more thoroughly and deliberately. The right to vote on an expedited basis is undercut when that vote is not counted for over a year. Similarly, providing employees with the right to vote three weeks after a petition is filed lacks utility if they do not have the opportunity to participate in a full and

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<sup>2</sup> *UPS Ground Freight, Inc. & Teamsters Local 773*, 365 NLRB No. 113 (2017).

<sup>3</sup> *Id.*

robust debate and become educated about the advantages and disadvantages of representation before they vote.

The Amended Rules have imposed significant costs and burdens on employers and have undercut the full and robust debate regarding unionization that Congress envisioned in promulgating the NLRA. SHRM and COLLE continue to contend that the Amended Rules are not needed, or alternatively, that they should be amended to return balance to the representation process as envisioned by the NLRA.

#### **A. The Board Should Rescind or Modify The Amended Rules' Statement Of Position and Hearing Requirements Because They Are Unfair and Unduly Burdensome**

The Board should rescind or modify the Amended Rules' Statement of Position requirements. Pursuant to the Amended Rules, employers are required to file a comprehensive Statement of Position within seven days of the Board's notice of petition for election (in the absence of a stipulated election agreement).<sup>4</sup> Furthermore, the Amended Rules require employers to appear at a representation hearing just eight days from the filing of the notice of hearing. As discussed in further detail below, these requirements and the incredibly brief time period within which they must be satisfied by employers (but not unions) have created an unfair election process that contravenes the policies that underpin the Act.

##### 1. The Statement of Position Requirement

Employers must address myriad topics in the newly-required Statement of Position including, but not limited to, any bars to election, appropriate unit and eligibility issues, multi-facility and multi-employer unit scope, statutory employee status of individuals constituting more than 20 percent of the petitioned-for unit, and whether there are any professional employees in the unit (as defined by the Act).<sup>5</sup> Worse, if an employer fails to raise an issue in the Statement of Position, the matter is effectively waived and the employer is precluded from later raising or litigating that issue at the representation hearing or at any other stage in the pre-election process.<sup>6</sup> Given these requirements, the seven-day filing timeframe is hardly enough time for employers to learn and understand their obligations under the Act, gather and analyze the necessary information, and compile it into a comprehensive legal document knowing that any position or argument that is forgotten or left incomplete is forever waived.

Suffice it to say that employers face significant challenges in preparing a comprehensive Statement of Position within the seven-day period. This means that Statements of Position are often hasty efforts and may include mistakes that may lead to

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<sup>4</sup> 79 Fed. Reg. 74,308, 74,361 (2014).

<sup>5</sup> *Id.* at 74,442.

<sup>6</sup> *Id.* at 74,442-74,443.

disputes later on in the process, thereby undermining the Amended Rules' focus on speed of representation elections. Besides the abbreviated time period, such mistakes may also be exacerbated by the fact that employers and human resources professionals are already incredibly busy doing their day-to-day jobs and potentially facing their first experience with elections under the NLRA.

Importantly, none of the burdens associated with the Statement of Position apply to labor unions, which are the one party in workplace representation elections that are most likely to understand and be able to prepare for the petition filing. This lopsided allocation of pre-election hearing burdens is simply unfair. For example, compare the information required to be contained in the employers' Statement of Position, described above, with the union's pre-election paperwork, which is merely a one-page petition that contains a brief description of the proposed unit, a statement that the unit is appropriate, some minimal election preferences, and union contact information. Additionally, as noted above, employers are precluded from raising issues at the representation hearing that are not set forth in the required Statement of Position filing. However, this is a one-sided requirement: the Amended Rules allow unions to amend their election petition during the representation hearing without any notice requirement or demonstration of good cause.<sup>7</sup> This means unions, but not employers, can raise issues at the representation hearing that they did not raise in their pre-hearing paperwork. This is a prime example of how the Amended Rules tip the balance of the election process by providing distinct procedural advantages to labor unions.

Further, by straining employer time and resources, the Statement of Position requirements limit employers' opportunities to communicate with employees about the pros and cons of unionization. Since the enactment of the Amended Rules, the practical effect of the shortened period from filing of the petition to the actual election has been reduced opportunity for employers to communicate with employees prior to an election and even more importantly, for employees to communicate with each other regarding the often numerous issues associated with union representation. Employers have the right to engage in protected speech prior to an election, but that right is meaningless if they do not have sufficient time to exercise it.<sup>8</sup>

The time provided by the Amended Rules for employers to gather, evaluate, and submit the information necessary to identify and raise issues regarding the petition for election is unnecessarily abbreviated and inflexible. Additionally, the time and resources expended by employers inevitably limits their abilities to communicate with employees about their position on the unionization debate, and also limits opportunities that employees

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<sup>7</sup> See *id.* at 74,443.

<sup>8</sup> See *General Shoe Co.*, 77 NLRB 124, 126 (1948) (“An election can serve its true purpose only if the surrounding conditions enable employees to register a free and untrammelled choice for or against a bargaining representative.”); *J.J. Cassone Bakery*, 345 NLRB 1305, 1318 (2005) (“The procedures for the conduct of elections are designed to insure, as much as possible, that the outcome reflects a free and fair choice of the voters.”); *Clark Brothers Co., Inc.*, 70 NLRB 802, 805 (1946) (“The Board has long recognized that ‘the rights guaranteed to employees by the Act include the full freedom to receive aid, advice, and information from others, concerning those rights and their enjoyment.’”)

have to communicate with each other about such a significant workplace decision.<sup>9</sup> In short, the rush to file Statements of Position is simply bad policy, and SHRM and COLLE members have expressed significant concerns with this particular requirement of the Amended Rules. The requirement should be eliminated or modified to return the pre-election hearing to a fact-finding, rather than adversarial, exercise.

## 2. The Pre-Election Hearing Requirement

The Amended Rules' requirement that the representation hearing occur exactly eight days after the notice of hearing works hand-in-glove with the problematic Statement of Position requirement and should, therefore, also be rescinded or modified. As discussed above, the Amended Rules unfairly burden employers by requiring them to gather, evaluate and produce substantial written information before the hearing. Employers should not be burdened with the additional requirement of preparing for the hearing in such a short period of time.

Accordingly, SHRM and COLLE urge the Board to modify the Amended Rules to allow regional directors to manage their dockets to schedule pre-election hearings based on the complexity of the issues contained in each petition, as well as other reasonable factors, such as the time of year or unique business-related circumstances. The Amended Rules simply do not consider the current realities of the workplace and how the inflexible eight-day timeframe may not be workable in every situation. For example, the Amended Rules do not allow for consideration of how complicated the legal issues may be or how many witnesses may be involved. Indeed, crucial witnesses may be unavailable to prepare for the hearing or appear at the hearing during the eight-day period.

Further, as SHRM expressed in 2014, "if the voting unit or workforce is large or complex, this is an insufficient amount of time for the employer to conduct an investigation of its workforce, determine if the identified unit is proper, and establish the presence of any bars to the election." Failing to analyze the complexity in each petition before setting the hearing date creates unnecessary burdens and potentially unnecessary delay. The Board should set the pre-election hearing date only after considering the complexity of the issues raised in the election petition.

The requirement to set the hearing eight days after the notice of the hearing should be the minimum, not the maximum. As SHRM contended in its 2014 comments regarding the proposed new election rules:

The approach proposed by the Board is contrary to a basic element in virtually every election procedure in this country, whether it be for a civic association, a religious organization, a fraternal organization, a union

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<sup>9</sup> See *NLRB v. Lorimar Prods.*, 771 F.2d 1294, 1302 (9th Cir. 1985) (noting that while it is important to avoid unnecessary delay in the electoral process, "it is at least of equal importance that employees be afforded the opportunity to cast informed votes on the unit certified") (emphasis added).

organization, a union officer or general federal, state, or local election, as each of these types of elections involve a minimum time period between the initial filing period of candidacy or issue presentation and the date of election.

SHRM further explained that “[s]uch timeframes have their origins in deeply rooted democratic principals in this country and permit voters sufficient time to obtain information, engage in dialogue and debate, and thereafter, make informed decisions.” Now in 2018, when the needless and hectic rush to such hearings is a reality and not just theoretical, SHRM and COLLE reiterate that all stakeholders must be given proper time to prepare for the pre-election hearing.

### **B. The Board Should Rescind The New Voter Eligibility List Requirements Because They Violate Employee Privacy**

In *Excelsior Underwear*, the Board established the requirement that employers must file an election eligibility list with the regional director within seven days after approval of an election agreement or issuance of a decision and direction of election.<sup>10</sup> The eligibility list consisted of the names and home addresses of the employees eligible to vote in the election. The regional director would then make the list available to all parties to the representation case. *Excelsior Underwear* also established that failure to provide the regional director with the election eligibility list during the designated timeframe is grounds for setting aside the results of the election.

The Amended Rules substantially changed the *Excelsior Underwear* requirements, which the Board had employed and parties had relied upon for nearly 50 years. The Amended Rules dramatically expanded the nature and quantity of employee information that employers must provide to regional directors and the parties to the representation case. In addition to providing eligible employees’ names and home addresses, the Amended Rules require employers to include the following information: employees’ personal email addresses, home phone numbers, personal cell phone numbers, work locations, shifts, and job classifications.<sup>11</sup> But while employers are now required to include significantly more information in the election eligibility list, they are required to provide that information in an even shorter period of time: two days after approval of an election agreement or issuance of a decision and direction of election, as opposed to seven days as required by *Excelsior Underwear*.<sup>12</sup> Pursuant to the Amended Rules, an employer’s failure to provide the regional director and other parties with the expanded election eligibility list within two business days is grounds for setting aside the results of an election.

The Board should rescind the Amended Rules’ expanded disclosure requirements and revert to *Excelsior Underwear* for several reasons. First, the Amended Rules did not

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<sup>10</sup> See *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1239-40 (1966).

<sup>11</sup> See 79 Fed. Reg. at 74,335.

<sup>12</sup> *Id.*

adequately address why the Board needed to expand union access to employees' personal information. Second, the Amended Rules do not take proper precautions to protect private employee information. Finally, the Amended Rules unjustifiably require employers to produce significantly more information about employees within a dramatically shorter time period. The Board lacked adequate justification for these changes and should revert to *Excelsior Underwear*, which was more than sufficient for union campaign purposes and established much more reasonable and workable disclosure requirements for employers and employees.

1. There is No Reason For Labor Unions to Have Access to Employees' Personal Information

In the Amended Rules, the Board did not provide sufficient justification for expanding the voter list disclosure requirements and changing what had been successful Board law for nearly 50 years. Indeed, the only justification the Board provided for expanding the nature and quantity of employee information that employers must provide was the development of new technology.<sup>13</sup> Of course, SHRM and COLLE understand that technological advancements may provide a basis for how employers must provide employee information (for example, by email instead of U.S. Mail) but they do not justify a dramatic expansion of the *types* and *quantity* of employee information that employers must provide. The Act “does not command that labor organizations as a matter of law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers.”<sup>14</sup> Just because technology improves does not mean the Board must, or even may, allow unions to contact employees in every conceivable medium. However, with minimal justification, that is exactly what the Amended Rules allow unions to do by requiring employers to provide employees' home addresses, personal e-mail addresses, home phone numbers, and personal cell phone numbers. Should the Board choose to retain these new voter list requirements, it should at least provide a sufficient justification that contemplates a thorough analysis of available technologies and how individuals, especially workers, communicate.

2. The Amended Rules Fail to Provide Adequate Safeguards For The Protection Of Private Employee Information

Absent from the Amended Rules' expansion of the voter eligibility list disclosure requirements is any meaningful protections from the unlawful collection and misuse of private employee information. Much of the information the Amended Rules now require employers to provide is confidential and sensitive. Employees expect employers to protect such information from disclosure to third parties without their consent. Yet the Amended Rules do not implement necessary safeguards to protect this important personal information of employees.

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<sup>13</sup> *Id.* at 74,339.

<sup>14</sup> *NLRB v. Steelworkers (Nutone)*, 357 U.S. 357, 363-64 (1958).



Concern about individual privacy and misuse of personal data has only increased in the three years since the Amended Rules became effective.<sup>15</sup> Even before the Amended Rules became effective, the Government Accountability Office (GAO) included in its biennial High-Risk Series report a topic entitled, “Ensuring the Security of Federal Information Systems and Cyber Critical Infrastructure and Protecting the Privacy of Personally Identifiable Information (PII).” The report noted that “[t]he number of reported security incidents involving PII at federal agencies has increased dramatically in recent years.”<sup>16</sup> And just a few months later in June of 2015 – only weeks after the Amended Rules became effective – the Office of Personnel Management discovered that major cybersecurity breaches of its computer systems and databases resulted in the exposure of personally identifiable information of over 21 million people. Despite these warnings, the Board did not provide adequate protections to safeguard against such cyber breaches when it issued the Amended Rules in late 2014. To SHRM and COLLE’s collective knowledge, the Board has not taken any steps since to ensure that worker information it collects through the voter list remains private and confidential. Nor do the Amended Rules include – as suggested by SHRM in both 2011 and 2014 – any penalties or causes of action to provide redress for failure to adequately protect employee privacy.

The Board’s insistence that the Amended Rules protect employee privacy concerns by limiting the scope, recipients, permissible usage, and duration for which the employee information can be used is insufficient. The Board asserted, for example, that a cell phone number is not entitled to the same degree of protection as medical records and “may reasonably be viewed as less private.”<sup>17</sup> However, technology experts now warn that hackers and identity thieves are increasingly using personal cell phone numbers to steal personal and confidential information.<sup>18</sup> Moreover, since the Amended Rules became effective, SHRM and COLLE have heard from members troubled by employees’ grave concerns about the required disclosure of their cell phone numbers and other personal information to third parties.

### 3. The Amended Rules Unfairly Require Employers To Produce More Employee Personal Information In A Shorter Time Period.

Finally, the Board should rescind the expanded voter list requirements because the Amended Rules require employers to produce significantly more information about employees in a dramatically shorter time – just two business days instead of seven. The Board’s justification for the change was that advances in technology make it unnecessary to

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<sup>15</sup> See PEW RESEARCH CENTER, “The state of privacy in post-Snowden America” (September 21, 2016) (“74% [of Americans] say it is ‘very important’ to them that they be in control of who can get information about them, and 65% say it is ‘very important’ to them to control what information is collected about them”), available at <http://www.pewresearch.org/fact-tank/2016/09/21/the-state-of-privacy-in-america/>.

<sup>16</sup> GOVERNMENT ACCOUNTABILITY OFFICE, HIGH-RISK SERIES – AN UPDATE REPORT TO CONGRESSIONAL COMMITTEES 234 (2015), available at <http://www.gao.gov/assets/670/668415.pdf>.

<sup>17</sup> See 79 Fed. Reg. at 74,344.

<sup>18</sup> See, e.g., *Hackers Are Coming for Your Cell-Phone Number*, MIT Technology Review, <https://www.technologyreview.com/the-download/608711/hackers-are-coming-for-your-cell-phone-number/>.

give employers more than two days to compile the required information.<sup>19</sup> This appeal to technological advancements demonstrates a lack of understanding of how most employers operate.

The Amended Rules ignore the fact that not all businesses use modern technology to conduct their operations. Moreover, employers may not necessarily keep all required employee information in the same databases or in the prescribed format. Furthermore, it is not always a straightforward, simple task for employers to determine who is eligible to vote in an election. To the contrary, in many industries, that determination can be complex and time-consuming.

For the reasons described above, the Board should abandon the enhanced disclosure requirements of the voter eligibility list prescribed by the Amended Rules. *Excelsior Underwear* proved more than adequate for unions, employers, and the Board alike for nearly 50 years. Employers should once again be required to provide a voter eligibility list that only contains the names and home addresses of employees eligible to vote in the election as required by *Excelsior Underwear*, and should be given seven (7) calendar days to do so.

### **C. The Board Should Allow for Bargaining Unit Eligibility Disputes To Be Resolved Prior to the Election.**

Pursuant to the Amended Rules, a representation hearing is limited solely to a determination as to whether a question concerning representation exists. The regulations provide that “[d]isputes concerning individuals’ eligibility to vote or inclusion in an appropriate unit ordinarily need not be litigated or resolved before an election is conducted.”<sup>20</sup> The Board majority at the time reasoned that this deferral of inclusion and eligibility issues until after the election was appropriate because the determination of such matters might not affect the outcome of the election.

However, this concept of deferral runs contrary to Sections 9(b) and 9(c) of the Act which state that “in each case,” the Board “shall provide for an appropriate hearing.”<sup>21</sup> Prior to the enactment of the Amended Rules, it was well-established Board law that this “appropriate hearing” requirement was necessary not just to determine the existence of a question concerning representation, but also to determine the bargaining unit’s configuration.<sup>22</sup> For employees to fully exercise their Section 7 rights in a union election, they are entitled to know the identity of all other employees that would be in their bargaining

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<sup>19</sup> See 79 Fed. Reg. at 74,353.

<sup>20</sup> NLRB Rules and Regulations, at § 102.63(a)(2).

<sup>21</sup> 29 U.S.C. § 159(b)-(c).

<sup>22</sup> See 79 Fed. Reg. at 74,438; see also *North Manchester Foundry Inc.*, 328 NLRB 372 (1999) (representation hearing did not satisfy requirements of Section 9(c) where the hearing officer “precluded the employer from presenting witnesses and introducing evidence in support of its contention that certain individuals were not eligible voters, and instead directed that resolution of that issue be deferred to the postelection challenge procedure.”).

unit before they vote for or against collective representation.<sup>23</sup> Voter confusion and uncertainty as to bargaining unit composition creates less – not more – stability in labor relations.

Employers should also be entitled to know which workers are statutory supervisors for purposes of the election. As the Board well knows, different standards of election-related conduct apply to workers depending on whether they are a statutory supervisor or an employee. Leaving employers to guess as to the supervisory status of workers could result in unfair labor practices as well as the overturning of election results. Such an outcome leads to further litigation and delay and can ultimately postpone the resolution of the question of whether employees desire to be represented by a union or not.<sup>24</sup>

The Board’s solution to unit placement questions – the use of challenged ballots – does not streamline the election process in all cases. To the contrary, it has led to a substantial delay and impediment to meaningful collective bargaining.<sup>25</sup> Moreover, voting under challenge also raises additional concerns relating to voter turnout. In its comments to the Board’s 2014 proposal, SHRM explained in detail the chilling effect of challenges to voters in elections.<sup>26</sup> Simply put, workers are less likely to vote if they know that their vote might not be counted when the polls close.

Therefore, absent an agreement between the parties that is reviewed and approved by the regional director and which the parties waive review thereof, a hearing and subsequent written decision by the regional director should be required in all cases in which any question exists concerning the Board’s jurisdiction, the configuration of the bargaining unit, the placement of individuals within or without such unit, and/or the status of any individual or individuals as putative statutory supervisors. Pursuing speed at all costs is bad policy, especially when pursued at the expense of employees’ right to enjoy the “fullest freedom” to determine whether to vote for union representation. SHRM and COLLE urge the Board to return to its long-established practice of conducting comprehensive evidentiary hearings on all disputed issues prior to holding an election.

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<sup>23</sup> See *NLRB v. Beverly Health and Rehab. Servs.*, 120 F.3d 262 (4th Cir. 1977) (per curiam) (unpublished) (“Where employees are led to believe that they are voting on a particular bargaining unit and that bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character . . . the employees have effectively been denied the right to make an informed choice in the representation election”).

<sup>24</sup> See *UPS Ground Freight*, 365 NLRB No. 113 (2017).

<sup>25</sup> See *id.*

<sup>26</sup> See comments to the National Labor Relations Board on Behalf of the HR Policy Association and the Society for Human Resource Management Regarding the Board’s Proposed New Election Rules, at pg. 11 (April 7, 2014), *citing* Liz Kennedy, et al., *Bullies at the Ballot Box*, Demos and Common Cause (2012) (available at [www.demos.org](http://www.demos.org)) (analyzing state voter challenge laws on the activity of voters in state and federal elections); Nicholas Riley, *Voter Challengers*, Brennan Center for Justice (2012) (available at [www.brennancenter.org](http://www.brennancenter.org)) (examining state laws concerning voter challenges and the difficulties they create for voters and elections officials); *The Role of Challengers in Elections*, Project Vote (2008) (available at [www.projectvote.org](http://www.projectvote.org)) (analyzing the advantages and disadvantages of state challenger policies and regulations and suggesting guidelines to improve such practices).

## **D. The Board Should Review and Modify Other Procedural Components of the Amended Rules That Unfairly Tip The Balance Of The Representation Process**

### **1. Regional Directors' Discretion Should be Revisited**

The Amended Rules delegate too much authority to the Board's regional directors. It is the Board – not the Board's hearing officers or regional directors – that should serve as the ultimate authority for deciding election disputes. Prior to the Amended Rules, aggrieved parties had a statutory right to seek review by the full NLRB of rulings and decisions made at the regional level. For example, review of important determinations such as the Board's jurisdiction over the employer, whether individuals are statutory employees, whether the election should be barred under one of the Board's election bar doctrines, are now reviewable only if the Board grants "special permission" to appeal. The same is true for post-election disputes. In practice, this delegation has resulted in the inconsistent application of representation law and regulation across NLRB regions. Consequently, SHRM and COLLE urge the Board to rescind much of the delegated discretion given to regional directors under the Amended Rules and reaffirm itself as the ultimate authority in settling union election disputes.

### **2. The Board Should Rescind Its Current Policy On Blocking Charges**

The Board's current blocking charge policy allows elections to be paused indefinitely if the union or employees file an unfair labor practice complaint that alleges that the employers' actions compromise the fairness of the election. This policy causes significant election delays in representation cases and, therefore, fails to achieve the Amended Rules' express goals of simplified procedures and reduced delay.<sup>27</sup> It also allows one party to an election – labor unions – to unilaterally postpone and delay elections and frustrate employees' self-determination. For these reasons, the current blocking charge procedure undermines instead of accomplishes the Board's stated goals, and should be eliminated.

## **IV. Conclusion**

The union election process envisioned by Congress – like all aspects of the NLRA – focuses on fairness and balance, rather than quickness and speed. Yet the Amended Rules unnecessarily disturb this thoughtful balance by unfairly favoring labor unions during the election process. Three years of practice under the Amended Rules have provided sufficient evidence to demonstrate that this is the case, as employers' experience has been decidedly negative: rushing to meet pre-election deadlines is burdensome, costly, and unproductive; communicating with employees is now increasingly difficult; employees may be confused regarding the composition of the bargaining unit; and employee privacy concerns remain

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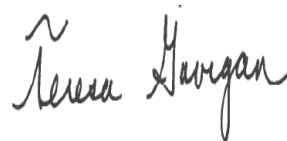
<sup>27</sup> 79 Fed. Reg. at 74,308.

stronger than ever. For these reasons, SHRM and COLLE urge the Board to rescind the Amended Rules or otherwise institute the recommendations above to return much needed balance and fairness to the union election process.

Sincerely,



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