UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:	**)**	**RIN 3142-AA08**
	)	
	)	**(79 Fed. Reg. 7138 No. 25)**
	)	
NOTICE OF PROPOSED RULEMAKING	**)**	
	)	
Representation Case Procedures	**)**	

Comments of the National Association of Manufacturers to the Rules Proposed By the National Labor Relations Board Regarding Representation Case Procedures

I. INTEREST OF THE NATIONAL ASSOCIATION OF MANUFACTURERS.

The National Association of Manufacturers ("NAM") is the preeminent manufacturing association in the United States, as well as the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector in all 50 states. Manufacturing is the largest driver of economic growth in the nation – contributing $1.8 trillion to the economy.

Over 12,000 manufacturing companies represented by the NAM have a distinct interest in the Proposed Rulemaking. Most members of the NAM are employers covered under Section 152 of the National Labor Relations Act ("Act") and respectfully submit that the separate and aggregated effect of the Proposed Rules would have a significant adverse effect on manufacturing, the meaningful exercise of employee Section 7 rights, employer rights under Section 8(c), and on the workplace in general. NAM members have a significant interest in the

manner in which the Act is administered by the National Labor Relations Board ("Board"), particularly with respect to the conduct of representation elections and the procedural safeguards associated therewith.

II. SUMMARY OF COMMENTS.

The Proposed Rules radically impair the right and ability of employees to make an informed choice regarding their Section 7 rights and denies employers their Section 8(c) rights to communicate vital information to their employees regarding unionization. Furthermore, by deferring determination of important procedural and unit placement issues until after the representation election and imposing expedited, determinative pleading requirements on employers, the Proposed Rules compromise employers' due process rights.

Although the Supreme Court has stated that "Congress has entrusted the Board with a wide degree of discretion in establishing the procedure and safeguards necessary to ensure the fair and free choice of bargaining representatives by employees," that discretion must be consistent with the essential purposes of the Act. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946). The NAM submits that the Proposed Rules are not consistent with the considered judgment of Congress to safeguard the employer's ability to communicate its positions to its employees and, in turn, for employees to make an informed decision regarding union representation.

There is no demonstrable need for the Proposed Rules and their promulgation will have an adverse effect on employer/employee rights and workplace stability. Moreover, the Proposed Rules will have a significant economic impact on a substantial number of small businesses, yet the Board has failed to comply with the directory requirements of the Regulatory Flexibility Act.

III. THE RULE MAKING PROCESS IS FLAWED AND PREVENTS A REASONED PROMULGATION OF IMPORTANT CHANGES TO ELECTION PROCEDURES.

The Proposed Rules are perhaps the most consequential in the Board's history, yet the Board's process in considering the changes to representation election procedures is inadequate to the magnitude of the changes.

Consider, for example, the last time the Board engaged in significant rule making. When the Board promulgated healthcare unit rules it engaged in a far more deliberative process than that accorded the Proposed Rules, despite the fact the former had far less impact on the nation's workplaces as a whole. The Board allowed parties four full months to submit comments before conducting four public hearings, followed by *another* six weeks for comments. The Board adduced more than 3,500 pages of testimony from 144 witnesses. The public hearings spanned 14 days.

Several discrete elements of the Proposed Rules each call for at least as much consideration as that given to the healthcare rules. Indeed, the NAM submits that the expansive sweep of changes contemplated by the Board counsels public hearings and comments *precede* promulgation of the Proposed Rules by the Board. Instead, the Board majority as adopted a "verdict now, trial later" approach to the Proposed Rules.

Further, by scheduling hearings on the Proposed Rules a mere three days after submission of Comments the Board has deprived affected parties a meaningful opportunity to consider the views and opinions of others and perhaps incorporate same into their oral testimony. It also prevents the Board itself from credibly analyzing the comments and utilizing points made therein during the hearings. This is both a procedural defect and wasted opportunity that limits a rational, logical assessment of the Proposed Rules.

Further, by essentially reissuing the rules first proposed in 2011, the Board has chosen to forego a *de novo* examination of the issues underlying the various subjects addressed in the Proposed Rules. This, despite significant changes in circumstances between 2011 and 2014, not the least of which is there are four new members of the Board. Perhaps of greater consequence is the Board's issuance of *Specialty Healthcare*, a decision that provokes serious bargaining scope issues.

The relative rush to promulgate the current Proposed Rules is a departure from past Board practice that will result in both an inadequate opportunity for stakeholders to address the merits of the rules and inadequate information and data for the Board to make a prudential judgment regarding the rules. In addition, given that the Board has failed to analyze its own data regarding the necessity for the new rules, serious questions regarding the advisability of the Proposed Rules will be left unaddressed.

IV. THE PROPOSED RULES ARE CONTRARY TO OR INCONSISTENT WITH THE ACT AS WELL AS BOARD AND COURT PRECEDENT

Several aspects of the Proposed Rules conflict with the provisions of the National Labor Relations Act. As such, the Proposed Rules violate the Administrative Procedures Act proscription against rules conflicting with substantive provisions of organic statutes. *See* 5 U.S.C. § 706(2)(A).

Perhaps the most glaring conflict between the Proposed Rules and the Act is the former's virtual extinguishment of a party's right to a pre-election hearing. Not only is the curtailment of such right ill-considered from a policy perspective, but it is in stark contrast with Section 9(c)'s requirement that the Board "provide for an appropriate hearing upon due notice" where a question of representation exists. *See e.g. American Hospital Association v. NLRB*, 499 U.S. 606 (1991). Allowing regional directors and/or hearing officers to deny a hearing where an issue

relating to the sought-after unit affects less than 20 percent of employees in such unit is wholly unsupported by Section 9(c); Section 9(c)(1) deprives a hearing officer of the ability to exclude certain pertinent issues from the record. Moreover, such exclusion vastly increases the probability employees will cast votes in an informational vacuum – one in which it is unclear whether others in the unit are statutory supervisors or otherwise properly included within the proposed unit. In passing the Taft-Hartley amendments in 1947 Congress clearly intended for voter eligibility issues to be determined in a pre-election hearing, thereby reversing the post-election determinations that had prevailed prior thereto.

The injury to Section 9(c) does not end there. The one-sided Statement of Position requirement imposed by the Proposed Rules on non-petitioning parties - upon penalty of waiving defenses not raised - is completely contrary to the purpose and intent of Section 9(c). The likely effect of the Statement of Position requirement will be to place significant burdens on employers not contemplated by the Act, while impermissibly shifting what is now a reasonably balanced process unfairly toward one party.

Further, by depriving a party of the ability to seek full Board review of regional director determinations, the Proposed Rules are wholly inconsistent with Section 3(b) of the Act. The intent of Section 3(b) was to allow the Board to delegate to the regional director its authority to determine the appropriate bargaining unit. This section, however, does not include the delegation to hearing officers. This could be detrimental to a fair election. Allowing hearing officers to exclude evidence of who is in the unit and who is a statutory supervisor alters the process in a manner not contemplated by Section 3(b).

V. THERE IS NO EVIDENCE THE PROPOSED REPRESENTATION ELECTION RULES ARE NECESSARY.

There is absolutely no evidence demonstrating the present timeframe for conducting representation elections is either too long or otherwise flawed. Indeed, all of the evidence gathered at the 2011 hearing, as well as the Board's own data, demonstrate that the current timeframes are not only adequate, but among the most expeditious in the Board's history. The data, as stated by the Dissent to the NPRM, "do not provide a rational basis for engaging in a wholesale reformulation of the Board's election procedures."

For example, data compiled by the Board show that the Board has either met or surpassed its own internal representation election goals and guidelines for over a decade.

- 94.3 percent of all initial elections were conducted within 56 days of the filing of a representation petition in fiscal year 2013.
- Over the last decade, initial elections were conducted in a median of 38 days from the filing of the representation petition.
- 85 percent of all representation cases were resolved within 100 days between fiscal years 2008 – 2010. The Board's target was 85 percent.
- The parties voluntarily entered into election agreements in 91 percent of all cases from 2008 – 2010.

There is no evidence that the causes of such delays would be remedied by any of the Proposed Rules changes. As noted by former member Hayes in his Dissent to the 2011 Rules, "without knowing which cases they were, I cannot myself state with certainty what caused delay in each instance, but I can say based on experience during my tenure as Board member that vacancies or partisan shifts in Board membership and the inability of the Board itself to deal promptly with complex legal and factual issues have delayed final resolution far more often than any systemic procedural problems or obstructionist legal tactics. That was the situation in each of the aforementioned extremely delayed cases, and in none of those cases would the majority's

current proposals have yielded a different result." Notice of Proposed Rulemaking 2011, Dissent at 46.

The Board has not produced demonstrable need for shortening the time between the filing of a representation petition and the conduct of an election and the Board has met or surpassed its own internal representation timeframe targets. Therefore, the NAM respectfully submits, as it did three years ago, that the Proposed Rules are a solution in search of a problem. Perhaps more accurately, it is a solution that will *create* myriad problems for employees and employers by impairing their Section 7 and 8(c) rights, as well as increasing structural costs to all employers, particularly smaller businesses.

A. Employees, Employers and Unions Would Benefit From A Longer Election Period.

In order to ensure robust discussion of the issues, all parties – employees, unions, employers – would be better served by a lengthier median, or a defined minimum, period between the filing of a representation petition and the conduct of an election. Congress has established prescribed minimum notice periods in a host of labor/employment - related statutes to afford employees sufficient time to absorb important information necessary to make critical decisions regarding their employment status. For example, in the Worker Retraining and Notification Act, Congress requires employers provide 60 days' notice to, *inter alia*, effected employees in a plant closing or mass layoff situation.

The decisions contemplated by employees in the foregoing circumstances are, arguably, no more consequential than the decision to vote for a particular collective bargaining representative. Arguably, more time is needed, rather than less. Not only would more time provide employees with the opportunity to process information, discuss same with co-workers

and their families, and evaluate competing claims, it would give both employers and unions the ability to communicate completely their respective positions. This is particularly crucial for smaller employers without standing human resource protocols or in-house counsel. For many in this cohort, a rushed exercise of Section 8(c) rights is not just unfair and imprudent.

VI. THE CUMULATIVE EFFECT OF THE PROPOSED RULES WOULD SIGNIFICANTLY IMPAIR THE RIGHTS AND ABILITIES OF EMPLOYERS TO COMMUNICATE THEIR POSITIONS TO EMPLOYEES UNDER SECTION 8(C) OF THE ACT.

Section 8(c) of the Act provides:

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

Section 8(c) protects the employer's right to communicate its position regarding, *inter alia*, union organization to its employees. As the Supreme Court stated in *Chamber of Commerce v. Brown*, 555 U.S. 60, 67-68 (2008):

> From one vantage, Section 8(c) "merely implements the First Amendment," *NLRB v. Gissel Packing Co*., 395 U.S. 575, 617, 89 S.Ct. 1918, 23 L.Ed.2d 547 (1969), in that it responded to particular constitutional rulings of the NLRB. *See* S. Rep. No. 80-105, Pt. 2, pp. 23-24 (1947). But its enactment also manifested a "Congressional intent to encourage free debate on issues dividing

> labor and management." *Linn v. Plant Guard Workers*, 383 U.S. 53, 62, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966). It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "free will use of the written and spoken word has been expressly fostered by Congress and approved by the NLRB." *Letter Carriers v. Austin*, 418 U.S. 264, 272-73, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

Section 8(c) provides NAM members the ability to engage their respective employees in robust discussion regarding unions and unionization generally. Furthermore, Section 8(c) safeguards the employer's abilities to ensure that their employees make an informed choice regarding critical employer-employee relations. *See, e.g., NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941); *NLRB v. American Tube Vending Co.*, 134 F.2d 993 (2nd Circuit), cert denied, 320 U.S. 768 (1943). *See also*, H.R. Rep. No. 510 80th Cong. 1st Sess. 15 (1947). This can only be done when an employer has a reasonable amount of time to prepare and communicate the necessary information to employees.

The Supreme Court stated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) "an employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union *or the National Labor Relations Board*." (Emphasis added.); *see also Chamber of Commerce v. Brown*, 544 U.S. 60 (2008).

The thrust of jurisprudence under Section 8(c) is to ensure that voters in a representation election are fully informed regarding the salient issues in such election. *See Chamber of Commerce v. Brown supra*.: *J.J. Cassone Bakery*, 345 NLRB 1305 (2005). As noted in the Dissent to the NPRM, if the goal in representational elections is to have an informed electorate the Proposed Rules are a massive roadblock to achieving such goal. 79 Fed. Reg. 7341 (Feb. 6, 2014).

The current median timeframe of 38 days between the filing of a representation petition to the conduct of an election is one of the shortest periods in the Board's history. Yet, the present period is itself an insufficient amount of time for many employers particularly small or medium-sized businesses, to effectively communicate information regarding the ramifications of unionization to employees and correct any mischaracterizations or errors union representatives may have made during their organizing campaign.

Consider the typical union organizational scenario: The union spends six to eight months gathering authorization cards from employees. During that time, the union conveys its message regarding the benefits of unionization with few legal constraints. Not all employees will necessarily be privy to the message and many, if not most, employers are completely oblivious to the fact that a union campaign is underway.

During the union campaign, the employee population, or portions thereof, often hears a one-sided, unrebutted message, and too frequently an inaccurate one. Undoubtedly, it is extremely unlikely employees will hear about any of the potential downsides of unionization or union membership. Employees may not receive information about union dues, fines and assessments imposed by the union. It is also unlikely that employees will hear about how

unionized companies fare or whether they are competitive relative to other non-unionized workplaces in a particular industry.

The filing of a representation petition is generally the first time most employers become aware that a union organizational campaign has been underway at their workplace. The employer then has approximately 5-1/2 weeks to formulate and convey its message to its employees in a manner that is compliant with the Act, – in contrast to the six to eight months that a union has been communicating to the same employees.

Unionization is not a trivial matter for either the employer or the employees. For many employers, unionization will significantly alter the manner in which they interact with their employees and conduct their business operations. Section 8(c) provides the employer the ability to communicate important information to employees, provided, however, the employer has a sufficient amount of time to convey the information. This information may include, but is not limited to, the track record of the petitioning labor organization, existing wages, benefits, and terms and conditions of employment, data concerning the profitability of competitors, the potential effects of unionization on operations, etc. Without such information, employees will be selecting a collective bargaining representative without crucial information. By truncating the period between the filing of a representation petition and the conduct of an election, the Proposed Rules reduce an employer's Section 8(c) rights to fiction as well as effectively strip employees of their Section 7 rights to make an informed choice regarding unionization.

The Proposed Rules would compress the period between the filing of a representation petition to the conduct of an election to a mere 14-20 days. An employer often needs 14-20 days just to determine what information it wishes to provide to employees regarding the union and unionization. Moreover, the compressed timeframe deprives employers—particularly small and

medium-sized businesses—of a meaningful opportunity to engage and consult with counsel. Smaller businesses do not necessarily have labor counsel on staff or on retainer. Therefore, after receiving the petition, the typical employer will need to find competent labor counsel, develop a complaint communications program while simultaneously analyze all of the issues to be addressed in its Statement of Position and the hearing—all within 14-20 days.

Consequently, were the Proposed Rules implemented, the election would occur before an employer has even had an opportunity to effectively consult with counsel and/or to determine what information should be conveyed to its employees. This information vacuum is compounded by the fact that the only information employees will likely have received has come from the petitioning union. Therefore, employees will be making the critical decision as to whether or not to unionize with either incomplete or clearly biased information. As suggested by former Member Hayes regarding the 2011 Rules, this will deprive employees of the ability to make an informed choice regarding their Section 7 rights. *See*, Section 1(b) *Short Title and Declarations of Policy, Labor Management Relations Act of 1947*, Pub.L.No. 101, 80th Cong., 29 U.S.C. § 145 (1994). Even in circumstances where the employer has effectively endorsed a union organization campaign, employees have rejected the petitioner, which should be a clear indicator that proper respect be given for the employee's ability to have sufficient time to weigh options about the petitioner and the notion of collectively bargaining or not.

VII. THE PROPOSED RULES' STATEMENT OF POSITION REQUIREMENT PLACES AN UNDUE BURDEN ON EMPLOYERS AND IS INCONSISTENT WITH THE ACT.

The Statement of Position requirement contained in the Proposed Rules places a statutorily impermissible and untenable burden on employers by compelling them to set forth certain positions and information in an unreasonably short amount of time, and perhaps without effective input of counsel. The proposed Section 102.63(b)(1) provides as follows:

After a petition has been filed under Section 102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file and serve on the parties named in the petition its Statement of Position by the date and in the manner specified in the Notice unless that date is the same as the hearing date. If the Statement of Position is due on the date of the hearing, its completion shall be the first order of business at the hearing before any further evidence is received, and its completion may be accomplished with the assistance of the Hearing Officer. (1) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over the petition and provide the requested information concerning the employer's relation to interstate commerce; state *whether the employer agrees that the proposed unit is appropriate, and, if the employer does not so agree, state the basis of the contention that the proposed unit is inappropriate, and describe the most similar unit that the employer concedes is appropriate; identify any individuals occupying classifications in the petitioned-for unit whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state the employer's position concerning the type, dates, times, and location of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing. . . .*

(ii) The Statement of Position shall further state the full names, work locations, shifts, and job classifications of all individuals in the proposed unit as of the payroll period preceding the filing of the petition who remain employed at the time of filing, *and if the employer contends that the proposed unit is*

> *inappropriate, the employer shall also state the full names, work locations, shifts, and job classifications of all employees in the most similar unit that the employer concedes is appropriate.* The list of names shall be alphabetized (overall and by department) and be in an electronic format generally approved by the Board's Executive Secretary unless the employer certifies that it does not possess the capacity to produce the list in the required form. (Emphasis added.)

It is plain from the above that the proposed Section 102.63 will place an unreasonable burden on the employer to not only provide a wealth of information to the Board within a short time of receiving the petition, but posit an alternate appropriate unit as well. This places the employer, as the *non-petitioning party*, in the extraordinary position of having to concede the appropriateness of a unit where it may oppose the propriety of the unionization effort of any of its employees and the employer forced to do so, when it is without determinative evidence that its employees wish to be unionized.

This unbalanced procedure places employers in the remarkable and peculiar position of not being able to contest the most important unit issues while forcing them to make concessions regarding such issues. This is akin to requiring a defendant in a civil case not to contest or assert defenses to a complaint, but only admit or concede the complaint's allegations. This is, to put it mildly, a warped approach to due process and administrative procedure; a "when did you stop beating your wife?" approach that unfairly tilts the playing field in favor of unions. When combined with the shortened election period that constricts employers' Section 8(c) rights, it violates the statutory and judicial requirements that the Board remain neutral regarding administration of the Act.

Moreover, an employer is required to provide the names, work locations, shifts and job classification of all employees in the most similar unit it concedes is appropriate. The rule makes no provision for, indeed does not even contemplate, that the non-petitioning party might not otherwise need or want to disclose such information, which information may be of extreme interest to the petitioning union or other unions in subsequent organizational campaigns.

These unbalanced pre-hearing requirements are compounded by the Board's decision in *Specialty Healthcare & Rehabilitation Center of Mobile*, 356 NLRB No. 56 (2010). Whereas petitions for "micro-units" consisting of employees in a single classification may be filed, an employer would be required to provide information in its Statement of position that exceeds the scope of the petitioned-for unit. Not only does this implicate employee privacy concerns, it provides unions with information unrelated to the organizational attempt at hand. This will necessarily result in more petitions, more confusion and a proliferation of units that will negatively affect efficiency and productivity.

Proposed Section 102.63 clearly presumes that all employers subject to the Act have the capacity to produce the required information in a timely fashion. The presumption may be valid for larger employers with a standing human resources department and, perhaps, in-house legal counsel. The presumption is flawed as it pertains to many if not most employers represented by the NAM. A sizeable cohort of employers do not maintain at the ready the information necessary to comply with the Statement of Position requirements in the timeframe proposed. Thus, the effect of the Proposed Rule, whether intentional or not, is to require employers covered by the Act to conform their personnel policies and practices so as to comply with proposed Section 102.63. Employers that fail to so conform may not be able to transmit the necessary information within the Board's arbitrary timeframes. Moreover, this will add tens of thousands

of dollars – in legal fees along – to NAM members' overhead. This prejudices employers and unfairly disadvantages smaller employers.

Small and medium-sized employers will likely retain advisors and counsel to help them navigate through Section 102.63(b)(1) requirements, whereas there currently is no need to do so. Under the Proposed Rules – particularly the timeframes contained therein – employers that "go it alone" without counsel will be taking a risk that their interests or will be adequately protected. The scope and complexity of the required information cannot credibly be transmitted by most employers. Thus, their interests will be unduly prejudiced and/or their costs will substantially increase. *See*, *Direct Press Modern Electro, Inc*., 328 NLRB 860, 161 LRRM 1193 (1999); *General Cable Corp*., 191 NLRB 800, 77 LRRM 1600 (1971); *Bob's Big Boy Family Rest. S*., 259 NLRB 153, 108 LRRM 1371 (1981); *Frank Hager, Inc*., 230 NLRB 476, 96 LRRM 1117 (1977); *see also*, *Mego Corp*., 223 NLRB 279, 92 LRRM 1080 (1976).

VIII. THE PROPOSED RULES WILL DEPRIVE EMPLOYERS OF THEIR DUE PROCESS RIGHTS UNDER SECTION 9(C) OF THE ACT.

The Proposed Rules attempt to override the substance of an employer's Section 9(c) right to present evidence and witnesses in furtherance of, and to protect its interests in, the representation election process. Proposed Rule 102.63(b)(v) provides:

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

Moreover, proposed Rule 102.66(c) provides:

> A party shall be *precluded* from raising any issue, presenting any evidence related to any issue, cross-examining any witness concerning any issue and presenting argument concerning any issue that the party failed to raise in their timely statement of position or to place in dispute in response to another party's statement.

The proposed rule requires the Statement of Position to be filed within seven days of the employer receiving the petition for the representation election. Accordingly, the Rule necessitates an employer to retain counsel, analyze multiple, potentially complex issues in consultation with counsel, prepare for a representation hearing, develop a communication strategy for its employees, develop its legal arguments on numerous issues and prepare and file its Statement of Position within five working days. Such requirement is completely unreasonable and effectively deprives employers of their rights to a hearing under Section 9(c) of the Act.

As set forth in Section VII above, compliance with the proposed Statement of Position requirement will be difficult enough for larger employers, but will place small employers at a particular disadvantage. Indeed, for smaller employers, compliance with the Statement of Position requirements may be extraordinarily burdensome and in many cases impossible. Small employers are not insulated from the panoply of representational issues that confront all employers. Small employers have multi-plant unit issues, employ seasonal employees and utilize a variety of skills and crafts. Sophisticated and complicated issues are not the sole preserve of major corporations. *See, J&L Plate*, 310 NLRB 429, 142 LRRM 1300 (1993); *see also*, *NLRB v. Broyhill Co*., 528 F.2d 719 (8th Cir. 1976). Determinations related to supervisory status and voter

eligibility cannot and should not be made cavalierly. Yet, the Proposed Rules necessarily require such determinations to be made without due deliberation, and consequently, to the potential prejudice of both the employer and affected employees. That a number of employers will be deprived of effective legal representation and due process rights is not hyperbole, but rather, a certainty.

The deprivation of due process rights is made more egregious by the fact that, as set forth in Section V hereof the Board has adduced absolutely no evidence that the proposed changes are the result of a demonstrable need. Thus, the rules are more akin to preferential fiat rather than consistent with the Board's rulemaking authority under Section 156 of the Act.

The Board states that "expeditious resolution of questions concerning representation is central to the statutory design" because Congress found that "refusal by some employers to accept the procedure of collective bargaining leads to strikes and other forms of industrial strife and unrest, which have the intent or the necessary effect of burdening and obstructing commerce." Thus, Congress found that the Board's expeditious processing of representation petitions and, when appropriate, conduct of elections would "safeguard commerce from injury, impairment or interruption." (Footnotes omitted.) It is respectfully submitted that this attempt by the Board to expedite resolution of questions concerning representation would have the opposite effect.

The evidentiary preclusions set forth in Proposed Rule 102.66(c) are exacerbated by Proposed Rule 102.63(b)(1)(v) that prevents employers from contesting the appropriateness of the petitioned-for unit and from contesting the eligibility or inclusion of any individuals at the pre-election hearing if such information is not contained in a timely filed Statement of Position.

Not only will such preclusion have a profoundly deleterious effect on the due process rights of employers, it will have the perverse effect of increasing the probability that nearly every petition will be contested—thereby thwarting the Board's ostensible aim of "streamlining" the representation election procedures.

Presently, pre-election hearings are a relative rarity. Employers and unions generally reach agreement on a variety of issues including unit composition, date, time and place of the election. Employers and unions typically enter into one of three types of pre-election agreements: consent election; stipulated election agreement and full consent-election agreement. Rather than enter into *any* of these agreements, a cautious employer will go to hearing. Mutually agreed eligibility lists, with agreement on timeframes would necessarily be less likely under the Proposed Rules. *See, Norris-Thermador Corp*., 119 NLRB 1301, 41 LRRM 1283 (1958); *see also, NLRB v. Hood Furniture Mfg. Co*., 941 F.2d 235 (5th Cir. 1991). Since many if not most employers will have had insufficient time to assess the issues that would otherwise be included in a Statement of Position, they will necessarily reserve the right to go to a hearing.

Furthermore, the short timeframe allowed for submitting the Statement of Position will necessarily prompt employers to raise every conceivable issue so that such issue will not be forfeited under the preclusion rule. Again, as a consequence, relatively few elections will be conducted by stipulation.

This would impair the finality the parties otherwise would have in, for example, an agreement for consent election. *McMullen Leavens Co*., 83 NLRB 948, 24 LRRM 1175 (1949); c *f Hampton Inn & Suites*, 331 NLRB 238 (2000). **[Per Joe – Pkirsanow adding paragraph on peculiarity of employer not being able to contest, only concede]**

IX. DEFERRAL OF KEY ELECTION ISSUES UNTIL AFTER THE REPRESENTATION ELECTION WILL COMPLICATE, FRUSTRATE, AND PROLONG THE ELECTION PROCESS.

The Proposed Rules would defer a number of fundamental matters until after the representational election has occurred. Included among the deferred matters are voter eligibility, supervisory status, and whose votes are to be counted. Failure to determine voter eligibility and supervisory status is a self-evident recipe for bargaining unit confusion. Failure to determine supervisory status, standing alone, ensures a proliferation of objections that will prolong, not shorten, the election process as well as promote a proliferation of unfair labor practice charges. It also ensures employees will be perpetually unsure of the status of putative members of the bargaining unit, thereby diluting the unit's bargaining position. Moreover, it generates uncertainty and friction among unit members pertaining to, among other things, seniority rights – again compromising the bargaining process. Voter eligibility issues should be resolved prior to the election rather than afterward.

By backloading Section 2(11) litigation, the Proposed Rules merely postpone nettlesome issues more appropriately litigated prior to the election. Pre-election litigation of supervisory issues clarifies matters related to unit scope and reduces the probability of objectionable conduct by employees whose managerial status is indeterminate. By permitting a regional director (or hearing officer) to direct an election before resolving unit appropriateness and eligibility issues, the Proposed Rules prejudice employers' due process rights and employee Section 7 rights.

X. THE PROPOSED "20% RULE" WILL DEPRIVE THE EMPLOYER AND THE ELECTORATE OF CERTAINTY REGARDING UNIT COMPOSITION, FRUSTRATE EMPLOYEE SECTION 7 RIGHTS TO MAKE AN INFORMED CHOICE AND INCREASE LITIGATION.

The Proposed Rules permitting a regional director or hearing officer to deny the employer a right to a pre-election hearing regarding the appropriateness of the bargaining unit

and eligibility of certain individuals purportedly within such unit unless such individuals constitute greater than 20 percent of the unit is contrary to Section 9(c) of the Act. The Proposed Rule plainly violates the requirement that a hearing be held where there is a question concerning representation.

Section 102.66(d) provides:

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

This Proposed Rule suffers from several serious infirmities, not the least of which is its stark contravention of Section 9(c) of the Act that:

> The Board shall investigate such petition and if it has a reasonable cause to believe that a question of representation affecting commerce exists *shall provide for an appropriate hearing upon due notice*. (Emphasis added.)

While it is true that a hearing officer has the authority to narrow issues related to a representation hearing, a full operative record on such issues is presumed. *Cf Angelica Health Care Servs. Group, Inc*., 315 NLRB 1320, 148 LRRM 1130 (1995). This will upset the workplace balance contemplated by Congress and compromises the Act's neutrality between employer and union. *See,* Section 1(b), *Short Title and Declaration of Policy, Labor-*

Management Relations Act of 1947, Pub. L No. 101, 80th Cong., 1st Sess; 29 U.S.C. Section 141 *et seq*. (1994).

The Proposed Rules place employers in a position not contemplated by the Act: within five working days the employer must engage counsel and submit a Statement of Position regarding a genuine issue of fact regarding the eligibility of 20 percent or more of the individuals in the putative unit or forfeit its rights under Section 9(c). These are not casual or simple determinations. Employers often spend scores of man hours dissecting voter eligibility issues. It is not uncommon for employers to engage in protracted consultation with counsel regarding these issues, many of which turn on minor issues of fact. *See*, *e.g*., *Red Row Freight Lines*, 278 NLRB 965, 121 LRRM 1257 (1986); *Airport-Shuttle Cincinnati*, 257 NLRB 995, 108 LRRM 1044 (1981) *enforced*, 708 F.2d 20 (6th Cir. 1983); *L & B Cooling*, 267 NLRB 1, 113 LRRM 1119 (1983) *enforced*, 757 F.2d 236 (10th Cir. 1985); *Pat's Blue Ribbon*, 286 NLRB 918, 127 LRRM 1034 (1987).

Further, under the Proposed Rules the eligibility determination will be made by a hearing officer, not a regional director. Hearing officers frequently have much less experience than regional directors in matters related to eligibility. Consequently, the Proposed Rule will likely result in more elections being overturned, creating greater uncertainty and disrupting workplace stability.

Where up to 20 percent of employees may vote under challenge, the number of such ballots may be determinative of the outcome of the election. The 20 percent rule increases the probability that sustained challenges will so modify the bargaining unit as to make it fundamentally different from the originally proposed unit. This necessarily compromises employees' Section 7 rights:

> When employees are led to believe that they are voting on a particular bargaining unit and the bargaining unit is subsequently modified post-election, such that the bargaining unit, as modified, is fundamentally different in scope or character from the proposed bargaining unit, *the employees have effectively been denied the right to make an informed choice in the representation election*.

NLRB v. Beverly Health and Rehabilitation Service, Inc., No. 96-2195, 1997 WL 457524 at 4 (4th Cir. 1997). *See also*, *K.C. Knitting Mills*, 320 NLRB 374, 152 LRRM 1083 (1985); *Virginia Mfg. Co*., 311 NLRB 912, 143 LRRM 1368 (1993); *cf Scolari's Warehouse Mkts*., 319 NLRB 153, 150 LRRM 1153 (1995).

This defect in the Proposed Rule is not merely speculative. Under the 20 percent test, 19 employees in a proposed bargaining unit of 100 could vote under challenge. Those individuals could later be adjudged to have no community of interest with the other individuals in the bargaining unit: their compensation structure may be radically different from the remainder of the employees in the unit; their hours may not be consistent with others in the unit; their work assignments and locations may be at odds with that of their co-workers. Yet employees would be voting with the presumption that all of the individuals would be included in the proposed unit, even though such unit may later be substantially modified. This is a prescription for uncertainty inconsistent with employees' Section 7 rights. *See NLRB v. Parsons School of Design*, 793 F.2d 503 (2nd Cir. 1986). *See also*, *NLRB v. Lorimar Productions*, 771 F.2d 1294 (9th Cir. 1985); *Hamilton Test Systems, New York, Inc. v. NLRB*, 745 F.2d 136 (2nd Cir. 1984).

Given the expedited timeframes in the Proposed Rules, small employers likely will make eligibility determinations and arguments without the benefit of counsel, or at the very least, with minimal consultation with counsel. Consequently, many employers will be left to analyze

similarities/differences in wages, hours, benefits, supervision, training skills, job functions, operational integration, employee interchange and bargaining history on their own. The employers will also be left to fashion their assessments of such factors on their own. *See*, *Kalamazoo Paper Box Corp*., 136 NLRB 134, 49 LRRM 1715 (1962). This is a clear violation of employers' due process rights and will serve merely to complicate the representation election process.

Proposed Rules 102.66(d) and 102.67(a) deprive employees of the ability to determine whether they have a community of interest with other employees who may be voting in the representation election. This will cause considerable uncertainty and has the potential to delay final resolution of the election. Failure to resolve unit appropriateness and eligibility issues will likely result in more—not fewer—elections being overturned as a result of post-election exclusion of ineligible employees. Moreover, the Proposed Rules' requirement that an election be conducted with up to 20 percent of potential voters subject to challenge will further confound the employer's ability to assess supervisory determination issues, as well as increase the likelihood that the number of challenges will be sufficient to affect the outcome of an election.

XI. THE PROPOSED RULES PLACE AN UNREASONABLE BURDEN OF PRODUCTION ON EMPLOYERS IN THE REPRESENTATION HEARING.

Regarding the representation of hearing, the Board apparently has modeled proposed amendments to Section 102.64 on Rule 56 of the Federal Rules of Civil Procedure, stating that, "the duty of the hearing officer is to create an evidentiary record concerning only genuine issues of material facts." Yet, the Proposed Rule appears to completely reverse the presumptions underlying Federal Rule 56. As opposed to the Federal Rule, under the Board's proposed regulation, the non-petitioning party is required to identify issues, make an offer of proof, marshal arguments and introduce evidence in support of the issues so identified. More

significantly, the Proposed Rule gets the predicate to Rule 56 exactly backwards. Rule 56 also presumes that parties have had a full and complete opportunity to litigate the salient issues before the court. The parties have typically engaged in all necessary discovery: admissions, interrogatories, requests for production of documents, depositions – all the evidence necessary to credibly determine whether or not there exists a genuine issue of material fact. Furthermore, preliminary matters have been addressed at pretrials and peripheral issues have been dispensed with through motions and amended pleadings. Moreover, parties are afforded an opportunity for oral argument so that the court may test the parties' respective positions. None of these things are available to the employer (again, the non-petitioning party) pursuant to Proposed Amendment to Section 102.64.

XII. THE PROPOSED RULE REQUIREMENTS THAT EMPLOYERS PROVIDE CERTAIN EMPLOYEE INFORMATION IMPLICATES EMPLOYEE PRIVACY RIGHTS AND EMPLOYER PROPERTY RIGHTS.

Proposed Rule 102.67(j) provides in pertinent part:

> The employer shall, within two days after such direction, provide to the regional director and the parties named in such direction, a list of the full names, home addresses, available telephone numbers, available e-mail addresses, work locations, shifts, and job classifications of all eligible voters.

Section 102.67(j) also provides that where feasible the foregoing list is to be filed electronically with the regional director and served electronically on all other parties.

The foregoing rules requirement that certain employee information – specifically email addresses – be provided implicates employee privacy rights that may not be compromised by the employer despite the employer's good faith compliance with the Board's rule. The Proposed Rule also has the potential to raise issues regarding email solicitation raised in *Register Guard* as

well as property rights issues. *See NLRB v. Babcock and Wilcox Co*., 351 U.S. 105 (1956). *See also NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969).

Disclosure of "available" employee telephone numbers, email addresses, shifts, work locations and job classifications provides a wealth of data easily converted to unscrupulous, if not unlawful, uses. The combination of addresses and shift information provide a timeline and roadmap for access to an employee's premises when he is at work. The information also provides unique opportunities for harassment and intimidation and exposes employers to liability for the consequences to dissemination. The Proposed Rules casually ignore the Board's holding and *Register Guard*, 351 NLRB 1110 (2007) upholding employer policies prohibiting the use of employer email for non-job related solicitations and can implicate lawful employer confidentiality requirements. *See also, Trustees of Columbia University*, 350 NLRB 574 (2007).

Consequently the Board should consider the imposition of penalties for unlawful or unauthorized disclosure of employee information as a deterrent, giving the Board discretion to bar any person engaged in the misappropriation of information from filing petitions before the Board for an appropriate period of time. The NAM also advises the Board to reconsider the inclusion of information that will undoubtedly reveal important information about employees that could be used in ways unrelated to organizing. For instance, revealing shift information not only discloses when the individual is at the workplace, it also reveals when the employee is not at home, which creates an issue of safety for the individual, their family, and their property.

XIII. THE PROPOSED RULES' NARROWING OF THE STANDARD OF BOARD REVIEW DEPRIVES EMPLOYEES OF THEIR SECTION 7 RIGHTS.

The Proposed Rules change the Board's post-election scope of review to a discretionary one. The NAM respectfully submits that this is highly inappropriate and deprives employees of the right to self-organization, to form, join, or assist a labor organization - and the right to refrain

from any and all such activity by subjecting conduct that could affect the outcome of the election to discretionary review, as opposed to automatic *de novo* review. It is axiomatic that conduct that could set aside an election goes to the essence of employee free choice. Matters of such import are the province of the Board.

Outcome-determinative decisions are properly a matter of the Board's quasi-judicial function. Such functions should not be outsourced to regional directors. The NAM respectfully submits that "compelling reasons" should not be the basis for a review, rather these issues should be a matter of automatic, *de novo* review by the Board. Although Section 3(b) of the Act provides for delegation of Board authority regarding the conduct of elections to regional directors, such delegation is subject to Board review and should remain so. This is a critical feature of the statutory construct that is properly left to the presidentially appointed members of the Board.

XIV. THE BOARD HAS FAILED TO COMPLY WITH THE REGULATORY FLEXIBILITY ACT IN PROMULGATION OF THE PROPOSED RULES.

The Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*. (1980) requires that federal agencies seek less burdensome alternatives to Proposed Rules where the impact of such rules is significant and affects a substantial number of small entities. Where the impact of Proposed Rules is significant and affects a substantial number of small entities, the agency must:

1. seek the views of small businesses;
2. seek input from the Small Business Administration;
3. publish an initial Regulatory Flexibility analysis in the Federal Register;
4. certify that the regulations will have no significant impact on small businesses;
5. seek less burdensome alternatives to the Proposed Regulations; or
6. detail why less burdensome alternatives are infeasible.

Id.

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

The Board proffered no analysis in support of its conclusion that the Proposed Rules will not have a significant economic impact on a substantial number of small businesses other than to note that the vast majority of the six million private employers in the United States are small entities, nearly all of whom are subject to the Board's jurisdiction, yet relatively few representation election petitions have been filed with the Board over the last five years. The Board summarily deduces that since only a small percentage of small employers are involved in representation petitions, the Proposed Rules will not have a significant impact on a substantial number of employers.

The NAM respectfully submits that the Board's conclusion is profoundly erroneous. For all of the reasons set forth in the preceding Sections hereof the Proposed Rules will, inescapably, have a significant impact on a substantial number of small entities.

Since the compression of the median timeframe between the filing of a representation petition until the conduct of the election will necessarily deprive employers of the ability to communicate their message to their employees, the union success rate in organizing small employers will spike upward dramatically. The comparative ease with which unions will be able

to successfully organize the workforces of smaller employers undoubtedly will encourage unions to expand organizing activities exponentially.

Therefore, the Board's determination that the Proposed Rules will not have a significant impact on a substantial number of small entities because relatively few employers receive representation petitions in a given year is seriously flawed. The Proposed Rules will inexorably produce a dramatic increase in the number of representation petitions filed, thereby affecting a substantial number of small entities.

Furthermore, the shortened timeframes in the Proposed Rules compel any and all prudent small employers to conform their personnel practices and human resources functions (such as they are) to rapidly respond to the informational requirements of the Statement of Position. Small employers—whether unionized or not—who do not regularly engage labor counsel will do so to ensure compliance with the new rules. Further, small employers that did not previously maintain ongoing employee communication programs will certainly develop them in light of the shortened campaign timeframes caused by the Proposed Rules. Moreover, the sheer number of comments submitted in response to the 2011 Notice of Proposed Rulemaking is an indication that small businesses dispute the Board's conclusion that they will not be significantly affected by the Proposed Rules.

The Board majority's assertion that the Proposed Rules satisfy the Regulatory Flexibility Act, 5 U.S.C. § 601 *et. seq*. because they will not have a significant economic impact on a substantial number of small entities misapprehends how the Proposed Rules will effect small employers. The Board majority contends that because fewer than 3,300 petitions have been filed in each of the last five years and fewer than 1,800 elections have been conducted, an insignificant number of the nation's small employers will be effected by the Proposed Rules.

Incredibly, the Board majority even asserts that "the net effect of the proposed amendments could be *decreased* costs for small entities." 79 Fed. Reg. 7350 (Feb. 6, 2014). (Emphasis added.)

The Proposed Rules will affect far more than those small employers subject to petitions and elections. The costs necessarily imposed upon prudent employers who prepare for the inevitable increase in petitions due to the Proposed Rules and the untenable timeframes with which employers much then comply would affect large numbers of small businesses. As stated previously, the Proposed Rules will prompt many, if not most, responsible small employers to establish standing human resource protocols so as not to be blindsided by the new breakneck speed of the election process. Furthermore, the Statement of Position requirements will necessarily result in sizable preparatory compliance expenses. The NAM respectfully submits that the Board majority has wholly underestimated the impact of the Proposed Rules, which will undoubtedly have a significant impact on a substantial number of small business, thereby rendering the RFA certification invalid.

The NAM challenges the accuracy of the Agency certification to the SBA that the proposed amendments will not have a significant economic impact on a substantial number of small entities. The certification completely ignores the obvious evidence that the Proposed Rules will have one of the most far-reaching effects on the workplace of any rules, statutes, or decisions in the last 50 years. Accordingly, the Board should have undertaken an initial Regulatory Flexibility analysis and developed less burdensome alternatives. This is particularly true given that there is absolutely no evidence that the Board's current representation election timeframes are defective or need reform at all. The Board's failure to conduct an initial analysis and then seek comments from affected stakeholders before revising its impact analysis is a clear

violation of the Regulatory Flexibility Act. It should also be noted that the Board has now twice refused to properly consider the effect the proposed rule will have on small businesses – once in 2011 and now in this proposed rule. Accordingly, the Proposed Rules should be withdrawn. *See American Trucking Associations, Inc. v. U.S. Environmental Protection Agency*, 175 F.3d 1027 (D.C. Cir. 1999).

XV. ELECTRONIC SIGNATURES SHOULD NOT BE PERMITTED ON UNION AUTHORIZATION CARDS.

The NAM submits that electronic signatures should not be permitted on union authorization cards or petitions under any circumstances. The Board has long recognized the potential for various abuses related to written authorization cards. That potential would necessarily multiply with electronic signatures. Combining the potential for manipulation inherent in electronic signatures with the potential for fraud and abuse in authorization cards would be irresponsible. Employees and employers rightfully expect a high level of integrity in their election process and the use of electronic signatures or authorizations would be inconsistent with those expectations and introduce a greater likelihood of a range of abuses.

XVI. CONCLUSION

For the aforementioned reasons, and those contained its comments filed with the Board on August 21, 2011, the National Association of Manufacturers respectfully submits that issuance of the Proposed Rules must be withdrawn in their entirety.

Respectfully submitted,

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