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Via Electronic Submission: http://www.regulations.gov

Mr. Gary Shinners
Executive Secretary
National Labor Relations Board
1099 14th Street. N.W.
Washington, D.C. 20570

Re: Representation-Case Procedures; RIN 3142-AA08
(Docket No. NLRB -- 2011-0002)

Dear Mr. Shinners:

The National Grocers Association (NGA) submits the following comments to the National Labor Relations Board (NLRB or the Board) in response to the above-referenced notice of proposed rulemaking (Proposal) published in the *Federal Register* on February 6, 2014 at 79 Federal Register 7318.[1]

About The National Grocers Association

NGA is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating in a variety of formats. Independents are the true "entrepreneurs" of the grocery industry and dedicated to their customers, associates, and communities. Much of NGA's membership is comprised of family-owned and family-operated small businesses. Nearly half of NGA's members are single-store operators, and another quarter operate less than five stores. Independent retail and wholesale grocers are an important part of America's economy. According to the NGA Economic Impact Study, independent grocers are responsible for over 1.5 million U.S. jobs, and independent retail and wholesale grocers and their employees generate almost $14 billion in state and local taxes and over $27 billion in federal taxes. Nearly $130 billion in sales are generated through our industry.

[1] NGA requests that the Board review and consider its prior comments and oral testimony submitted by NGA on August 22, 2011 in response to the June 22, 2011 NPRM (3142-AA08).

Comments in Response to the Proposal

Although there are numerous objectionable aspects of the Proposal, these comments will primarily focus on the dramatic reduction in the time period between the filing of the petition and the election. NGA also has serious concerns with the requirement that employers disclose private employee information, the lack of due process associated with the new statement of position and issue waiver provisions, and the restrictions placed on pre-election hearing procedures. Simply put, the drastic changes the Proposal would bring about are wholly unnecessary. NGA respectfully urges the Board to withdraw the Proposal.

I. Under the Board's Own Criteria, the Proposed Changes Are Unnecessary.

NGA opposes any reduction in the scheduling of the election because there is no legitimate analysis supporting a need to hasten the time before an election and certainly nothing supported by empirical evidence from the Board, especially when its own data confirms that the median time between a petition and election was 38 days.

In its press release accompanying the Proposal, the Board asserts that the proposed changes to representation case procedures are aimed at "eliminating unnecessary litigation and delay."[2] While the majority carefully avoids any explicit declaration that it simply wants elections to occur faster, it admits that the Proposal "clearly regards more timely elections as a natural and salutary effect of eliminating unnecessary and duplicative litigation procedures."[3] What is less clear is *why* the majority seeks to speed up elections.[4]

Importantly, the Board's own statistics establish that the vast majority of elections are completed with no delay or litigation. Under the current procedure, approximately 90 percent of all elections are conducted pursuant to an agreement or stipulation.[5] In recent decades, the time between the filing of the petition and the date of the election has steadily decreased. In 1975 the median time between the filing of a petition and the holding of an election was 50 days.[6] As of

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[2] http://www.nlrb.gov/news-outreach/news-story/national-labor-relations-board-proposes-amendments-improve-representation

[3] NPRM at 7337.

[4] The Board gets it right when it states that "The true outcome of properly conducted elections is employees, employers, and unions voluntarily and freely exercising their statutory rights as set out in the NLRA." NLRB Performance and Accountability Report (Fiscal Year 2013), 43, *available at* http://www.nlrb.gov/reports-guidance/reports/performance-and-accountability.

[5] NPRM at 7324.

[6] NPRM at 7320.

last year, this timeframe had dropped 24%, to a median of 38 days.[7] Also in fiscal year 2013, the Board held 94.3 percent of all elections within 56 days.[8] There is no objective basis on which the majority can declare that 38 or 60 days to prepare for and hold an election amounts to "unnecessary delay." Since 2001, the Board's internal guidelines are to hold elections within a median of 42 days, and to have 90% of all elections within 56 days.[9] In addition, consistent with its statutory role of administering representation elections, several years ago the Board set for itself a strategic goal to "Resolve all questions concerning representation impartially and promptly."[10] In order to measure its performance towards this goal, the Board annually determines "[t]he percentage of representation cases resolved within 100 days of filing of the election petition."[11] Thus, in the Board's own view, it fulfills its statutory role to "promptly" resolve representation questions when it does so within 100 days.[12] The Board has met this strategic goal nearly every year, and in the past five years has resolved at least 84.4% of all questions concerning representation within 100 days. In fact, this past year was the Board's best year ever; it resolved 87.4% of all elections within 100 days, exceeding its own goal by more than 2%.[13]

These statistics turn the Board's rationale underlying the Proposal on its head, and establish that the Board is simply looking to solve a problem that does not exist. Not only is the median time between the filing of the petition and the date of the election not reflective of any unnecessary delay, but it demonstrates, rather, that the Proposal itself is "unnecessary." Election times have been steadily decreasing for decades. Rather than embrace this undeniable fact, the majority complains that "[f]or most of the past decade, when a pre-election hearing was conducted, the median number of days from petition to election has hovered in the mid-60s."[14]

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[7] NLRB Performance and Accountability Report (Fiscal Year 2013), 38, *available at* http://www.nlrb.gov/reports-guidance/reports/performance-and-accountability.

[8] Id.

[9] NPRM at 7341.

[10] NLRB Performance and Accountability Report (Fiscal Year 2013), 19, *available at* http://www.nlrb.gov/reports-guidance/reports/performance-and-accountability.

[11] In setting the goal of resolving questions concerning representation, "Rather than focus on the individual segments of the casehandling process," the Board decided instead to "focus on the time it takes to process an entire case, from start to finish." NLRB Performance and Accountability Report (Fiscal Year 2013), 18, *available at* http://www.nlrb.gov/reports-guidance/reports/performance-and-accountability.

[12] The NLRB avers that this 100-day performance measure is "aligned with the mission of the NLRB," which "is to carry out the statutory responsibilities of the National Labor Relations Act, *as efficiently as possible*, in a manner that gives full effect to the rights afforded to all parties under the Act." NLRB Performance and Accountability Report (Fiscal Year 2013), 18, 12 (emphasis added), *available at* http://www.nlrb.gov/reports-guidance/reports/performance-and-accountability.

[13] Id.

[14] NPRM at 7337.

This statement assumes that there is something problematic in having a pre-election hearing, and that using the election machinery of the Board is somehow inappropriate.

If, as the Board stated in its most recent Performance and Accountability Report, "[t]he goal is to resolve representation matters within 100 days," and (1) this consistently occurs almost 90% of the time, (2) current performance surpasses even the Board's own expectations, and (3) aligns with the Board's mission to carry out its statutory responsibilities as efficiently as possible, there is no justifiable reason to change the current timing of elections, as the Proposal seeks to do.

Why does the majority feel the need to fundamentally transform an accepted long-standing process at the heart of the Board's statutory role when, by the Board's own estimate, the current process exceeds the Board's standards? As the old adage goes: "if it ain't broke, don't fix it!" NGA submits that these internal, long-standing and noncontroversial standards should be the yardstick by which the current election procedures should be measured.[15]

Each election, like each workplace, will be unique. Important factors vary among employers, and include the size of the workforce, the workplace issues, the union involved, the exchange of pertinent information, the reasons behind the organizing campaign and innumerable others.[16] The Proposal adversely affects employers of all sizes. Many NGA members are small employers without extensive management or HR teams and would require time to educate themselves about their legal rights before responding to any organizing campaign. Similarly, larger employers could face complex issues, including who should be and should not be included in a bargaining unit. In either case, the Proposal imposes significant prejudice upon employers of all sizes.

As the foregoing shows, the Proposal's primary purpose rests almost entirely on the faulty premise that accelerated elections are somehow superior to those conducted after a thorough debate. Free speech is the cornerstone of the Act's statutory protections, and the Proposal eviscerates an employee's opportunity to become fully informed. Instead of deliberately evaluating all relevant information, employees will be rushed into voting without a full opportunity to receive facts, contemplate the consequence of their decision, and make an informed choice whether to be represented by a union. Common sense dictates that the greater the time an individual has to inform him or herself, and to reflect upon and consider all aspects of a decision, the more likely the decision will be a true reflection of the individual's interests.

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[15] In the Board's 2013 Federal Employee Viewpoint Survey Results, released on November 4, 2013, only 10% of the workforce disagreed with the statement: "My agency is successful at accomplishing its mission." Of course, the vote on the current NPRM implies that 60% of the Board's current members disagree, to the extent that they feel the need to radically change the procedures which currently work so well.

[16] There are a few instances in which it is Board policy to delay an election – in fact, as a matter of course, the Board allows for 30- or 40-day delays when labor organizations are competing against one another. *See* NLRB Case Handling Procedures, 11018.1 and 11018.2.

The notion that faster elections are better is counterintuitive for a reason: it conflicts with the basic premise that a secret ballot should be informed by a full, free and vigorous debate, and that more, not less opportunities for the exchange of information and ideas is beneficial when making an important decision that will impact fundamentally one's life and livelihood. Employees faced with making such an important workplace decision should be able to do so in an environment conducive to reflection and thought, not one that sacrifices deliberation for speed.

The push for accelerated elections cannot stand on its own merits, as the majority has failed to identify a single problem to which its proposed solution is responsive. In fact, by any measure – whether historical, or gauged against the Board's own current goals and internal guidelines, the existing system is working very well. In this light, the dissent's suggestion that "Rather than engaging in a wholesale revision of the procedures applicable to all elections, the Board should closely examine the particular reasons that have contributed to those relatively few elections that have involved unacceptable delay" appears to be the most sensible and reasoned approach. NGA respectfully suggests the Board withdraw its proposal.

II. The Proposal Would Violate Employee Privacy Rights

NGA is very concerned about the Proposal's compulsory disclosure of employees' personal and confidential e-mail accounts and phone numbers on voter lists. This non-consensual disclosure constitutes a gross invasion of employees' privacy.

Many NGA members are small businesses who do not collect, and do not wish to collect, their employees' personal and private information. Indeed, those employers who may collect this information likely only do so for use in emergency situations, demonstrating the importance of protecting the employee's privacy. Requiring the employer to provide employee phone numbers and email addresses constitutes an invasion of the employee's privacy and opens employees up to potential use and abuse of personal information. Although the Proposal suggests a possible amendment to prohibit use of the list from being used for anything other than the organizing campaign,[17] such an agreement would not bind anyone beyond the organizing campaign from using employee personal information.

Additionally, an employee may not want her personal email address or phone number shared at all. Thus, her privacy would be violated even if the use of this information were limited. In light of the Proposal, it is unclear whether the labor unions' calls to employees would now be covered under the Federal Trade Commission's regulatory definition of a solicitation for purposes of the Do Not Call registry. The Do Not Call registry was established to protect privacy, and employees should, at a minimum, be required to opt-in to disclosure of their private information to labor unions so that it is an informed and knowing decision. Even where a work

[17] NPRM at 7327.

email address and/or phone number is provided, this opens up both the employee and the employer to unwanted solicitation at the workplace during working hours.[18]

Even more disconcerting to employees' privacy interests is how the information could be used. It is not inconceivable that individual organizers could abuse this information, causing irreparable harm to employees. As security breaches become widespread with identify theft as the fastest growing white collar crime, companies must be ever vigilant in protecting their employee's personal information. There are no safeguards contemplated by the Proposal to protect against unforeseen abuses with this private information. Identity theft, harassment or other abuse of personal information can happen without the union's knowledge, and there is no mechanism for the Board or anyone else to effectively sanction individuals who misuse private information, or protect employees against abuse.

The Proposal would also require the employer to file and serve on other parties an electronic "*Excelsior*" list within only two days – rather than the current seven days – of the Board ordering an election.[19] But having the employer, rather than the Board, send this list, and disclose private email and phone numbers to labor unions within 2 days after direction of an election does not further the Act's statutory purposes. Moreover, if an employer is required to provide work email addresses, it is unclear how this would impact the employers' right to enforce its lawful "no-solicitation" policies. Because the Proposal would infringe on employees' personal privacy and burden employers with additional requirements, it should be withdrawn.

III. The Proposal Raises Due Process Concerns For Employees and Employers

There are serious due process problems with the Proposal's procedural changes to the issues litigated issues during the pre-election hearing. For example, the Proposal only allows a review of a bargaining unit prior to election if the individuals in dispute make up 20% or more of the unit.[20] An election proceeding, however, should not be allowed to proceed if any portion of the unit is in question because the employer, as well as the employees within the unit, have a due process right to have this issue heard prior to a final decision being made.

The heart of a petition is whether there is a question concerning representation. As an initial matter, the Board must determine if 30% of the unit has made a showing of interest, and the Board cannot fulfill this statutory function without knowing the unit's composition. Further, even if the Board concludes there is a satisfactory showing of interest, the Proposal impairs an employer's protected Section 8(c) rights by not providing clarity as to which employees are

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[18] In addition to the employees' phone numbers and email addresses, the Proposal would require employers to provide to the union the employees' work locations, shifts and classifications as part of the so-called "*Excelsior* list." NPRM at 7326.

[19] NPRM at 7327.

[20] NPRM at 7330-31.

included in the electorate. An employer has a First Amendment free speech right to make strategic decisions about what to communicate, when to communicate and to whom to communicate its lawful opinions about unionization based on the electorate. As the U.S. Supreme Court recently pronounced, free speech is tempered by resources, and if the government limits speech resources – including the amount of time and to whom an employer can communicate to – the First Amendment is violated.[21] Accordingly, by confusing who constitutes the electorate until after the election, the Proposal violates an employer's due process and Section 8(c) rights.

Furthermore, how can employees be expected to make an informed decision about representation when they are confused about who else will be in the unit? The possibility that supervisors might be allowed to vote along with those they supervise is equally troublesome. The prejudice created by postponing voter eligibility challenges until post-election is akin to a litigant not being able to disqualify a juror until after the verdict is rendered. In such a scenario, employees suffer due process because not only will they not know who is in the bargaining unit, they could themselves be removed from the unit if it is determined post-election that they were not appropriately placed in the bargaining unit. This may cause anger and frustration among employees and actually inhibit future organizing campaigns. The repercussions of what the dissent termed, "election now, hearing later" are very real for both employers and employees.[22] According to the majority, "[t]he proposed amendments are also intended to eliminate unnecessary litigation concerning issues that may be, and often are, rendered moot by election results."[23] But whether the issues turn out to be moot or not, an employer is entitled to a fair hearing on its concerns prior to the final outcome of the organizing campaign – after the election has been held, there is simply no way to "unscramble the egg."

This is particularly important in light of the *Specialty Healthcare* decision as now, more than ever, there is uncertainty as to which employees may properly be included within a bargaining unit. While the Board contends *Specialty Healthcare* will not impact the processing of representation cases,[24] the imposition of an "overwhelming community of interest" standard for expanding the scope of a proposed unit undoubtedly makes representation cases more complicated, and the proposed rules would hamstring employers' ability to deal with the issues.

Finally, the Proposal would allow employers only seven days after the petition has been filed to investigate and analyze the issues, find and retain counsel, and file its position

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[21] *McCutcheon v. FEC*, No. 12-536, 2014 U.S. LEXIS 2391 at *35 (Apr. 2, 2014) (finding that by limiting a donor's allowable resources, the government also limits the candidates he may support and the policy concerns he can address, causing clear first Amendment violations).

[22] NPRM at 7338.

[23] NPRM 7318, 7323.

[24] NPRM at 7335.

statement.[25] As small business owners, many if not most NGA members are not armed with legal staff, and it takes time to locate, retain and consult appropriate labor counsel on the significant business and operational issues posed by a petition. Even worse, an employer risks waiving forever any issue it fails to include in the position statement. Unfortunately, most employers are at a serious information disadvantage to unions in the initial stages of an organizing campaign and when a petition is filed, and may face difficulty simply investigating the factual issues, much less ensuring every legal argument is properly raised.

Requiring employers to put every possible issue in a statement of position at a pre-election hearing within days of the petition or be subject to waiver is likely to increase the adversarial nature of the proceeding and make it even less likely that the parties will voluntarily resolve disputes early in the process.[26] Fearing that they may waive issues not set forth in writing, employers may be less inclined to enter into stipulated or consented to elections, and will instead raise every conceivable issue prior to a hearing. In this manner, the Proposal may actually promote further contention among the parties and frustrate, rather than foster "the friendly adjustment of industrial disputes" at the heart of the Act.[27]

With no pre-election recourse to the Board, no ability to deal with potential inclusion of supervisors in a proposed unit before an election, and the real risk of waiver of any issues not properly raised in a hastily prepared position statement, the Proposal would trample on the due process rights of employers and employees alike.

Conclusion

If adopted the Proposal would upend decades of settled Board procedure without any justification, and in all probability significantly harm employees' privacy rights, and employers' due process rights resulting in protracted, prolonged litigation and delay rather than less. Given the clear evidence that the current election process is not only fair to all interested parties, but, judged by the Board's own long-standing and well-informed measures, remarkably successful in the vast majority of cases in carrying out the purposes of the Act, the Proposal is entirely unnecessary.

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[25] NPRM at 7328.

[26] NPRM at 7354.

[27] 29 U.S.C. § 151.

For all these reasons, the National Grocers Association urges the Board to withdraw the Proposal. Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

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