Hearing Position Statement of Society for Human Resource Management

By G. Roger King, Esq.
Jones Day
325 John H. McConnell Blvd., Suite 600
Columbus, OH 43215
614-281-3874
gking@jonesday.com

I. Interest of Society for Human Resource Management ("SHRM")

The Society for Human Resource Management is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of human resource professionals and advances the interests of the human resource profession. Founded in 1948, the Society has more than 575 affiliated chapters within the United States and subsidiary offices in China and India. Most of the Society’s members have a significant interest in how the National Labor Relations Act ("NLRA") is interpreted and administered.

II. Summary of Position

A The National Labor Relations Board ("Board") has not identified a need for, or established a record, to support its proposed new election rules.

B The procedure the Board is utilizing to review and potentially implement such new rules is seriously flawed and inconsistent with the procedure the Board used in its previous rulemaking initiative with respect to health care bargaining units.

C There is no rational basis, in fact or in law, for such proposed rules. The proposed rules, additionally, do not properly balance the rights of employees, employers and labor organizations in the pre-election period and further deprive employers of their due process rights under Section 9(c) of the National Labor Relations Act.

D The proposed rules will significantly impair small business entities in responding to petitions for election and will also place significant burdens on large employers in responding to petitions for an election in large and diverse voting units.

E The Board’s request for comments with respect to the current “blocking charge procedure” is a positive first step and the Board should hereafter establish a definite time frame in which to promulgate rules to improve the present procedure.

F Certain portions of the Board’s proposed new rules, including the electronic filing of petitions, have merit, but should be proposed for comment before proceeding to formal rulemaking.
G The proposed rules with respect to imposing a requirement upon employers to furnish e-mail addresses of their employees, has the potential to significantly interfere with employee privacy rights, and to the extent employers even have such information, they should not be required to furnish same to any third party absent an employee’s consent. Further, to the extent that the proposed rule would require an employer to produce its employees’ work e-mail addresses, there are significant questions regarding whether such a requirement would infringe on the employer’s property rights in its company property and equipment.

H If the Board implements its proposed election rules, including the requirement that employers furnish e-mail and other private information regarding employees to a labor organization, the sanction for improper use of such confidential employee information should be future disqualification of such labor organization for a period of time to receive such electronic information regarding employee confidential information.

III. The National Labor Relations Board has not identified a need or established a record to support its proposed new election rules.

A The Board’s time frames for holding elections have either been met or exceeded, as noted in Member Hayes’s dissent. See 76 Fed. Reg. 36812, 36831.

- In FY 2010, the average time for an election for all petitions filed was 31 days.
- In contested cases in FY 2010, regional directors issued pre-election decisions in 37 days, surpassing the target median of 45 days.
- FY 2010 post-election cases also exceeded the General Counsel’s goals. In cases in which a hearing was held, decisions or supplemental reports were issued in a median of 70 days, exceeding the General Counsel’s goal of 80 days. Likewise, non-hearing cases produced decisions in a median of 22 days, again surpassing the General Counsel’s target of 32 days.

B The Board apparently has failed to analyze its own considerable data and information sources to establish a need for the proposed new election rules.

- SHRM and the American Hospital Association, HR Policy Association, Coalition for a Democratic Workplace, the United States Chamber of Commerce, and the National Association of Manufacturers filed a Freedom of Information Act (“FOIA”) request on Friday, July 15, 2011, for the Board to furnish any studies or analyses it has undertaken to support its proposed new rules—See Exhibit A. The Board should promptly and fully respond to such request.
- The recent study issued by Professors Bronfenbrenner and Warren, “The Empirical Case for Streamlining the NLRB Certification Process,” does not support a need for the Board’s new proposed election rules and such study
further is seriously flawed in a number of areas. Rather, the study focuses on the fact that a number of unfair labor practices are committed prior to the filing of a petition. Nothing in the proposed rule would alter a union’s or employer’s pre-petition experiences.

IV. **The expedited procedure the Board is utilizing to review, and potentially implement, such new rules (1) raises significant policymaking questions, (2) is inconsistent with the procedure the Board used in its previous rulemaking initiative with respect to health care bargaining units, and (3) raises questions as to the institutional credibility and neutrality of the Agency.**

A The Board’s failure to comply with Executive Order 13,563, “Improving Regulation and Regulatory Review,” 76 Fed. Reg. 3821 (Jan. 18, 2011), significantly diminishes the process which, as described below, is already deficient. The fact that the Obama Administration has encouraged all agencies to comply with the Order underscores its importance. Particularly in a regulatory undertaking of this magnitude, complying with the Order and inviting public comment before publishing a rule in its entirety would add elements of fairness, openness, and legitimacy that are lacking in the current rulemaking process. The Board’s passing reference to the Order, see 76 Fed. Reg. 36812, 36817 n.34, neither satisfies nor alters the Order’s important governmental objectives.

B The expedited time frame for review of the proposed rules is exceedingly short and does not permit a fully-informed decision making process—SHRM requests that the Board reconsider its denial of the Motion filed by SHRM, the United States Chamber of Commerce, the National Association of Manufacturers, The Coalition for a Democratic Workplace, Council on Labor Law Equality, The Atlantic Legal Foundation, HR Policy Association, and Associated Builders & Contractors, Inc., for the Board to extend the time period in which to consider its proposed rules—See Exhibit B. The expedited time frame—a grand total of 74 days—is inadequate given the magnitude of the rulemaking, which covers 36-pages of 3-column print including scores of changes that amount to an entire re-writing of the representation case procedure process.

C The procedures utilized by the Board to develop its rules with respect to health care bargaining unit configuration were much more thorough, detailed and analytical than the current procedure (a process that I was personally involved with)\(^1\) and should be replicated, at least in part, with respect to the Board’s proposed new election rules.

D The Majority’s attempt to distinguish the procedure used with respect to health care bargaining unit rulemaking and the instant rulemaking process, is unavailing.

\(^1\) In those proceedings, the Board compiled 3,545 pages of testimony from 144 witnesses over 14 days of hearings, in addition to 1,500 pages of written commentary on the Board’s first notice and an additional 1,500 comments in response to the second notice.
The Board states in its instant rulemaking procedure that it is utilizing its own expertise and knowledge of its rules, but it has apparently failed to undertake any significant analysis or study of how its present rules have been applied, including particularly, the reasons for any delays in processing petitions for elections.

E The Board’s rulemaking is also insufficient in that, while it invites comments on a number of insular changes, there appears to be no consideration by the Majority of how the rule, when promulgated in its entirety, will operate. It is unclear from the proposed rule how a change in one provision—for instance, the preclusion provision—will operate with changes to other provisions. While the Board may view the current election procedure inadequate, it is the product of decades of trial-and-error experience and should not be discarded in whole as the proposed rule contemplates.

F The Board should undertake a detailed and scholarly review of its own data before proposing any new election rules. If the Board has undertaken such a review, the Board should expeditiously produce the information in response to the FOIA request filed on behalf of SHRM and numerous other trade associations to permit utilization of such data by parties who wish to file written comments on or before August 22, 2011.

G The Board should also enter into dialogue with interested stakeholder groups, including employers, labor organizations, individuals with expertise in administrative law, committees of the American Bar Association and individuals with knowledge of the Federal Rules of Civil Procedure, prior to undertaking any rulemaking with respect to election procedures. Doing so prior to issuing the NPRM would have been an important step in complying with Executive Order 13,563.

H The Board should not proceed with this initiative in that it only has three (3) confirmed Members and the Board should also not so proceed when only one (1) Member of its current complement is from the opposite party.

V. There is no rational basis, in fact or in law, for such proposed rules. The proposed rules, additionally, do not properly balance the rights of employees, employers and labor organizations in the pre-election period and further deprive employers of their due process rights under Section 9(c) of the National Labor Relations Act.

A The proposed rules jeopardize an employer’s Section 9(c) right to a hearing and would appear to violate the employer’s due process rights to protect its interests in the formation of appropriate voting units to insure industrial peace, stability, and productivity from an employer’s workforce.

B The proposed new election rules also are deficient inter alia as follows:

• The “preclusion” impact requirements on an employer with respect to the Statement of Position that it is to file within seven (7) days of receiving a
petition for election, does not conform with due process requirements or Rule 56 of the Federal Rules of Civil Procedure, essentially creating a new form of summary judgment that is inappropriate and significantly detrimental to employer rights in the pre-election period.²

- While the Board touts that the rule would “leave a higher percentage of final decisions about disputes...with the Board’s regional directors who are members of the career civil service,” 76 Fed. Reg. 36812, 36817, while those individuals are undoubtedly familiar with Board regulations, they are not well-versed in applying Rule 56 of the Federal Rule of Civil Procedure, which the Board proposes to adopt as the test for whether issues may be raised. See id. at 36822. While the Board summarily states that this “accord[s]...full due process of law consistent with that accorded in the federal courts,” the “genuine dispute [of] material fact” analysis accords due process in federal courts after full discovery and an “opportunity to be heard” that includes briefing and, frequently, oral argument before being reviewed by a judge or magistrate. That process is far different from a process where “offers of proof” are evaluated—assuming that the issue was included in the Statement of Position—without any discovery or argument in order to determine if there can even be argument. But, perhaps more troubling is the impression that the Board’s Members—appointed by the President and, in most cases, confirmed by the Senate—have abdicated that final decision making authority down to regional directors.

- Holding parties against a threat of preclusion will likely increase the litigious nature of election proceedings, rather than expediting them. While the vast majority of elections—over 90%—are currently held by stipulation, that number is likely to plummet under the proposed rule, as numerous witnesses testified before the Board on July 18, 2011. And, as the number of contested cases increase, the number of issues placed before a hearing officer will also increase as parties raise every potential issue in order to avoid the Board’s penal preclusion provisions.

- The “20% Rule” wherein up to 20% of the number of potentially eligible voters in a unit could be required to vote subject to challenge, is inappropriate and will cause not only confusion, but prejudice to employers, particularly with respect to supervisory determination issues and in petitions involving large voting units that include numerous and diverse job classifications.

² Under the proposed § 102.66(c), “A party shall be precluded from raising any issue, presenting any evidence relating to any issue, cross-examining any witness concerning any issue, and presenting argument concerning any issue that the party failed to raise in its timely Statement of Position or to place in dispute in response to another party’s Statement....” Likewise, under proposed §102.63(b)(1)(v), “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” required to be included in the Statement of Position.
• The provisions in the NPRM that authorize the regional director or hearing officer to direct an election without first resolving disputes regarding the appropriateness of the petitioned-for unit and the eligibility of individual employees to vote in the election will cause unnecessary confusion, fail to adequately inform voters of their potential community of interest with other employees in the putative bargaining unit, and undermine the purposes and efficacy of the secret ballot election. 76 Fed. Reg. 36841-36842 (to be codified at 29 C.F.R. §§ 102.66(d), 102.67(a)).

• Relatedly, by sacrificing process for a faster election, the proposed rule increases uncertainty in elections by shifting the delay to after the election, which creates significant problems for employers. As Member Hayes noted, once a union is elected as the representative—or purported representative until the post-election issues are resolved—the employer engages in unilateral changes at its peril. See 76 Fed. Reg. 36812, 36832. Note that this includes not only major changes such as wages and benefits, but seemingly inconsequential matters such as uniforms and parking.

• Additionally, election certainty is important to employees and the petitioning union, as the Fourth Circuit noted in Beverly Health & Rehabilitation Services, Inc., No. 96-2195, 1997 WL 457542, at *4 (4th Cir. 1997) and Member Hayes cited in dissent. Where, as in Beverly Health, the unit voted on includes employees who are excluded post-election, the election can be overturned and the certification of a representative and commencement of bargaining—the actual goal of organization—is delayed.

• The Board’s proposal to delay litigation of Section 2(11) supervisory issues until after the election is rife with problems. Employers will be required to proceed to election without any formulation of the issues regarding whether those individual employees are supervisors or in the petitioned-for unit. While there is currently no entitlement to a pre-election decision on Section 2(11) issues, the employer is entitled to litigation of the issues and development of a record so that the issue can be properly considered post-election. See NLRB Guide for Hearing Officers at 122-23 (Sept. 2003) (noting that “where a party raises an issue that a particular employee performs unit work but also performs work as a supervisor, the hearing officer must delve into the 2(11) issues and obtain testimony in this regard.”); see also GC Memo 91-3, “Guidelines Concerning Application of Health Care Rule” (May 9, 1991) (“Of course, absent stipulation, hearings will need to be held to resolve disputed issues other than unit scope such as: . . . (2) Supervisory and managerial status.”). By doing so, the employer is aware of the legal issues and disputed facts with respect to alleged supervisors and can participate in the election based on that knowledge. It is suggested that if new election rules are to be adopted, absent special circumstances, Section 2(11) supervisory issues should be resolved pre-election to minimize illegal and objectionable conduct by individuals that if deemed to be supervisors are legal agents of the employer. Correspondingly, under the Harborside line of cases,
inappropriate activity by such individuals on behalf of the union can also invalidate the election.

- The provisions of the NPRM that consider whether to allow electronic signature on authorization cards should be rejected because of the substantial possibility that electronic signatures could lead to voter fraud and undermine the sanctity and accuracy of the election process.

The Board’s recent initiatives, including the instant rulemaking initiative with respect to election procedures, amount to a regulatory tsunami on employers and includes no less than nine (9) separate significant initiatives in a time frame of ten (10) months—See Exhibit C. SHRM submits, that there is no rational basis for such initiatives, nor is there any record to support the need for such initiatives. The totality of such initiatives clearly creates a disturbing course of action by the Board Majority and creates considerable questions regarding the institutional credibility and neutrality of the Agency.

In summary, SHRM supports the dissenting view of Member Hayes with respect to the proposed election rules and respectfully requests that such rulemaking initiative be withdrawn except for the requested comments with respect to the blocking charge procedure. SHRM anticipates filing its objections to the proposed rule in written comment form on or before August 22, 2011, or such later date as the Board may grant on reconsideration of SHRM’s Motion to extend the time period for comments.
Exhibit A
July 15, 2011

VIA FACSIMILE

Lester A. Heltzer
Executive Secretary
Board FOIA Officer
Facsimile: (202) 273-4270

Jacqueline A. Young
General Counsel FOIA Officer
Facsimile: (202) 273-4275

National Labor Relations Board
1099 14th Street, NW, Room 11602
Washington, D.C. 20570-0001

Re: Notice of Proposed Rulemaking regarding Representation Case Procedures, 76 FR 36812 (June 22, 2011)

Dear Mr. Heltzer and Ms. Young:

Jones Day represents the Society for Human Resource Management (“SHRM”), the American Hospital Association (“the AHA”), and HR Policy Association regarding the above-referenced rulemaking proceeding. Additionally, Morgan, Lewis & Bockius LLP represents Coalition for a Democratic Workplace (“CDW”) and Proskauer represents the United States Chamber of Commerce in the above-reference rulemaking proceeding. Finally, Benesch, Friedlander, Coplan & Aronoff represents the National Association of Manufacturers (“NAM”). In an effort to address the issues identified by the National Labor Relations Board (“NLRB” or “the Board”) in its Notice of Proposed Rulemaking, 76 FR 36812 (June 22, 2011) (“NPRM”), SHRM, the AHA, HR Policy Association, CDW, the United States Chamber of Commerce, and NAM (collectively, “the requesting parties”), submit this request for documentation pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552.

The Notice of Proposed Rulemaking published by the Board indicates that the proposed rule is needed to avoid unnecessary delays and accelerate the holding of elections. See 76 FR 36812. As the Board noted in the NPRM, “[n]o party possesses greater knowledge of the Board’s own procedures than the Board itself.” Id. at 36829. Accordingly, the requesting parties believe that it is incumbent upon the Board to carefully and transparently review and analyze the information in the Board’s possession that forms the basis of the Board’s expertise. To better
educate themselves on the Board's procedures and be able to submit meaningful comment on the NPRM, the requesting parties submit the following FOIA requests. To the extent that the information exists in a readily available format, the requesting parties ask for such information. If the information does not exist in a readily available format, the requesting parties ask the NLRB to provide the agency records containing such information.

A. Please provide the number of R Cases in each of Fiscal Years 2005, 2006, 2007, 2008, 2009, and 2010 in which blocking charges occurred and, for those cases, the average number of days and the median number of days between petition and election.

B. Please provide all statistical analyses, surveys, reports or other data—if any—that the Board relied on in formulating its NPRM regarding the effect of blocking charges in delaying the holding of an election.

C. Please provide the number of R Cases in each of Fiscal Years 2005, 2006, 2007, 2008, 2009, and 2010 in which an election was delayed by more than thirty (30) days because the Board lacked a sufficient number of Members to decide an open issue in the matter.

D. Please provide all statistical analyses, surveys, reports or other data—if any—that the Board relied on in formulating its NPRM regarding the effect of Member turnover and Board vacancies in delaying the holding of an election.

E. Please provide the number of cases in each of Fiscal Years 2005, 2006, 2007, 2008, 2009, and 2010 in which the Board reversed, in whole or in part, a regional director's resolution of pre-election hearing disputes.

F. Please provide the number of cases in each of Fiscal Years 2005, 2006, 2007, 2008, 2009, and 2010 in which an election was delayed by thirty (30) days or more by pre-election hearing issues such as in Kansas City Repertory Theatre, 17-CA-12647, referenced in Member Hayes's dissent, 76 FR 36812, 36831 n. 76, and all documentation reflecting the reasons for the delay in such cases.

G. Please provide all statistical analyses, surveys, reports or other data—if any—that the Board relied on in formulating its NPRM regarding cases that were delayed by thirty (30) days or more to resolve pre-election issues, such as in Kansas City Repertory Theatre, 17-CA-12647, referenced in Member Hayes's dissent, 76 FR 36812, 36831 n. 76.

H. Please provide the number of cases in each of Fiscal Years 2005, 2006, 2007, 2008, 2009, and 2010 in which it took over one (1) year to resolve post-election
hearing issues such as *Manhattan Crowne Plaza*, 341 NLRB 619 (2004), referenced in the Board's NPRM, *see* 76 FR 36812, 36814 n. 22, and the cases cited in Member Hayes's dissent, *id.* at 36831 n. 77, and all documentation reflecting the reasons for the delay in such cases.

I. Please provide all statistical analyses, surveys, reports or other data—if any—that the Board relied on in formulating its NPRM regardless of cases in which it took more than one (1) year to resolve post-election hearing issues, such as *Manhattan Crowne Plaza*, 341 NLRB 619 (2004), referenced in the Board's NPRM, *see* 76 FR 36812, 36814 n. 22, and the cases cited in Member Hayes's dissent, *id.* at 36831 n. 77.

J. Please provide all statistical analyses, surveys, reports or other data—if any—that the Board relied on in formulating its NPRM regarding whether any internal Board practices, such as the ability of a dissenting Member to delay the issuing of an opinion, delayed the holding of an election.

K. Please provide any other statistical analyses, surveys, reports or other data—if any—that the Board relied on in formulating its NPRM.

Please forward the requested information to all parties listed below, with an invoice directed to Roger King at the address below. Alternatively, if producing the information to multiple parties is too burdensome, please contact Mr. King to make alternative arrangements. Thank you in advance for your assistance.

Sincerely,

G. Roger King  
JONES DAY  
325 John H. McConnell Blvd.  
Columbus, OH 43215  
Ph: (614) 281.3874  
Fax: (614) 461.4198  
E-mail: rking@jonesday.com  
*Counsel for Society for Human Resource Management*

Andrew M. Kramer  
JONES DAY  
51 Louisiana Ave., NW  
Washington, D.C. 20001  
Ph: (202) 879.4660  
Fax: (202) 626.1700  
E-mail: akramer@jonesday.com  
*Counsel for HR Policy Association*
Mr. Lester A. Heltzer  
Ms. Jacqueline A. Young  
July 15, 2011  
Page 4

F. Curt Kirschner Jr.  
JONES DAY  
555 California St.  
26th Floor  
San Francisco, CA 94104  
Ph: (415) 875.5769  
Fax: (415) 875.5700  
E-mail: ckirschner@jonesday.com  
Counsel for the American Hospital Association

Philip A. Miscimarra  
MORGAN, LEWIS & BOCKIUS LLP  
77 West Wacker Dr., 5th Floor  
Chicago, IL 60601  
Ph: (312) 324.1165  
Fax: (312) 324.1001  
E-mail: pmiscimarra@morganlewis.com  
Counsel for Coalition for a Democratic Workplace

Charles I. Cohen  
MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Ave., NW  
Washington, D.C. 20004  
Ph: (202) 739.5710  
Fax: (202) 739.3001  
E-mail: ccohen@morganlewis.com  
Counsel for Coalition for a Democratic Workplace

Peter N. Kirsanow  
BENESCH, FRIEDLANDER, COPLAN & ARONOFF  
200 Public Square, Suite 3200  
Cleveland, Ohio 44114  
Ph: (216) 363.4481  
Fax: (216) 363.4588  
E-mail: pkirsanow@beneschlaw.com  
Counsel for National Association of Manufacturers

Ronald Meisburg  
PROSKAUER  
1001 Pennsylvania Ave., NW  
Suite 400 South  
Washington, D.C. 20004  
Ph: (202) 416.5860  
Fax: (202) 416.6899  
E-mail: rmeisburg@proskauer.com  
Counsel for the United States Chamber of Commerce
Exhibit B
UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In Re:

NLRB Notice of Proposed Rulemaking – Representation Case Procedures

ORDER

On June 22, 2011, the National Labor Relations Board published a Notice of Proposed Rulemaking (NPRM) (76 FR 15307), and in that notice and through a separate notice on June 27, 2011, the Board invited interested parties to attend a public meeting on July 18, 2011 to share their views on the proposed amendments to its pre- and post-election procedures, or to make other suggestions for improving representation case procedures.

The Board has received requests seeking, inter alia, to postpone the public meeting. These requests have been made by Senators Enzi, Hatch and Isakson, by the United States Chamber of Commerce (joined by other organizations) and by the Workforce Fairness Institute. Having duly considered these requests, the Board (Member Hayes, dissenting1) has decided to proceed with the meeting as scheduled. Sufficient public interest in participating in the meeting has been expressed to warrant extending the meeting through July 19, 2011. Moreover, interested parties that are unable to participate in the hearing or wish to extend their oral remarks may do so through the submission of written comments by August 22, 2011, pursuant to the NPRM.

By direction of the Board:

Dated, Washington, D.C., July 8, 2011

Lester A. Heitzen
Executive Secretary

---

1 For the reasons stated by the requesting parties, which accord with prior procedural objections voiced by Member Hayes in his dissent to the Notice of Proposed Rulemaking, Member Hayes would postpone the hearing at least until the second week of August. In his view, there is absolutely no reason for conducting a hearing only 3 weeks after its announced scheduling and less than 4 weeks after publication of the Notice spanning 36 pages in the Federal Register.
July 6, 2011

BY FAX

Mr. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

Re: RIN 3142-AA08 (Notice of Proposed Rule Making)
Request to Extend Time for Submission of Comments,
Reschedule Existing Hearing and Schedule Additional Hearings

Dear Mr. Heltzer:

Faxed herewith is a Request to Extend Time for Submission of Comments, Reschedule Existing Hearing and Schedule Additional Hearings, which is filed by their respective counsel on behalf of the parties identified in the Request. Copies of the original will be sent to you by overnight delivery. Thank you for your attention to this matter.

Very truly yours,

[Signature]

Ronald Meisburg

Enclosure

cc: Peter N. Kirsanow, Esq.
    Charles I. Cohen, Esq.
    Philip A. Miscimarra, Esq.
    Harold P. Coxson, Esq.
    Harold R. Weinrich, Esq.
    Andrew M. Kramer, Esq.
    G. Roger King, Esq.
    Maurice Baskin, Esq.
July 6, 2011

BY OVERNIGHT MAIL

Mr. Lester Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

Re: RIN 3142-AA08 (Notice of Proposed Rule Making)
   Request to Extend Time for Submission of Comments,
   Reschedule Existing Hearing and Schedule Additional Hearings

Dear Mr. Heltzer:

Enclosed herewith are the original and eight copies of a Request to Extend Time for Submission of Comments, Reschedule Existing Hearing and Schedule Additional Hearings, which is filed by their respective counsel on behalf of the parties identified in the Request. Thank you for your attention to this matter.

Very truly yours,

[Signature]

Ronald Meisburg

Enclosure

cc: Peter N. Kirsanow, Esq.
    Charles I. Cohen, Esq.
    Philip A. Miscimarra, Esq.
    Harold P. Coxson, Esq.
    Harold R. Weinrich, Esq.
    Andrew M. Kramer, Esq.
    G. Roger King, Esq.
    Maurice Baskin, Esq.
REQUEST TO EXTEND TIME FOR SUBMISSION OF COMMENTS, RESCHEDULE EXISTING HEARING AND SCHEDULE ADDITIONAL HEARINGS

The parties identified below hereby request that the Board to enter an order:

1. Extending the time within which public comments will be received by the Board for ninety days, from August 21, 2011, to and including November 19, 2011, with the understanding that because the ninety-day extension period ends on a Saturday, the comment deadline will be Monday, November 21, 2011.

2. Providing 14 days from November 21, 2011, to and including December 5, 2011, for the filing of responsive comments.

3. Postponing the public hearing currently scheduled in Washington, DC, for July 18 and 19, 2011, to a date or dates at least thirty days after December 5, 2011.

4. Scheduling, on dates at least thirty days after December 5, 2011, at least four additional hearings at locations around the United States convenient to persons and organizations who may wish to testify before the Board with respect to the proposed regulations.

As grounds for granting this request, the parties state that:
(1) the significant and substantial changes that may be brought about by the proposed regulations, some of which may not be readily apparent without further consideration and study, do not allow for the filing of complete and comprehensive comments within the time currently allowed;

(2) the problem of the short current deadline is compounded by the fact that the proposed regulations must be studied and comments on them developed, drafted, revised and filed over the months of July and August, when many of the persons necessary to carefully evaluate the proposed regulations, such as managers, attorneys and other advisers, may be effectively unavailable because of travel and family plans and commitments;

(3) typically in rulemaking the public hearings are utilized as an adjunct to written comments after the written comments have been filed, with the written comments serving as the basis of a give and take between the Board and members of the public, and furthering the goal of having a full explication of the proposed rules and suggested alternatives;

(4) the utility of hearings is enhanced when they are also held outside the confines of Washington, DC, at convenient locations around the United States, which allows the opportunity for a greater variety and cross section of affected parties to speak directly to the Board and allows the Board to ask questions of the speakers;

(5) both the substance and appearance of good government – and thus, the efficacy of the proposed rules – will be enhanced if the Board does not – and does not appear to – “rush to judgment”, but instead allows the reasonable time and occasions necessary all stakeholders – employers, unions, employees, and their representatives,
attorneys and advisers – to fully and fairly participate in a process which may potentially have great impact on their work, life and livelihood;

(6) the requested process is similar to that which was followed by the Board in the promulgation of the health care rules nearly thirty years ago, and the success of those rules is testament to the wisdom of utilizing the same or similar process with respect to the proposed rules under consideration in this proceeding.

The undersigned counsel represents that he has been authorized to present this request on behalf of each of the counsel who represent their respective clients named below. Each party has requested an opportunity to appear and make a presentation at the July 18-19 hearing, and the request for postponement of that hearing is made without prejudice to our respective requests to appear.

In view of the foregoing, the parties ask that this request be granted.

Respectfully submitted,

Ronald Meisburg
PROSKAUER ROSE LLP
1001 Pennsylvania Avenue, N.W.
Suite 400 South
Washington, DC 20004
(202) 416-5860
rmeisburg@proskauer.com

Counsel for the United States Chamber of Commerce
Peter N. Kirsanow  
BENESCH, FRIEDLANDER, COPLAN & ARONOFF  
200 Public Square, Suite 2300  
Cleveland, OH 44114  
(216) 363-4481  
pkirsanow@beneschlaw.com  

Counsel for National Association of Manufacturers

Harold R. Weinrich  
JACKSON LEWIS LLP  
10701 Parkridge Blvd., Suite 300  
Reston, VA 20191  
(703) 483-8300  
weinrich@jacksonlewis.com  

Counsel for The Atlantic Legal Foundation

Charles I. Cohen  
MORGAN, LEWIS & BOCKIUS LLP  
1111 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
(202) 739-5710  
ccoohen@morganlewis.com  

Counsel for HR Policy Association

Andrew M. Kramer  
JONES DAY  
51 Louisiana Avenue, N.W.  
Washington, DC 20001  
(202) 879-4660  
akramer@jonesday.com  

Philip A. Miscimarra  
MORGAN, LEWIS & BOCKIUS LLP  
77 West Wacker Drive  
Chicago, IL 60601-5094  
(312) 324-1165  
pmiscimarra@morganlewis.com  

Counsel for The Coalition For a Democratic Workplace

G. Roger King  
JONES DAY  
P.O. Box 165017  
Columbus, OH 43216  
(614) 281-3874  
rking@jonesday.com  

Counsel for Society for Human Resource Management

Harold P. Coxson  
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.  
1909 K Street, NW, Suite 1000  
Washington, DC 20006  
(202) 887-0855  
hal.coxson@ogletreedeakins.com  

Counsel for Council on Labor Law Equality

Maurice Baskin  
VENABLE LLP  
575 7th Street, N.W.  
Washington, DC 20004-1601  
(202) 344-4823  
mbaskin@venable.com  

Counsel for Associated Builders & Contractors, Inc.
Exhibit C
Recent NLRB Initiatives


- Rulemaking requiring employers to post a notice informing employees of their rights under the National Labor Relations Act, 75 Fed. Reg. 80410 (Dec. 22, 2010).

- Invitation to file amicus briefs in *DR Horton, Inc.*, 12-CA-25764, regarding whether an employer violated Section 8(a)(1) by requiring employees to waive all rights to a judicial forum and denying the arbitrator the ability to consolidate claims or proceed as a class or collective action.

- Invitation to file amicus briefs in *Hawaii Tribune-Herald*, 37-CA-7043 and related cases, regarding whether an employer has a duty to provide a union with statements provided to the employer in the course of its investigation into alleged employee misconduct.

- Invitation to file amicus briefs in *Chicago Mathematics & Science Academy Charter School, Inc.*, 13-RM-1768, addressing whether an Illinois charter school falls under the jurisdiction of the NLRB or an Illinois labor relations board.

- Invitation to file amicus briefs in *Specialty Healthcare*, 356 NLRB No. 56, asking whether the Board should continue to adhere to *Park Manor Care Center*, 305 NLRB 872 (1991), or whether there should be a presumption that employees in the “same job” make up an appropriate unit.

- Invitation to file amicus briefs in *Roundy’s Inc.*, 30-CA-17185, addressing the appropriate standard to review allegations of unlawful employer discrimination in nonemployee access cases. Specifically, the Board asked whether it should continue to adhere to *Sandusky Mall Co.*, 329 NLRB 618 and what bearing, if any, *Register Guard*, 351 NLRB 1110, has on the Board’s standards for unlawful discrimination in nonemployee access cases.

- Invitation to file amicus briefs in *Lamons Gasket Co.*, 31-RD-1578, where the Board asked for amici’s experience under *Dana Corp.*, 351 NLRB 434 (2007), which, after an employer voluntarily recognized a union, allowed employees 45 days’ to file a decertification petition or to support another union. The Board asked whether, in light of the parties’ experiences, *Dana Corp.* should be overturned.

- Invitation to file amicus briefs in *UGL-Unnico Service Co. & Grocery Haulers, Inc.* 355 NLRB No. 155, where the Board is considering overturning *MV Transportation*, 337 NLRB 770 (2002), and requiring a successor to bargain with an incumbent union for a reasonable period of time without any challenge to the union’s majority status. The Board also asked for amici’s views on whether *MV Transportation* applies in a “perfectly clear” successor situation.