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CODE OF FEDERAL REGULATIONS

Title 29
Labor

Parts 100 to 499

Revised as of July 1, 2021

Containing a codification of documents
of general applicability and future effect

As of July 1, 2021

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Cite this Code: CFR

To cite the regulations in this volume use title, part and section number. Thus, 29 CFR 100.101 *refers to title 29, part 100, section 101.*

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Title 17 through Title 27.....as of April 1
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OLIVER A. POTTS,
Director,
Office of the Federal Register
July 1, 2021

THIS TITLE

Title 29—LABOR is composed of nine volumes. The parts in these volumes are arranged in the following order: Parts 0–99, parts 100–499, parts 500–899, parts 900–1899, part 1900–§ 1910.999, part 1910.1000–end of part 1910, parts 1911–1925, part 1926, and part 1927 to end. The contents of these volumes represent all current regulations codified under this title as of July 1, 2021.

The OMB control numbers for title 29 CFR part 1910 appear in § 1910.8. For the convenience of the user, § 1910.8 appears in the Finding Aids section of the volume containing § 1910.1000 to the end.

Subject indexes appear following the occupational safety and health standards (part 1910).

For this volume, Robert J. Sheehan, III was Chief Editor. The Code of Federal Regulations publication program is under the direction of John Hyrum Martinez, assisted by Stephen J. Frattini.

Title 29—Labor

(This book contains parts 100 to 499)

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AUTHORITY: Section 6, National Labor Relations Act, as amended (29 U.S.C. 141, 156).

Subpart A is also issued under 5 U.S.C. 7301.

Subpart B is also issued under the Inspector General Act of 1976, as amended by the Inspector General Act Amendments of 1988, 5 U.S.C. ap3; 42 U.S.C. 2000e–16(a).

Subpart D is also issued under 28 U.S.C. 2672; 28 CFR part 14.

Subpart E is also issued under 29 U.S.C. 794.

Subpart F is also issued under 31 U.S.C. 3711 and 3716–3719, as amended, 31 CFR part 285, 31 CFR chapter IX parts 900–904.

Subpart A—Employee Responsibilities and Conduct

§ 100.101 Cross-reference to financial disclosure requirements and other conduct rules.

Employees of the National Labor Relations Board (NLRB) should refer to the executive branch-wide Standards of Ethical Conduct at 5 CFR part 2635; the NLRB's regulations at 5 CFR part 7101, which supplement the executive branch-wide standards; the employee responsibilities and conduct regulations at 5 CFR part 735; and the executive branch financial disclosure regulations at 5 CFR part 2634.

[62 FR 6448, Feb. 12, 1997]

Subpart B—Cooperation in Audits and Investigations

§ 100.201 Audits and investigations.

(a) Employees shall cooperate fully with any audit or investigation conducted by the Office of the Inspector General involving matters that fall within the jurisdiction and authority of the Inspector General, as defined in the Inspector General Act of 1978, as amended, or with any audit or investigation conducted by any Agency official or department, including, but not limited to, the Office of Equal Employment Opportunity, involving matters that relate to or have an effect on the official business of the Agency. Such cooperation shall include, among other things, responding to requests for information, providing statements under oath relating to such audits or investigations, and affording access to Agency records and/or any other Agency materials in an employee's possession.

(b) The obstruction of an audit or investigation, concealment of information, intentional furnishing of false or misleading information, refusal to provide information and/or answer questions, or refusal to provide a statement under oath, by an employee to an auditor or investigator pursuant to any audit or investigation as described in paragraph (a) of this section, may result in disciplinary action against an employee. However, nothing herein shall be construed to deny, abridge, or otherwise restrict the rights, privileges, or other entitlements or protections afforded to Agency employees.

[59 FR 37158, July 21, 1994]

Subpart C—Employee Personal Property Loss Claims [Reserved]

Subpart D—Claims Under the Federal Tort Claims Act

§ 100.401 Claims under the Federal Tort Claims Act for loss of or damage to property or for personal injury or death.

(a) *Scope of regulations.* These regulations apply to administrative claims filed under the Federal Tort Claims Act (28 U.S.C. 2672), as amended, for money damages against the United States for damage to or loss of property, or for personal injury or death, caused by the negligent or wrongful act or omission of any employee of the National Labor Relations Board acting within the scope of his or her office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. The regulations in this part supplement the Department of Justice's regulations in 28 CFR part 14.

(b) *Filing a claim.* Claims may be submitted to the Associate General Counsel, Division of Legal Counsel, Headquarters, National Labor Relations Board, Washington, DC 20570 at any time within 2 years after such claim has accrued. The current address for Headquarters can be found at *www.nlrb.gov*. Such claim may be presented by a person specified in 28 CFR 14.3. An executed Standard Form 95, *Claim for Damage, Injury, or Death*, or written notification must be submitted and accompanied by as much of the appropriate information specified in 28 CFR 14.4 as may reasonably be obtained.

(c) *Amendment of claim.* A claim submitted in compliance with this subpart may be amended by the claimant at any time prior to final action by the National Labor Relations Board or prior to the exercise of the claimant's option under 28 U.S.C. 2675(a). Amendments shall be submitted in writing and signed by the claimant or his or her duly authorized agent or legal representative. Upon the timely filing of an amendment to a pending claim, the National Labor Relations Board shall have six months to make a final disposition of the claim as amended and the claimant's option under 28 U.S.C. 2675(a) shall not accrue until six months after filing of an amendment.

(d) *Action on claims.* The Associate General Counsel, Division of Legal Counsel, shall have the power to consider, ascertain, adjust, determine, compromise, or settle any claim submitted in accordance with paragraph (a) of this section. Any exercise of such power shall be in accordance with 28 U.S.C. 2672 and 28 CFR part 1.

(e) *Legal review of claims.* In accordance with 28 CFR 14.5, legal review is required if the amount of a proposed settlement, compromise, or award exceeds $5,000. Any exercise of such power shall be in accordance with 28 U.S.C. 2672 and 28 CFR part 14.

(f) *Payment of awards.* Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this action will be paid by the Chief Financial Officer out of appropriations available to the National Labor Relations Board. Payment of any award, compromise, or settlement in an amount greater than $2,500 will be paid in accordance with 28 CFR 14.10.

(g) *Acceptance of payment constitutes release.* Acceptance by a claimant, his or her agent or legal representative of any award, compromise, or settlement made pursuant to this part shall be final and conclusive on the claimant, his or her agent or legal representative and any other person on whose behalf or for whose benefit the claim has been submitted, and shall constitute a complete release of any claims against the United States, the National Labor Relations Board, and any employee of the government whose act or omission gave rise to the claim.

[81 FR 19487, Apr. 5, 2016]

Subpart E—Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities Conducted by the National Labor Relations Board

SOURCE: 53 FR 25884, 25885, July 8, 1988, unless otherwise noted. Redesignated at 59 FR 37159, July 21, 1994.

§ 100.501 Purpose.

The purpose of this regulation is to effectuate section 119 of the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, which amended section 504 of the Rehabilitation Act of 1973 to prohibit discrimination on the basis of handicap in programs or activities conducted by Executive agencies or the United States Postal Service.

§ 100.502 Application.

This regulation (§§ 100.501–100.570) applies to all programs or activities conducted by the agency, except for programs or activities conducted outside the United States that do not involve individuals with handicaps in the United States.

[53 FR 25884, 25885, July 8, 1988. Redesignated at 59 FR 37159, July 21, 1994, and amended at 60 FR 32587, June 23, 1995]

§ 100.503 Definitions.

For purposes of this regulation, the term—

Assistant Attorney General means the Assistant Attorney General, Civil Rights Division, United States Department of Justice.

Auxiliary aids means services or devices that enable persons with impaired sensory, manual, or speaking skills to have an equal opportunity to participate in, and enjoy the benefits of, programs or activities conducted by the agency. For example, auxiliary aids useful for persons with impaired vision include readers, Brailled materials, audio recordings, and other similar services and devices. Auxiliary aids useful for persons with impaired hearing include telephone handset amplifiers, telephones compatible with hearing aids, telecommunication devices for deaf persons (TDD's), interpreters, notetakers, written materials, and other similar services and devices.

Complete complaint means a written statement that contains the complainant's name and address and describes the agency's alleged discriminatory action in sufficient detail to inform the agency of the nature and date of the alleged violation of section 504. It shall be signed by the complainant or by someone authorized to do so on his or her behalf. Complaints filed on behalf of classes or third parties shall describe or identify (by name, if possible) the alleged victims of discrimination.

Facility means all or any portion of buildings, structures, equipment, roads, walks, parking lots, rolling stock or other conveyances, or other real or personal property.

Historic preservation programs means programs conducted by the agency that

have preservation of historic properties as a primary purpose.

Historic properties means those properties that are listed or eligible for listing in the National Register of Historic Places or properties designated as historic under a statute of the appropriate State or local government body.

Individual with handicaps means any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

As used in this definition, the phrase:

(1) *Physical or mental impairment* includes—

(i) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; and endocrine; or

(ii) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term ''physical or mental impairment'' includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairments, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, emotional illness, and drug addiction and alcoholism.

(2) *Major life activities* includes functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(3) *Has a record of such an impairment* means has a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities.

(4) *Is regarded as having an impairment* means—

(i) Has a physical or mental impairment that does not substantially limit major life activities but is treated by the agency as constituting such a limitation;

(ii) Has a physical or mental impairment that substantially limits major life activities only as a result of the attitudes of others toward such impairment; or

(iii) Has none of the impairments defined in paragraph (1) of this definition but is treated by the agency as having such an impairment.

Qualified individual with handicaps means—

(1) With respect to preschool, elementary, or secondary education services provided by the agency, an individual with handicaps who is a member of a class of persons otherwise entitled by statute, regulation, or agency policy to receive education services from the agency;

(2) With respect to any other agency program or activity under which a person is required to perform services or to achieve a level of accomplishment, an individual with handicaps who meets the essential eligibility requirements and who can achieve the purpose of the program or activity without modifications in the program or activity that the agency can demonstrate would result in a fundamental alteration in its nature;

(3) With respect to any other program or activity, an individual with handicaps who meets the essential eligibility requirements for participation in, or receipt of benefits from, that program or activity; and

(4) *Qualified handicapped person* as that term is defined for purposes of employment in 29 CFR 1613.702(f), which is made applicable to this regulation by § 100.540.

Section 504 means section 504 of the Rehabilitation Act of 1973 (Pub. L. 93–112, 87 Stat. 394 (29 U.S.C. 794)), as amended by the Rehabilitation Act Amendments of 1974 (Pub. L. 93–516, 88 Stat. 1617); the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (Pub. L. 95–602, 92 Stat. 2955); and the Rehabilitation Act Amendments of 1986 (Pub. L. 99–506, 100 Stat. 1810). As used in this regulation, section 504 applies only to programs or activities conducted by Executive agencies and not to federally assisted programs.

Substantial impairment means a significant loss of the integrity of finished

materials, design quality, or special character resulting from a permanent alteration.

[53 FR 25884, 25885, July 8, 1988. Redesignated at 59 FR 37159, July 21, 1994, and amended at 60 FR 32587, June 23, 1995]

§§ 100.504–100.509 [Reserved]

§ 100.510 Self-evaluation.

(a) The agency shall, by September 6, 1989, evaluate its current policies and practices, and the effects thereof, that do not or may not meet the requirements of this regulation and, to the extent modification of any such policies and practices is required, the agency shall proceed to make the necessary modifications.

(b) The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the self-evaluation process by submitting comments (both oral and written).

(c) The agency shall, for at least three years following completion of the self-evaluation, maintain on file and make available for public inspection:

(1) A description of areas examined and any problems identified; and

(2) A description of any modifications made.

§ 100.511 Notice.

The agency shall make available to employees, applicants, participants, beneficiaries, and other interested persons such information regarding the provisions of this regulation and its applicability to the programs or activities conducted by the agency, and make such information available to them in such manner as the head of the agency finds necessary to apprise such persons of the protections against discrimination assured them by section 504 and this regulation.

§§ 100.512–100.529 [Reserved]

§ 100.530 General prohibitions against discrimination.

(a) No qualified individual with handicaps shall, on the basis of handicap, be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

(b)(1) The agency, in providing any aid, benefit, or service, may not, directly or through contractual, licensing, or other arrangements, on the basis of handicap—

(i) Deny a qualified individual with handicaps the opportunity to participate in or benefit from the aid, benefit, or service;

(ii) Afford a qualified individual with handicaps an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others;

(iii) Provide a qualified individual with handicaps with an aid, benefit, or service that is not as effective in affording equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement as that provided to others;

(iv) Provide different or separate aid, benefits, or services to individuals with handicaps or to any class of individuals with handicaps than is provided to others unless such action is necessary to provide qualified individuals with handicaps with aid, benefits, or services that are as effective as those provided to others;

(v) Deny a qualified individual with handicaps the opportunity to participate as a member of planning or advisory boards;

(vi) Otherwise limit a qualified individual with handicaps in the enjoyment of any right, privilege, advantage, or opportunity enjoyed by others receiving the aid, benefit, or service.

(2) The agency may not deny a qualified individual with handicaps the opportunity to participate in programs or activities that are not separate or different, despite the existence of permissibly separate or different programs or activities.

(3) The agency may not, directly or through contractual or other arrangements, utilize criteria or methods of administration the purpose or effect of which would—

(i) Subject qualified individuals with handicaps to discrimination on the basis of handicap; or

(ii) Defeat or substantially impair accomplishment of the objectives of a

program or activity with respect to individuals with handicaps.

(4) The agency may not, in determining the site or location of a facility, make selections the purpose or effect of which would—

(i) Exclude individuals with handicaps from, deny them the benefits of, or otherwise subject them to discrimination under any program or activity conducted by the agency; or

(ii) Defeat or substantially impair the accomplishment of the objectives of a program or activity with respect to individuals with handicaps.

(5) The agency, in the selection of procurement contractors, may not use criteria that subject qualified individuals with handicaps to discrimination on the basis of handicap.

(6) The agency may not administer a licensing or certification program in a manner that subjects qualified individuals with handicaps to discrimination on the basis of handicap, nor may the agency establish requirements for the programs or activities of licensees or certified entities that subject qualified individuals with handicaps to discrimination on the basis of handicap. However, the programs or activities of entities that are licensed or certified by the agency are not, themselves, covered by this regulation.

(c) The exclusion of nonhandicapped persons from the benefits of a program limited by Federal statute or Executive order to individuals with handicaps or the exclusion of a specific class of individuals with handicaps from a program limited by Federal statute or Executive order to a different class of individuals with handicaps is not prohibited by this regulation.

(d) The agency shall administer programs and activities in the most integrated setting appropriate to the needs of qualified individuals with handicaps.

§§ 100.531–100.539 [Reserved]

§ 100.540 Employment.

No qualified individual with handicaps shall, on the basis of handicap, be subject to discrimination in employment under any program or activity conducted by the agency. The definitions, requirements, and procedures of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791), as established by the Equal Employment Opportunity Commission in 29 CFR part 1613, shall apply to employment in federally conducted programs or activities.

§§ 100.541–100.548 [Reserved]

§ 100.549 Program accessibility: Discrimination prohibited.

Except as otherwise provided in § 100.550, no qualified individual with handicaps shall, because the agency's facilities are inaccessible to or unusable by individuals with handicaps, be denied the benefits of, be excluded from participation in, or otherwise be subjected to discrimination under any program or activity conducted by the agency.

[53 FR 25884, 25885, July 8, 1988. Redesignated at 59 FR 37159, July 21, 1994, and amended at 60 FR 32587, June 23, 1995]

§ 100.550 Program accessibility: Existing facilities.

(a) *General.* The agency shall operate each program or activity so that the program or activity, when viewed in its entirety, is readily accessible to and usable by individuals with handicaps. This paragraph does not—

(1) Necessarily require the agency to make each of its existing facilities accessible to and usable by individuals with handicaps;

(2) In the case of historic preservation programs, require the agency to take any action that would result in a substantial impairment of significant historic features of an historic property; or

(3) Require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 100.550(a) would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee

after considering all agency resources available for use in the funding and operation of the conducted program or activity, and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with handicaps receive the benefits and services of the program or activity.

(b) *Methods*—(1) *General.* The agency may comply with the requirements of this section through such means as redesign of equipment, reassignment of services to accessible buildings, assignment of aides to beneficiaries, home visits, delivery of services at alternate accessible sites, alteration of existing facilities and construction of new facilities, use of accessible rolling stock, or any other methods that result in making its programs or activities readily accessible to and usable by individuals with handicaps. The agency is not required to make structural changes in existing facilities where other methods are effective in achieving compliance with this section. The agency, in making alterations to existing buildings, shall meet accessibility requirements to the extent compelled by the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), and any regulations implementing it. In choosing among available methods for meeting the requirements of this section, the agency shall give priority to those methods that offer programs and activities to qualified individuals with handicaps in the most integrated setting appropriate.

(2) *Historic preservation programs.* In meeting the requirements of §100.550(a) in historic preservation programs, the agency shall give priority to methods that provide physical access to individuals with handicaps. In cases where a physical alteration to an historic property is not required because of §100.550(a) (2) or (3), alternative methods of achieving program accessibility include—

(i) Using audio-visual materials and devices to depict those portions of an historic property that cannot otherwise be made accessible;

(ii) Assigning persons to guide individuals with handicaps into or through portions of historic properties that cannot otherwise be made accessible; or

(iii) Adopting other innovative methods.

(c) *Time period for compliance.* The agency shall comply with the obligations established under this section by November 7, 1988, except that where structural changes in facilities are undertaken, such changes shall be made by September 6, 1991, but in any event as expeditiously as possible.

(d) *Transition plan.* In the event that structural changes to facilities will be undertaken to achieve program accessibility, the agency shall develop, by March 6, 1989, a transition plan setting forth the steps necessary to complete such changes. The agency shall provide an opportunity to interested persons, including individuals with handicaps or organizations representing individuals with handicaps, to participate in the development of the transition plan by submitting comments (both oral and written). A copy of the transition plan shall be made available for public inspection. The plan shall, at a minimum—

(1) Identify physical obstacles in the agency's facilities that limit the accessibility of its programs or activities to individuals with handicaps;

(2) Describe in detail the methods that will be used to make the facilities accessible;

(3) Specify the schedule for taking the steps necessary to achieve compliance with this section and, if the time period of the transition plan is longer than one year, identify steps that will be taken during each year of the transition period; and

(4) Indicate the official responsible for implementation of the plan.

[53 FR 25884, 25885, July 8, 1988. Redesignated at 59 FR 37159, July 21, 1994, and amended at 60 FR 32587, June 23, 1995]

§100.551 Program accessibility: New construction and alterations.

Each building or part of a building that is constructed or altered by, on behalf of, or for the use of the agency

shall be designed, constructed, or altered so as to be readily accessible to and usable by individuals with handicaps. The definitions, requirements, and standards of the Architectural Barriers Act (42 U.S.C. 4151–4157), as established in 41 CFR 101–19.600 to 101–19.607, apply to buildings covered by this section.

§§ 100.552–100.559 [Reserved]

§ 100.560 Communications.

(a) The agency shall take appropriate steps to ensure effective communication with applicants, participants, personnel of other Federal entities, and members of the public.

(1) The agency shall furnish appropriate auxiliary aids where necessary to afford an individual with handicaps an equal opportunity to participate in, and enjoy the benefits of, a program or activity conducted by the agency.

(i) In determining what type of auxiliary aid is necessary, the agency shall give primary consideration to the requests of the individual with handicaps.

(ii) The agency need not provide individually prescribed devices, readers for personal use or study, or other devices of a personal nature.

(2) Where the agency communicates with applicants and beneficiaries by telephone, telecommunication devices for deaf persons (TDD's) or equally effective telecommunication systems shall be used to communicate with persons with impaired hearing.

(b) The agency shall ensure that interested persons, including persons with impaired vision or hearing, can obtain information as to the existence and location of accessible services, activities, and facilities.

(c) The agency shall provide signage at a primary entrance to each of its inaccessible facilities, directing users to a location at which they can obtain information about accessible facilities. The international symbol for accessibility shall be used at each primary entrance of an accessible facility.

(d) This section does not require the agency to take any action that it can demonstrate would result in a fundamental alteration in the nature of a program or activity or in undue financial and administrative burdens. In those circumstances where agency personnel believe that the proposed action would fundamentally alter the program or activity or would result in undue financial and administrative burdens, the agency has the burden of proving that compliance with § 100.560 would result in such alteration or burdens. The decision that compliance would result in such alteration or burdens must be made by the agency head or his or her designee after considering all agency resources available for use in the funding and operation of the conducted program or activity and must be accompanied by a written statement of the reasons for reaching that conclusion. If an action required to comply with this section would result in such an alteration or such burdens, the agency shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with handicaps receive the benefits and services of the program or activity.

[53 FR 25884, 25885, July 8, 1988. Redesignated at 59 FR 37159, July 21, 1994, and amended at 60 FR 32587, June 23, 1995]

§§ 100.561–100.569 [Reserved]

§ 100.570 Compliance procedures.

(a) Except as provided in paragraph (b) of this section, this section applies to all allegations of discrimination on the basis of handicap in programs and activities conducted by the agency.

(b) The agency shall process complaints alleging violations of section 504 with respect to employment according to the procedures established by the Equal Employment Opportunity Commission in 29 CFR part 1613 pursuant to section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791).

(c) The Director of Administration shall be responsible for coordinating implementation of this section. Complaints may be sent to Director of Administration, National Labor Relations Board, 1099 Fourteenth Street NW., Washington, DC 20570.

(d) The agency shall accept and investigate all complete complaints for which it has jurisdiction. All complete complaints must be filed within 180

days of the alleged act of discrimination. The agency may extend this time period for good cause.

(e) If the agency receives a complaint over which it does not have jurisdiction, it shall promptly notify the complainant and shall make reasonable efforts to refer the complaint to the appropriate Government entity.

(f) The agency shall notify the Architectural and Transportation Barriers Compliance Board upon receipt of any complaint alleging that a building or facility that is subject to the Architectural Barriers Act of 1968, as amended (42 U.S.C. 4151–4157), is not readily accessible to and usable by individuals with handicaps.

(g) Within 180 days of the receipt of a complete complaint for which it has jurisdiction, the agency shall notify the complainant of the results of the investigation in a letter containing—

(1) Findings of fact and conclusions of law;

(2) A description of a remedy for each violation found; and

(3) A notice of the right to appeal.

(h) Appeals of the findings of fact and conclusions of law or remedies must be filed by the complainant within 90 days of receipt from the agency of the letter required by §100.170(g). The agency may extend this time for good cause.

(i) Timely appeals shall be accepted and processed by the head of the agency.

(j) The head of the agency shall notify the complainant of the results of the appeal within 60 days of the receipt of the request. If the head of the agency determines that additional information is needed from the complainant, he or she shall have 60 days from the date of receipt of the additional information to make his or her determination on the appeal.

(k) The time limits cited in paragraphs (g) and (j) of this section may be extended with the permission of the Assistant Attorney General.

(l) The agency may delegate its authority for conducting complaint investigations to other Federal agencies, except that the authority for making the final determination may not be delegated to another agency.

[53 FR 25884, 25885, July 8, 1988, as amended at 53 FR 25884, July 8, 1988. Redesignated and amended at 59 FR 37159, July 21, 1994]

§§ 100.571–100.599 [Reserved]

Subpart F—Debt Collection Procedures

SOURCE: 72 FR 40070, July 23, 2007, unless otherwise noted.

§ 100.601 Purpose and scope.

This part prescribes standards and procedures for officers and employees of the National Labor Relations Board (NLRB) who are responsible for the collection and disposition of certain debts owed to the United States, as further defined below. The authority for this part is the Federal Claims Collection Act of 1966; the Debt Collection Improvement Act of 1996; 31 U.S.C. 3711 and 3716 through 3719, as amended; The Federal Claims Collection Standards, 31 CFR chapter IX parts 900–904; and Office of Management and Budget Circular A–129. The activities covered include: the collection of claims of any amount; compromising claims; suspending or terminating the collection of claims; referring debts that are more than 180 days delinquent to the Department of the Treasury for collection action; and the referral of debts of more than $100,000 (exclusive of any interest and charges) to the Department of Justice for litigation.

§ 100.602 Definitions.

For the purpose of this subpart, the following definitions will apply:

Administrative Offset means withholding money payable by the United States Government (including money payable by the United States Government on behalf of a State Government) to, or held by the Government for, a person to satisfy a debt the person owes the United States Government.

Centralized offset means the offset of Federal payments through the Treasury Offset Program to collect debts which creditor agencies have certified pursuant to 31 U.S.C. 3716(c), 3720A(a) and applicable regulations. The term

''centralized offset'' includes the Treasury Offset Program's processing of offsets of Federal payments disbursed by disbursing officials other than the Department of the Treasury.

Claim or debt means an amount of money, funds, or property that has been determined by an agency official to be owed to the United States by a person, organization, or entity, except another Federal agency. For the purposes of *administrative offset* under 31 U.S.C. 3716, the terms *claim* and *debt* include an amount of money, funds, or property owed by a person to a State (including past-due support being enforced by a State), the District of Columbia, American Samoa, Guam, the United States Virgin Islands, the Commonwealth of the Northern Mariana Islands, or the Commonwealth of Puerto Rico.

Cross-servicing means that the Department of the Treasury or another debt collection center is taking appropriate debt collection action on behalf of one or more Federal agencies or a unit or sub-agency thereof.

Debtor means an individual, organization, group, association, partnership, or corporation indebted to the United States, or the person or entity with legal responsibility for assuming the debtor's obligation.

Delinquent refers to the status of a debt and means a debt has not been paid by the date specified in the initial written demand for payment or applicable contractual agreement with the NLRB, unless other satisfactory payment arrangements have been made by that date. If the debtor fails to satisfy obligations under a payment agreement with the NLRB after other payment arrangements have been made, the debt becomes a delinquent debt.

Payment in full means payment of the total debt due the United States, including any interest, penalty, and administrative costs of collection assessed against the debtor.

Recoupment is a special method for adjusting debts arising under the same transaction or occurrence. For example, obligations arising under the same contract generally are subject to recoupment.

§ 100.603 Debts that are covered.

(a) The procedures covered by this part generally apply to claims for payment or debts which

(1) Result from certain internal management activities of the NLRB; or

(2) Are referred to the NLRB for collection.

(b) The procedures covered by this part do not apply to

(1) A debt arising from, or ancillary to, any action undertaken by or on behalf of the NLRB or its General Counsel in furtherance of efforts to ensure compliance with the National Labor Relations Board Act, 29 U.S.C. 151, *et seq.*, including but not limited to actions involving the collection of monies owed for back pay and/or other monetary remedies provided for in Board orders or ancillary court proceedings. (Regulations concerning the collection of these types of debts are found in 29 CFR part 102, subparts U and V.);

(2) A debt involving criminal actions of fraud, the presentation of a false claim, or misrepresentation on the part of the debtor or any other person having an interest in the claim;

(3) A debt based in whole or in part on conduct in violation of the antitrust laws;

(4) A debt under the Internal Revenue Code of 1986;

(5) A debt between Federal agencies. Federal agencies should attempt to resolve interagency claims by negotiation in accordance with Executive Order 12146 (3 CFR, 1980 Comp., pp. 409–412);

(6) A debt once it becomes subject to salary offset under 5 U.S.C. 5514; or

(7) A debt involving bankruptcy which is covered by Title 11 of the United States Code.

(c) Debts involving criminal actions of fraud, false claims, misrepresentation, or which violate antitrust laws will be promptly referred to the Department of Justice. Only the Department of Justice has the authority to compromise, suspend, or terminate collection activity on such debts. However, at its discretion, the Department of Justice may return a debt to the NLRB for further handling.

§ 100.604 Monetary limitations on NLRB's authority.

The NLRB's authority to compromise a debt or to suspend or terminate collection action on a debt covered by these procedures is limited by 31 U.S.C. 3711(a) to claims that:

(a) Have not been referred to another Federal Agency for further collection actions; and

(b) Do not exceed $100,000 (exclusive of any interest) or such higher amount as the Attorney General shall from time to time prescribe for purposes of compromise or suspension or termination of collection activity.

§ 100.605 Information collection requirements: OMB approval.

This part contains no information collection requirements, and, therefore, is not subject to the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*)

§ 100.606 No private rights created.

(a) The failure of the NLRB to include in this part any provision of the Federal Collections Claim Standards (FCCS), 31 CFR chapter IX parts 900–904, does not prevent the NLRB from applying these provisions.

(b) A debtor may not use the failure of the NLRB to comply with any provision of this part or of the FCCS as a defense.

§ 100.607 Form of payment.

These procedures are directed primarily at the recovery of money or, when a contractual basis exists, the NLRB may demand the return of specific property or the performance of specific services.

§ 100.608 Subdivision of claims or debts.

A debt may not be subdivided to avoid the monetary ceiling established by 31 U.S.C. 3711(a)(2) and 29 CFR 100.604.

§ 100.609 Administrative collection of claims.

The NLRB shall aggressively collect all claims or debts. These collection activities will be undertaken promptly and follow up action will be taken as appropriate in accordance with 31 CFR chapter IX § 901.1.

§ 100.610 Written demand for payment.

(a) The NLRB will promptly make written demand upon the debtor for payment of money or the return of specific property. The written demand for payment will be consistent with the requirements of 31 CFR chapter IX § 901.2. The date by which payment is due to avoid any late charges will be 60 days from the date that the demand letter is mailed or hand-delivered.

(b) The failure to state in a letter of demand a matter described in 31 CFR chapter IX § 901.2 is not a defense for a debtor and does not prevent the NLRB from proceeding with respect to that matter.

(c) When necessary, to protect the Government's interest, written demand may be preceded by other appropriate action, including immediate referral for litigation. It may be appropriate to contact a debtor or his representative or guarantor by other means (telephone, in person, etc.) to discuss prompt payment, the debtor's ability to repay the debt, and to inform the debtor of his rights and the affect of nonpayment or delayed payment.

(d) When the NLRB learns that a bankruptcy petition has been filed with respect to a debtor, the NLRB will cease collection action immediately unless it has been determined that the automatic stay imposed at the time of filing pursuant to 11 U.S.C. 362 has been lifted or is no longer in effect.

§ 100.611 Reporting claims or debts.

(a) In addition to assessing interest, penalties, and administrative costs pursuant to 31 CFR chapter IX § 901.9, the NLRB may report a debt that has been delinquent for 90 days to a consumer reporting agency in accordance with the requirements of 31 U.S.C. 3711(e).

(b) The information the NLRB discloses to a consumer reporting agency is limited to—

(1) Information necessary to establish the identity of the individual debtor, including name, address, and taxpayer identification number;

(2) The amount, status, and history of the debt; and

(3) The NLRB activity under which the debt arose.

§ 100.612 Disputed claims or debts.

(a) A debtor who disputes a debt should provide the NLRB with an explanation as to why the debt is incorrect within 60 days from the date the initial demand letter was mailed or hand-delivered. The debtor may support the explanation by affidavits, cancelled checks, or other relevant evidence.

(b) If the debtor's arguments appear to have merit, the NLRB may waive the interest period pursuant to 29 CFR 100.617(c) pending a final determination of the existence or the amount of the debt.

(c) The NLRB may investigate the facts concerning the dispute and, if it considers it necessary, arrange for a conference at which the debtor may present evidence and any arguments in support of the debtor's position.

§ 100.613 Contracting for collection services.

The NLRB may contract for collection services in order to recover delinquent debts only if the debts are not subject to the DCIA requirement to transfer claims or debts to Treasury for debt collection services, e.g., claims or debts of less than 180 days delinquent. However, the NLRB retains the authority to resolve disputes, compromise claims, suspend or terminate collection action, and initiate enforced collection through litigation. When appropriate, the NLRB shall contract for collection services in accordance with guidance and standards contained in 31 CFR chapter IX parts 900–904.

§ 100.614 Collection by administrative offset.

(a) *Application.* (1) The NLRB may administratively undertake collection by centralized offset on each claim which is liquidated or certain in amount in accordance with the guidance and standards in 31 CFR parts 900–904 and 5 U.S.C. 5514.

(2) This section does not apply to those debts described in 31 CFR 901.3(a)(2).

(3) Unless otherwise provided for by contract or law, debts or payments that are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority.

(4) Generally, administrative offset of payments under the authority of 31 U.S.C. 3716 may not be conducted more than 10 years after the Government's right to collect the claim or debt first accrued.

(b) *Mandatory centralized offset.* (1) The NLRB is required to refer past due legally enforceable, nontax debts that are over 180 days delinquent to the Department of the Treasury for collection by centralized administrative offset. A debt is legally enforceable if there has been a final determination by the NLRB that the debt, in the amount stated, is due and there are no legal bars to collection action. Debts under this section will be referred and collected pursuant to procedures in 31 CFR 901.3(b).

(c) *NLRB administrative offset.* The NLRB, in order to refer a delinquent debt to the Department of the Treasury for administrative offset, adopts the administrative offset procedures as prescribed by 31 CFR 901.3.

(d) *Non-centralized administrative offset.* Generally, non-centralized administrative offsets are ad hoc case-by-case offsets that the NLRB would conduct at its own discretion, internally or in cooperation with the agency certifying or authorizing payments to the debtor. Non-centralized administrative offset is used when centralized administrative offset is not available or appropriate to collect past due legally enforceable, nontax delinquent debts. In these cases, the NLRB may make a request directly to a payment-authorizing agency to offset a payment due a debtor to collect a delinquent debt. The NLRB adopts the procedures in 31 CFR 901.3(c) so that it may request that the Department of the Treasury or any other payment authorizing agency to conduct a non-centralized administrative offset.

(e) *Requests to OPM to offset a debtor's anticipated or future benefit payments under the Civil Service Retirement and Disability Fund and the Federal Employees Retirement System.* Upon providing

OPM written certification that a debtor has been afforded the procedures provided for in this section, the NLRB will request that OPM offset a debtor's anticipated or future benefit payments under the Civil Service Retirement and Disability Fund (Fund) in accordance with regulations codified at 5 CFR 831.1801–831.1808 and the Federal Employees Retirement System (System) in accordance with regulations codified at 5 CFR 845.401–845.408. Upon receipt of a request, OPM will identify and ''flag'' a debtor's account in anticipation of the time when the debtor requests or becomes eligible for payments from the Fund or System. This will satisfy any requirement that offset be initiated prior to the expiration of the time limitations referenced in 29 CFR 100.614(a)(4).

(f) *Review requirements.* For purposes of this section, whenever the NLRB is required to afford a debtor a review within the Agency, the NLRB shall provide the debtor with a reasonable opportunity for a review of the record in accordance with 31 CFR 901.3(e). The NLRB will provide the debtor with the reasonable opportunity for an oral hearing in accordance with 31 CFR 285.11(f), when the debtor requests reconsideration of the debt, and the NLRB determines that the question of the indebtedness cannot be resolved by review of the written record, for example, when the validity of the debt turns on an issue of credibility or veracity.

§ 100.615 Authorities other than offset.

(a) *Administrative Wage Garnishment.* The NLRB is authorized to collect debts from a debtor's wages by means of administrative wage garnishment in accordance with the requirements of 31 U.S.C. 3720D and 31 CFR 285.11. This section adopts and incorporates all of the provisions of 31 CFR 285.11 concerning administrative wage garnishment, including the hearing procedures described in 31 CFR 285.11(f). The NLRB may use administrative wage garnishment to collect a delinquent debt unless the debtor is making timely payments under an agreement to pay the debt in installments.

(b) This section does not apply to Federal salary offset, the process by which the NLRB collects debts from the salaries of Federal employees.

§ 100.616 Payment collection.

(a) The NLRB shall make every effort to collect a claim in full before it becomes delinquent, but will consider arranging for payment in regular installments consistent with 31 CFR 901.8, if the debtor furnishes satisfactory evidence that he is unable to pay the debt in one lump sum. Except for a claim described in 5 U.S.C. 5514, all installment payment arrangements must be in writing and require the payment of interest, penalties, and other administrative costs. If possible, the installment payments should be sufficient in size and frequency to liquidate the debt in three years or less.

(b) If a debt is paid in one lump sum after it becomes delinquent, the NLRB shall impose charges for interest, penalties, and administrative costs as specified in 31 CFR 901.9.

(c) Payment of a debt is made by check, electronic funds transfer, draft, or money order payable to the National Labor Relations Board. Payment should be made to the National Labor Relations Board, Finance Branch, 1099 14th Street NW., Washington, DC 20570, unless payment is—

(1) Made pursuant to arrangements with the Department of Justice;

(2) Ordered by a Court of the United States; or

(3) Otherwise directed in any other part of this chapter.

§ 100.617 Interest, penalties, and administrative costs.

(a) Pursuant to 31 U.S.C. 3717, the NLRB shall assess interest, penalties, and administrative costs on debts owed to the United States Government. Interest, penalties, and administrative costs will be assessed in accordance with the provisions contained in 31 CFR 901.9.

(b) The NLRB shall waive collection of interest on a debt or any portion of the debt which is paid in full within 30 days after the date on which the interest began to accrue.

(c) The NLRB may waive interest during a period a disputed debt is under investigation or review by the NLRB. However, this additional waiver is not

automatic and must be requested before the expiration of the initial 30-day waiver period. The NLRB may grant the additional waiver only if it finds merit in the explanation the debtor has submitted.

(d) The NLRB may waive collection of interest, penalties, and administrative costs if it finds that one or more of the following conditions exist:

(1) The debtor is unable to pay any significant sum toward the debt within a reasonable period of time;

(2) Collection of interest, penalties, and administrative costs will jeopardize collection of the principal of the debt;

(3) The NLRB is unable to enforce collection in full within a reasonable period of time by enforced collection proceedings; or

(4) Collection is not in the best interest of the United States, including when an administrative offset or installment agreement is in effect.

(e) The NLRB is authorized to impose interest and related charges on debts not subject to 31 U.S.C. 3717, in accordance with common law.

§ 100.618 Bankruptcy claims.

When the NLRB learns that a bankruptcy petition has been filed by a debtor, before proceeding with further collection action, the NLRB will immediately seek legal advice from the NLRB's Office of Special Counsel concerning the impact of the Bankruptcy Code on any pending or contemplated collection activities. After seeking legal advice from the NLRB's Office of Special Counsel, the NLRB will take any necessary action in accordance with the provisions of 31 CFR 901.2(h).

§ 100.619 When a debt may be compromised.

The NLRB may compromise a debt not in excess of the monetary limitation in accordance with 31 CFR part 902 if it has not been referred to the Department of Justice for litigation.

§ 100.620 Finality of a compromise.

An offer of compromise must be in writing and signed by the debtor. An offer of compromise which is accepted by the NLRB is final and conclusive on the debtor and on all officials, agencies, and courts of the United States, unless obtained by fraud, misrepresentation, the presentation of a false claim, or mutual mistake of fact.

§ 100.621 When collection action may be terminated or suspended.

The NLRB may suspend or terminate collection action on a claim not in excess of the monetary limitation of $100,000 or such other amount as the Attorney General may direct, exclusive of interest, penalties, and administrative costs, after deducting the amount of partial payments or collections, if any, in accordance with the standards and reasons set forth in 31 CFR part 903.

§ 100.622 Termination of collection action.

Before terminating collection activity, the NLRB will have pursued all appropriate means of collection and determined, based upon results of the collection activity, that the debt is uncollectible. Termination of collection activity ceases active collection of the debt. The termination of collection activity does not preclude the NLRB from retaining a record of the account for the purposes stated in 31 CFR 903.3(b) and (c).

§ 100.623 Exception to termination.

If a debt meets the exceptions described in 31 CFR 903.4, the NLRB may refer it for litigation even though termination of collection activity may otherwise be appropriate.

§ 100.624 Discharge of indebtedness; reporting requirements.

(a) Before discharging a delinquent debt (also referred to as close-out of a debt), the NLRB shall take all appropriate steps to collect the debt in accordance with 31 U.S.C. 3711(g), including, as applicable, administrative offset, tax refund offset, Federal salary offset, referral to Treasury or Treasury-designated collection centers or private collection contractors, credit bureau reporting, wage garnishment, litigation, and foreclosure. Discharge of indebtedness is distinct from termination or suspension of collection activity and is governed by the Internal

Revenue Code. When the NLRB determines that it will discharge a debt, it will do so in accordance with the provisions of 31 CFR 903.5.

(b) [Reserved]

§ 100.625 Referral of a claim to the Department of Justice.

The NLRB shall promptly refer debts that are subject to aggressive collection activity and that cannot be compromised, or debts on which collection activity cannot be suspended or terminated, to the Department of Justice for litigation. Debts shall be referred as early as possible, consistent with the standards contained if 31 CFR parts 900–904 and, in any event, well within the period for initiating timely lawsuits against the debtors. The NLRB will make every effort to refer delinquent debts to the Department of Justice within one year of the date such debts became delinquent.

PART 101—STATEMENTS OF PROCEDURES

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Sec.

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AUTHORITY: Sec. 6 of the National Labor Relations Act, as amended (29 U.S.C. 151, 156), and sec. 552(a) of the Administrative Procedure Act (5 U.S.C. 552(a)). Section 101.14 also issued under sec. 2112(a)(1) of Pub. L. 100–236, 28 U.S.C. 2112(a)(1).

SOURCE: 52 FR 23968, June 26, 1987, unless otherwise noted.

Subpart A—General Statement

§ 101.1 General statement.

The following statements of the general course and method by which the Board's functions are channeled and determined are issued and published pursuant to 5 U.S.C. 552(a)(1)(B).

Subpart B—Unfair Labor Practice Cases Under Section 10 (a) to (i) of the Act and Telegraph Merger Act Cases

§ 101.2 Initiation of unfair labor practice cases.

The investigation of an alleged violation of the National Labor Relations Act is initiated by the filing of a charge, which must be in writing and signed, and must either be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of the persons' knowledge and belief. The charge is filed with the Regional Director for the Region in which the alleged violations have occurred or are occurring. A blank form for filing such charge is supplied by the Regional Office upon request. The charge contains the name and address of the person against whom the charge is made and a statement of the facts constituting the alleged unfair labor practices.

§ 101.3 [Reserved]

§ 101.4 Investigation of charges.

When the charge is received in the Regional Office it is filed, docketed, and assigned a case number. The Regional Director may cause a copy of the charge to be served on the person against whom the charge is made, but timely service of a copy of the charge within the meaning of the proviso to section 10(b) of the Act is the exclusive responsibility of the charging party and not of the Regional Director. The Regional Director requests the person filing the charge to submit promptly evidence in its support. As part of the investigation hereinafter mentioned, the person against whom the charge is filed, hereinafter called the respondent, is asked to submit a statement of position in respect to the allegations. The case is assigned for investigation to a member of the field staff, who interviews representatives of the parties and other persons who have knowledge as to the charge, as is deemed necessary. In the investigation and in all other stages of the proceedings, charges alleging violations of section 8(b)(4) (A), (B), and (C), charges alleging violations of section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief under section 10(1) of the Act, and charges alleging violations of section 8(b)(7) or 8(e) are given priority over all other cases in the office in which they are pending except cases of like character; and charges alleging violations of sections 8(a)(3) or 8(b)(2) are given priority over all other cases except cases of like character and cases under section 10(1) of the Act. The Regional Director may exercise discretion to dispense with any portion of the investigation described in this section as appears necessary in consideration of such factors as the amount of time necessary to complete a full investigation, the nature of the proceeding, and the public interest. After investigation, the case may be disposed of through informal methods such as withdrawal, dismissal, or settlement; or the case may necessitate formal methods of disposition. Some of the informal methods of handling unfair labor practice cases will be stated first.

§ 101.5 Withdrawal of charges.

If investigation reveals that there has been no violation of the National Labor Relations Act or the evidence is insufficient to substantiate the charge, the Regional Director recommends withdrawal of the charge by the person who filed. Withdrawal may also be requested on the initiative of the complainant. If the complainant accepts the recommendation of the Regional

Director or requests withdrawal, the respondent is immediately notified of the withdrawal of the charge.

§ 101.6 Dismissal of charges and appeals to the General Counsel.

If the complainant refuses to withdraw the charge as recommended, the Regional Director dismisses the charge. The Regional Director thereupon informs the parties of this section, together with a simple statement of the grounds therefor, and the complainant's right of appeal to the General Counsel in Washington, DC, within 14 days. If the complainant appeals to the General Counsel, the entire file in the case is sent to Washington, DC, where the case is fully reviewed by the General Counsel with staff assistance. Oral presentation of the appeal issues may be permitted a party on timely written request, in which event the other parties are notified and afforded a like opportunity at another appropriate time. Following such review, the General Counsel may sustain the Regional Director's dismissal, stating the grounds of affirmance, or may direct the Regional Director to take further action.

§ 101.7 Settlements.

Before any complaint is issued or other formal action taken, the Regional Director affords an opportunity to all parties for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit. Normally prehearing conferences are held, the principal purpose of which is to discuss and explore such submissions and proposals of adjustment. The Regional Office provides Board-prepared forms for such settlment agreements, as well as printed notices for posting by the respondent. These agreements, which are subject to the approval of the Regional Director, provide for an appeal to the General Counsel, as described in §101.6, by a complainant who will not join in a settlement or adjustment deemed adequate by the Regional Director. Proof of compliance is obtained by the Regional Director before the case is closed. If the respondent fails to perform the obligations under the informal agreement, the Regional Director may determine to institute formal proceedings.

§ 101.8 Complaints.

If the charge appears to have merit and efforts to dispose of it by informal adjustment are unsuccessful, the Regional Director institutes formal action by issuance of a complaint and notice of hearing. In certain types of cases, involving novel and complex issues, the Regional Director, at the discretion of the General Counsel, must submit the case for advice from the General Counsel before issuing a complaint. The complaint, which is served on all parties, sets forth the facts upon which the Board bases its jurisidiction and the facts relating to the alleged violations of law by the respondent. The respondent must file an answer to the complaint within 14 days of its receipt, setting forth a statement of its defense.

§ 101.9 Settlement after issuance of complaint.

(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or commenced, the attorney in charge of the case and the Regional Director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the Agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, DC. In such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for

the entry of a judgment by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the Regional Director, who has authority to withdraw the complaint before the hearing (§ 102.18), may conclude that an informal settlement agreement of the type described in § 101.7 is appropriate. Such agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

(c)(1) If after issuance of a complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the Regional Director, the respondent, and any other parties whose consent may be required, the Regional Director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 7 days after service of these documents, the charging party may file with the Regional Director a written statement of any objections to the proposed settlement. Such objections will be considered by the Regional Director in determining whether to approve the proposed settlement. If the settlement is approved by the Regional Director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

(2) If the settlement agreement approved by the Regional Director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the Regional Director's written statements are submitted to Washington, DC, where they are reviewed by the General Counsel. If the General Counsel decides to approve the settlement agreement, the charging party is so informed and the agreement and accompanying documents are submitted to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, DC, a further statement in support of objections to the settlement agreement.

(3) If the settlement agreement approved by the Regional Director is an informal one, providing for the withdrawal of the complaint, the charging party may appeal the Regional Director's action to the General Counsel, as provided in § 102.19 of the Board's Rules and Regulations.

(d)(1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in § 102.26.

(e)(1) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court judgment are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a settlement stipulation providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order pursuant to section 10 of the National Labor Relations Act.

(2) In the event the respondent fails to comply with the terms of an informal settlement agreement, the Regional Director may set the agreement aside and institute further proceedings.

§ 101.10 Hearings.

(a) Except in extraordinary situations the hearing is open to the public and usually conducted in the Region where the charge originated. A duly designated administrative law judge presides over the hearing. The Government's case is conducted by an attorney attached to the Board's Regional Office, who has the responsibility of presenting the evidence in support of

the complaint. The rules of evidence applicable in the district courts of the United States under the Rules of Civil Procedure adopted by the Supreme Court are, so far as practicable, controlling. Counsel for the General Counsel, all parties to the proceeding, and the administrative law judge have the power to call, examine, and cross-examine witnesses and to introduce evidence into the record. They may also submit briefs, engage in oral argument, and submit proposed findings and conclusions to the administrative law judge. The attendance and testimony of witnesses and the production of evidence material to any matter under investigation may be compelled by subpoena.

(b) The functions of all administrative law judges and other Board agents or employees participating in decisions in conformity with section 8 of the Administrative Procedure Act (5 U.S.C. 557) are conducted in an impartial manner and any such administrative law judge, agent, or employee may at any time withdraw if he or she deems himself or herself disqualified because of bias or prejudice. The Board's attorney has the burden of proof of violations of section 8 of the National Labor Relations Act and section 222(f) of the Telegraph Merger Act. In connection with hearings subject to the provisions of section 7 of the Administrative Procedure Act (5 U.S.C. 556):

(1) No sanction is imposed or rule or order issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the preponderance of the reliable, probative, and substantial evidence.

(2) Every party has the right to present its case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(3) Where any decision rests on official notice of a material fact not appearing in the evidence in the record, any party is on timely request afforded a reasonable opportunity to show the contrary.

(4) Subject to the approval of the administrative law judge, all parties to the proceeding voluntarily may enter into a stipulation dispensing with a verbatim written transcript of record of the oral testimony adduced at the hearing and providing for the waiver by the respective parties of their right to file with the Board exceptions to the findings of fact (but not to conclusions of law or recommended orders) in the administrative law judge's decision.

§ 101.11 Administrative law judge's decision.

(a) At the conclusion of the hearing the administrative law judge prepares a decision stating findings of fact and conclusions, as well as the reasons for the determinations on all material issues, and making recommendations as to action which should be taken in the case. The administrative law judge may recommend dismissal or sustain the complaint, in whole or in part, and recommend that the respondent cease and desist from the unlawful acts found and take action to remedy their effects.

(b) The administrative law judge's decision is filed with the Board in Washington, DC, and copies are simultaneously served on each of the parties. At the same time the Board, through its Executive Secretary, issues and serves on each of the parties an order transferring the case to the Board. The parties may accept and comply with the administrative law judge's recommended order, which, in the absence of exceptions, shall become the order of the Board. Or, the parties or counsel for the Board may file exceptions to the administrative law judge's decision with the Board. Whenever any party files exceptions, any other party may file an answering brief limited to questions raised in the exceptions and/or may file cross-exceptions relating to any portion of the administrative law judge's decision. Cross-exceptions may be filed only by a party who has not previously filed exceptions. Whenever any party files cross-exceptions, any other party may file an answering brief to the cross-exceptions. The parties may request permission to appear and argue orally before the Board in Washington, DC. They may also submit proposed findings and conclusions to the Board.

§ 101.12 Board decision and order.

(a) If any party files exceptions to the administrative law judge's decision, the Board, with the assistance of the staff counsel to each Board Member who function in much the same manner as law clerks do for judges, reviews the entire record, including the administrative law judge's decision and recommendations, the exceptions thereto, the complete transcript of evidence, and the exhibits, briefs, and arguments. The Board does not consult with members of the administrative law judge's staff of the division of judges or with any agent of the General Counsel in its deliberations. It then issues its decision and order in which it may adopt, modify, or reject the findings and recommendations of the administrative law judge. The decision and order contains detailed findings of fact, conclusions of law, and basic reasons for decision on all material issues raised, and an order either dismissing the complaint in whole or in part or requiring the respondent to cease and desist from its unlawful practices and to take appropriate affirmative action.

(b) If no exceptions are filed, the administrative law judge's decision and recommended order automatically become the decision and order of the Board pursuant to section 10(c) of the Act. All objections and exceptions, whether or not previously made during or after the hearing, are deemed waived for all purposes.

§ 101.13 Compliance with Board decision and order.

(a) Shortly after the Board's decision and order is issued the Director of the Regional Office in which the charge was filed communicates with the respondent for the purpose of obtaining compliance. Conferences may be held to arrange the details necessary for compliance with the terms of the order.

(b) If the respondent effects full compliance with the terms of the order, the Regional Director submits a report to that effect to Washington, DC, after which the case may be closed. Despite compliance, however, the Board's order is a continuing one; therefore, the closing of a case on compliance is necessarily conditioned upon the continued observance of that order; and in some cases it is deemed desirable, notwithstanding compliance, to implement the order with an enforcing court judgment. Subsequent violations of the order may become the basis of further proceedings.

§ 101.14 Judicial review of Board decision and order.

If the respondent does not comply with the Board's order, or the Board deems it desirable to implement the order with a court judgment, the Board may petition the appropriate Federal court for enforcement. Or, the respondent or any person aggrieved by a final order of the Board may petition the circuit court of appeals to review and set aside the Board's order. If a petition for review is filed, the respondent or aggrieved person must ensure that the Board receives, by service upon its Deputy Associate General Counsel of the Appellate Court Branch, a court-stamped copy of the petition with the date of filing. Upon such review or enforcement proceedings, the court reviews the record and the Board's findings and order and sustains them if they are in accordance with the requirements of law. The court may enforce, modify, or set aside in whole or in part the Board's findings and order, or it may remand the case to the Board for further proceedings as directed by the court. Following the court's judgment, either the Government or the private party may petition the Supreme Court for review upon writ of certiorari. Such applications for review to the Supreme Court are handled by the Board through the Solicitor General of the United States.

[53 FR 24440, June 29, 1988]

§ 101.15 Compliance with court judgment.

After a Board order has been enforced by a court judgment, the Board has the responsibility of obtaining compliance with that judgment. Investigation is made by the Regional Office of the respondent's efforts to comply. If it finds that the respondent has failed to live up to the terms of the court's judgment, the General Counsel may, on behalf of the Board, petition the court to hold the respondent in contempt of

court. The court may order immediate remedial action and impose sanctions and penalties.

§ 101.16 Backpay proceedings.

(a) After a Board order directing the payment of backpay has been issued or after enforcement of such order by a court judgment, if informal efforts to dispose of the matter prove unsuccessful, the Regional Director then has discretion to issue a ''backpay specification'' in the name of the Board and a notice of hearing before an administrative law judge, both of which are served on the parties involved. The specification sets forth computations showing gross and net backpay due and any other pertinent information. The respondent must file an answer within 21 days of the receipt of the specification, setting forth a particularized statement of its defense.

(b) In the alternative, the Regional Director, under the circumstances specified above, may issue and serve on the parties a notice of hearing only, without a specification. Such notice contains, in addition to the time and place of hearing before an administrative law judge, a brief statement of the matters in controversy.

(c) The procedure before the administrative law judge or the Board, whether initiated by the ''backpay specification'' or by notice of hearing without backpay specification, is substantially the same as that described in §§ 101.10 to 101.14, inclusive.

Subpart C [Reserved]

Subpart D—Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

§ 101.22 Initiation and investigation of a case under section 8(b)(7).

(a) The investigation of an alleged violation of section 8(b)(7) of the Act is initiated by the filing of a charge. The manner of filing such charge and the contents thereof are the same as described in § 101.2. In some cases, at the time of the investigation of the charge, there may be pending a representation petition involving the employees of the employer named in the charge. In those cases, the results of the investigation of the charge will determine the cause of the petition.

(b) The investigation of the charge is conducted in accordance with the provisions of § 101.4, insofar as they are applicable. If the investigation reveals that there is merit in the charge, a complaint is issued as described in § 101.8, and an application is made for an injunction under section 10(1) of the Act, as described in § 101.37. If the investigation reveals that there is no merit in the charge, the Regional Director, absent a withdrawal of the charge, dismisses it, subject to appeal to the General Counsel. However, if the investigation reveals that issuance of a complaint may be warranted but for the pendency of a representation petition involving the employees of the employer named in the charge, action on the charge is suspended pending the investigation of the petition as provided in § 101.23.

§ 101.23 Initiation and investigation of a petition in connection with a case under section 8(b)(7).

(a) A representation petition[1] involving the employees of the employer named in the charge is handled under an expedited procedure when the investigation of the charge has revealed that:

(1) The employer's operations affect commerce within the meaning of the Act;

(2) Picketing of the employer is being conducted for an object proscribed by section 8(b)(7) of the Act;

(3) Subparagraph (C) of that section of the Act is applicable to the picketing; and

(4) The petition has been filed within a reasonable period of time not to exceed 30 days from the commencement

[1] The manner of filing of such petition and the contents thereof are the same as described in 29 CFR 102.60 and 102.61 and the statement of the general course of proceedings under Section 9(c) of the Act published in the FEDERAL REGISTER, insofar as they are applicable, except that the petitioner is not required to allege that a claim was made on the employer for recognition or that the union represents a substantial number of employees.

of the picketing. In these circumstances, the member of the regional director's staff to whom the matter has been assigned investigates the petition to ascertain further: the unit appropriate for collective bargaining; and whether an election in that unit would effectuate the policies of the Act.

(b) If, based on such investigation, the regional director determines that an election is warranted, the director may, without a prior hearing, direct that an election be held in an appropriate unit of employees. Any party aggrieved may file a request with the Board for special permission to appeal that action to the Board, but such review, if granted, will not, unless otherwise ordered by the Board, stay the proceeding. If it is determined that an election is not warranted, the director dismisses the petition or makes other disposition of the matter. Should the regional director conclude that an election is warranted, the director fixes the basis of eligibility of voters and the place, date, and hours of balloting. The mechanics of arranging the balloting, the other procedures for the conduct of the election, and the postelection proceedings are the same, insofar as appropriate, as those described in 29 CFR 102.69 and the statement of the general course of proceedings under Section 9(c) of the Act published in the FEDERAL REGISTER, except that the regional director's rulings on any objections to the conduct of the election or challenged ballots are final and binding unless the Board, on an application by one of the parties, grants such party special permission to appeal from the regional director's rulings. The party requesting such review by the Board must do so promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the regional director. Neither the request for review by the Board nor the Board's grant of such review operates as a stay of any action taken by the regional director, unless specifically so ordered by the Board. If the Board grants permission to appeal, and it appears to the Board that substantial and material factual issues have been presented with respect to the objections to the conduct of the election or challenged ballots, it may order that a hearing be held on such issues or take other appropriate action.

(c) If the regional director believes, after preliminary investigation of the petition, that there are substantial issues which require determination before an election may be held, the director may order a hearing on the issues. This hearing is followed by regional director decision and direction of election, or other disposition. The procedures to be used in connection with such hearing and posthearing proceedings are the same, insofar as they are applicable, as those described in 29 CFR 102.63, 102.64, 102.65, 102.66, 102.67, 102.68, and 102.69, and the statement of the general course.

(d) Should the parties so desire, they may, with the approval of the regional director, resolve the issues as to the unit, the conduct of the balloting, and related matters pursuant to informal consent procedures, as described in 29 CFR 102.62(a) and the statement of the general course.

(e) If a petition has been filed which does not meet the requirements for processing under the expedited procedures, the regional director may process it under the procedures set forth in subpart C of 29 CFR part 102 and the statement of the general course.

[79 FR 74476, Dec. 15, 2014]

§ 101.24 Final disposition of a charge which has been held pending investigation of the petition.

(a) Upon the determination that the issuance of a direction of election is warranted on the petition, the Regional Director, absent withdrawal of the charge, dismisses it subject to an appeal to the General Counsel in Washington, DC.

(b) If, however, the petition is dismissed or withdrawn, the investigation of the charge is resumed, and the appropriate steps described in §101.22 are taken with respect to it.

§ 101.25 Appeal from the dismissal of a petition, or from the refusal to process it under the expedited procedure.

If it is determined after investigation of the representation petition that further proceedings based thereon are not warranted, the regional director, absent withdrawal of the petition, dismisses it, stating the grounds therefor. If it is determined that the petition does not meet the requirements for processing under the expedited procedure, the regional director advises the petitioner of the determination to process the petition under the procedures described in subpart C of 29 CFR part 102 and the statement of the general course. In either event, the regional director informs all the parties of such action, and such action is final, although the Board may grant an aggrieved party permission to appeal from the regional director's action. Such party must request such review promptly, in writing, and state briefly the grounds relied on. Such party must also immediately serve a copy on the other parties, including the regional director. Neither the request for review by the Board, nor the Board's grant of such review, operates as a stay of the action taken by the regional director, unless specifically so ordered by the Board.

[79 FR 74476, Dec. 15, 2014]

Subpart E—Referendum Cases Under Section 9(e) (1) and (2) of the Act

§ 101.26 Initiation of rescission of authority cases.

The investigation of the question as to whether the authority of a labor organization to make an agreement requiring membership in a labor organization as a condition of employment is to be rescinded is initiated by the filing of a petition by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization. The petition must be in writing and signed, and either must be notarized or must contain a declaration by the person signing it, under the penalties of the Criminal Code, that its contents are true and correct to the best of his knowledge and belief. It is filed with the regional director for the Region in which the alleged appropriate bargaining unit exists or, if the bargaining unit exists in two or more Regions, with the regional director for any of such Regions. The blank form, which is supplied by the Regional Office upon request or is available online, provides, among other things, for a description of the bargaining unit covered by the agreement, the approximate number of employees involved, the names of any other labor organizations which claim to represent the employees, the petitioner's position on the type, date(s), time(s), and location(s) of the election sought, and the name of, and contact information for, the individual who will serve as the petitioner's representative. The petition may be filed by facsimile or electronically. The petitioner must supply with the petition evidence of authorization from the employees.

[79 FR 74476, Dec. 15, 2014]

§ 101.27 Investigation of petition; withdrawals and dismissals.

(a) Upon receipt of the petition in the Regional Office, it is filed, docketed, and assigned to a member of the staff, usually a field examiner, for investigation. The field examiner conducts an investigation to ascertain:

(1) Whether the employer's operations affect commerce within the meaning of the Act,

(2) Whether there is in effect an agreement requiring as a condition of employment membership in a labor organization,

(3) Whether the petitioner has been authorized by at least 30 percent of the employees to file such a petition, and

(4) Whether an election would effectuate the policies of the Act by providing for a free expression of choice by the employees.

The evidence of designation submitted by the petitioner, usually in the form of cards signed by individual employees authorizing the filing of such a petition, is checked to determine the proportion of employees who desire rescission.

(b) The petitioner may on its own initiative request the withdrawal of the petition if the investigation discloses that an election is inappropriate, because, among other possible reasons, the petitioner's card-showing is insufficient to meet the 30-percent statutory requirement referred to in subsection (a) of this section.

(c) For the same or similar reasons the Regional Director may request the petitioner to withdraw its petition. If the petitioner, despite the Regional Director's recommendation, refuses to withdraw the petition, the Regional Director then dismisses the petition, stating the grounds for his dismissal and informing the petitioner of the right of appeal to the Board in Washington, DC. The petitioner may within 14 days appeal from the Regional Director's dismissal by filing such request with the Board in Washington, DC. The request shall contain a complete statement setting forth the facts and reasons upon which the request is made. After a full review of the file with the assistance of its staff, the Board may sustain the dismissal, stating the grounds for its affirmance, or may direct the Regional Director to take further action.

§ 101.28 Consent agreements providing for election.

(a) The Board makes available to the parties three types of informal consent procedures through which authorization issues can be resolved without resort to formal procedures. These informal agreements are the consent election agreement with final regional director determinations of post-election disputes, the stipulated election agreement with discretionary Board review, and the full consent election agreement with final regional director determinations of pre- and post-election disputes. Forms for use in these informal procedures are available in the Regional Offices.

(b) The procedures to be used in connection with a consent-election agreement with final regional director determinations of post-election disputes, a stipulated election agreement with discretionary Board review, and a full consent-election agreement with final regional director determinations of pre- and post-election disputes are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course in connection with similar agreements in representation cases under Section 9(c) of the Act, except that no provision is made for runoff elections.

[79 FR 74477, Dec. 15, 2014]

§ 101.29 Procedure respecting election conducted without hearing.

If the regional director determines that the case is an appropriate one for election without formal hearing, an election is conducted as quickly as possible among the employees and upon the conclusion of the election the regional director makes available to the parties a tally of ballots. The parties, however, have an opportunity to make appropriate challenges and objections to the conduct of the election and they have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots, as is described in subpart C of 29 CFR part 102 and the statement of the general course in connection with the post-election procedures in representation cases under Section 9(c) of the Act, except that no provision is made for a runoff election. If no such objections are filed within 7 days and if the challenged ballots are insufficient in number to affect the results of the election, the regional director issues to the parties a certification of the results of the election, with the same force and effect as if issued by the Board.

[79 FR 74477, Dec. 15, 2014]

§ 101.30 Formal hearing and procedure respecting election conducted after hearing.

(a) The procedures are the same as those described in subpart C of 29 CFR part 102 and the statement of the general course respecting representation cases arising under Section 9(c) of the Act insofar as applicable. If the preliminary investigation indicates that there are substantial issues which require determination before an appropriate election may be held, the regional director will institute formal proceedings by issuance of a notice of

hearing on the issues which, after hearing, is followed by regional director decision and direction of election or dismissal. The notice of hearing together with a copy of the petition is served on the petitioner, the employer, and any other known persons or labor organizations claiming to have been designated by employees involved in the proceeding.

(b) The hearing, usually open to the public, is held before a hearing officer who normally is an attorney or field examiner attached to the Regional Office but may be another qualified Agency official. The hearing, which is nonadversary in character, is part of the investigation in which the primary interest of the Board's agents is to insure that the record contains as full a statement of the pertinent facts as may be necessary for determination of the case. The parties are afforded full opportunity to present their respective positions and to produce the significant facts in support of their contentions that are relevant to the issue of whether the Board should conduct an election to determine whether the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8(a)(3) of the Act, desire that such authority be rescinded. In most cases a substantial number of the relevant facts are undisputed and stipulated. The parties are permitted to argue orally on the record before the hearing officer.

(c) Upon the close of the hearing, the entire record in the case is then forwarded to the regional director, together with an informal analysis by the hearing officer of the issues and the evidence but without recommendations. Post-hearing briefs are filed only upon special permission of the regional director and within the time and addressing the subjects permitted by the regional director.

(d) The parties have the same rights, and the same procedure is followed, with respect to objections to the conduct of the election and challenged ballots as is described in connection with the postelection procedures in representation cases under Section 9(c) of the Act.

[79 FR 74477, Dec. 15, 2014]

Subpart F—Jurisdictional Dispute Cases Under Section 10(k) of the Act

§ 101.31 Initiation of proceedings to hear and determine jurisdictional disputes under section 10(k).

The investigation of a jurisdictional dispute under section 10(k) is initiated by the filing of a charge, as described in §101.2, by any person alleging a violation of paragraph (4)(D) of section 8(b). As soon as possible after a charge has been filed, the Regional Director serves on the parties a copy of the charge together with a notice of the filing of such charge.

§ 101.32 Investigation of charges; withdrawal of charges; dismissal of charges and appeals to Board.

These matters are handled as described in §§101.4 to 101.7, inclusive. Cases involving violation of paragraph (4)(D) of section 8(b) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to section 10(1) of the Act are given priority over all other cases in the office except other cases under section 10(1) of the Act and cases of like character.

§ 101.33 Initiation of formal action; settlement.

If, after investigation, it appears that the Board should determine the dispute under section 10(k) of the Act, the Regional Director issues a notice of hearing which includes a simple statement of issues involved in the jurisdictional dispute and which is served on all parties to the dispute out of which the unfair labor practice is alleged to have arisen. The hearing is scheduled for not less than 10 days after service of the notice of the filing of the charge, except that in cases involving the national defense, agreement will be sought for scheduling of hearing on less notice. If the parties present to the Regional Director satisfactory evidence that they have adjusted the dispute, the Regional Director withdraws the notice of hearing and either permits the withdrawal of the charge or dismisses the charge. If the parties submit to the Regional Director satisfactory evidence that they have agreed upon methods for the voluntary adjustment

of the dispute, the Regional Director shall defer action upon the charge and shall withdraw the notice of hearing if issued. The parties may agree on an arbitrator, a proceeding under section 9(c) of the Act, or any other satisfactory method to resolve the dispute. If the agreed-upon method for voluntary adjustment results in a determination that employees represented by a charged union are entitled to perform the work in dispute, the Regional Director dismisses the charge against that union irrespective of whether the employer complies with that determination.

§ 101.34 Hearing.

If the parties have not adjusted the dispute or agreed upon methods of voluntary adjustment, a hearing, usually open to the public, is held before a hearing officer. The hearing is nonadversary in character, and the primary interest of the hearing officer is to insure that the record contains as full a statement of the pertinent facts as may be necessary for a determination of the issues by the Board. All parties are afforded full opportunity to present their respective positions and to produce evidence in support of their contentions. The parties are permitted to argue orally on the record before the hearing officer. At the close of the hearing, the case is transmitted to the Board for decision. The hearing officer prepares an analysis of the issues and the evidence, but makes no recommendations in regard to resolution of the dispute.

§ 101.35 Procedure before the Board.

The parties have 7 days after the close of the hearing, subject to any extension that may have been granted, to file briefs with the Board and to request oral argument which the Board may or may not grant. However, in cases involving the national defense and so designated in the notice of hearing, the parties may not file briefs but after the close of the evidence may argue orally upon the record their respective contentions and positions, except that for good cause shown in an application expeditiously made to the Board in Washington, DC, after the close of the hearing, the Board may grant leave to file briefs in such time as it shall specify. The Board then considers the evidence taken at the hearing and the hearing officer's analysis together with any briefs that may be filed and the oral argument, if any, and issues its determination or makes other disposition of the matter.

§ 101.36 Compliance with determination; further proceedings.

After the issuance of determination by the Board, the Regional Director in the Region in which the proceeding arose communicates with the parties for the purpose of ascertaining their intentions in regard to compliance. Conferences may be held for the purpose of working out details. If satisfied that the parties are complying with the determination, the Regional Director dismisses the charge. If not satisfied that the parties are complying, the Regional Director issues a complaint and notice of hearing, charging violation of section 8(b)(4)(D) of the Act, and the proceeding follows the procedure outlined in §§101.8 to 101.15, inclusive. However, if the Board determines that employees represented by a charged union are entitled to perform the work in dispute, the Regional Director dismisses the charge against that union irrespective of whether the employer complies with the determination.

Subpart G—Procedure Under Section 10 (j) and (l) of the Act

§ 101.37 Application for temporary relief or restraining orders.

Whenever it is deemed advisable to seek temporary injunctive relief under section 10(j) or whenever it is determined that a complaint should issue alleging violation of section 8(b)(4) (A), (B), or (C), or section 8(e), or section 8(b)(7), or whenever it is appropriate to seek temporary injunctive relief for a violation of section 8(b)(4)(D), the officer or regional attorney to whom the matter has been referred will make application for appropriate temporary relief or restraining order in the district court of the United States within which the unfair labor practice is alleged to have occurred or within which the party sought to be enjoined resides or transacts business, except that such

officer or regional attorney will not apply for injunctive relief under section 10(l) with respect to an alleged violation of section 8(b)(7) if a charge under section 8(a)(2) has been filed and, after preliminary investigation, there is reasonable cause to believe that such charge is true and a complaint should issue.

§ 101.38 Change of circumstances.

Whenever a temporary injunction has been obtained pursuant to section 10(j) and thereafter the administrative law judge hearing the complaint, upon which the determination to seek such injunction was predicated, recommends dismissal of such complaint, in whole or in part, the officer or regional attorney handling the case for the Board suggests to the district court which issued the temporary injunction the possible change in circumstances arising out of the findings and recommendations of the administrative law judge.

Subpart H—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

§ 101.39 Initiation of advisory opinion case.

(a) The question of whether the Board will assert jurisdiction over a labor dispute which is the subject of a proceeding in an agency or court of a State or territory is initiated by the filing of a petition with the Board. This petition may be filed only if:

(1) A proceeding is currently pending before such agency or court;

(2) The petitioner is the agency or court itself; and

(3) The relevant facts are undisputed or the agency or court has already made the relevant factual findings.

(b) The petition must be in writing and signed. It is filed with the Executive Secretary of the Board in Washington, DC. No particular form is required, but the petition must be properly captioned and must contain the allegations required by section 102.99 of the Board's Rules and Regulations. None of the information sought may relate to the merits of the dispute. The petition may be withdrawn at any time before the Board issues its advisory opinion determining whether it would or would not assert jurisdiction on the basis of the facts before it.

[61 FR 65182, Dec. 11, 1996; 62 FR 52381, Oct. 7, 1997]

§ 101.40 Proceedings following the filing of the petition.

(a) A copy of the petition is served on all other parties and the appropriate Regional Director by the petitioner.

(b) Interested persons may request intervention by a written motion to the Board. Such intervention may be granted at the discretion of the Board.

(c) Parties other than the petitioner may reply to the petition in writing, admitting or denying any or all of the matters asserted therein.

(d) No briefs shall be filed except upon special permission of the Board.

(e) After review of the entire record, the Board issues an advisory opinion as to whether the facts presented would or would not cause it to assert jurisdiction over the case if the case had been originally filed before it. The Board will limit its advisory opinion to the jurisdictional issue confronting it, and will not presume to render an opinion on the merits of the case or on the question of whether the subject matter of the dispute is governed by the Labor Management Relations Act.

§ 101.41 Informal procedures for obtaining opinions on jurisdictional questions.

Although a formal petition is necessary to obtain an advisory opinion from the Board, other avenues are available to persons seeking informal and, in most cases, speedy opinions on jurisdictional issues. In discussion of jurisdictional questions informally with Regional Office personnel, information and advice concerning the Board's jurisdictional standards may be obtained. Such practices are not intended to be discouraged by the rules providing for formal advisory opinions by the Board, although the opinions expressed by such personnel are not to be regarded as binding upon the Board or the General Counsel.

§ 101.42 Procedures for obtaining declaratory orders of the Board.

(a) When both an unfair labor practice charge and a representation petition are pending concurrently in a Regional Office, appeals from a Regional Director's dismissals thereof do not follow the same course. Appeal from the dismissal of a charge must be made to the General Counsel, while appeal from dismissal of a representation petition may be made to the Board. To obtain uniformity in disposing of such cases on jurisdictional grounds at the same stage of each proceeding, the General Counsel may file a petition for a declaratory order of the Board. Such order is intended only to remove uncertainty with respect to the question of whether the Board would assert jurisdiction over the labor dispute.

(b) A petition to obtain a declaratory Board order may be filed only by the General Counsel. It must be in writing and signed. It is filed with the Executive Secretary of the Board in Washington, DC. No particular form is required, but the petition must be properly captioned and must contain the allegations required by §102.106 of the Board's Rules and Regulations. None of the information sought relates to the merits of the dispute. The petition may be withdrawn any time before the Board issues its declaratory order deciding whether it would or would not assert jurisdiction over the cases.

§ 101.43 Proceedings following the filing of the petition.

(a) A copy of the petition is served on all other parties.

(b) Interested persons may request intervention by a written motion to the Board. Such intervention may be granted at the discretion of the Board.

(c) All other parties may reply to the petition in writing.

(d) Briefs may be filed.

(e) After review of the record, the Board issues a declaratory order as to whether it will assert jurisdiction over the cases, but it will not render a decision on the merits at this stage of the cases.

(f) The declaratory Board order will be binding on the parties in both cases.

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AUTHORITY: 29 U.S.C. 151, 156. Section 102.117 also issued under 5 U.S.C. 552(a)(4)(A), and § 102.119 also issued under 5 U.S.C. 552a(j) and (k). Sections 102.143 through 102.155 also issued under 5 U.S.C. 504(c)(1).

SOURCE: 24 FR 9102, Nov. 7, 1959, unless otherwise noted.

Subpart A—Definitions

§ 102.1 Terms defined in Section 2 of the Act.

(a) *Definition of terms*. The terms *person*, *employer*, *employee*, *representative*, *labor organization*, *commerce*, *affecting commerce*, and *unfair labor practice* as used herein have the meanings set forth in Section 2 of the National Labor Relations Act, as amended by title I of the Labor Management Relations Act, 1947.

(b) *Act, Board, and Board agent*. The term *Act* means the National Labor Relations Act, as amended. The term *Board* means the National Labor Relations Board and must include any group of three or more Members designated pursuant to Section 3(b) of the Act. The term *Board agent* means any Member, agent, or agency of the Board, including its General Counsel.

(c) *General Counsel*. The term *General Counsel* means the General Counsel under Section 3(d) of the Act.

(d) *Region and Subregion*. The term *Region* means that part of the United States or any territory thereof fixed by the Board as a particular Region. The term *Subregion* means that area within a Region fixed by the Board as a particular *Subregion*.

(e) *Regional Director, Officer-in-Charge, and Regional Attorney*. The term *Regional Director* means the agent designated by the Board as the Regional Director for a particular Region, and also includes any agent designated by the Board as Officer-in-Charge of a Subregional office, but the Officer-in-Charge must have only such powers, duties, and functions appertaining to Regional Directors as have been duly delegated to such Officer-in-Charge. The term *Regional Attorney* means the attorney designated as Regional Attorney for a particular Region.

(f) *Administrative Law Judge and Hearing Officer*. The term *Administrative Law Judge* means the agent of the Board conducting the hearing in an unfair labor practice proceeding. The term *Hearing Officer* means the agent of the Board conducting the hearing in a proceeding under Section 9 or in a dispute proceeding under Section 10(k) of the Act.

(g) *State*. The term *State* includes the District of Columbia and all States, territories, and possessions of the United States.

(h) *Party*. The term *party* means the Regional Director in whose Region the proceeding is pending and any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under the Act, any person named as Respondent, as employer, or as party to a contract in any proceeding under the Act, and any labor organization alleged to be dominated, assisted, or supported in violation of Section 8(a)(1) or 8(a)(2) of the Act; but nothing herein should be construed to prevent the Board or its designated agent from limiting any party to participate in the proceedings to the extent of the party's interest only.

(i) *Business day*. The term *business day* means days that Agency offices are open normal business operating hours, which is Monday through Friday, excluding Federal holidays. A list of Federal holidays can be found at

www.opm.gov/policy-data-oversight/snow-dismissal-procedures/federal-holidays/.

[82 FR 11751, Feb. 24, 2017, as amended at 84 FR 69588, Dec. 18, 2019]

Subpart B—Service and Filings

SOURCE: 82 FR 11751, Feb. 24, 2017, unless otherwise noted.

§ 102.2 Time requirements for filings with the Agency.

(a) Time computation. In computing any period of time prescribed or allowed by these Rules, the day of the act, event, or default after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it does not fall on a business day, in which event the period runs until the next Agency business day. When the period of time prescribed or allowed is less than 7 days, only business days are included in the computation. Except as otherwise provided, in computing the period of time for filing a responsive document, the designated period begins to run on the date the preceding document was required to be received by the Agency, even if the preceding document was filed prior to that date.

(b) *Timeliness of filings.* If there is a time limit for the filing of a motion, brief, exception, request for extension of time, or other paper in any proceeding, such document must be received by the Board or the officer or agent designated to receive such matter on or before the last day of the time limit for such filing or the last day of any extension of time that may have been granted. Non E-Filed documents must be received before the official closing time of the receiving office (see *www.nlrb.gov* setting forth the official business hours of the Agency's several offices). E-Filed documents must be received by 11:59 p.m. of the time zone of the receiving office. In construing this section of the Rules, the Board will accept as timely filed any document which is postmarked on the day before (or earlier than) the due date; documents which are postmarked on or after the due date are untimely. ''Postmarking'' must include timely depositing the document with a delivery service that will provide a record showing that the document was given to the delivery service in sufficient time for delivery by the due date, but in no event later than the day before the due date. However, the following documents must be received on or before the last day for filing:

(1) Charges filed pursuant to Section 10(b) of the Act (see also § 102.14).

(2) Applications for awards and fees and other expenses under the Equal Access to Justice Act.

(3) Petitions to revoke subpoenas.

(4) Requests for extensions of time to file any document for which such an extension may be granted.

(c) *Extension of time to file.* Except as otherwise provided, a request for an extension of time to file a document must be filed no later than the date on which the document is due. Requests for extensions of time filed within 3 days of the due date must be grounded upon circumstances not reasonably foreseeable in advance. Requests for extension of time must be in writing and must be served simultaneously on the other parties. Parties are encouraged to seek agreement from the other parties for the extension, and to indicate the other parties' position in the extension of time request. An opposition to a request for an extension of time should be filed as soon as possible following receipt of the request.

(d) *Late-filed documents.* (1) The following documents may be filed within a reasonable time after the time prescribed by these Rules only upon good cause shown based on excusable neglect and when no undue prejudice would result:

(i) In unfair labor practice proceedings, motions, exceptions, answers to a complaint or a backpay specification, and briefs; and

(ii) In representation proceedings, exceptions, requests for review, motions, briefs, and any responses to any of these documents.

(2) A party seeking to file such documents beyond the time prescribed by these Rules must file, along with the document, a motion that states the grounds relied on for requesting permission to file untimely. The specific facts relied on to support the motion must be set forth in affidavit form and

sworn to by individuals with personal knowledge of the facts. The time for filing any document responding to the untimely document will not commence until the date a ruling issues accepting the untimely document. In addition, cross-exceptions are due within 14 days, or such further period as the Board may allow, from the date a ruling issues accepting the untimely filed documents.

[82 FR 11751, Feb. 24, 2017, as amended at 84 FR 69588, Dec. 18, 2019]

§ 102.3 Date of service.

Where service is made by mail, private delivery service, or email, the date of service is the day when the document served is deposited in the United States mail, is deposited with a private delivery service that will provide a record showing the date the document was tendered to the delivery service, or is sent by email, as the case may be. Where service is made by personal delivery or facsimile, the date of service will be the date on which the document is received.

§ 102.4 Methods of service of process and papers by the Agency; proof of service.

(a) *Method of service for certain Agency-issued documents.* Complaints and compliance specifications (including accompanying notices of hearing, and amendments to either complaints or to compliance specifications), final orders of the Board in unfair labor practice cases and Administrative Law Judges' decisions must be served upon all parties personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by email as appropriate, or by any other method of service authorized by law.

(b) *Service of subpoenas.* Subpoenas must be served upon the recipient personally, by registered or certified mail, by leaving a copy at the principal office or place of business of the person required to be served, by private delivery service, or by any other method of service authorized by law.

(c) *Service of other Agency-issued documents.* Other documents may be served by the Agency by any of the foregoing methods as well as by regular mail, private delivery service, facsimile, or email.

(d) *Proof of service.* In the case of personal service, or delivery to a principal office or place of business, the verified return by the serving individual, setting forth the manner of such service, is proof of service. In the case of service by registered or certified mail, the return post office receipt is proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(e) *Service upon representatives of parties.* Whenever these Rules require or permit the service of pleadings or other papers upon a party, a copy must be served on any attorney or other representative of the party who has entered a written appearance in the proceeding on behalf of the party. If a party is represented by more than one attorney or representative, service upon any one of such persons in addition to the party satisfies this requirement. Service by the Board or its agents of any documents upon any such attorney or other representative may be accomplished by any means of service permitted by these Rules, including regular mail.

§ 102.5 Filing and service of papers by parties: Form of papers; manner and proof of filing or service.

(a) *Form of papers to be filed.* All papers filed with the Board, General Counsel, Regional Director, Administrative Law Judge, or Hearing Officer must be typewritten or otherwise legibly duplicated on 8½ by 11-inch plain white paper, and must have margins no less than one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there. Typeface that is single-spaced must not contain more than 10.5 characters per inch, and proportionally-spaced typeface must be 12 point or larger, for both text and footnotes. Condensed text is not permitted. The text must be double-spaced, but headings and footnotes may be single-spaced, and quotations more than two lines long may be indented and single-spaced. Case names must be italicized or underlined. Where any brief filed with the Board exceeds 20 pages, it must contain

a subject index with page references and an alphabetical table of cases and other authorities cited.

(b) *Requests to exceed the page limits.* Requests for permission to exceed the page limits for documents filed with the Board must state the reasons for the requests. Unless otherwise specified, such requests must be filed not less than 10 days prior to the date the document is due.

(c) *E-Filing with the Agency.* Unless otherwise permitted under this section, all documents filed in cases before the Agency must be filed electronically (''E-Filed'') on the Agency's Web site (*www.nlrb.gov*) by following the instructions on the Web site. The Agency's Web site also contains certain forms that parties or other persons may use to prepare their documents for E-Filing. If the document being E-Filed is required to be served on another party to a proceeding, the other party must be served by email, if possible, or in accordance with paragraph (g) of this section. Unfair labor practice charges, petitions in representation proceedings, and showings of interest may be filed in paper format or E-Filed. A party who files other documents in paper format must accompany the filing with a statement explaining why the party does not have access to the means for filing electronically or why filing electronically would impose an undue burden. Notwithstanding any other provision in these Rules, if a document is filed electronically the filer need not also file a hard copy of the document, and only one copy of a document filed in hard copy should be filed. Documents may not be filed with the Agency via email without the prior approval of the receiving office.

(d) *Filing with the Agency by Mail or Delivery.* Documents to be filed with the Board are to be filed with the Office of the Executive Secretary in Washington, DC. Documents to be filed with the Regional Offices are to be filed with the Regional Office handling the case. Documents to be filed with the Division of Judges are to be filed with the Division office handling the matter.

(e) *Filing by fax with the Agency.* Only unfair labor practice charges, petitions in representation proceedings, objections to elections, and requests for extensions of time for filing documents will be accepted by the Agency if faxed to the appropriate office. Other documents may not be faxed. At the discretion of the receiving office, the person submitting a document by fax may be required simultaneously to file the original with the office by overnight delivery service. When filing a charge, a petition in a representation proceeding, or election objections by fax pursuant to this section, receipt of the faxed document by the Agency constitutes filing with the Agency. A failure to timely file or serve a document will not be excused on the basis of a claim that facsimile transmission could not be accomplished because the receiving machine was off-line or busy or unavailable for any other reason.

(f) *Service.* Unless otherwise specified, documents filed with the Agency must be simultaneously served on the other parties to the case including, as appropriate, the Regional Office in charge of the case. Service of documents by a party on other parties may be made personally, or by registered mail, certified mail, regular mail, email (unless otherwise provided for by these Rules), private delivery service, or by fax for documents of or under 25 pages in length. Service of documents by a party on other parties by any other means, including by fax for documents over 25 pages in length, is permitted only with the consent of the party being served. When a party does not have the ability to receive service by email or fax, or chooses not to accept service of a document longer than 25 pages by fax, the other party must be notified personally or by telephone of the substance of the filed document and a copy of the document must be served by personal service no later than the next day, by overnight delivery service, or by fax or email as appropriate. Unless otherwise specified elsewhere in these Rules, service on all parties must be made in the same manner as that used in filing the document with the Board, or in a more expeditious manner. When filing with the Board is done by hand, however, the

other parties must be immediately notified of such action, followed by service of a copy in a manner designed to insure receipt by them by the close of the next business day. The provisions of this section apply to the General Counsel after a complaint has issued, just as they do to any other party, except to the extent that the provisions of §102.4(a) provide otherwise.

(g) *Proof of service.* When service is made by registered or certified mail, the return post office receipt will be proof of service. When service is made by a private delivery service, the receipt from that service showing delivery will be proof of service. However, these methods of proof of service are not exclusive; any sufficient proof may be relied upon to establish service.

(h) *Statement of service.* The person or party filing a document with the Agency must simultaneously file a statement of service. Such statement must include the names of the parties served, the date and manner of service, and the location of service such as mailing address, fax number, or email address as appropriate. The Agency requires proof of service as defined in paragraph (g) of this section only if, subsequent to the receipt of the statement of service, a question is raised with respect to proper service. Failure to make proof of service does not affect the validity of the service.

(i) *Failure to properly serve.* Failure to comply with the requirements of this section relating to timeliness of service on other parties will be a basis for either:

(1) Rejecting the document; or

(2) Withholding or reconsidering any ruling on the subject matter raised by the document until after service has been made and the served party has had reasonable opportunity to respond.

§102.6 Notice to the Administrative Law Judge or Board of supplemental authority.

Pertinent and significant authorities that come to a party's attention after the party's submission to the Administrative Law Judge or the Board has been filed may be brought to the Judge's or the Board's attention by the party promptly filing a letter with the judge or the Board and simultaneously serving all other parties. The body of the letter may not exceed 350 words. A party may file and serve on all other parties a response that is similarly limited. In unfair labor practice cases, the response must be filed no later than 14 days after service of the letter. In representation cases, the response must be filed no later than 7 days after service of the letter. No extension of time will be granted to file the response.

§102.7 Signature on documents E-Filed with the Agency.

Documents filed with the Agency by E-Filing may contain an electronic signature of the filer which will have the same legal effect, validity, and enforceability as if signed manually. The term ''electronic signature'' means an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the document.

§102.8 [Reserved]

Subpart C—Procedure Under Section 10(A) to (I) of the Act for the Prevention of Unfair Labor Practices

SOURCE: 82 FR 11754, Feb. 24, 2017, unless otherwise noted.

§102.9 Who may file; withdrawal and dismissal.

Any person may file a charge alleging that any person has engaged in or is engaging in any unfair labor practice affecting commerce. The charge may be withdrawn, prior to the hearing, only with the consent of the Regional Director with whom such charge was filed; at the hearing and until the case has been transferred to the Board pursuant to §102.45, upon motion, with the consent of the Administrative Law Judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to §102.45, upon motion, with the consent of the Board. Upon withdrawal of any charge, any complaint based thereon will be dismissed by the Regional Director

issuing the complaint, the Administrative Law Judge designated to conduct the hearing, or the Board.

§ 102.10 Where to file.

Except as provided in § 102.33, a charge must be filed with the Regional Director for the Region in which the alleged unfair labor practice has occurred or is occurring. A charge alleging that an unfair labor practice has occurred or is occurring in two or more Regions may be filed with the Regional Director for any of those Regions.

§ 102.11 Signature; sworn; declaration.

Charges must be in writing and signed, and either must be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or must contain a declaration by the person signing it, under the penalty of perjury that its contents are true and correct (see 28 U.S.C. 1746).

§ 102.12 Contents.

(a) A charge must contain the following:

(1) The full name and address of the person making the charge.

(2) If the charge is filed by a labor organization, the full name and address of any national or international labor organization of which it is an affiliate or constituent unit.

(3) The full name and address of the person against whom the charge is made (referred to as the Charged Party).

(4) A brief statement of the conduct constituting the alleged unfair labor practices affecting commerce.

(b) Attachments to charges are not permitted.

§ 102.13 [Reserved]

§ 102.14 Service of charge.

(a) *Charging Party's obligation to serve; methods of service.* Upon the filing of a charge, the Charging Party is responsible for the timely and proper service of a copy upon the person against whom such charge is made. Service may be made personally, or by registered mail, certified mail, regular mail, private delivery service, or facsimile. With the permission of the person receiving the charge, service may be made by email or by any other agreed-upon method.

(b) *Service as courtesy by Regional Director.* The Regional Director will, as a matter of courtesy, serve a copy of the charge on the charged party in person, or send it to the charged party by regular mail, private delivery service, email or facsimile transmission, in any manner provided for in Rules 4 or 5 of the Federal Rules of Civil Procedure, or in any other agreed-upon method. The Region will not be responsible for such service.

(c) *Date of service of charge.* In the case of service of a charge by mail or private delivery service, the date of service is the date of deposit with the post office or other carrier. In the case of delivery by email, the date of service is the date the email is sent. In the case of service by other methods, including hand delivery or facsimile transmission, the date of service is the date of receipt.

§ 102.15 When and by whom issued; contents; service.

After a charge has been filed, if it appears to the Regional Director that formal proceedings may be instituted, the Director will issue and serve on all parties a formal complaint in the Board's name stating the alleged unfair labor practices and containing a Notice of Hearing before an Administrative Law Judge at a fixed place and at a time not less than 14 days after the service of the complaint. The complaint will contain:

(a) A clear and concise statement of the facts upon which the Board asserts jurisdiction, and

(b) A clear and concise description of the acts which are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives who committed the acts.

§ 102.16 Hearing; change of date or place.

(a) Upon the Regional Director's own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may extend the

hearing date or change the hearing place, except that the Regional Director's authority to extend the hearing date is limited to the following circumstances:

(1) Where all parties agree or no party objects to extension of the hearing date;

(2) Where a new charge or charges have been filed which, if meritorious, might be appropriate for consolidation with the pending complaint;

(3) Where negotiations which could lead to settlement of all or a portion of the complaint are in progress;

(4) Where issues related to the complaint are pending before the General Counsel's Division of Advice or Office of Appeals; or

(5) Where more than 21 days remain before the scheduled hearing date.

(b) In circumstances other than those set forth in paragraph (a) of this section, motions to reschedule the hearing may be filed with the Division of Judges in accordance with §102.24(a). When a motion to reschedule has been granted, the Regional Director issuing the complaint retains the authority to order a new hearing date and the responsibility to make the necessary arrangements for conducting the hearing, including its location and the transcription of the proceedings.

§102.17 Amendment.

A complaint may be amended upon such terms as may be deemed just, prior to the hearing, by the Regional Director issuing the complaint; at the hearing and until the case has been transferred to the Board pursuant to §102.45, upon motion, by the Administrative Law Judge designated to conduct the hearing; and after the case has been transferred to the Board pursuant to §102.45, at any time prior to the issuance of an order based thereon, upon motion, by the Board.

§102.18 Withdrawal.

A complaint may be withdrawn before the hearing by the Regional Director on the Director's own motion.

§102.19 Appeal to the General Counsel from refusal to issue or reissue.

(a) If, after the charge has been filed, the Regional Director declines to issue a complaint or, having withdrawn a complaint pursuant to §102.18, refuses to reissue it, the Director will so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for that action. The Charging Party may obtain a review of such action by filing the ''Appeal Form'' with the General Counsel in Washington, DC, and filing a copy of the ''Appeal Form'' with the Regional Director, within 14 days from the service of the notice of such refusal to issue or reissue by the Regional Director, except where a shorter period is provided by §102.81. The Charging Party may also file a statement setting forth the facts and reasons upon which the appeal is based. If such a statement is timely filed, the separate ''Appeal Form'' need not be served. A request for extension of time to file an appeal must be in writing and be received by the General Counsel, and a copy of such request filed with the Regional Director, prior to the expiration of the filing period. Copies of the acknowledgment of the filing of an appeal and of any ruling on a request for an extension of time for filing of the appeal must be served on all parties. Consideration of an appeal untimely filed is within the discretion of the General Counsel upon good cause shown.

(b) Oral presentation in Washington, DC, of the appeal issues may be permitted by a party on written request made within 4 days after service of acknowledgement of the filing of an appeal. In the event such request is granted, the other parties must be notified and afforded, without additional request, a like opportunity at another appropriate time.

(c) The General Counsel may sustain the Regional Director's refusal to issue or reissue a complaint, stating the grounds of the affirmance, or may direct the Regional Director to take further action; the General Counsel's decision must be served on all the parties. A motion for reconsideration of the decision must be filed within 14 days of service of the decision, except as hereinafter provided, and must state with particularity the error requiring reconsideration. A motion for reconsideration based upon newly discovered evidence which has become available only

since the decision on appeal must be filed promptly on discovery of such evidence. Motions for reconsideration of a decision previously reconsidered will not be entertained, except in unusual situations where the moving party can establish that new evidence has been discovered which could not have been discovered by diligent inquiry prior to the first reconsideration.

§ 102.20 Answer to complaint; time for filing; contents; allegations not denied deemed admitted.

The Respondent must, within 14 days from the service of the complaint, file an answer. The Respondent must specifically admit, deny, or explain each of the facts alleged in the complaint, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the Respondent states in the answer that the Respondent is without knowledge, will be deemed to be admitted to be true and will be so found by the Board, unless good cause to the contrary is shown.

§ 102.21 Where to file; service upon the parties; form.

An original and four copies of the answer shall be filed with the Regional Director issuing the complaint. Immediately upon the filing of the answer, Respondent shall serve a copy thereof on the other parties. An answer of a party represented by counsel or non-attorney representative shall be signed by at least one such attorney or non-attorney representative of record in his/her individual name, whose address shall be stated. A party who is not represented by an attorney or non-attorney representative shall sign his/her answer and state his/her address. Except when otherwise specifically provided by rule or statute, an answer need not be verified or accompanied by affidavit. The signature of the attorney or non-attorney party representative constitutes a certificate by him/her that he/she has read the answer; that to the best of his/her knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay. If an answer is not signed or is signed with intent to defeat the purpose of this section, it may be stricken as sham and false and the action may proceed as though the answer had not been served. For a willful violation of this section an attorney or non-attorney party representative may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted.

[82 FR 11754, Feb. 24, 2017, as amended at 82 FR 43697, Sept. 19, 2017]

§ 102.22 Extension of time for filing.

Upon the Regional Director's own motion or upon proper cause shown by any other party, the Regional Director issuing the complaint may by written order extend the time within which the answer must be filed.

§ 102.23 Amendment.

The Respondent may amend its answer at any time prior to the hearing. During the hearing or subsequently, the Respondent may amend the answer in any case where the complaint has been amended, within such period as may be fixed by the Administrative Law Judge or the Board. Whether or not the complaint has been amended, the answer may, in the discretion of the Administrative Law Judge or the Board, upon motion, be amended upon such terms and within such periods as may be fixed by the Administrative Law Judge or the Board.

§ 102.24 Motions; where to file; contents; service on other parties; promptness in filing and response; default judgment procedures; summary judgment procedures.

(a) All motions under §§ 102.22 and 102.29 made prior to the hearing must be filed in writing with the Regional Director issuing the complaint. All motions for default judgment, summary judgment, or dismissal made prior to the hearing must be filed in writing with the Board pursuant to the provisions of § 102.50. All other motions made prior to the hearing, including motions to reschedule the hearing under circumstances other than those set forth in § 102.16(a), must be filed in

writing with the Chief Administrative Law Judge in Washington, DC, with the Associate Chief Judge in San Francisco, California, or with the Associate Chief Judge in New York, New York, as the case may be. All motions made at the hearing must be made in writing to the Administrative Law Judge or stated orally on the record. All motions filed subsequent to the hearing, but before the transfer of the case to the Board pursuant to §102.45, must be filed with the Administrative Law Judge, care of the Chief Administrative Law Judge in Washington, DC, the Associate Chief Judge in San Francisco, or the Associate Chief Judge in New York, as the case may be. Motions must briefly state the order or relief applied for and the grounds therefor. All motions filed with a Regional Director or an Administrative Law Judge as set forth in this paragraph (a) must be filed together with an affidavit of service on the parties. All motions filed with the Board, including motions for default judgment, summary judgment, or dismissal, must be filed with the Executive Secretary of the Board in Washington, DC, together with an affidavit of service on the parties. Unless otherwise provided in these Rules, motions, oppositions, and replies must be filed promptly and within such time as not to delay the proceeding.

(b) All motions for summary judgment or dismissal must be filed with the Board no later than 28 days prior to the scheduled hearing. Where no hearing is scheduled, or where the hearing is scheduled less than 28 days after the date for filing an answer to the complaint or compliance specification, whichever is applicable, the motion must be filed promptly. Upon receipt of the motion, the Board may deny the motion or issue a Notice to Show Cause why the motion may not be granted. If a Notice to Show Cause is issued, the hearing, if scheduled, will normally be postponed indefinitely. If a party desires to file an opposition to the motion prior to issuance of the Notice to Show Cause to prevent postponement of the hearing, it may do so. However, any such opposition must be filed no later than 21 days prior to the hearing. If a Notice to Show Cause is issued, an opposing party may file a response notwithstanding any opposition it may have filed prior to issuance of the notice. The time for filing the response must be fixed in the Notice to Show Cause. Neither the opposition nor the response must be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing. The Board in its discretion may deny the motion where the motion itself fails to establish the absence of a genuine issue, or where the opposing party's pleadings, opposition and/or response indicate on their face that a genuine issue may exist. If the opposing party files no opposition or response, the Board may treat the motion as conceded, and default judgment, summary judgment, or dismissal, if appropriate, will be entered.

(c) A party that has filed a motion may file a reply to an opposition to its motion within 7 days of receipt of the opposition, but in the interest of administrative finality, further responses are not permitted except where there are special circumstances warranting leave to file such a response.

§102.25 Ruling on motions.

An Administrative Law Judge designated by the Chief Administrative Law Judge, the Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge as the case may be, will rule on all prehearing motions (except as provided in §§102.16, 102.22, 102.29, and 102.50), and all such rulings and orders will be issued in writing and a copy served on each of the parties. The Administrative Law Judge designated to conduct the hearing will rule on all motions after opening of the hearing (except as provided in §102.47), and any related orders, if announced at the hearing, will be stated orally on the record; in all other cases, the Administrative Law Judge will issue such rulings and orders in writing and must cause a copy to be served on each of the parties, or will make the ruling in the decision. Whenever the Administrative Law Judge has reserved ruling on any motion, and the proceeding is thereafter transferred to and continued before the Board pursuant to §102.50, the Board must rule on such motion.

§ 102.26 Motions; rulings and orders part of the record; rulings not to be appealed directly to the Board without special permission; requests for special permission to appeal.

All motions, rulings, and orders will become a part of the record, except that rulings on motions to revoke subpoenas will become a part of the record only upon the request of the party aggrieved thereby as provided in §102.31. Unless expressly authorized by the Rules and Regulations, rulings by the Regional Director or by the Administrative Law Judge on motions and/or by the Administrative Law Judge on objections, and related orders, may not be appealed directly to the Board except by special permission of the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to §102.46. Requests to the Board for special permission to appeal from a ruling of the Regional Director or of the Administrative Law Judge, together with the appeal from such ruling, must be filed in writing promptly and within such time as not to delay the proceeding, and must briefly state the reasons special permission may be granted and the grounds relied on for the appeal. The moving party must simultaneously serve a copy of the request for special permission and of the appeal on the other parties and, if the request involves a ruling by an Administrative Law Judge, on the Administrative Law Judge. Any statement in opposition or other response to the request and/or to the appeal must be filed within 7 days of receipt of the appeal, in writing, and must be served simultaneously on the other parties and on the Administrative Law Judge, if any. If the Board grants the request for special permission to appeal, it may proceed immediately to rule on the appeal.

§ 102.27 Review of granting of motion to dismiss entire complaint; reopening of the record.

If any motion in the nature of a motion to dismiss the complaint in its entirety is granted by the Administrative Law Judge before the filing of the Judge's decision, any party may obtain a review of such action by filing a request with the Board in Washington, DC, stating the grounds for review, and, immediately on such filing must serve a copy on the Regional Director and on the other parties. Unless such request for review is filed within 28 days from the date of the order of dismissal, the case will be closed.

§ 102.28 Filing of answer or other participation in proceedings not a waiver of rights.

The right to make motions or to make objections to rulings upon motions will not be deemed waived by the filing of an answer or by other participation in the proceedings before the Administrative Law Judge or the Board.

§ 102.29 Intervention; requisites; rulings on motions to intervene.

Any person desiring to intervene in any proceeding must file a motion in writing or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Prior to the hearing, such a motion must be filed with the Regional Director issuing the complaint; during the hearing, such motion must be made to the Administrative Law Judge. Immediately upon filing a written motion, the moving party must serve a copy on the other parties. The Regional Director will rule upon all such motions filed prior to the hearing, and will serve a copy of the rulings on the other parties, or may refer the motion to the Administrative Law Judge for ruling. The Administrative Law Judge will rule upon all such motions made at the hearing or referred to the Judge by the Regional Director, in the manner set forth in §102.25. The Regional Director or the Administrative Law Judge, as the case may be, may, by order, permit intervention in person, or by counsel or other representative, to such extent and upon such terms as may be deemed proper.

§ 102.30 Depositions; examination of witnesses.

Witnesses must be examined orally under oath at a hearing, except that for good cause shown after the issuance

of a complaint, testimony may be taken by deposition.

(a) Applications to take depositions, including deposition testimony contemporaneously transmitted by videoconference, must be in writing and set forth the reasons why the depositions may be taken, the name, mailing address and email address (if available) of the witness, the matters concerning which it is expected the witness will testify, and the time and place proposed for taking the deposition, together with the name and mailing and email addresses of the person before whom it is desired that the deposition be taken (for the purposes of this section hereinafter referred to as the ''officer''). Such application must be made to the Regional Director prior to the hearing, and to the Administrative Law Judge during and subsequent to the hearing but before transfer of the case to the Board pursuant to §102.45 or §102.50. Such application must be served on the Regional Director or the Administrative Law Judge, as the case may be, and on all other parties, not less than 7 days (when the deposition is to be taken within the continental United States) and 15 days (if the deposition is to be taken elsewhere) prior to the time when it is desired that the deposition be taken. The Regional Director or the Administrative Law Judge, as the case may be, will upon receipt of the application, if in the Regional Director's or Administrative Law Judge's discretion, good cause has been shown, make and serve on the parties an order specifying the name of the witness whose deposition is to be taken and the time, place, and designation of the officer before whom the witness is to testify, who may or may not be the same officer as that specified in the application. Such order will be served on all the other parties by the Regional Director or on all parties by the Administrative Law Judge.

(b) The deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, including any Board agent authorized to administer oaths. If the examination is held in a foreign country, it may be taken before any secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States.

(c) At the time and place specified in the order, the officer designated to take the deposition will permit the witness to be examined and cross-examined under oath by all the parties appearing in person or by contemporaneous transmission through videoconference, and testimony shall be transcribed by the officer or under the officer's direction. All objections to questions or evidence will be deemed waived unless made at the examination. The officer will not have power to rule upon any objections but the objections will be noted in the deposition. The testimony must be subscribed by the witness to the satisfaction of the officer who will attach a certificate stating that the witness was duly sworn by the officer, that the deposition is a true record of the testimony and exhibits given by the witness, and that the officer is not of counsel or attorney to any of the parties nor interested in the event of the proceeding or investigation. If the deposition is not signed by the witness because the witness is ill, dead, cannot be found, or refuses to sign it, such fact will be included in the certificate of the officer and the deposition may then be used as fully as though signed. The officer will immediately deliver the transcript, together with the certificate, in person, by registered or certified mail, or by E-File to the Regional Director or Division of Judges' office handling the matter.

(d) The Administrative Law Judge will rule upon the admissibility of the deposition or any part of the deposition. A party may object to the admissibility of deposition testimony by videoconference on grounds that the taking of the deposition did not comply with appropriate safeguards as set forth in §102.35(c), provided that the party opposing the admission of the deposition raised deficiencies in safeguards at the time of the deposition when corrections might have been made.

(e) All errors or irregularities in compliance with the provisions of this section will be deemed waived unless a motion to suppress the deposition in whole or part is made with reasonable

promptness after such defect is or, with due diligence, might have been ascertained.

(f) If the parties so stipulate in writing, depositions may be taken before any person at any time or place, upon any notice and in any manner, and when so taken may be used like other depositions.

(g) The official record of the deposition testimony will be the official transcript prepared by the officer designated to transcribe the deposition testimony.

[82 FR 11754, Feb. 24, 2017, as amended at 82 FR 43696, 43967, Sept. 19, 2017]

§ 102.31 Issuance of subpoenas; petitions to revoke subpoenas; rulings on claim of privilege against self-incrimination; subpoena enforcement proceedings; right to inspect or copy data.

(a) The Board or any Board Member will, on the written application of any party, issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, electronic data, or documents, in their possession or under their control. The Executive Secretary has the authority to sign and issue any such subpoenas on behalf of the Board or any Board Member. Applications for subpoenas, if filed before the hearing opens, must be filed with the Regional Director. Applications for subpoenas filed during the hearing must be filed with the Administrative Law Judge. Either the Regional Director or the Administrative Law Judge, as the case may be, will grant the application on behalf of the Board or any Member. Applications for subpoenas may be made *ex parte*. The subpoena must show on its face the name and address of the party at whose request the subpoena was issued.

(b) Any person served with a subpoena, whether *ad testificandum* or *duces tecum*, if that person does not intend to comply with the subpoena, must, within 5 business days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke is the date the subpoena is received. All petitions to revoke subpoenas must be served on the party at whose request the subpoena was issued. A petition to revoke, if made prior to the hearing, must be filed with the Regional Director and the Regional Director will refer the petition to the Administrative Law Judge or the Board for ruling. Petitions to revoke subpoenas filed during the hearing must be filed with the Administrative Law Judge. Petitions to revoke subpoenas filed in response to a subpoena issued upon request of the Agency's Contempt, Compliance, and Special Litigation Branch must be filed with that Branch, which will refer the petition to the Board for ruling. Notice of the filing of petitions to revoke will be promptly given by the Regional Director, the Administrative Law Judge, or the Contempt, Compliance and Special Litigation Branch, as the case may be, to the party at whose request the subpoena was issued. The Administrative Law Judge or the Board, as the case may be, will revoke the subpoena if in their opinion the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Administrative Law Judge or the Board, as the case may be, will make a simple statement of procedural or other grounds for the ruling on the petition to revoke. The petition to revoke any opposition to the petition, response to the opposition, and ruling on the petition will not become part of the official record except upon the request of the party aggrieved by the ruling, at an appropriate time in a formal proceeding rather than at the investigative stage of the proceeding.

(c) Upon refusal of a witness to testify, the Board may, with the approval of the Attorney General of the United States, issue an order requiring any individual to give testimony or provide other information at any proceeding before the Board if, in the judgment of the Board:

(1) The testimony or other information from such individual may be necessary to the public interest; and

(2) Such individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination. Requests for the issuance of such an order by the Board may be made by any party. Prior to hearing, and after transfer of the proceeding to the Board, such requests must be made to the Board in Washington, DC, and the Board will take such action thereon as it deems appropriate. During the hearing, and thereafter while the proceeding is pending before the Administrative Law Judge, such requests must be made to the Administrative Law Judge. If the Administrative Law Judge denies the request, the ruling will be subject to appeal to the Board, in Washington, DC, in the manner and to the extent provided in §102.26 with respect to rulings and orders by an Administrative Law Judge, except that requests for permission to appeal in this instance must be filed within 24 hours of the Administrative Law Judge's ruling. If no appeal is sought within such time, or if the appeal is denied, the ruling of the Administrative Law Judge becomes final and the denial becomes the ruling of the Board. If the Administrative Law Judge deems the request appropriate, the Judge will recommend that the Board seek the approval of the Attorney General for the issuance of the order, and the Board will take such action on the Administrative Law Judge's recommendation as it deems appropriate. Until the Board has issued the requested order, no individual who claims the privilege against self-incrimination will be required or permitted to testify or to give other information respecting the subject matter of the claim.

(d) Upon the failure of any person to comply with a subpoena issued upon the request of a private party, the General Counsel will, in the name of the Board but on relation of such private party, institute enforcement proceedings in the appropriate district court, unless in the judgment of the Board the enforcement of the subpoena would be inconsistent with law and with the policies of the Act. Neither the General Counsel nor the Board will be deemed thereby to have assumed responsibility for the effective prosecution of the same before the court.

(e) Persons compelled to submit data or evidence at a public proceeding are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them. Persons compelled to submit data or evidence in the nonpublic investigative stages of proceedings may, for good cause, be limited by the Regional Director to inspection of the official transcript of their testimony, but must be entitled to make copies of documentary evidence or exhibits which they have produced.

§ 102.32 Payment of witness fees and mileage; fees of officer who transcribes deposition or video testimony.

Witnesses summoned before the Administrative Law Judge must be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken or who testify by videoconference and the officer who transcribes the testimony shall severally be entitled to the same fees as are paid for like services in the courts of the United States, and those fees shall be paid by the party at whose instance the deposition is taken.

[82 FR 43696, Sept. 19, 2017]

§ 102.33 Transfer of charge and proceeding from Region to Region; consolidation of proceedings in same Region; severance.

(a) Whenever the General Counsel deems it necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay, a charge may be filed with the General Counsel in Washington, DC, or, at any time after a charge has been filed with a Regional Director, the General Counsel may order that such charge and any proceeding regarding the charge be:

(1) Transferred to and continued before the General Counsel for investigation or consolidation with any other proceeding which may have been instituted in a Regional Office or with the General Counsel; or

(2) Consolidated with any other proceeding which may have been instituted in the same region; or

(3) Transferred to and continued in any other Region for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such other region; or

(4) Severed from any other proceeding with which it may have been consolidated pursuant to this section.

(b) The provisions of §§ 102.9 through 102.32 will, insofar as applicable, govern proceedings before the General Counsel, pursuant to this section, and the powers granted to Regional Directors in such provisions will, for the purpose of this section, be reserved to and exercised by the General Counsel. After the transfer of any charge and any proceeding which may have been instituted with respect thereto from one Region to another pursuant to this section, the provisions of this subpart will, insofar as possible, govern such charge and such proceeding as if the charge had originally been filed in the Region to which the transfer is made.

(c) The Regional Director may, prior to hearing, exercise the powers in paragraphs (a)(2) and (4) of this section with respect to proceedings pending in the Director's Region.

(d) Motions to consolidate or sever proceedings after issuance of complaint must be filed as provided in § 102.24 and ruled upon as provided in § 102.25, except that the Regional Director may consolidate or sever proceedings prior to hearing upon the Director's own motion. Rulings by the Administrative Law Judge upon motions to consolidate or sever may be appealed to the Board as provided in § 102.26.

§ 102.34 Who will conduct hearing; public unless otherwise ordered.

The hearing for the purpose of taking evidence upon a complaint will be conducted by an Administrative Law Judge designated by the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or any Associate Chief Judge, as the case may be, unless the Board or any Board Member presides. At any time, an Administrative Law Judge may be designated to take the place of the Administrative Law Judge previously designated to conduct the hearing. Hearings will be public unless otherwise ordered by the Board or the Administrative Law Judge.

§ 102.35 Duties and powers of Administrative Law Judges; stipulations of cases to Administrative Law Judges or to the Board; assignment and powers of settlement judges.

(a) The Administrative Law Judge will inquire fully into the facts as to whether the Respondent has engaged in or is engaging in an unfair labor practice affecting commerce as set forth in the complaint or amended complaint. The Administrative Law Judge has authority, with respect to cases assigned to the Judge, between the time the Judge is designated and transfer of the case to the Board, subject to the Rules and Regulations of the Board and within its powers, to:

(1) Administer oaths and affirmations.

(2) Grant applications for subpoenas.

(3) Rule upon petitions to revoke subpoenas.

(4) Rule upon offers of proof and receive relevant evidence.

(5) Take or cause depositions to be taken whenever the ends of justice would be served.

(6) Regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question.

(7) Hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases.

(8) Dispose of procedural requests, motions, or similar matters, including motions referred to the Administrative Law Judge by the Regional Director and motions for default judgment, summary judgment, or to amend pleadings; also to dismiss complaints or portions thereof; to order hearings reopened; and, upon motion, to order proceedings consolidated or severed prior to issuance of Administrative Law Judge decisions.

(9) Approve stipulations, including stipulations of facts that waive a hearing and provide for a decision by the

Administrative Law Judge. Alternatively, the parties may agree to waive a hearing and decision by an Administrative Law Judge and submit directly to the Executive Secretary a stipulation of facts, which, if approved, provides for a decision by the Board. A statement of the issues presented may be set forth in the stipulation of facts, and each party may also submit a short statement (no more than three pages) of its position on the issues. If the Administrative Law Judge (or the Board) approves the stipulation, the Judge (or the Board) will set a time for the filing of briefs. In proceedings before an Administrative Law Judge, no further briefs may be filed except by special leave of the Judge. In proceedings before the Board, answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed. No further briefs may be filed except by special leave of the Board. At the conclusion of the briefing schedule, the Administrative Law Judge (or the Board) will decide the case or otherwise dispose of it.

(10) Make and file decisions, including bench decisions delivered within 72 hours after conclusion of oral argument, in conformity with Public Law 89–554, 5 U.S.C. 557.

(11) Call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.

(12) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case and/or supporting theory(ies).

(13) Take any other necessary action authorized by the Board's published Rules and Regulations.

(b) Upon the request of any party or of the Administrative Law Judge assigned to hear a case, or upon the Chief Judge, Deputy Chief Judge, or Associate Chief Judge's own motion, the Chief Judge, Deputy Chief Judge or an Associate Chief Judge may assign a Judge other than the trial judge to conduct settlement negotiations. In exercising this discretion, the Chief Judge, Deputy Chief Judge, or Associate Chief Judge making the assignment will consider, among other factors, whether there is reason to believe that resolution of the dispute is likely, the request for assignment of a settlement judge is made in good faith, and the assignment is otherwise feasible. However, no such assignment will be made absent the agreement of all parties to the use of this procedure.

(1) The settlement judge will convene and preside over conferences and settlement negotiations between the parties, assess the practicalities of a potential settlement, and report to the Chief Judge, Deputy Chief Judge, or Associate Chief Judge the status of settlement negotiations, recommending continuation or termination of the settlement negotiations. Where feasible, settlement conferences will be held in person.

(2) The settlement judge may require that the attorney or other representative for each party be present at settlement conferences and that the parties or agents with full settlement authority also be present or available by telephone.

(3) Participation of the settlement judge will terminate upon the order of the Chief Judge, Deputy Chief Judge, or Associate Chief Judges issued after consultation with the settlement judge. The conduct of settlement negotiations must not unduly delay the hearing.

(4) All discussions between the parties and the settlement judge will be confidential. The settlement judge must not discuss any aspect of the case with the trial judge, and no evidence regarding statements, conduct, offers of settlement, and concessions of the parties made in proceedings before the settlement judge will be admissible in any proceeding before the Board, except by stipulation of the parties. Documents disclosed in the settlement process may not be used in litigation unless voluntarily produced or obtained pursuant to subpoena.

(5) No decision of a Chief Judge, Deputy Chief Judge, or Associate Chief Judge concerning the assignment of a settlement judge or the termination of a settlement judge's assignment is appealable to the Board.

(6) Any settlement reached under the auspices of a settlement judge is subject to approval in accordance with the

provisions of §101.9 of the Board's Statements of Procedure.

(c) Upon a showing of good cause based on compelling circumstances, and under appropriate safeguards, the taking of video testimony by contemporaneous transmission from a different location may be permitted.

(1) Applications to obtain testimony by videoconference must be presented to the Administrative Law Judge in writing, and the requesting party must simultaneously serve notice of the application upon all parties to the hearing. The application must set forth the compelling circumstances for such testimony, the witness's name and address, the location where the video testimony will be held, the matter concerning which the witness is expected to testify, the conditions in place to protect the integrity of the testimony, the transmission safeguards, and the electronic address from which the video testimony will be transmitted. Such application and any opposition must be made promptly and within such time as not to delay the proceeding.

(2) Appropriate safeguards must ensure that the Administrative Law Judge has the ability to assess the witness's credibility and that the parties have a meaningful opportunity to examine and cross-examine the witness, and must include at a minimum measures that ensure that representatives of the parties have the opportunity to be present at the remote location, the judge, participants, and the reporter are able to hear the testimony and observe the witness, the camera view is adjustable to provide a close-up view of counsel and the witness and a panoramic view of the room, exhibits used in the witness's examination are exchanged in advance of the examination, and video technology assistance is available to assist with technical difficulties that arise during the examination. The Administrative Law Judge may also impose additional safeguards.

(3) The official record of the videoconference testimony will be the official transcript prepared by the officer designated to transcribe the testimony.

[82 FR 11754, Feb. 24, 2017, as amended at 82 FR 43696, Sept. 19, 2017]

§102.36 Disqualification and unavailability of Administrative Law Judges.

(a) An Administrative Law Judge may withdraw from a proceeding because of a personal bias or for other disqualifying reasons. Any party may request the Administrative Law Judge, at any time following the Judge's designation and before filing of the Judge's decision, to withdraw on grounds of personal bias or disqualification, by filing with the Judge promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification. If, in the Administrative Law Judge's opinion, the affidavit is filed with due diligence and is sufficient on its face, the Judge will promptly disqualify himself/herself and withdraw from the proceeding. If the Administrative Law Judge does not disqualify himself/herself and withdraw from the proceeding, the Judge must rule upon the record, stating the grounds for that ruling, and proceed with the hearing, or, if the hearing has closed, the Judge will proceed with issuance of the decision, and the provisions of §102.26, with respect to review of rulings of Administrative Law Judges, will apply.

(b) If the Administrative Law Judge designated to conduct the hearing becomes unavailable to the Board after the hearing has been opened, the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge, as the case may be, may designate another Administrative Law Judge for the purpose of further hearing or other appropriate action.

§102.37 [Reserved]

§102.38 Rights of parties.

Any party has the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the Administrative Law Judge may limit the participation of any party as appropriate. Documentary evidence must be submitted in duplicate for the record with a copy to each party.

§ 102.39 Rules of evidence controlling so far as practicable.

The hearing will, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U.S.C., title 28, Sections 723–B, 723–C).

§ 102.40 Stipulations of fact admissible.

Stipulations of fact may be introduced in evidence with respect to any issue.

§ 102.41 Objection to conduct of hearing; how made; objections not waived by further participation.

Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection will be deemed waived by further participation in the hearing.

§ 102.42 Filings of briefs and proposed findings with the Administrative Law Judge and oral argument at the hearing.

Any party is entitled, upon request, to oral argument, for a reasonable period at the close of the hearing. Oral argument and any presentation of proposed findings and conclusions will be included in the transcript of the hearing. In the discretion of the Administrative Law Judge, any party may, upon request made before the close of the hearing, file a brief or proposed findings and conclusions, or both, with the Administrative Law Judge, who may fix a reasonable time for such filing, but not in excess of 35 days from the close of the hearing. Requests for further extensions of time must be made to the Chief Administrative Law Judge, Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge, as the case may be. Notice of the request for any extension must be immediately served on all other parties, and proof of service must be furnished. The brief or proposed findings and conclusions must be served on the other parties, and a statement of such service must be furnished. In any case in which the Administrative Law Judge believes that written briefs or proposed findings of fact and conclusions may not be necessary, the Judge must notify the parties at the opening of the hearing or as soon thereafter as practicable that the Judge may wish to hear oral argument in lieu of briefs.

§ 102.43 Continuance and adjournment.

In the Administrative Law Judge's discretion, the hearing may be continued from day to day, or adjourned to a later date or to a different place, by announcement at the hearing by the Administrative Law Judge, or by other appropriate notice.

§ 102.44 [Reserved]

§ 102.45 Administrative Law Judge's decision; contents of record; alternative dispute resolution program.

(a) *Administrative Law Judge's decision.* After a hearing for the purpose of taking evidence upon a complaint, the Administrative Law Judge will prepare a decision. The decision will contain findings of fact, conclusions of law, and the reasons or grounds for the findings and conclusions, and recommendations for the proper disposition of the case. If the Respondent is found to have engaged in the alleged unfair labor practices, the decision will also contain a recommendation for such affirmative action by the Respondent as will effectuate the policies of the Act. The Administrative Law Judge will file the decision with the Board. If the Judge delivers a bench decision, promptly upon receiving the transcript the Judge will certify the accuracy of the pages of the transcript containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the Judge may deem necessary to complete the decision; and serve a copy on each of the parties. Upon the filing of the decision, the Board will enter an order transferring the case to the Board, setting forth the date of the transfer and will serve on all the parties copies of the decision and the order. Service of the

Administrative Law Judge's decision and of the order transferring the case to the Board is complete upon mailing.

(b) *Contents of record.* The charge upon which the complaint was issued and any amendments, the complaint and any amendments, notice of hearing, answer and any amendments, motions, rulings, orders, the transcript of the hearing, stipulations, exhibits, documentary evidence, and depositions, together with the Administrative Law Judge's decision and exceptions, and any cross-exceptions or answering briefs as provided in §102.46, constitutes the record in the case.

(c) *Alternative dispute resolution program.* The Alternative Dispute Resolution (ADR) Program is available to parties with unfair labor practice or compliance cases pending before the Board at any stage subsequent to the initial issuance of an Administrative Law Judge's decision or any other process involving the transfer to the Board of such cases. Participation in the ADR Program is voluntary, and a party that enters the ADR Program may withdraw any time after the first meeting with the neutral. No party will be charged fees or expenses for using the ADR Program.

(1) The parties may request participation in the ADR Program by contacting the program director. Deadlines for filing pleadings with the Board will be stayed effective the date that the case enters the ADR Program. If the case is removed from the ADR Program, the time period for filing will begin to run and will consist of the time period that remained when the case entered the ADR Program. Notice will be provided to the parties of the date the case enters the ADR Program and the date it is removed from the ADR Program.

(2) A case may remain in the ADR Program for 28 days from the first settlement meeting or until the parties reach a settlement, whichever occurs first. A request for extension of the stay beyond the 28 days will be granted only with the approval and in the discretion of both the neutral and the program director upon a showing that such an extension is supported by good cause.

(3) Once the case enters the ADR Program, the program director will arrange for the appointment of a neutral to assist the parties in settling the case.

(4) The preferred method of conducting settlement conferences is to have the parties or their representatives attend in person, and therefore the neutral will make every reasonable effort to meet with the participants face-to-face at the parties' location. Settlement conferences by telephone or through videoconference may be held if the parties so desire.

(5) Parties may be represented by counsel at the conferences, but representation by counsel is not required. However, each party must have in attendance a representative who has the authority to bind the party to the terms of a settlement agreement.

(6) The neutral may ask the parties to submit pre-conference memos setting forth the issues in dispute, prior settlement efforts, and anything else that the parties would like to bring to the neutral's attention. A party's memo will be treated as a confidential submission unless the party that prepared the memo authorizes its release to the other parties.

(7) Settlement discussions held under the ADR Program will be confidential. All documents submitted to the neutral and statements made during the ADR proceedings, including proposed settlement terms, are for settlement purposes only and are confidential. However, evidence otherwise admissible or discoverable will not be rendered inadmissible or undiscoverable because of its use in the ADR proceedings. No evidence as to what transpired during the ADR proceedings will be admissible in any administrative or court proceeding except to the extent it is relevant to determining the existence or meaning of a settlement agreement. The parties and their representatives will not discuss with the press any matters concerning settlement positions communicated during the ADR proceedings except by express written permission of the other parties. There will be no communication between the

ADR Program and the Board on specific cases submitted to the ADR Program, except for procedural information such as case name, number, timing of the process, and status.

(8) The neutral has no authority to impose a settlement. Settlement agreements are subject to approval by the Board in accordance with its existing procedures for approving settlements.

(9) No party will at any time or in any proceeding take the position that participation in the ADR Program resulted in the waiver of any legal rights related to the underlying claims in the case, except as set forth in any settlement agreement.

(10) Nothing in the ADR Program is intended to discourage or interfere with settlement negotiations that the parties wish to conduct outside the ADR Program.

§ 102.46 Exceptions and brief in support; answering briefs to exceptions; cross-exceptions and brief in support; answering briefs to cross-exceptions; reply briefs; failure to except; oral argument; filing requirements; amicus curiae briefs.

(a) *Exceptions and brief in support.* Within 28 days, or within such further period as the Board may allow, from the date of the service of the order transferring the case to the Board, pursuant to §102.45, any party may (in accordance with Section 10(c) of the Act and §§102.2 through 102.5 and 102.7) file with the Board in Washington, DC, exceptions to the Administrative Law Judge's decision or to any other part of the record or proceedings (including rulings upon all motions or objections), together with a brief in support of the exceptions. The filing of exceptions and briefs is subject to the filing requirements of paragraph (h) of this section

(1) *Exceptions.* (i) Each exception must:

(A) Specify the questions of procedure, fact, law, or policy to which exception is taken;

(B) Identify that part of the Administrative Law Judge's decision to which exception is taken;

(C) Provide precise citations of the portions of the record relied on; and

(D) Concisely state the grounds for the exception. If a supporting brief is filed, the exceptions document must not contain any argument or citation of authorities in support of the exceptions; any argument and citation of authorities must be set forth only in the brief. If no supporting brief is filed, the exceptions document must also include the citation of authorities and argument in support of the exceptions, in which event the exceptions document is subject to the 50-page limit for briefs set forth in paragraph (h) of this section.

(ii) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged will be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

(2) *Brief in support of exceptions.* Any brief in support of exceptions must contain only matter that is included within the scope of the exceptions and must contain, in the order indicated, the following:

(i) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.

(ii) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.

(iii) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page citations to the record and the legal or other material relied on.

(b) *Answering briefs to exceptions.* (1) Within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, a party opposing the exceptions may file an answering brief to the exceptions, in accordance with the filing requirements of paragraph (h) of this section.

(2) The answering brief to the exceptions must be limited to the questions raised in the exceptions and in the brief in support. It must present clearly the points of fact and law relied on in support of the position taken on each question. Where exception has been taken to a factual finding of the Administrative Law Judge and the party filing the answering brief proposes to support the Judge's finding,

the answering brief must specify those pages of the record which the party contends support the Judge's finding.

(c) *Cross-exceptions and brief in support.* Any party who has not previously filed exceptions may, within 14 days, or such further period as the Board may allow, from the last date on which exceptions and any supporting brief may be filed, file cross-exceptions to any portion of the Administrative Law Judge's decision, together with a supporting brief, in accordance with the provisions of paragraphs (a) and (h) of this section.

(d) *Answering briefs to cross-exceptions.* Within 14 days, or such further period as the Board may allow, from the last date on which cross-exceptions and any supporting brief may be filed, any other party may file an answering brief to such cross-exceptions in accordance with the provisions of paragraphs (b) and (h) of this section. Such answering brief must be limited to the questions raised in the cross-exceptions.

(e) *Reply briefs.* Within 14 days from the last date on which an answering brief may be filed pursuant to paragraphs (b) or (d) of this section, any party may file a reply brief to any such answering brief. Any reply brief filed pursuant to this paragraph (e) must be limited to matters raised in the brief to which it is replying, and must not exceed 10 pages. No extensions of time will be granted for the filing of reply briefs, nor will permission be granted to exceed the 10-page limit. The reply brief must be filed with the Board and served on the other parties. No further briefs may be filed except by special leave of the Board. Requests for such leave must be in writing and copies must be served simultaneously on the other parties.

(f) *Failure to except.* Matters not included in exceptions or cross-exceptions may not thereafter be urged before the Board, or in any further proceeding.

(g) *Oral argument.* A party desiring oral argument before the Board must request permission from the Board in writing simultaneously with the filing of exceptions or cross-exceptions. The Board will notify the parties of the time and place of oral argument, if such permission is granted. Oral arguments are limited to 30 minutes for each party entitled to participate. No request for additional time will be granted unless timely application is made in advance of oral argument.

(h) *Filing requirements.* Documents filed pursuant to this section must be filed with the Board in Washington, DC, and copies must also be served simultaneously on the other parties. Any brief filed pursuant to this section must not be combined with any other brief, and except for reply briefs whose length is governed by paragraph (e) of this section, must not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited.

(i) *Amicus curiae briefs.* Amicus curiae briefs will be accepted only by permission of the Board. Motions for permission to file an amicus brief must state the bases of the movant's interest in the case and why the brief will be of benefit to the Board in deciding the matters at issue. Unless the Board directs otherwise, the following procedures will apply.

(1) The Board will consider motions to file an amicus brief only when: (a) A party files exceptions to an Administrative Law Judge's decision; or (b) a case is remanded by the court of appeals and the Board requests briefing from the parties.

(2) In circumstances where a party files exceptions to an Administrative Law Judge's decision, the motion must be filed with the Office of the Executive Secretary of the Board no later than 42 days after the filing of exceptions, or in the event cross-exceptions are filed, no later than 42 days after the filing of cross-exceptions. Where a case has been remanded by the court of appeals, the motion must be filed no later than 21 days after the parties file statements of position on remand. A motion filed outside these time periods must be supported by a showing of good cause. The motion will not operate to stay the issuance of a Board decision upon completion of the briefing schedule for the parties.

(3) The motion must be accompanied by the proposed amicus brief and must comply with the service and form prescribed by §102.5. The brief may be no more than 25 pages in length.

(4) A party may file a reply to the motion within 7 days of service of the motion. A party may file an answering brief to the amicus brief within 14 days of issuance of the Board's order granting permission to file the amicus brief. Replies to an answering brief will not be permitted.

(5) The Board may direct the Executive Secretary to solicit amicus briefs. In such cases, the Executive Secretary will specify in the invitation the due date and page length for solicited amicus briefs, and the deadline for the parties to file answering briefs. Absent compelling reasons, no extensions of time will be granted for filing solicited amicus briefs or answering briefs.

[82 FR 11754, Feb. 24, 2017, as amended at 82 FR 43696, Sept. 19, 2017]

§ 102.47 Filing of motion after transfer of case to Board.

All motions filed after the case has been transferred to the Board pursuant to § 102.45 must be filed with the Board in Washington, DC, and served upon the other parties. Such motions must be printed or otherwise legibly duplicated.

§ 102.48 No exceptions filed; exceptions filed; motions for reconsideration, rehearing, or reopening the record.

(a) *No exceptions filed.* If no timely or proper exceptions are filed, the findings, conclusions, and recommendations contained in the Administrative Law Judge's decision will, pursuant to Section 10(c) of the Act, automatically become the decision and order of the Board and become its findings, conclusions, and order, and all objections and exceptions must be deemed waived for all purposes.

(b) *Exceptions filed.* (1) Upon the filing of timely and proper exceptions, and any cross-exceptions or answering briefs, as provided in § 102.46, the Board may decide the matter upon the record, or after oral argument, or may reopen the record and receive further evidence before a Board Member or other Board agent or agency, or otherwise dispose of the case.

(2) Where exception is taken to a factual finding of the Administrative Law Judge, the Board, in determining whether the finding is contrary to a preponderance of the evidence, may limit its consideration to such portions of the record as are specified in the exceptions, the supporting brief, and the answering brief.

(c) *Motions for reconsideration, rehearing, or reopening the record.* A party to a proceeding before the Board may, because of extraordinary circumstances, move for reconsideration, rehearing, or reopening of the record after the Board decision or order.

(1) A motion for reconsideration must state with particularity the material error claimed and with respect to any finding of material fact, must specify the page of the record relied on. A motion for rehearing must specify the error alleged to require a hearing de novo and the prejudice to the movant from the error. A motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing.

(2) Any motion pursuant to this section must be filed within 28 days, or such further period as the Board may allow, after the service of the Board's decision or order, except that a motion to reopen the record must be filed promptly on discovery of the evidence to be adduced.

(3) The filing and pendency of a motion under this provision will not stay the effectiveness of the action of the Board unless so ordered. A motion for reconsideration or rehearing need not be filed to exhaust administrative remedies.

§ 102.49 Modification or setting aside of Board order before record filed in court; action thereafter.

Within the limitations of the provisions of Section 10(c) of the Act, and § 102.48, until a transcript of the record in a case is filed in a court, within the meaning of Section 10 of the Act, the Board may at any time upon reasonable notice modify or set aside, in

whole or in part, any findings of fact, conclusions of law, or order made or issued by it. Thereafter, the Board may proceed pursuant to §102.50, insofar as applicable.

§102.50 Hearings before the Board or a Board Member.

Whenever the Board deems it necessary to effectuate the purposes of the Act or to avoid unnecessary costs or delay, it may, at any time, after a complaint has issued pursuant to §102.15 or §102.33, order that such complaint and any proceeding which may have been instituted with respect thereto be transferred to and continued before it or any Board Member. The provisions of this subpart, insofar as applicable, govern proceedings before the Board or any Board Member pursuant to this section, and the powers granted to Administrative Law Judges in such provisions will, for the purpose of this section, be reserved to and exercised by the Board or the Board Member who will preside.

§102.51 Settlement or adjustment of issues.

At any stage of a proceeding prior to hearing, where time, the nature of the proceeding, and the public interest permit, all interested parties have an opportunity to submit to the Regional Director, with whom the charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

§102.52 Compliance with Board order; notification of compliance determination.

After entry of a Board order directing remedial action, or the entry of a court judgment enforcing such order, the Regional Director will seek compliance from all persons having obligations under the order. As appropriate, the Regional Director will make a compliance determination and notify the parties of that determination. A Charging Party adversely affected by a monetary, make-whole, reinstatement, or other compliance determination will be provided, on request, with a written statement of the basis for that determination.

§102.53 Appeal of compliance determination to the General Counsel; General Counsel's action; request for review by the Board; Board action; opposition to appeal or request for review.

(a) *Appeal of compliance determination to the General Counsel.* The Charging Party may appeal a compliance determination to the General Counsel in Washington, DC, within 14 days of the written statement of compliance determination as set forth in §102.52. The appeal must contain a complete statement setting forth the facts and reasons upon which it is based and must identify with particularity the error claimed in the Regional Director's determination. The General Counsel may for good cause shown extend the time for filing an appeal.

(b) *General Counsel's action.* The General Counsel may affirm or modify the Regional Director's determination or take such other action deemed appropriate, and must state the grounds for that decision.

(c) *Request for review by Board.* Within 14 days after service of the General Counsel's decision, the Charging Party may file a request for review of that decision with the Board in Washington, DC. The request for review must contain a complete statement of the facts and reasons upon which it is based and must identify with particularity the error claimed in the General Counsel's decision. A copy of the request for review must be served simultaneously on all other parties and on the General Counsel and the Regional Director.

(d) *Board action.* The Board may affirm or modify the General Counsel's decision, or otherwise dispose of the matter as it deems appropriate. The denial of the request for review will constitute an affirmance of the General Counsel's decision.

(e) *Opposition to appeal or request for review.* Within 7 days of receipt of a compliance appeal or request for review, a party may file an opposition to the compliance appeal or request for review.

§ 102.54 Issuance of compliance specification; consolidation of complaint and compliance specification.

(a) If it appears that controversy exists with respect to compliance with a Board order which cannot be resolved without a formal proceeding, the Regional Director may issue and serve on all parties a compliance specification in the name of the Board. The specification will contain or be accompanied by a Notice of Hearing before an Administrative Law Judge at a specific place and at a time not less than 21 days after the service of the specification.

(b) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may issue a compliance specification, with or without a notice of hearing, based on an outstanding complaint.

(c) Whenever the Regional Director deems it necessary to effectuate the purposes and policies of the Act or to avoid unnecessary costs or delay, the Regional Director may consolidate with a complaint and Notice of Hearing issued pursuant to §102.15 a compliance specification based on that complaint. After opening of the hearing, the Board or the Administrative Law Judge, as appropriate, must approve consolidation. Issuance of a compliance specification is not a prerequisite or bar to Board initiation of proceedings in any administrative or judicial forum which the Board or the Regional Director determines to be appropriate for obtaining compliance with a Board order.

§ 102.55 Contents of compliance specification.

(a) *Contents of specification with respect to allegations concerning the amount of backpay due.* With respect to allegations concerning the amount of backpay due, the specification will specifically and in detail show, for each employee, the backpay periods broken down by calendar quarters, the specific figures and basis of computation of gross backpay and interim earnings, the expenses for each quarter, the net backpay due, and any other pertinent information.

(b) *Contents of specification with respect to allegations other than the amount of backpay due.* With respect to allegations other than the amount of backpay due, the specification will contain a clear and concise description of the respects in which the Respondent has failed to comply with a Board or court order, including the remedial acts claimed to be necessary for compliance by the Respondent and, where known, the approximate dates, places, and names of the Respondent's agents or other representatives described in the specification.

(c) *Amendments to specification.* After the issuance of the Notice of Compliance Hearing but before the hearing opens, the Regional Director may amend the specification. After the hearing opens, the specification may be amended upon leave of the Administrative Law Judge or the Board, upon good cause shown.

§ 102.56 Answer to compliance specification.

(a) *Filing and service of answer to compliance specification.* Each Respondent alleged in the specification to have compliance obligations must, within 21 days from the service of the specification, file an answer with the Regional Director issuing the specification, and must immediately serve a copy on the other parties.

(b) *Form and contents of answer.* The answer to the specification must be in writing, signed and sworn to by the Respondent or by a duly authorized agent with appropriate power of attorney affixed, and contain the address of the Respondent. The answer must specifically admit, deny, or explain each allegation of the specification, unless the Respondent is without knowledge, in which case the Respondent must so state, such statement operating as a denial. Denials must fairly meet the substance of the allegations of the specification at issue. When a Respondent intends to deny only a part of an allegation, the Respondent must specify so much of it as is true and deny only the remainder. As to all matters within the knowledge of the Respondent, including but not limited to the various factors entering into the computation of gross backpay, a general

denial will not suffice. As to such matters, if the Respondent disputes either the accuracy of the figures in the specification or the premises on which they are based, the answer must specifically state the basis for such disagreement, setting forth in detail the Respondent's position and furnishing the appropriate supporting figures.

(c) *Failure to answer or to plead specifically and in detail to backpay allegations of specification.* If the Respondent fails to file any answer to the specification within the time prescribed by this section, the Board may, either with or without taking evidence in support of the allegations of the specification and without further notice to the Respondent, find the specification to be true and enter such order as may be appropriate. If the Respondent files an answer to the specification but fails to deny any allegation of the specification in the manner required by paragraph (b) of this section, and the failure to deny is not adequately explained, such allegation will be deemed admitted as true, and may be so found by the Board without the taking of evidence supporting such allegation, and the Respondent will be precluded from introducing any evidence controverting the allegation.

(d) *Extension of time for filing answer to specification.* Upon the Regional Director's own motion or upon proper cause shown by any Respondent, the Regional Director issuing the compliance specification may, by written order, extend the time within which the answer to the specification must be filed.

(e) *Amendment to answer.* Following the amendment of the specification by the Regional Director, any Respondent affected by the amendment may amend its answer.

§ 102.57 Extension of date of hearing.

Upon the Regional Director's own motion or upon proper cause shown, the Regional Director issuing the compliance specification and Notice of Hearing may extend the hearing date.

§ 102.58 Withdrawal of compliance specification.

Any compliance specification and Notice of Hearing may be withdrawn before the hearing by the Regional Director upon the Director's own motion.

§ 102.59 Hearing and posthearing procedures.

After the issuance of a compliance specification and Notice of Hearing, the procedures provided in §§ 102.24 through 102.51 will be followed insofar as applicable.

Subpart D—Procedure Under Section 9(c) of the Act for the Determination of Questions Concerning Representation of Employees[2] and for Clarification of Bargaining Units and for Amendment of Certifications Under Section 9(b) of the Act

SOURCE: 24 FR 9102, Nov. 7, 1959, unless otherwise noted. Redesignated at 82 FR 11754, Feb. 24, 2017.

§ 102.60 Petitions.

(a) *Petition for certification or decertification.* A petition for investigation of a question concerning representation of employees under paragraphs (1)(A)(i) and (1)(B) of Section 9(c) of the Act (hereinafter called a petition for certification) may be filed by an employee or group of employees or any individual or labor organization acting in their behalf or by an employer. A petition under paragraph (1)(A)(ii) of Section 9(c) of the Act, alleging that the individual or labor organization which has been certified or is being currently recognized as the bargaining representative is no longer such representative (hereinafter called a petition for decertification), may be filed by any employee or group of employees or any individual or labor organization acting in their behalf. Petitions under this section shall be in writing and signed, and either shall be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or shall contain a declaration by the person signing it, under the penalty of

[2] Procedure under the first proviso to sec. 8(b)(7)(C) of the Act is governed by subpart D of this part.

perjury, that its contents are true and correct (see 28 U.S.C. 1746). One original of the petition shall be filed, and a copy served on all parties named in the petition. A person filing a petition by facsimile pursuant to §102.5(e) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically pursuant to §102.5(c) need not file an original. Except as provided in §102.72, such petitions shall be filed with the Regional Director for the Region wherein the bargaining unit exists, or, if the bargaining unit exists in two or more Regions, with the Regional Director for any of such Regions. A certificate of service on all parties named in the petition shall also be filed with the Regional Director when the petition is filed. Along with the petition, the petitioner shall serve the Agency's description of the procedures in representation cases and the Agency's Statement of Position form on all parties named in the petition. Prior to the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Regional Director with whom such petition was filed. After the transfer of the record to the Board, the petition may be withdrawn only with the consent of the Board. Whenever the Regional Director or the Board, as the case may be, approves the withdrawal of any petition, the case shall be closed.

(b) *Petition for clarification of bargaining unit or petition for amendment of certification.* A petition for clarification of an existing bargaining unit or a petition for amendment of certification, in the absence of a question of representation, may be filed by a labor organization or by an employer. Where applicable the same procedures set forth in paragraph (a) of this section shall be followed.

[84 FR 69588, Dec. 18, 2019]

§102.61 Contents of petition for certification; contents of petition for decertification; contents of petition for clarification of bargaining unit; contents of petition for amendment of certification.

(a) *RC petitions.* A petition for certification, when filed by an employee or group of employees or an individual or labor organization acting in their behalf, shall contain the following:

(1) The name of the employer.

(2) The address of the establishments involved.

(3) The general nature of the employer's business.

(4) A description of the bargaining unit which the petitioner claims to be appropriate.

(5) The names and addresses of any other persons or labor organizations who claim to represent any employees in the alleged appropriate unit, and brief descriptions of the contracts, if any, covering the employees in such unit.

(6) The number of employees in the alleged appropriate unit.

(7) A statement that a substantial number of employees in the described unit wish to be represented by the petitioner. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(8) A statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act or that the labor organization is currently recognized but desires certification under the Act.

(9) The name, affiliation, if any, and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(10) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(11) Any other relevant facts.

(12) The type, date(s), time(s) and location(s) of the election sought.

(b) *RM petitions.* A petition for certification, when filed by an employer, shall contain the following:

(1) The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(2) The general nature of the petitioner's business.

(3) A brief statement setting forth that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of all employees in the unit claimed to be appropriate; a description of such unit; and the number of employees in the unit.

(4) The name or names, affiliation, if any, and addresses of the individuals or labor organizations making such claim for recognition.

(5) A statement whether the petitioner has contracts with any labor organization or other representatives of employees and, if so, their expiration date(s).

(6) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(7) Any other relevant facts.

(8) Evidence supporting the statement that a labor organization has made a demand for recognition on the employer or that the employer has good faith uncertainty about majority support for an existing representative. Such evidence shall be filed together with the petition, but if the evidence reveals the names and/or number of employees who no longer wish to be represented, the evidence shall not be served on any party. However, no proof of representation on the part of the labor organization claiming a majority is required and the Regional Director shall proceed with the case if other factors require it unless the labor organization withdraws its claim to majority representation.

(9) The type, date(s), time(s) and location(s) of the election sought.

(c) *RD petitions.* Petitions for decertification shall contain the following:

(1) The name of the employer.

(2) The address of the establishments and a description of the bargaining unit involved.

(3) The general nature of the employer's business.

(4) The name and address of the petitioner and affiliation, if any, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(5) The name or names and addresses of the individuals or labor organizations who have been certified or are being currently recognized by the employer and who claim to represent any employees in the unit involved, and the expiration date of any contracts covering such employees.

(6) An allegation that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative in the appropriate unit as defined in Section 9(a) of the Act.

(7) The number of employees in the unit.

(8) A statement that a substantial number of employees in the described unit no longer wish to be represented by the incumbent representative. Evidence supporting the statement shall be filed with the petition in accordance with paragraph (f) of this section, but shall not be served on any party.

(9) Whether a strike or picketing is in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(10) Any other relevant facts.

(11) The type, date(s), time(s) and location(s) of the election sought.

(d) *UC petitions.* A petition for clarification shall contain the following:

(1) The name of the employer and the name of the recognized or certified bargaining representative.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) A description of the present bargaining unit, and, if the bargaining

unit is certified, an identification of the existing certification.

(5) A description of the proposed clarification.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees affected by the proposed clarifications, and brief descriptions of the contracts, if any, covering any such employees.

(7) The number of employees in the present bargaining unit and in the unit as proposed under the clarification.

(8) The job classifications of employees as to whom the issue is raised, and the number of employees in each classification.

(9) A statement by petitioner setting forth reasons why petitioner desires clarification of unit.

(10) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(11) Any other relevant facts.

(e) *AC petitions.* A petition for amendment of certification shall contain the following:

(1) The name of the employer and the name of the certified union involved.

(2) The address of the establishment involved.

(3) The general nature of the employer's business.

(4) Identification and description of the existing certification.

(5) A statement by petitioner setting forth the details of the desired amendment and reasons therefor.

(6) The names and addresses of any other persons or labor organizations who claim to represent any employees in the unit covered by the certification and brief descriptions of the contracts, if any, covering the employees in such unit.

(7) The name, the affiliation, if any, and the address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the representation proceeding.

(8) Any other relevant facts.

(f) *Provision of original signatures.* Evidence filed pursuant to paragraph (a)(7), (b)(8), or (c)(8) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the Regional Director no later than 2 business days after the facsimile or electronic filing.

[84 FR 69588, Dec. 18, 2019]

§ 102.62 Election agreements; voter list; Notice of Election.

(a) *Consent-election agreements with final Regional Director determinations of post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election and further providing that post-election disputes will be resolved by the Regional Director. Such agreement, referred to as a consent election agreement, shall include a description of the appropriate unit, the time and place of holding the election, and the payroll period to be used in determining what employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to §§ 102.69 and 102.70 except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

(b) *Stipulated election agreements with discretionary Board review.* Where a petition has been duly filed, the employer and any individuals or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement providing for the waiver of a hearing and for an election as described in paragraph (a) of this section and further providing that the parties may request Board review of the Regional Director's resolution of post-election disputes. Such agreement, referred to as a stipulated election agreement, shall also include a description of the appropriate bargaining unit, the time and place of holding the election, and the payroll period to be used in determining which employees within the appropriate unit shall be eligible to vote. Such election shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election and the post-election procedure shall be consistent with that followed by the Regional Director in conducting elections pursuant to §§ 102.69 and 102.70.

(c) *Full consent election agreements with final Regional Director determinations of pre- and post-election disputes.* Where a petition has been duly filed, the employer and any individual or labor organizations representing a substantial number of the employees involved may, with the approval of the Regional Director, enter into an agreement, referred to as a full consent election agreement, providing that pre- and post-election disputes will be resolved by the Regional Director. Such agreement provides for a hearing pursuant to §§ 102.63, 102.64, 102.65, 102.66, and 102.67 to determine if a question of representation exists. Upon the conclusion of such a hearing, the Regional Director shall issue a decision. The rulings and determinations by the Regional Director thereunder shall be final, with the same force and effect, in that case, as if issued by the Board. Any election ordered by the Regional Director shall be conducted under the direction and supervision of the Regional Director. The method of conducting such election shall be consistent with the method followed by the Regional Director in conducting elections pursuant to §§ 102.69 and 102.70, except that the rulings and determinations by the Regional Director of the results thereof shall be final, and the Regional Director shall issue to the parties a certification of the results of the election, including certifications of representative where appropriate, with the same force and effect, in that case, as if issued by the Board, and except that rulings or determinations by the Regional Director in respect to any amendment of such certification shall also be final.

(d) *Voter list.* Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within 5 business days after the approval of an election agreement pursuant to paragraph (a) or (b) of this section, or issuance of a direction of election pursuant to paragraph (c) of this section, the employer shall provide to the Regional Director and the parties named in the agreement or direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ''cell'' telephone numbers) of all eligible voters. The employer shall also include in separate sections of that list the same information for those individuals who will be permitted to vote subject to challenge. In order to be timely filed and served, the list must be received by the Regional Director and the parties named in the agreement or direction respectively within 5 business days after the approval of the agreement or issuance of the direction unless a longer time is specified in the agreement or direction. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the Regional Director and served electronically on the other parties named in the agreement or direction. A certificate of service on all parties shall be filed with the Regional Director when the voter

list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

(e) *Notice of Election.* Upon approval of the election agreement pursuant to paragraph (a) or (b) of this section or with the direction of election pursuant to paragraph (c) of this section, the Regional Director shall promptly transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The employer shall post and distribute the Notice of Election in accordance with §102.67(k). The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

[84 FR 69588, Dec. 18, 2019]

§102.63 Investigation of petition by Regional Director; Notice of Hearing; service of notice; Notice of Petition for Election; Statement of Position; withdrawal of Notice of Hearing.

(a) *Investigation; Notice of Hearing; notice of petition for election.* (1) After a petition has been filed under §102.61(a), (b), or (c), if no agreement such as that provided in §102.62 is entered into and if it appears to the Regional Director that there is reasonable cause to believe that a question of representation affecting commerce exists, that the policies of the Act will be effectuated, and that an election will reflect the free choice of employees in an appropriate unit, the Regional Director shall prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein. Except in cases presenting unusually complex issues, the Regional Director shall set the hearing for a date 14 business days from the date of service of the notice. The Regional Director may postpone the hearing upon request of a party showing good cause. A copy of the petition, a description of procedures in representation cases, a ''Notice of Petition for Election,'' and a Statement of Position form as described in paragraphs (b)(1) through (3) of this section, shall be served with such Notice of Hearing. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion.

(2) Within 5 business days after service of the Notice of Hearing, the employer shall post the Notice of Petition for Election in conspicuous places, including all places where notices to employees are customarily posted, and shall also distribute it electronically to employees in the petitioned-for unit if the employer customarily communicates with its employees electronically. The Notice of Petition for Election shall indicate that no final decisions have been made yet regarding the appropriateness of the petitioned-for bargaining unit and whether an election shall be conducted. The employer shall maintain the posting until the petition is dismissed or withdrawn or the Notice of Petition for Election is replaced by the Notice of Election. The employer's failure properly to post or distribute the Notice of Petition for Election may be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall

be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(b) *Statements of Position*—(1) *Statement of Position in RC cases.* If a petition has been filed under §102.61(a) and the Regional Director has issued a Notice of Hearing, the employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(i) *Employer's Statement of Position.* (A) The employer's Statement of Position shall state whether the employer agrees that the Board has jurisdiction over it 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 for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals 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 length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; state the employer's position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues the employer intends to raise at the hearing.

(B) The Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer.

(C) The Statement of Position shall include a list of 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 separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form.

(ii) *Petitioner's Statement of Position.* Following timely filing and service of an employer's Statement of Position, the petitioner shall file with the Regional Director and serve on the parties named in the petition its Statement of Position responding to the issues raised in the employer's Statement of Position, such that it is received no later than noon 3 business days before the hearing. The Regional Director may permit the petitioner to amend its Statement of Position in a timely manner for good cause.

(2) *Statement of Position in RM cases.* If a petition has been filed under §102.61(b) and the Regional Director has issued a Notice of Hearing, each individual or labor organization named in the petition shall file with the Regional Director and serve on the other parties named in the petition its Statement of Position such that it is received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be at noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the

Statement of Position upon request of a party showing good cause. The Regional Director may permit each individual or labor organization named in the petition to amend its Statement of Position in a timely manner for good cause.

(i) *Individual or labor organization's Statement of Position.* Each individual or labor organization's Statement of Position shall state whether it agrees that the Board has jurisdiction over the employer; state whether it agrees that the proposed unit is appropriate, and, if it does not so agree, state the basis for its contention that the proposed unit is inappropriate, and state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote the individual or labor organization intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; state its position concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues it intends to raise at the hearing.

(ii) *Identification of representative for service of papers.* Each individual or labor organization's Statement of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as its representative and accept service of all papers for purposes of the representation proceeding and be signed by the individual or a representative of the individual or labor organization.

(iii) *Employer's Statement of Position.* The employer shall file with the Regional Director and serve on the parties named in the petition its Statement of Position such that it is received no later than noon 3 business days before the hearing. The Employer's Statement of Position shall include a list of 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. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also state whether the employer agrees that the Board has jurisdiction over it and provide the requested information concerning the employer's relation to interstate commerce; identify any individuals whose eligibility to vote the employer intends to contest at the pre-election hearing and the basis of each such contention; state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date; and respond to the issues raised in any Statement of Position timely filed and served pursuant to paragraph (b)(2)(i) of this section. The Regional Director may permit the employer to amend its Statement of Position in a timely manner for good cause.

(3) *Statement of Position in RD cases—*(i) *Employer's and Representative's Statements of Position.* (A) If a petition has been filed under §102.61(c) and the Regional Director has issued a Notice of Hearing, the employer and the certified or recognized representative of employees shall file with the Regional Director and serve on the parties named in the petition their respective Statements of Position such that they are received by the Regional Director and the parties named in the petition by the date and time specified in the Notice of Hearing, which shall be no later than noon 8 business days following the issuance and service of the Notice of Hearing. The Regional Director may postpone the time for filing and serving the Statement of Position upon request of a party showing good cause. The Regional Director may permit the employer and the certified or recognized representative of employees to amend their respective Statements of Position in a timely manner for good cause.

(B) The Statements of Position of the employer and the certified or recognized representative shall state each party's position concerning the Board's jurisdiction over the employer; state whether each agrees that the proposed unit is appropriate, and, if not, state the basis for the contention that the proposed unit is inappropriate, and

state the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit; identify any individuals whose eligibility to vote each party intends to contest at the pre-election hearing and the basis of each such contention; raise any election bar; and state each party's respective positions concerning the type, date(s), time(s), and location(s) of the election and the eligibility period; and describe all other issues each party intends to raise at the hearing.

(C) The Statements of Position shall also state the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the employer or the certified or recognized representative of the employees and accept service of all papers for purposes of the representation proceeding and be signed by a representative of the employer or the certified or recognized representative, respectively.

(D) The employer's Statement of Position shall also include a list of 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 separately list the full names, work locations, shifts, and job classifications of all individuals that the employer contends must be added to the proposed unit to make it an appropriate unit. The employer shall also indicate those individuals, if any, whom it believes must be excluded from the proposed unit to make it an appropriate unit. The list(s) of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. The employer's Statement of Position shall also provide the requested information concerning the employer's relation to interstate commerce and state the length of the payroll period for employees in the proposed unit and the most recent payroll period ending date.

(ii) *Petitioner's Statement of Position.* Following timely filing and service of any Statement(s) of Position filed pursuant to paragraph (b)(3)(i) of this section, the petitioner shall file with the Regional Director and serve on the parties named in the petition its Statement of Position responding to the issues raised in the other Statement(s) of Position, such that it is received no later than noon 3 business days before the hearing. The Regional Director may permit the petitioner to amend its Statement of Position in a timely manner for good cause.

(c) *UC or AC cases.* After a petition has been filed under §102.61(d) or (e), the Regional Director shall conduct an investigation and, as appropriate, may issue a decision without a hearing; or prepare and cause to be served upon the parties and upon any known individuals or labor organizations purporting to act as representatives of any employees directly affected by such investigation, a Notice of Hearing before a Hearing Officer at a time and place fixed therein; or take other appropriate action. If a Notice of Hearing is served, it shall be accompanied by a copy of the petition. Any such Notice of Hearing may be amended or withdrawn before the close of the hearing by the Regional Director on the director's own motion. All hearing and post-hearing procedure under this paragraph (c) shall be in conformance with §§102.64 through 102.69 whenever applicable, except where the unit or certification involved arises out of an agreement as provided in §102.62(a), the Regional Director's action shall be final, and the provisions for review of Regional Director's decisions by the Board shall not apply. Dismissals of petitions without a hearing shall not be governed by §102.71. The Regional Director's dismissal shall be by decision, and a request for review therefrom may be obtained under §102.67, except where an agreement under §102.62(a) is involved.

[84 FR 69590, Dec. 18, 2019]

§102.64 Conduct of hearing.

(a) The primary purpose of a hearing conducted under Section 9(c) of the Act is to determine if a question of representation exists. A question of representation exists if a proper petition

has been filed concerning a unit appropriate for the purpose of collective bargaining or concerning a unit in which an individual or labor organization has been certified or is being currently recognized by the employer as the bargaining representative. Disputes concerning unit scope, voter eligibility and supervisory status will normally be litigated and resolved by the Regional Director before an election is directed. However, the parties may agree to permit disputed employees to vote subject to challenge, thereby deferring litigation concerning such disputes until after the election. If, upon the record of the hearing, the Regional Director finds that a question of representation exists, the director shall direct an election to resolve the question.

(b) Hearings shall be conducted by a Hearing Officer and shall be open to the public unless otherwise ordered by the Hearing Officer. At any time, a Hearing Officer may be substituted for the Hearing Officer previously presiding. Subject to the provisions of §102.66, it shall be the duty of the Hearing Officer to inquire fully into all matters and issues necessary to obtain a full and complete record upon which the Board or the Regional Director may discharge their duties under Section 9(c) of the Act.

(c) The hearing shall continue from day to day until completed unless the Regional Director concludes that extraordinary circumstances warrant otherwise. The Regional Director may, in the director's discretion, adjourn the hearing to a different place by announcement thereof at the hearing or by other appropriate notice.

[84 FR 69593, Dec. 18, 2019]

§102.65 Motions; intervention; appeals of Hearing Officer's rulings.

(a) All motions, including motions for intervention pursuant to paragraphs (b) and (e) of this section, shall be in writing or, if made at the hearing, may be stated orally on the record and shall briefly state the order or relief sought and the grounds for such motion. The Motion shall immediately be served on the other parties to the proceeding. Motions made prior to the transfer of the record to the Board shall be filed with the Regional Director, except that motions made during the hearing shall be filed with the Hearing Officer. After the transfer of the record to the Board, all motions shall be filed with the Board. Such motions shall be printed or otherwise legibly duplicated. Eight copies of such motions shall be filed with the Board. Extra copies of electronically-filed papers need not be filed. The Regional Director may rule upon all motions filed with him/her, causing a copy of the ruling to be served on the parties, or may refer the motion to the Hearing Officer, except that if the Regional Director prior to the close of the hearing grants a motion to dismiss the petition, the petitioner may obtain a review of such ruling in the manner prescribed in §102.71. The Hearing Officer shall rule, either orally on the record or in writing, upon all motions filed at the hearing or referred to the Hearing Officer as hereinabove provided, except that the Hearing Officer shall rule on motions to intervene and to amend the petition only as directed by the Regional Director, and except that all motions to dismiss petitions shall be referred for appropriate action at such time as the entire record is considered by the Regional Director or the Board, as the case may be. All motions, rulings, and orders shall become a part of the record, except that rulings on motions to revoke subpoenas shall become a part of the record only upon the request of the party aggrieved thereby as provided in §102.66(f).

(b) Any person desiring to intervene in any proceeding shall make a motion for intervention, stating the grounds upon which such person claims to have an interest in the proceeding. The Regional Director, or the Hearing Officer, at the specific direction of the Regional Director, may by order permit intervention in person or by counsel or other representative to such extent and upon such terms as the Regional Director may deem proper, and such intervenor shall thereupon become a party to the proceeding.

(c) Rulings by the Hearing Officer shall not be appealed directly to the Regional Director, except by special permission of the Regional Director, but shall be considered by the Regional

Director when the director reviews the entire record. Requests to the Regional Director for special permission to appeal from a ruling of the Hearing Officer, together with the appeal from such ruling, shall be filed promptly, in writing, and shall briefly state the reasons special permission should be granted and the grounds relied on for the appeal. The moving party shall immediately serve a copy of the request for special permission and of the appeal on the other parties and on the Regional Director. Any statement in opposition or other response to the request and/or to the appeal shall be filed promptly, in writing, and shall be served immediately on the other parties and on the Regional Director. No party shall be precluded from raising an issue at a later time because it did not seek special permission to appeal. If the Regional Director grants the request for special permission to appeal, the Regional Director may proceed forthwith to rule on the appeal. Neither the filing nor the grant of such a request shall stay the proceedings unless otherwise ordered by the Regional Director. As stated in §102.67, the parties may request Board review of Regional Director actions.

(d) The right to make motions or to make objections to rulings on motions shall not be deemed waived by participation in the proceeding.

(e)(1) A party to a proceeding may, because of extraordinary circumstances, move after the close of the hearing for reopening of the record, or move after the decision or report for reconsideration, for rehearing, or to reopen the record, but no such motion shall stay the time for filing a request for review of a decision or exceptions to a report. No motion for reconsideration, for rehearing, or to reopen the record will be entertained by the Board or by any Regional Director or Hearing Officer with respect to any matter which could have been but was not raised pursuant to any other section of these Rules except that the Regional Director may treat a request for review of a decision or exceptions to a report as a motion for reconsideration. A motion for reconsideration shall state with particularity the material error claimed and with respect to any finding of material fact shall specify the page of the record relied on for the motion. A motion for rehearing or to reopen the record shall specify briefly the error alleged to require a rehearing or hearing de novo, the prejudice to the movant alleged to result from such error, the additional evidence sought to be adduced, why it was not presented previously, and what result it would require if adduced and credited. Only newly discovered evidence—evidence which has become available only since the close of the hearing—or evidence which the Regional Director or the Board believes should have been taken at the hearing will be taken at any further hearing.

(2) Any motion for reconsideration or for rehearing pursuant to paragraph (e)(1) of this section shall be filed within 10 business days, or such further period as may be allowed, after the service of the decision or report. Any request for an extension of time to file such a motion shall be served promptly on the other parties. A motion to reopen the record shall be filed promptly on discovery of the evidence sought to be adduced.

(3) The filing and pendency of a motion under this provision shall not unless so ordered operate to stay the effectiveness of any action taken or directed to be taken nor will a Regional Director or the Board delay any decision or action during the period specified in paragraph (e)(2) of this section, except that, if a motion for reconsideration based on changed circumstances or to reopen the record based on newly discovered evidence states with particularity that the granting thereof will affect the eligibility to vote of specific employees, the Board agent shall have discretion to allow such employees to vote subject to challenge even if they are specifically excluded in the direction of election and to challenge or permit the moving party to challenge the ballots of such employees even if they are specifically included in the direction of election in any election conducted while such motion is pending. A motion for reconsideration, for rehearing, or to reopen the record need not be filed to exhaust administrative remedies.

[84 FR 69593, Dec. 18, 2019]

§ 102.66 Introduction of evidence: rights of parties at hearing; preclusion; subpoenas; oral argument and briefs.

(a) *Rights of parties at hearing.* Any party shall have the right to appear at any hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation and the other issues in the case that have been properly raised. The Hearing Officer shall also have power to call, examine, and cross-examine witnesses and to introduce into the record documentary and other evidence. Witnesses shall be examined orally under oath. The rules of evidence prevailing in courts of law or equity shall not be controlling. Stipulations of fact may be introduced in evidence with respect to any issue.

(b) *Statements of Position.* Issues in dispute shall be identified as follows: After a Statement of Position is received in evidence and prior to the introduction of further evidence, all other parties shall respond on the record to each issue raised in the Statement. The Regional Director may permit any Statement of Position to be amended in a timely manner for good cause, in which event the other parties shall respond to each amended position. The Regional Director may also permit responses to be amended in a timely manner for good cause. The Hearing Officer shall not receive evidence concerning any issue as to which parties have not taken adverse positions, except that this provision shall not preclude the receipt of evidence regarding the Board's jurisdiction over the employer or limit the Regional Director's discretion to direct the receipt of evidence concerning any issue, such as the appropriateness of the proposed unit, as to which the Regional Director determines that record evidence is necessary.

(c) *Offers of proof.* The Regional Director shall direct the Hearing Officer concerning the issues to be litigated at the hearing. The Hearing Officer may solicit offers of proof from the parties or their counsel as to any or all such issues. Offers of proof shall take the form of a written statement or an oral statement on the record identifying each witness the party would call to testify concerning the issue and summarizing each witness's testimony. If the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received. But in no event shall a party be precluded from introducing relevant evidence otherwise consistent with this subpart.

(d) *Preclusion.* 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 of Position or response, except that no party shall be precluded from contesting or presenting evidence relevant to the Board's statutory jurisdiction to process the petition. Nor shall any party be precluded, on the grounds that a voter's eligibility or inclusion was not contested at the pre-election hearing, from challenging the eligibility of any voter during the election. If a party contends that the proposed unit is not appropriate in its Statement of Position but fails to specify the classifications, locations, or other employee groupings that must be added to or excluded from the proposed unit to make it an appropriate unit, the party shall also be precluded from raising any issue as to the appropriateness of the unit, presenting any evidence relating to the appropriateness of the unit, cross-examining any witness concerning the appropriateness of the unit, and presenting argument concerning the appropriateness of the unit. If the employer fails to timely furnish the lists of employees described in §102.63(b)(1)(iii), (b)(2)(iii), or (b)(3)(iii), the employer shall be precluded from contesting the appropriateness of the proposed 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.

(e) *Objections.* Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing, accompanied by a short statement of the grounds of such objection, and included in the record. No such objection shall be deemed waived by further participation in the hearing.

(f) *Subpoenas.* The Board, or any Member thereof, shall, on the written application of any party, forthwith issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence, including books, records, correspondence, or documents, in their possession or under their control. The Executive Secretary shall have the authority to sign and issue any such subpoenas on behalf of the Board or any Member thereof. Any party may file applications for subpoenas in writing with the Regional Director if made prior to hearing, or with the Hearing Officer if made at the hearing. Applications for subpoenas may be made ex parte. The Regional Director or the Hearing Officer, as the case may be, shall forthwith grant the subpoenas requested. Any person served with a subpoena, whether ad testificandum or duces tecum, if he or she does not intend to comply with the subpoena, shall, within 5 business days after the date of service of the subpoena, petition in writing to revoke the subpoena. The date of service for purposes of computing the time for filing a petition to revoke shall be the date the subpoena is received. Such petition shall be filed with the Regional Director who may either rule upon it or refer it for ruling to the Hearing Officer except that if the evidence called for is to be produced at a hearing and the hearing has opened, the petition to revoke shall be filed with the Hearing Officer. Notice of the filing of petitions to revoke shall be promptly given by the Regional Director or Hearing Officer, as the case may be, to the party at whose request the subpoena was issued. The Regional Director or the Hearing Officer, as the case may be, shall revoke the subpoena if, in his/her opinion, the evidence whose production is required does not relate to any matter under investigation or in question in the proceedings or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. The Regional Director or the Hearing Officer, as the case may be, shall make a simple statement of procedural or other grounds for his/her ruling. The petition to revoke, any answer filed thereto, and any ruling thereon shall not become part of the record except upon the request of the party aggrieved by the ruling. Persons compelled to submit data or evidence are entitled to retain or, on payment of lawfully prescribed costs, to procure copies or transcripts of the data or evidence submitted by them.

(g) *Election details.* Prior to the close of the hearing, the Hearing Officer will:

(1) Solicit the parties' positions on the type, date(s), time(s), and location(s) of the election and the eligibility period, but shall not permit litigation of those issues;

(2) Solicit the name, address, email address, facsimile number, and phone number of the employer's on-site representative to whom the Regional Director should transmit the Notice of Election in the event the Regional Director directs an election;

(3) Inform the parties that the Regional Director will issue a decision as soon as practicable and that the director will immediately transmit the document to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided); and

(4) Inform the parties what their obligations will be under these Rules if the director directs an election and of the time for complying with such obligations.

(h) *Oral argument and briefs.* Any party shall be entitled, upon request, to a reasonable period at the close of the hearing for oral argument, which shall be included in the stenographic report of the hearing. Any party desiring to submit a brief to the Regional Director shall be entitled to do so within 5 business days after the close of the hearing. Prior to the close of the hearing and for good cause the Hearing Officer may grant an extension of time to file a brief not to exceed an additional

10 business days. Copies of the brief shall be served on all other parties to the proceeding and a statement of such service shall be filed with the Regional Director together with the brief. No reply brief may be filed except upon special permission of the Regional Director.

(i) *Hearing Officer analysis.* The Hearing Officer may submit an analysis of the record to the Regional Director but shall make no recommendations.

(j) *Witness fees.* Witness fees and mileage shall be paid by the party at whose instance the witness appears.

[84 FR 69594, Dec. 18, 2019]

§ 102.67 Proceedings before the Regional Director; further hearing; action by the Regional Director; appeals from actions of the Regional Director; statement in opposition; requests for extraordinary relief; Notice of Election; voter list.

(a) *Proceedings before Regional Director.* The Regional Director may proceed, either forthwith upon the record or after oral argument, the submission of briefs, or further hearing, as the director may deem proper, to determine whether a question of representation exists in a unit appropriate for purposes of collective bargaining as provided in §102.64(a), and to direct an election, dismiss the petition, or make other disposition of the matter. A decision by the Regional Director upon the record shall set forth the director's findings, conclusions, and order or direction.

(b) *Directions of elections.* If the Regional Director directs an election, the direction may specify the type, date(s), time(s), and location(s) of the election and the eligibility period, but the Regional Director retains discretion to continue investigating these details after directing an election and to specify them in a subsequently-issued Notice of Election. The Regional Director shall schedule the election for the earliest date practicable, but unless a waiver is filed, the Regional Director will normally not schedule an election before the 20th business day after the date of the direction of election, to permit the Board to rule on any request for review which may be filed pursuant to paragraph (c) of this section. The Regional Director shall transmit the direction of election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided). The Regional Director shall also transmit the Board's Notice of Election to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided), whether transmitted simultaneously with the direction of election or separately thereafter. If the direction of election provides for individuals to vote subject to challenge, the Notice of Election shall so state, and shall advise employees that the individuals are neither included in, nor excluded from, the bargaining unit, inasmuch as they have been permitted to vote subject to challenge. The election notice shall further advise employees that the eligibility or inclusion of the individuals will be resolved, if necessary, following the election.

(c) *Requests for Board review of Regional Director actions.* Upon the filing of a request therefor with the Board by any interested person, the Board may review any action of a Regional Director delegated to him/her under Section 3(b) of the Act except as the Board's Rules provide otherwise. The request for review may be filed at any time following the action until 10 business days after a final disposition of the proceeding by the Regional Director. The filing of such a request shall not, unless otherwise ordered by the Board, operate as a stay of the election or any other action taken or directed by the Regional Director, except that if a request for review of a decision and direction of election is filed within 10 business days of that decision and has not been ruled upon or has been granted before the election is conducted, ballots whose validity might be affected by the Board's ruling on the request for review or decision on review shall be segregated in an appropriate manner, and all ballots shall be impounded and remain unopened pending such ruling or decision. A party retains the right to file a request for review of a decision and direction of election more than 10 business days after that

decision issues, but the pendency of such a request for review shall not require impoundment of the ballots.

(d) *Grounds for review.* The Board will grant a request for review only where compelling reasons exist therefor. Accordingly, a request for review may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) That the Regional Director's decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.

(3) That the conduct of any hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.

(4) That there are compelling reasons for reconsideration of an important Board rule or policy.

(e) *Contents of request.* A request for review must be a self-contained document enabling the Board to rule on the basis of its contents without the necessity of recourse to the record; however, the Board may, in its discretion, examine the record in evaluating the request. With respect to the ground listed in paragraph (d)(2) of this section, and other grounds where appropriate, the request must contain a summary of all evidence or rulings bearing on the issues together with page citations from the transcript and a summary of argument. Such request may not raise any issue or allege any facts not timely presented to the Regional Director.

(f) *Opposition to request.* Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition which shall be served in accordance with the requirements of paragraph (i) of this section. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

(g) *Finality; waiver; denial of request.* The Regional Director's actions are final unless a request for review is granted. The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the Regional Director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

(h) *Grant of review; briefs.* The grant of a request for review shall not, outside of the provision for impoundment set forth in paragraph (c) of this section, stay the Regional Director's action unless otherwise ordered by the Board. Except where the Board rules upon the issues on review in the order granting review, the appellants and other parties may, within 10 business days after issuance of an order granting review, file briefs with the Board. Such briefs may be reproductions of those previously filed with the Regional Director and/or other briefs which shall be limited to the issues raised in the request for review. No reply briefs may be filed except upon special leave of the Board. Where review has been granted, the Board may provide for oral argument or further hearing. The Board will consider the entire record in the light of the grounds relied on for review and shall make such disposition of the matter as it deems appropriate. Any request for review may be withdrawn with the permission of the Board at any time prior to the issuance of the decision of the Board thereon.

(i) *Format, Service, and Extensions*—(1) *Format of request.* All documents filed with the Board under the provisions of this section shall be double spaced, on 8 1/2- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Requests for review, including briefs in support thereof and any motions under paragraph (j) of this section; statements in opposition thereto; and briefs on review shall not exceed 50 pages in length exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained

from the Board by motion, setting forth the reasons therefor, filed pursuant to the procedures set forth in §102.2(c). Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited. A party may combine a request for review of the Regional Director's decision and direction of election with a request for review of a Regional Director's post-election decision, if the party has not previously filed a request for review of the pre-election decision. A party may not, however, file more than one request for review of a particular action or decision by the Regional Director. Repetitive requests will not be considered.

(2) *Service.* The party filing with the Board a request for review, a statement in opposition to a request for review, or a brief on review shall serve a copy thereof on the other parties and shall file a copy with the Regional Director. A certificate of service shall be filed with the Board together with the document.

(3) *Extensions.* Requests for extensions of time to file requests for review, statements in opposition to a request for review, or briefs, as permitted by this section, shall be filed pursuant to §102.2(c) with the Board or the Regional Director, as the case may be, except that no extension of time will be granted to circumvent the impoundment provisions set forth in paragraph (c) of this section. The party filing the request for an extension of time shall serve a copy thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.

(j) *Requests for extraordinary relief.* (1) A party requesting review may also move in writing to the Board for one or more of the following forms of relief:

(i) Expedited consideration of the request;

(ii) A stay of some or all of the proceedings, including the election; or

(iii) Impoundment and/or segregation of some or all of the ballots.

(2) Relief will be granted only upon a clear showing that it is necessary under the particular circumstances of the case. The pendency of a motion does not entitle a party to interim relief, and an affirmative ruling by the Board granting relief is required before the action of the Regional Director will be altered in any fashion.

(k) *Notice of Election.* The employer shall post copies of the Board's Notice of Election in conspicuous places, including all places where notices to employees in the unit are customarily posted, at least 3 full working days prior to 12:01 a.m. of the day of the election and shall also distribute it electronically to all eligible voters (including individuals permitted to vote subject to challenge) if the employer customarily communicates with employees in the unit electronically. In elections involving mail ballots, the election shall be deemed to have commenced the day the ballots are deposited by the Regional Office in the mail. In all cases, the notices shall remain posted until the end of the election. For the purposes of this subpart, the term working day shall mean an entire 24-hour period excluding Saturdays, Sundays, and holidays. The employer's failure properly to post or distribute the election notices as required herein shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a)(8). A party shall be estopped from objecting to the nonposting of notices if it is responsible for the nonposting, and likewise shall be estopped from objecting to the nondistribution of notices if it is responsible for the nondistribution.

(l) *Voter list.* Absent extraordinary circumstances specified in the direction of election, the employer shall, within 5 business days after issuance of the direction, provide to the Regional Director and the parties named in such direction a list of the full names, work locations, shifts, job classifications, and contact information (including home addresses, available personal email addresses, and available home and personal cellular ''cell'' telephone numbers) of all eligible voters. The employer shall also include in separate sections of that list the same information for those individuals who will be permitted to vote subject to challenge. In order to be timely filed and served,

the list must be received by the Regional Director and the parties named in the direction respectively within 5 business days after issuance of the direction of election unless a longer time is specified therein. The list of names shall be alphabetized (overall or by department) and be in an electronic format approved by the General Counsel unless the employer certifies that it does not possess the capacity to produce the list in the required form. When feasible, the list shall be filed electronically with the Regional Director and served electronically on the other parties named in the direction. A certificate of service on all parties shall be filed with the Regional Director when the voter list is filed. The employer's failure to file or serve the list within the specified time or in proper format shall be grounds for setting aside the election whenever proper and timely objections are filed under the provisions of §102.69(a)(8). The employer shall be estopped from objecting to the failure to file or serve the list within the specified time or in the proper format if it is responsible for the failure. The parties shall not use the list for purposes other than the representation proceeding, Board proceedings arising from it, and related matters.

[84 FR 69595, Dec. 18, 2019]

§102.68 Record in pre-election proceeding; what constitutes; transmission to Board.

The record in a proceeding conducted pursuant to the foregoing section shall consist of: the petition, Notice of Hearing with affidavit of service thereof, statements of position, responses to statements of position, offers of proof made at the pre-election hearing, motions, rulings, orders, the stenographic report of the hearing and of any oral argument before the Regional Director, stipulations, exhibits, affidavits of service, and any briefs or other legal memoranda submitted by the parties to the Regional Director or to the Board, and the decision of the Regional Director, if any. Immediately upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit the record to the Board.

[84 FR 69597, Dec. 18, 2019]

§102.69 Election procedure; tally of ballots; objections; certification by the Regional Director; hearings; Hearing Officer reports on objections and challenges; exceptions to Hearing Officer reports; Regional Director decisions on objections and challenges.

(a) *Election procedure; tally; objections.* (1) Unless otherwise directed by the Board, all elections shall be conducted under the supervision of the Regional Director in whose Region the proceeding is pending.

(2) All elections shall be by secret ballot.

(3) Whenever two or more labor organizations are included as choices in an election, either participant may, upon its prompt request to and approval thereof by the Regional Director, whose decision shall be final, have its name removed from the ballot, except that in a proceeding involving an employer-filed petition or a petition for decertification the labor organization certified, currently recognized, or found to be seeking recognition may not have its name removed from the ballot without giving timely notice in writing to all parties and the Regional Director, disclaiming any representation interest among the employees in the unit.

(4) A pre-election conference may be held at which the parties may check the list of voters and attempt to resolve any questions of eligibility or inclusions in the unit.

(5) When the election is conducted manually, any party may be represented by observers of its own selection; whenever possible, a party shall select a current member of the voting unit as its observer, and when no such individual is available, a party should select a current nonsupervisory employee as its observer. Selection of observers is also subject to such limitations as the Regional Director may prescribe.

(6) Any party and Board agents may challenge, for good cause, the eligibility of any person to participate in

the election. The ballots of such challenged persons shall be impounded.

(7) Upon the conclusion of the election the ballots will be counted and a tally of ballots prepared and immediately made available to the parties.

(8) Within 5 business days after the tally of ballots has been prepared, any party may file with the Regional Director objections to the conduct of the election or to conduct affecting the results of the election which shall contain a short statement of the reasons therefor and a written offer of proof in the form described in §102.66(c) insofar as applicable, except that the Regional Director may extend the time for filing the written offer of proof in support of the election objections upon request of a party showing good cause. Such filing(s) must be timely whether or not the challenged ballots are sufficient in number to affect the results of the election. The party filing the objections shall serve a copy of the objections, including the short statement of reasons therefor, but not the written offer of proof, on each of the other parties to the case, and include a certificate of such service with the objections. A person filing objections by facsimile pursuant to §102.5(e) shall also file an original for the Agency's records, but failure to do so shall not affect the validity of the filing if otherwise proper. In addition, extra copies need not be filed if the filing is by facsimile or electronically pursuant to §102.5(e) or (c). The Regional Director will transmit a copy of the objections to be served on each of the other parties to the proceeding, but shall not transmit the offer of proof.

(b) *Certification in the absence of objections, determinative challenges and runoff elections.* If no objections are filed within the time set forth in paragraph (a)(8) of this section, if the challenged ballots are insufficient in number to affect the results of the election, and if no runoff election is to be held pursuant to §102.70, and if no request for review filed pursuant to §102.67(c) is pending, the Regional Director shall forthwith issue to the parties a certification of the results of the election, including certification of representative where appropriate, with the same force and effect as if issued by the Board.

(c) *Regional director's resolution of objections and challenges*—(1) *Regional director's determination to hold a hearing*—(i) *Decisions resolving objections and challenges without a hearing.* If timely objections are filed to the conduct of an election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof would not constitute grounds for setting aside the election if introduced at a hearing, and the Regional Director determines that any determinative challenges do not raise substantial and material factual issues, the Regional Director shall issue a decision disposing of the objections and determinative challenges. If no request for review filed pursuant to §102.67(c) is pending, and no request for review is timely filed pursuant to paragraph (c)(2) of this section, the Regional Director shall issue a certification of the results of the election, including certification of representative where appropriate.

(ii) *Notices of hearing on objections and challenges.* If timely objections are filed to the conduct of the election or to conduct affecting the results of the election, and the Regional Director determines that the evidence described in the accompanying offer of proof could be grounds for setting aside the election if introduced at a hearing, or if the challenged ballots are sufficient in number to affect the results of the election, and raise substantial and material factual issues, the Regional Director shall transmit to the parties and their designated representatives by email, facsimile, or by overnight mail (if neither an email address nor facsimile number was provided) a Notice of Hearing before a Hearing Officer at a place and time fixed therein. The Regional Director shall set the hearing for a date 15 business days after the preparation of the tally of ballots or as soon as practicable thereafter, unless the parties agree to an earlier date, except that the Regional Director may consolidate the hearing concerning objections and challenges with an unfair labor practice proceeding before an Administrative Law Judge. In any proceeding wherein the election has been held pursuant to §102.62(a) or (c) and

the representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing, the Administrative Law Judge shall, after issuing a decision, sever the representation case and transfer it to the Regional Director for further processing.

(iii) *Hearings; Hearing Officer reports; exceptions to Regional Director.* The hearing on objections and challenges shall continue from day to day until completed unless the Regional Director concludes that extraordinary circumstances warrant otherwise. Any hearing pursuant to this section shall be conducted in accordance with the provisions of §§ 102.64, 102.65, and 102.66, insofar as applicable. Any party shall have the right to appear at the hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the objections and determinative challenges that are the subject of the hearing. The Hearing Officer may rule on offers of proof. Any party desiring to submit a brief to the Hearing Officer shall be entitled to do so within 5 business days after the close of the hearing. Prior to the close of the hearing and for good cause the Hearing Officer may grant an extension of time to file a brief not to exceed an additional 10 business days. Upon the close of such hearing, the Hearing Officer shall prepare and cause to be served on the parties a report resolving questions of credibility and containing findings of fact and recommendations as to the disposition of the issues. Any party may, within 10 business days from the date of issuance of such report, file with the Regional Director an original and one copy of exceptions to such report, with supporting brief if desired. A copy of such exceptions, together with a copy of any brief filed, shall immediately be served on the other parties and a statement of service filed with the Regional Director. Within 5 business days from the last date on which exceptions and any supporting brief may be filed, or such further time as the Regional Director may allow, a party opposing the exceptions may file an answering brief with the Regional Director. An original and one copy shall be submitted. A copy of such answering brief shall immediately be served on the other parties and a statement of service filed with the Regional Director. Extra copies of electronically-filed papers need not be filed. The Regional Director shall thereupon decide the matter upon the record or make other disposition of the case. If no exceptions are filed to such report, the Regional Director, upon the expiration of the period for filing such exceptions, may decide the matter forthwith upon the record or may make other disposition of the case, save that the Regional Director shall not issue a certification of results and/or representative if a request for review previously filed subject to § 102.67(c) remains pending, or if a request for review is timely filed pursuant to paragraph (c)(2) of this section prior to the issuance of the certification of results and/or representative.

(2) *Regional Director decisions and Board review.* The decision of the Regional Director disposing of challenges and/or objections shall be final unless a request for review is granted. If a consent election has been held pursuant to §§ 102.62(a) or (c), the decision of the Regional Director is not subject to Board review. If the election has been conducted pursuant to § 102.62(b), or by a direction of election issued following any proceeding under § 102.67, the parties shall have the right to Board review set forth in § 102.67, except that in any proceeding wherein a representation case has been consolidated with an unfair labor practice proceeding for purposes of hearing and the election was conducted pursuant to §§ 102.62(b) or 102.67, the provisions of § 102.46 shall govern with respect to the filing of exceptions or an answering brief to the exceptions to the Administrative Law Judge's decision, and a request for review of the Regional Director's decision and direction of election shall be due at the same time as the exceptions to the Administrative Law Judge's decision are due. If no request for review is timely filed pursuant to this paragraph, and no request for review filed pursuant to § 102.67(c) is pending, the

Regional Director shall issue a certification of the results of the election, including certification of representative where appropriate.

(d) *Record for objections and challenges.* (1)(i) *Record in case with hearing.* In a proceeding pursuant to this section in which a hearing is held, the record in the case shall consist of the Notice of Hearing, motions, rulings, orders, stenographic report of the hearing, stipulations, exhibits, together with the objections to the conduct of the election or to conduct affecting the results of the election, offers of proof made at the post-election hearing, any briefs or other legal memoranda submitted by the parties, any report on such objections and/or on challenged ballots, exceptions, the decision of the Regional Director, any requests for review, and the record previously made as defined in §102.68. Materials other than those set out above shall not be a part of the record.

(ii) *Record in case with no hearing.* In a proceeding pursuant to this section in which no hearing is held, the record shall consist of the objections to the conduct of the election or to conduct affecting the results of the election, any decision on objections or on challenged ballots and any request for review of such a decision, any documentary evidence, excluding statements of witnesses, relied upon by the Regional Director in his decision, any briefs or other legal memoranda submitted by the parties, and any other motions, rulings, or orders of the Regional Director. Materials other than those set out above shall not be a part of the record, except as provided in paragraph (d)(3) of this section.

(2) Immediately upon issuance of an order granting a request for review by the Board, the Regional Director shall transmit to the Board the record of the proceeding as defined in paragraph (d)(1) of this section.

(3) In a proceeding pursuant to this section in which no hearing is held, a party filing a request for review of a Regional Director's decision on challenged ballots or on objections or on both, or any opposition thereto, may support its submission to the Board by appending thereto copies of any offer of proof, including copies of any affidavits or other documentary evidence, it has timely submitted to the Regional Director and which were not included in the decision. Documentary evidence so appended shall thereupon become part of the record in the proceeding. Failure to append that evidence to its submission to the Board in the representation proceeding as provided above, shall preclude a party from relying on such evidence in any subsequent unfair labor proceeding.

(e) *Revised tally of ballots.* In any case under this section in which the Regional Director or the Board, upon a ruling on challenged ballots, has directed that such ballots be opened and counted and a revised tally of ballots issued, and no objection to such revised tally is filed by any party within 5 business days after the revised tally of ballots has been made available, the Regional Director shall forthwith issue to the parties certification of the results of the election, including certifications of representative where appropriate, with the same force and effect as if issued by the Board.

(f) *Format of filings with Regional Director.* All documents filed with the Regional Director under the provisions of this section shall be filed double spaced, on 8½- by 11-inch paper, and shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. Briefs in support of exceptions or answering briefs shall not exceed 50 pages in length, exclusive of subject index and table of cases and other authorities cited, unless permission to exceed that limit is obtained from the Regional Director by motion, setting forth the reasons therefor, filed pursuant to the procedures set forth in §102.2(c). Where any brief filed pursuant to this section exceeds 20 pages, it shall contain a subject index with page references and an alphabetical table of cases and other authorities cited.

(g) *Extensions of time.* Requests for extensions of time to file exceptions, requests for review, supporting briefs, or answering briefs, as permitted by this section, shall be filed pursuant to §102.2(c) with the Board or the Regional Director, as the case may be. The party filing the request for an extension of time shall serve a copy

thereof on the other parties and, if filed with the Board, on the Regional Director. A statement of such service shall be filed with the document.

(h) *Final disposition.* For the purposes of filing a request for review pursuant to §102.67(c) or paragraph (c)(2) of this section, a case is considered to have reached final disposition when the Regional Director dismisses the petition or issues a post-election decision that will result in the issuance of a certification of results (including, where appropriate, a certification of representative) absent the filing of a request for review.

[84 FR 69597, Dec. 18, 2019]

§ 102.70 Runoff election.

(a) The regional director shall conduct a runoff election, without further order of the Board, when an election in which the ballot provided for not less than three choices (i.e., at least two representatives and ''neither'') results in no choice receiving a majority of the valid ballots cast and no objections are filed as provided in §102.69. Only one runoff shall be held pursuant to this section.

(b) Employees who were eligible to vote in the election and who are in an eligible category on the date of the runoff election shall be eligible to vote in the runoff election.

(c) The ballot in the runoff election shall provide for a selection between the two choices receiving the largest and second largest number of votes.

(d) In the event the number of votes cast in an inconclusive election in which the ballot provided for a choice among two or more representatives and ''neither'' or ''none'' is equally divided among the several choices; or in the event the number of ballots cast for one choice in such election is equal to the number cast for another of the choices but less than the number cast for the third choice, the regional director shall declare the first election a nullity and shall conduct another election, providing for a selection from among the three choices afforded in the original ballot; and he shall thereafter proceed in accordance with paragraphs (a), (b), and (c) of this section. In the event two or more choices receive the same number of ballots and another choice receives no ballots and there are no challenged ballots that would affect the results of the election, and if all eligible voters have cast valid ballots, there shall be no runoff election and a certification of results of election shall be issued. Only one such further election pursuant to this paragraph may be held.

(e) Upon the conclusion of the runoff election, the provisions of §102.69 shall govern, insofar as applicable.

[26 FR 3891, May 4, 1961]

§ 102.71 Dismissal of petition; refusal to proceed with petition; requests for review by the Board of action of the Regional Director.

(a) If, after a petition has been filed and at any time prior to the close of hearing, it shall appear to the Regional Director that no further proceedings are warranted, the Regional Director may dismiss the petition by administrative action and shall so advise the petitioner in writing, setting forth a simple statement of the procedural or other grounds for the dismissal, with copies to the other parties to the proceeding. Any party may obtain a review of such action by filing a request therefor with the Board in Washington, DC, in accordance with the provisions of paragraph (c) of this section. A request for review from an action of a Regional Director pursuant to this subsection may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) There are compelling reasons for reconsideration of an important Board rule or policy.

(3) The request for review is accompanied by documentary evidence previously submitted to the Regional Director raising serious doubts as to the Regional Director's factual findings, thus indicating that there are factual issues which can best be resolved upon the basis of the record developed at a hearing.

(4) The Regional Director's action is, on its face, arbitrary or capricious.

(5) The petition raises issues which can best be resolved upon the basis of a record developed at a hearing.

(b) Where the Regional Director dismisses a petition or directs that the proceeding on the petition be held in abeyance, and such action is taken because of the pendency of concurrent unresolved charges of unfair labor practices, and the Regional Director, upon request, has so notified the parties in writing, any party may obtain a review of the Regional Director's action by filing a request therefor with the Board in Washington, DC, in accordance with the provisions of paragraph (c) of this section. A review of an action of a Regional Director pursuant to this subsection may be granted only upon one or more of the following grounds:

(1) That a substantial question of law or policy is raised because of:

(i) The absence of; or

(ii) A departure from, officially reported Board precedent.

(2) There are compelling reasons for reconsideration of an important Board rule or policy.

(3) The Regional Director's action is, on its face, arbitrary or capricious.

(c) A request for review must be filed with the Board in Washington, DC, and a copy filed with the Regional Director and copies served on all the other parties within 10 business days of service of the notice of dismissal or notification that the petition is to be held in abeyance. The request shall contain a complete statement setting forth facts and reasons upon which the request is based. The request shall be printed or otherwise legibly duplicated. Extra copies of electronically-filed papers need not be filed. The request must comply with the formatting requirements set forth in §102.67(i)(1). Requests for an extension of time within which to file the request for review shall be filed pursuant to §102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests.

(d) Any party may, within 5 business days after the last day on which the request for review must be filed, file with the Board a statement in opposition to the request for review. An opposition must be filed with the Board in Washington, DC, and a copy filed with the Regional Direction and copies served on all the other parties. The opposition must comply with the formatting requirements set forth in §102.67(i)(1). Requests for an extension of time within which to file the opposition shall be filed pursuant to §102.2(c) with the Board in Washington, DC, and a certificate of service shall accompany the requests. The Board may grant or deny the request for review without awaiting a statement in opposition. No reply to the opposition may be filed except upon special leave of the Board.

[84 FR 69599, Dec. 18, 2019]

§102.72 Filing petition with general counsel: investigation upon motion of general counsel; transfer of petition and proceeding from region to general counsel or to another region; consolidation of proceedings in same region; severance; procedure before general counsel in cases over which the general counsel has assumed jurisdiction.

(a) Whenever it appears necessary in order to effectuate the purposes of the Act, or to avoid unnecessary costs or delay, the General Counsel may permit a petition to be filed with him/her in Washington, DC, or may, at any time after a petition has been filed with a Regional Director pursuant to §102.60, order that such petition and any proceeding that may have been instituted with respect thereto:

(1) Be transferred to and continued before him/her, for the purpose of investigation or consolidation with any other proceeding which may have been instituted in a Regional Office or with him/her; or

(2) Be consolidated with any other proceeding which may have been instituted in the same region; or

(3) Be transferred to and continued in any other region, for the purpose of investigation or consolidation with any proceeding which may have been instituted in or transferred to such region; or

(4) Be severed from any other proceeding with which it may have been consolidated pursuant to this section.

(b) The provisions of §§102.60 to 102.71, inclusive, shall, insofar as applicable, apply to proceedings before the general counsel pursuant to this section, and

the powers granted to regional directors in such provisions shall, for the purpose of this section, be reserved to and exercised by the general counsel. After the transfer of any petition and any proceeding which may have been instituted in respect thereto from one region to another pursuant to this section, the provisions of this subpart shall, insofar as applicable, govern such petition and such proceedings as if the petition has originally been filed in the region to which the transfer was made.

(c) The Regional Director may exercise the powers in paragraphs (a)(2) and (4) of this section with respect to proceedings pending in his/her Region.

[32 FR 9550, July 1, 1967, as amended at 82 FR 43698, Sept. 19, 2017]

Subpart E—Procedure for Unfair Labor Practice and Representation Cases Under Sections 8(b)(7) and 9(c) of the Act

SOURCE: 24 FR 9102, Nov. 7, 1959. Redesignated at 82 FR 11754, Feb. 24, 2017.

§ 102.73 Initiation of proceedings.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 8(b)(7) of the Act, the Regional Director will investigate such charge, giving it the priority specified in subpart H of this part.

[82 FR 11764, Feb. 24, 2017]

§ 102.74 Complaint and formal proceedings.

If it appears to the Regional Director that the charge has merit, formal proceedings will be instituted in accordance with the procedures described in §§ 102.15 through 102.51, insofar as they are applicable, and insofar as they are not inconsistent with the provisions of this subpart. If it appears to the Regional Director that issuance of a complaint is not warranted, the Director will decline to issue a complaint, and the provisions of § 102.19, including the provisions for appeal to the General Counsel, are applicable unless an election has been directed under §§ 102.77 and 102.78, in which event the provisions of § 102.81 are applicable.

[82 FR 11764, Feb. 24, 2017]

§ 102.75 Suspension of proceedings on the charge where timely petition is filed.

If it appears to the Regional Director that issuance of a complaint may be warranted but for the pendency of a petition under Section 9(c) of the Act, which has been filed by any proper party within a reasonable time not to exceed 30 days from the commencement of picketing, the Regional Director will suspend proceedings on the charge and will proceed to investigate the petition under the expedited procedure provided below, pursuant to the first proviso to subparagraph (C) of Section 8(b)(7) of the Act.

[82 FR 11764, Feb. 24, 2017]

§ 102.76 Petition; who may file; where to file; contents.

When picketing of an employer has been conducted for an object proscribed by Section 8(b)(7) of the Act, a petition for the determination of a question concerning representation of the employees of such employer may be filed in accordance with the provisions of §§ 102.60 and 102.61, insofar as applicable, except that if a charge under § 102.73 has been filed against the labor organization on whose behalf picketing has been conducted, the petition will not be required to contain a statement that the employer declines to recognize the petitioner as the representative within the meaning of Section 9(a) of the Act; or that the union represents a substantial number of employees; or that the labor organization is currently recognized but desires certification under the Act; or that the individuals or labor organizations who have been certified or are currently recognized by the employer are no longer the representative; or, if the petitioner is an employer, that one or more individuals or labor organizations have presented to the petitioner a claim to be recognized as the exclusive representative of the employees in the unit claimed to be appropriate.

[82 FR 11764, Feb. 24, 2017]

§ 102.77 Investigation of petition by Regional Director; directed election.

(a) Where a petition has been filed pursuant to §102.76 the regional director shall make an investigation of the matters and allegations set forth therein. Any party, and any individual or labor organization purporting to act as representative of the employees involved and any labor organization on whose behalf picketing has been conducted as described in section 8(b)(7)(C) of the Act may present documentary and other evidence relating to the matters and allegations set forth in the petition.

(b) If, after the investigation of such petition or any petition filed under subpart D of this part, and after the investigation of the charge filed pursuant to §102.73, it appears to the Regional Director that an expedited election under Section 8(b)(7)(C) of the Act is warranted, and that the policies of the Act would be effectuated thereby, the Regional Director shall forthwith proceed to conduct an election by secret ballot of the employees in an appropriate unit, or make other disposition of the matter, except that in any case in which it appears to the Regional Director that the proceeding raises questions which cannot be decided without a hearing, the Director may issue and cause to be served on the parties, individuals, and labor organizations involved a Notice of Hearing before a Hearing Officer at a time and place fixed therein. In this event, the method of conducting the hearing and the procedure following, shall be governed insofar as applicable by §§102.63 through 102.68.

[24 FR 9102, Nov. 7, 1959, as amended at 26 FR 3892, May 4, 1961; 76 FR 80188, Dec. 22, 2011; 79 FR 3494, Jan. 22, 2014; 79 FR 74488, Dec. 15, 2014; 82 FR 11765, Feb. 24, 2017]

§ 102.78 Election procedure; method of conducting balloting; postballoting procedure.

If no agreement such as that provided in §102.79 has been made, the regional director shall fix the time and place of the election, eligibility requirements for voting, and other arrangements for the balloting. The method of conducting the balloting and the postballoting procedure shall be governed, insofar as applicable, by the provisions of §§102.69 and 102.70 except that the labor organization on whose behalf picketing has been conducted may not have its name removed from the ballot without the consent of the regional director and except that the regional director's rulings on any objections or challenged ballots shall be final unless the Board grants special permission to appeal from the regional director's rulings. Any request for such permission shall be filed promptly, in writing, and shall briefly state the grounds relied upon. The party requesting review shall immediately serve a copy thereof on each other party. A request for review shall not operate as a stay of the regional director's rulings unless so ordered by the Board.

§ 102.79 Consent-election agreements.

Where a petition has been duly filed, the parties involved may, subject to the approval of the regional director, enter into an agreement governing the method of conducting the election as provided for in §102.62(a), insofar as applicable.

§ 102.80 Dismissal of petition; refusal to process petition under expedited procedure.

(a) If, after a petition has been filed pursuant to the provisions of §102.76, and prior to the close of the hearing, it shall appear to the regional director that further proceedings in respect thereto in accordance with the provisions of §102.77 are not warranted, he may dismiss the petition by administrative action, and the action of the regional director shall be final, subject to a prompt appeal to the Board on special permission which may be granted by the Board. Upon such appeal the provisions of §102.71 shall govern insofar as applicable. Such appeal shall not operate as a stay unless specifically ordered by the Board.

(b) If it shall appear to the regional director that an expedited election is not warranted but that proceedings under subpart C of this part are warranted, he/she shall so notify the parties in writing with a simple statement of the grounds for his/her decision.

(c) Where the regional director, pursuant to §§ 102.77 and 102.78, has determined that a hearing prior to election is not required to resolve the issues raised by the petition and has directed an expedited election, any party aggrieved may file a request with the Board for special permission to appeal from such determination. Such request shall be filed promptly, in writing, and shall briefly state the grounds relied upon. The party requesting such appeal shall immediately serve a copy thereof on each other party. Should the Board grant the requested permission to appeal, such action shall not, unless specifically ordered by the Board, operate as a stay of any action by the regional director.

[24 FR 9102, Nov. 7, 1959, as amended at 26 FR 3892, May 4, 1961; 82 FR 43699, Sept. 19, 2017]

§ 102.81 Review by the general counsel of refusal to proceed on charge; resumption of proceedings upon charge held during pendency of petition; review by the general counsel of refusal to proceed on related charge.

(a) Where an election has been directed by the Regional Director or the Board in accordance with the provisions of §§ 102.77 and 102.78, the Regional Director shall decline to issue a complaint on the charge, and he/she shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his/her action. The person making the charge may obtain a review of such action by filing an appeal with the general counsel in Washington, DC, and filing a copy of the appeal with the regional director, within 7 days from the service of the notice of such refusal by the regional director. In all other respects the appeal shall be subject to the provisions of § 102.19. Such appeal shall not operate as a stay of any action by the regional director.

(b) Where an election has not been directed and the petition has been dismissed in accordance with the provisions of § 102.80, the regional director shall resume investigation of the charge and shall proceed in accordance with § 102.74.

(c) If in connection with an 8(b)(7) proceeding, unfair labor practice charges under other sections of the Act have been filed and the Regional Director upon investigation has declined to issue a complaint upon such charges, he/she shall so advise the parties in writing, accompanied by a simple statement of the procedural or other grounds for his/her action. The person making such charges may obtain a review of such action by filing an appeal with the general counsel in Washington, DC, and filing a copy of the appeal with the regional director, within 7 days from the service of the notice of such refusal by the regional director. In all other respects the appeal shall be subject to the provisions of § 102.19.

[32 FR 9550, July 1, 1967, as amended at 51 FR 23749, July 1, 1986; 82 FR 43699, Sept. 19, 2017]

§ 102.82 Transfer, consolidation, and severance.

The provisions of §§ 102.33 and 102.72, respecting the filing of a charge or petition with the general counsel and the transfer, consolidation, and severance of proceedings, shall apply to proceedings under this subpart, except that the provisions of §§ 102.73 to 102.81, inclusive, shall govern proceedings before the general counsel.

Subpart F—Procedure for Referendum Under Section 9(e) of the Act

SOURCE: 24 FR 9102, Nov. 7, 1959. Redesignated at 82 FR 11754, Feb. 24, 2017.

§ 102.83 Petition for referendum under Section 9(e)(1) of the Act; who may file; where to file; withdrawal.

A petition to rescind the authority of a labor organization to make an agreement requiring as a condition of employment membership in such labor organization may be filed by an employee or group of employees on behalf of 30 percent or more of the employees in a bargaining unit covered by such an agreement. The petition shall be in writing and signed, and either must be sworn to before a notary public, Board agent, or other person duly authorized by law to administer oaths and take acknowledgments or must contain a declaration by the person signing it, under the penalties of the Criminal

Code, that its contents are true and correct to the best of his/her knowledge and belief. One original of the petition must be filed with the Regional Director wherein the bargaining unit exists or, if the unit exists in two or more Regions, with the Regional Director for any of such Regions. A person filing a petition by facsimile must also file an original for the Agency's records, but failure to do so must not affect the validity of the filing by facsimile, if otherwise proper. A person filing a petition electronically need not file an original. The petition may be withdrawn only with the approval of the Regional Director with whom such petition was filed. Upon approval of the withdrawal of any petition the case will be closed.

[82 FR 11765, Feb. 24, 2017, as amended at 82 FR 43699, Sept. 19, 2017]

§ 102.84 Contents of petition to rescind authority.

(a) The name of the employer.

(b) The address of the establishments involved.

(c) The general nature of the employer's business.

(d) A description of the bargaining unit involved.

(e) The name and address of the labor organization whose authority it is desired to rescind.

(f) The number of employees in the unit.

(g) Whether there is a strike or picketing in progress at the establishment involved and, if so, the approximate number of employees participating, and the date such strike or picketing commenced.

(h) The date of execution and of expiration of any contract in effect covering the unit involved.

(i) The name and address of the petitioner, and the name, title, address, telephone number, facsimile number, and email address of the individual who will serve as the representative of the petitioner and accept service of all papers for purposes of the proceeding.

(j) A statement that 30 percent or more of the bargaining unit employees covered by an agreement between their employer and a labor organization made pursuant to Section 8(a)(3) of the Act, desire that the authority to make such an agreement be rescinded.

(k) Any other relevant facts.

(l) Evidence supporting the statement that 30 percent or more of the bargaining unit employees desire to rescind the authority of their employer and labor organization to enter into an agreement made pursuant to Section 8(a)(3) of the Act. Such evidence must be filed together with the petition, but must not be served on any other party.

(m) Evidence filed pursuant to paragraph (l) of this section together with a petition that is filed by facsimile or electronically, which includes original signatures that cannot be transmitted in their original form by the method of filing of the petition, may be filed by facsimile or in electronic form provided that the original documents are received by the regional director no later than 2 days after the facsimile or electronic filing.

(n) The type, date(s), time(s) and location(s) of the election sought.

[24 FR 9102, Nov. 7, 1959, as amended at 79 FR 74489, Dec. 15, 2014; 82 FR 11765, Feb. 24, 2017]

§ 102.85 Investigation of petition by Regional Director; consent referendum; directed referendum.

Where a petition has been filed pursuant to § 102.83, and it appears to the Regional Director that the petitioner has made an appropriate showing, in such form as the Regional Director may determine, that 30 percent or more of the employees within a unit covered by an agreement between their employer and a labor organization requiring membership in such labor organization desire to rescind the authority of such labor organization to make such an agreement, the Regional Director will proceed to conduct a secret ballot of the employees involved on the question whether they desire to rescind the authority of the labor organization to make such an agreement with their employer, except that, in any case in which it appears to the Regional Director that the proceeding raises questions which cannot be decided without a hearing, the Director may issue and cause to be served on the parties a Notice of Hearing before a Hearing Officer at a time and place fixed therein. The Regional Director will fix the time and

place of the election, eligibility requirements for voting, and other arrangements of the balloting, but the parties may enter into an agreement, subject to the approval of the Regional Director, fixing such arrangements. In any such consent agreements, provision may be made for final determination of all questions arising with respect to the balloting by the Regional Director or upon grant of a request for review, by the Board.

[82 FR 11765, Feb. 24, 2017]

§ 102.86 Hearing; posthearing procedure.

The method of conducting the hearing and the procedure following the hearing will be governed, insofar as applicable, by §§ 102.63 through 102.68.

[82 FR 11765, Feb. 24, 2017]

§ 102.87 Method of conducting balloting; postballoting procedure.

The method of conducting the balloting and the postballoting procedure will be governed by the provisions of § 102.69, insofar as applicable.

[82 FR 11765, Feb. 24, 2017]

§ 102.88 Refusal to conduct referendum; appeal to Board.

If, after a petition has been filed, and prior to the close of the hearing, it appears to the Regional Director that no referendum should be conducted, the Regional Director will dismiss the petition by administrative action. Such dismissal will be in writing and accompanied by a simple statement of the procedural or other grounds. The petitioner may obtain a review of such action by filing a request therefor with the Board in Washington, DC, and filing a copy of such request with the Regional Director and the other parties within 14 days from the service of notice of such dismissal. The request must contain a complete statement setting forth the facts and reasons upon which the request is based.

[82 FR 11765, Feb. 24, 2017]

Subpart G—Procedure to Hear and Determine Disputes Under Section 10(k) of the Act

SOURCE: 82 FR 11766, Feb. 24, 2017, unless otherwise noted.

§ 102.89 Initiation of proceedings.

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of Section 8(b)(4)(D) of the Act, the Regional Director of the office in which such charge is filed or to which it is referred will, as soon as possible after the charge has been filed, serve on the parties a copy of the charge and will investigate such charge and if it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act, the Regional Director will give it priority over all other cases in the office except other cases under Section 10(l) and cases of like character.

§ 102.90 Notice of hearing; hearing; proceedings before the Board; briefs; determination of dispute.

If it appears to the Regional Director that the charge has merit and the parties to the dispute have not submitted satisfactory evidence to the Regional Director that they have adjusted, or have agreed-upon methods for the voluntary adjustment of, the dispute out of which such unfair labor practice has arisen, the Regional Director will serve on all parties to such dispute a Notice of Hearing under Section 10(k) of the Act before a Hearing Officer at a time and place stated in the Notice. The hearing date will not be less than 10 days after service of the notice of the filing of the charge. The Notice of Hearing must contain a simple statement of the issues involved in such dispute. Such Notice will be issued promptly, and, in cases in which it is deemed appropriate to seek injunctive relief pursuant to Section 10(l) of the Act, will normally be issued within 5 days of the date upon which injunctive relief is first sought. Hearings will be conducted by a Hearing Officer, and the procedure will conform, insofar as applicable, to the procedure set forth in §§ 102.64 through 102.68. Upon the close

of the hearing, the proceeding will be transferred to the Board, and the Board will proceed either promptly upon the record, or after oral argument, or the submission of briefs, or further hearing, to determine the dispute or otherwise dispose of the matter. Parties who desire to file a brief with the Board must do so within 7 days after the close of the hearing. However, no briefs will be filed in cases designated in the Notice of Hearing as involving the national defense, and the parties, after the close of the evidence, may argue orally upon the record their respective contentions and positions; except that, upon application for leave to file briefs expeditiously made to the Board in Washington, DC, after the close of the hearing, the Board may for good cause shown, grant leave to file briefs and set a time for filing. Simultaneously upon such filing, a copy must be served on the other parties. No reply brief may be filed except upon special leave of the Board.

§ 102.91 Compliance with determination; further proceedings.

If, after issuance of the determination by the Board, the parties submit to the Regional Director satisfactory evidence that they have complied with the determination, the Regional Director will dismiss the charge. If no satisfactory evidence of compliance is submitted, the Regional Director will proceed with the charge under Section 8(b)(4)(D) and Section 10 of the Act and the procedure prescribed in §§ 102.9 through 102.51 will, insofar as applicable, govern. However, if the Board determination is that employees represented by a Charged Union are entitled to perform the work in dispute, the Regional Director will dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

§ 102.92 Review of determination.

The record of the proceeding under Section 10(k) and the determination of the Board will become a part of the record in such unfair labor practice proceeding and may be subject to judicial review in proceedings to enforce or review the final order of the Board under Section 10(e) and (f) of the Act.

§ 102.93 Alternative procedure.

If, either before or after service of the Notice of Hearing, the parties submit to the Regional Director satisfactory evidence that they have adjusted the dispute, the Regional Director will dismiss the charge and will withdraw the Notice of Hearing if Notice has issued. If, either before or after issuance of the Notice of Hearing, the parties submit to the Regional Director satisfactory evidence that they have agreed-upon methods for the voluntary adjustment of the dispute, the Regional Director will defer action upon the charge and will withdraw the Notice of Hearing if Notice has issued. If it appears to the Regional Director that the dispute has not been adjusted in accordance with such agreed-upon methods and that an unfair labor practice within the meaning of Section 8(b)(4)(D) of the Act is occurring or has occurred, the Regional Director may issue a complaint under § 102.15, and the procedure prescribed in §§ 102.9 through 102.51 will, insofar as applicable, govern; and §§ 102.90 through 102.92 are inapplicable, except that if an agreed-upon method for voluntary adjustment results in a determination that employees represented by a Charged Union are entitled to perform the work in dispute, the Regional Director will dismiss the charge as to that union irrespective of whether the employer has complied with that determination.

Subpart H—Procedure in Cases Under Section 10(j), (l), and (m) of the Act

SOURCE: 82 FR 11766, Feb. 24, 2017, unless otherwise noted.

§ 102.94 Expeditious processing of Section 10(j) cases.

(a) Whenever temporary relief or a restraining order pursuant to Section 10(j) of the Act has been procured by the Board, the complaint which has been the basis for such temporary relief or restraining order will be heard expeditiously and the case will be given priority by the Board in its successive steps following the issuance of

the complaint (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all other cases except cases of like character and cases under Section 10(l) and (m) of the Act.

(b) In the event the Administrative Law Judge hearing a complaint, concerning which the Board has procured temporary relief or a restraining order pursuant to Section 10(j), recommends a dismissal in whole or in part of such complaint, the chief law officer will promptly suggest to the district court which issued such temporary relief or restraining order the possible change in circumstances arising out of the findings and recommendations of the Administrative Law Judge.

§ 102.95 Priority of cases pursuant to Section 10(l) and (m) of the Act.

(a) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of Section 8(b)(4)(A), (B), (C), 8(b)(7), or 8(e) of the Act, the Regional Office in which such charge is filed or to which it is referred will give it priority over all other cases in the office except cases of like character and cases under Section 8(b)(4)(D) in which it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act.

(b) Whenever a charge is filed alleging the commission of an unfair labor practice within the meaning of Section 8(a)(3) or 8(b)(2), the Regional Office in which such charge is filed or to which it is referred will give it priority over all other cases in the office except cases of like character and cases under Section 10(l) of the Act.

§ 102.96 Issuance of complaint promptly.

Whenever injunctive relief pursuant to Section 10(l) of the Act is sought in district court, a complaint against the party or parties sought to be enjoined, covering the same subject matter as the application for injunctive relief, will be issued promptly, normally within 5 days of the date when injunctive relief is first sought, except in cases in which a Notice of Hearing under Section 10(k) of the Act has issued.

§ 102.97 Expeditious processing of Section 10(l) and (m) cases in successive stages.

(a) Any complaint issued pursuant to § 102.95(a) or, in a case in which it is deemed appropriate to seek injunctive relief of a district court pursuant to Section 10(l) of the Act, any complaint issued pursuant to § 102.93 or Notice of Hearing issued pursuant to § 102.90 will be heard expeditiously and the case will be given priority in such successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character.

(b) Any complaint issued pursuant to § 102.95(b) will be heard expeditiously and the case will be given priority in its successive steps following its issuance (until ultimate enforcement or dismissal by the appropriate circuit court of appeals) over all cases except cases of like character and cases under Section 10(l) of the Act.

Subpart I—Advisory Opinions and Declaratory Orders Regarding Board Jurisdiction

SOURCE: 24 FR 9102, Nov. 7, 1959, unless otherwise noted. Redesignated at 82 FR 11754, Feb. 24, 2017.

§ 102.98 Petition for advisory opinion; who may file; where to file.

Whenever an agency or court of any State or territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of its current standards, or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act.

[24 FR 9102, Nov. 7, 1959, as amended at 51 FR 15613, Apr. 25, 1986; 61 FR 65182, Dec. 11, 1996]

§ 102.99 Contents of petition for advisory opinion.

(a) A petition for an advisory opinion, when filed by an agency or court of

a State or territory, must allege the following:

(1) The name of the agency or court.

(2) The names of the parties to the proceeding and the docket number.

(3) The nature of the proceeding, and the need for the Board's opinion on the jurisdictional issue to the proceeding.

(4) The general nature of the business involved in the proceeding and, where appropriate, the nature of and details concerning the employing enterprise.

(5) The findings of the agency or court or, in the absence of findings, a statement of the evidence relating to the commerce operations of such business and, where appropriate, to the nature of the employing enterprise.

(b) The petition or request must be submitted to the Board in Washington, DC.

[82 FR 11767, Feb. 24, 2017]

§ 102.100 Notice of petition; service of petition.

Upon the filing of a petition, the petitioner must simultaneously serve, in the manner provided by §102.5(g), a copy of the petition on all parties to the proceeding and on the Director of the Board's Regional Office having jurisdiction over the territorial area in which such agency or court is located. A statement of service must be filed with the petition as provided by §102.5(h).

[82 FR 11767, Feb. 24, 2017]

§ 102.101 Response to petition; service of response.

Any party served with such petition may, within 14 days after service thereof, respond to the petition, admitting or denying its allegations. The response must be filed with the Board in Washington, DC. The response must simultaneously be served on all other parties to the proceeding, and a statement of service must be filed in accordance with the provisions of §102.5(h).

[82 FR 11767, Feb. 24, 2017]

§ 102.102 Intervention.

Any person desiring to intervene must file a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. The motion must be filed with the Board in Washington, DC.

[82 FR 11767, Feb. 24, 2017]

§ 102.103 Proceedings before the Board; briefs; advisory opinions.

The Board will thereupon proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that the Board would or would not assert jurisdiction. Such determination will be in the form of an advisory opinion and will be served on the parties. No briefs may be filed except upon special permission of the Board.

[82 FR 11767, Feb. 24, 2017]

§ 102.104 Withdrawal of petition.

The petitioner may withdraw the petition at any time prior to issuance of the Board's advisory opinion.

[82 FR 11767, Feb. 24, 2017]

§ 102.105 Petitions for declaratory orders; who may file; where to file; withdrawal.

Whenever both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a Regional Office of the Board, and the General Counsel entertains doubt whether the Board would assert jurisdiction over the employer involved, the General Counsel may file a petition with the Board for a declaratory order disposing of the jurisdictional issue in the case. Such petition may be withdrawn at any time prior to the issuance of the Board's order.

[82 FR 11767, Feb. 24, 2017]

§ 102.106 Contents of petition for declaratory order.

(a) A petition for a declaratory order must allege the following:

(1) The name of the employer.

(2) The general nature of the employer's business.

(3) The case numbers of the unfair labor practice and representation cases.

(4) The commerce data relating to the operations of such business.

(5) Whether any proceeding involving the same subject matter is pending before an agency or court of a State or territory.

(b) The petition must be filed with the Board in Washington, DC.

[82 FR 11767, Feb. 24, 2017]

§ 102.107 Notice of petition; service of petition.

Upon filing a petition, the General Counsel will simultaneously serve a copy thereof on all parties and must file a statement of service as provided by § 102.5(h).

[82 FR 11767, Feb. 24, 2017]

§ 102.108 Response to petition; service of response.

Any party to the representation or unfair labor practice case may, within 14 days after service, respond to the petition, admitting or denying its allegations. The response must be filed with the Board in Washington, DC. The response must be served on the General Counsel and all other parties, and a statement of service must be filed as provided by § 102.5(h).

[82 FR 11767, Feb. 24, 2017]

§ 102.109 Intervention.

Any person desiring to intervene must file a motion for intervention, stating the grounds upon which such person claims to have an interest in the petition. The motion must be filed with the Board in Washington, DC.

[82 FR 11767, Feb. 24, 2017]

§ 102.110 Proceedings before the Board; briefs; declaratory orders.

The Board will proceed, upon the petition, responses, and submission of briefs, to determine whether, on the facts before it, the commerce operations of the employer involved are such that the Board would or would not assert jurisdiction over the employer. Such determination will be made by a declaratory order, with like effect as in the case of other orders of the Board, and will be served on the parties. Any party desiring to file a brief must file the brief with the Board in Washington, DC, with a statement that copies are being served simultaneously on the other parties.

[82 FR 11767, Feb. 24, 2017]

§§ 102.111–102.114 [Reserved]

Subpart J—Certification and Signature of Documents

SOURCE: 82 FR 11768, Feb. 24, 11768, Feb. 24, 2017, unless otherwise noted.

§ 102.115 Certification of Board papers and documents.

The Executive Secretary of the Board, or, in the event of the Executive Secretary's absence or disability, whomever may be designated by the Board in the Executive Secretary's place, will certify copies of all papers and documents which are a part of any of the files or records of the Board as necessary or desirable from time to time.

§ 102.116 Signature on Board orders.

The Executive Secretary, Deputy Executive Secretary, or an Associate Executive Secretary, or, in the event of their absence or disability, whomever may be designated by the Board in their place, is hereby authorized to sign all orders of the Board.

Subpart K—Records and Information

SOURCE: 82 FR 11768, Feb. 24, 2017, unless otherwise noted.

§ 102.117 Freedom of Information Act Regulations: Agency materials including formal documents available pursuant to the Freedom of Information Act; requests for described records; time limit for response; appeal from denial of request; fees for document search, duplication, and review; files and records not subject to inspection.

(a)(1) *Introduction.* This subpart contains the Rules that the National Labor Relations Board (Agency) follows in processing requests for records under the Freedom of Information Act (FOIA), 5 U.S.C. 552. The Rules in this subpart may be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee

Schedule and Guidelines published by the Office of Management and Budget (OMB Guidelines). Some records will be made available on the Agency's Web site at *www.nlrb.gov* to facilitate public access. Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552(a), are processed under §102.119.

(2) *FOIA Officials.* The following are designated as the Agency's FOIA officials with responsibilities for complying with the FOIA:

(i) *FOIA Officer.* The Assistant General Counsel for the FOIA Branch is the Agency's designated FOIA Officer.

(ii) *Chief FOIA Officer.* The Associate General Counsel for the Division of Legal Counsel is the Agency's designated Chief FOIA Officer.

(iii) *FOIA Public Liaison.* The official(s) designated by the Chief FOIA Officer is the Agency's FOIA Public Liaison, with overall responsibilities for assisting in reducing delays, increasing transparency, understanding the status of requests, and assisting in the resolution of disputes. The designated FOIA Public Liaison is available on the Agency's Web site.

(3) *Authority to respond to requests and administrative appeals.* The FOIA Officer has the authority to act upon and respond on behalf of the Board and the General Counsel to all requests for Agency records, except for records maintained by the Agency's Office of the Inspector General. The Office of the Inspector General has the authority to respond to all requests for records maintained by that Office. The Chief FOIA Officer has the authority to respond on behalf of the Chairman of the Board and the General Counsel to all administrative appeals of adverse determinations. The Chief FOIA Officer's authority includes responding, on behalf of the Chairman of the Board, to appeals of initial determinations made by the Office of the Inspector General.

(4) *Records made available.* Records that are required by the FOIA under 5 U.S.C. 552(a)(2) may be accessed through the Agency's Web site at *www.nlrb.gov*.

(b)(1) *Formal documents.* The formal documents constituting the record in a case or proceeding are matters of official record and, until officially destroyed pursuant to applicable statutory authority, are available to the public pursuant to the procedures in this section.

(2) *Certification of records.* The Executive Secretary will certify copies of all formal documents maintained by the Board upon request made a reasonable time in advance of need and payment of lawfully prescribed costs. The Deputy General Counsel will certify copies of any record maintained by, or originating from, the Office of General Counsel and any division, branch, or office organizationally overseen by the Office of the General Counsel, including any Regional, Subregional, or Resident Office.

(c)(1) *Making FOIA requests to the Agency*—(i) *Content of requests*—(A) *Description of records sought.* Requests for records must be in writing and must reasonably describe the record so as to permit its identification and location. To the extent possible, requesters may include specific information, such as the NLRB case number, case name, date(s) of record(s) requested, and/or full name of the party, author, or recipient of the record(s) in question. Requesters should include as much detail as practicable about the records sought. Requesters may contact the FOIA Public Liaison to discuss the records sought and to receive assistance in describing the records.

(B) *Assumption of fees.* Requests must contain a specific statement assuming financial responsibility for the direct costs of responding to the request in accordance with paragraph (d)(2) of this section.

(C) *Specificity requirement.* Requests that do not reasonably describe the records sought or assume sufficient financial responsibility for responding to the request, or that otherwise fail to comply with this section, may delay the Agency's response to the request.

(ii) *Transmission of requests.* Requests for records maintained by the Agency should be made to the FOIA Branch, which is located in the Agency's Washington, DC headquarters. The FOIA Branch is responsible for responding to requests for records originating from, or maintained by, the Board and the Office of the General Counsel, including Regional, Subregional, and resident

offices. Requests for records maintained by the Agency's Office of the Inspector General may be made directly to that office.

(A) Requesters may file FOIA requests electronically through the Agency's Web site (*https://www.nlrb.gov*), which is the preferred method of submission to allow for prompt receipt, including for requests for records maintained by the Agency's Office of the Inspector General. FOIA requests may also be made by mail to the Agency's Washington, DC headquarters address, by email to the Agency's designated mailbox, or by facsimile. The mailing address, email address, and facsimile number are available on the Agency's Web site.

(B) Requests not made through the Agency's Web site should be clearly marked to indicate that they contain a request for records under the Freedom of Information Act.

(C) Requests made to an Agency division, branch, or any office other than the FOIA Branch will be forwarded to the FOIA Branch by the receiving office, but in that event, the applicable time limit for response set forth in paragraph (i) of this section will be calculated from the date of receipt by the FOIA Branch. The receiving office will normally forward the request to the FOIA Branch within 10 days of the initial receipt.

(D) Requests made to the Agency for records that originated with another governmental agency may be referred to that agency.

(2) *Processing of FOIA requests*—(i) *Timing of response.* The Agency ordinarily responds to FOIA requests according to their order of receipt. An initial determination will be issued within 20 working days (*i.e.*, exempting Saturdays, Sundays, and legal public holidays) after the receipt of a request. Responsive records are released at the time of the determination or, if necessary, at a time thereafter on a rolling basis.

(ii) *Expedited treatment.* A request for expedited processing may be made at any time during the pendency of a FOIA request or appeal. Requests and appeals will be taken out of order and given expedited treatment when warranted. A requester must provide sufficient justification to grant such processing by showing that any one of the following circumstances exists:

(A) The lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual; or

(B) There is an urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information; or

(C) The loss of substantial due process rights; or

(D)(*1*) There is widespread and exceptional media interest and possible questions exist about the government's integrity which may affect public confidence.

(*2*) Within 10 calendar days of receipt of a request for expedited processing, the Agency will decide whether to grant it and will notify the requester of the decision. Once the determination has been made to grant expedited processing, the request will be given priority and processed as soon as practicable. If a request for expedited processing is denied, the Agency will act expeditiously on any appeal of that decision.

(iii) *Initial determination of requests.* Within 20 working days after receipt of a request by the FOIA Branch, a determination will be made whether to comply with such request, and the requester will be notified in writing of that determination. In the case of requests made for records maintained by the Agency's Office of the Inspector General, that determination will be made by the Office of the Inspector General. Requesters will be made aware of their right to seek assistance from the Agency's FOIA Public Liaison.

(A) *Grants of requests.* If the determination is to comply with the request, the records will be made promptly available to the person making the request and, at the same time, a statement of any charges due in accordance with the fee schedule provisions of paragraph (d)(2) of this section will be provided.

(B) *Denials of requests.* If the determination is to deny the request in any respect, the requester will be notified in writing of that determination. The

determination will set forth: The reason(s) for the denial; the name and title or position of each person responsible for the denial; and an estimate of the volume of records or information withheld, in number of pages or in some other reasonable form of estimation: However, this estimate does not need to be provided if the volume is otherwise indicated through deletions on records disclosed in part, or if providing an estimate would harm an interest protected by an applicable exemption. The determination will also inform the requester of the right to seek dispute resolution services from the Agency's FOIA Public Liaison or the Office of Government Information Services, as well as the right to appeal the adverse determination under the administrative appeal provisions of paragraph (c)(2)(v) of this section.

(C) Adverse determinations may consist of: A determination to withhold any requested record in whole or in part; a determination that a requested record does not exist or cannot be located; a determination that what has been requested is not a record subject to the FOIA; a determination on any disputed fee matter, including a denial of a request for a fee waiver or reduction or placement in a particular fee category; and a denial of a request for expedited treatment. An adverse determination to an administrative appeal by the Chief FOIA Officer will be the final action of the Agency. An adverse determination will inform the requester of the right to seek dispute resolution services from the Agency's FOIA Public Liaison or the Office of Government Information Services, as well as the right to appeal the adverse determination under the administrative appeal provisions of paragraph (c)(2)(v) of this section.

(iv) *Records containing business information.* Business information obtained by the Agency from a submitter will be disclosed under the FOIA only consistent with the procedures established in this section.

(A) For purposes of this section:

(*1*) *Business information* means commercial or financial information obtained by the Agency from a submitter that may be protected from disclosure under Exemption 4 of the FOIA.

(*2*) *Submitter* means any person or entity from whom the Agency obtains business information, directly or indirectly. The term includes corporations; state, local, and tribal governments; and foreign governments.

(B) A submitter of business information will use good faith efforts to designate, by appropriate markings, either at the time of submission or at a reasonable time thereafter, any portions of its submission that it considers to be protected from disclosure under Exemption 4. These designations will expire 10 years after the date of the submission unless the submitter requests, and provides justification for, a longer designation period. The Agency will provide a submitter with prompt written notice of a FOIA request or administrative appeal that seeks its business information wherever required under paragraph (c)(2)(iv)(C) of this section, except as provided in paragraph (c)(2)(iv)(F) of this section, in order to give the submitter an opportunity to object to disclosure of any specified portion of that information under paragraph (c)(2)(iv)(D) of this section. The notice will either describe the business information requested or include copies of the requested records or record portions containing the information. When notification of a voluminous number of submitters is required, notification may be made by posting or publishing the notice in a place reasonably likely to accomplish notification.

(C) Notice will be given to a submitter whenever: The information has been designated in good faith by the submitter as information considered protected from disclosure under Exemption 4; or the Agency has reason to believe that the information may be protected from disclosure under Exemption 4.

(D) The Agency will allow a submitter a reasonable time to respond to the notice described in paragraph (c)(2)(iv)(B) of this section. If a submitter has any objection to disclosure, it is required to submit a detailed written statement. The statement must specify all grounds for withholding any portion of the information under any exemption of the FOIA and, in the case of Exemption 4, it must show why the

information is a trade secret or commercial or financial information that is privileged or confidential. In the event that a submitter fails to respond to the notice within the time specified in it, the submitter will be considered to have no objection to disclosure of the information. Information provided by a submitter under this paragraph may itself be subject to disclosure under the FOIA.

(E) The Agency will consider a submitter's objections and specific grounds for nondisclosure in deciding whether to disclose business information. Whenever the Agency decides to disclose business information over the objection of a submitter, the Agency will give the submitter written notice, which will include: A statement of the reason(s) why each of the submitter's disclosure objections was not sustained; a description of the business information to be disclosed; and a specified disclosure date, which will be a reasonable time subsequent to the notice.

(F) The notice requirements of paragraphs (c)(2)(iv)(B) and (E) of this section will not apply if: The Agency determines that the information may not be disclosed; the information lawfully has been published or has been officially made available to the public; disclosure of the information is required by statute (other than the FOIA) or by a regulation issued in accordance with the requirements of Executive Order 12600 (3 CFR, 1988 Comp., p. 235); or the designation made by the submitter under paragraph (c)(2)(iv)(B) of this section appears obviously frivolous—except that, in such a case, the Agency will, within a reasonable time prior to a specified disclosure date, give the submitter written notice of any final decision to disclose the information.

(G) Whenever a requester files a lawsuit seeking to compel the disclosure of business information, the Agency will promptly notify the submitter.

(H) Whenever the Agency provides a submitter with notice and an opportunity to object to disclosure under paragraph (c)(2)(iv)(B) of this section, the Agency will also notify the requester(s). Whenever the Agency notifies a submitter of its intent to disclose requested information under paragraph (c)(2)(iv)(E) of this section, the Agency will also notify the requester(s). Whenever a submitter files a lawsuit seeking to prevent the disclosure of business information, the Agency will notify the requester(s).

(v) *Administrative appeals.* (A) An appeal from an adverse determination made pursuant to paragraph (c)(2)(iii) of this section must be filed within 90 calendar days of the service of the notification of the adverse determination, in whole or in part. Appeals of adverse determinations made by the FOIA Officer or the Office of the Inspector General may be filed with the Division of Legal Counsel in Washington, DC.

(B) As provided in paragraph (c)(2)(iii) of this section, an adverse determination will notify the requester of the right to appeal the adverse determination and will specify where such appeal may be filed. Within 20 working days after receipt of an appeal, the Chief FOIA Officer will make a determination with respect to such appeal and will notify the requester in writing. If the determination is to grant the appeal, the responsive records will be made promptly available to the requester upon receipt of payment of any charges due in accordance with the provisions of paragraph (d)(2) of this section. If the appeal is denied, in whole or in part, the requester will be notified of the reasons for the decision, the name and title or position of any person responsible for the denial, and the provisions for judicial review of that determination under the provisions of 5 U.S.C. Section 552(4)(B).

(C) Before seeking judicial review of an adverse determination, a requester must first submit a timely administrative appeal.

(D) Even if no FOIA appeal is filed, the Chief FOIA Officer may, without regard to the time limit for filing of an appeal, initiate reconsideration of an adverse determination by issuing written notice to the requester. In such event, the time limit for making the determination will commence with the issuance of such notification.

(vi) *Extension of time to respond to requests.* In unusual circumstances as specified in this paragraph (c)(2)(vi), the Agency may extend the time limits

prescribed in either paragraph (c)(2)(i) or (iv) of this section by written notice to the requester setting forth the reasons for such extension and the date on which a determination is expected, and notifying the requester of the right to seek dispute resolution services from the Office of Government Information Services. The extension of time will not exceed 10 working days. As used in this paragraph (c)(2)(vi), *unusual circumstances* means, but only to the extent reasonably necessary to the proper processing of the particular request:

(A) The need to search for and collect the requested records from other offices in the Agency that are separate from the FOIA Branch;

(B) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records which are sought in a single request;

(C)(*1*) The need for consultation, which will be conducted with all practicable speed, with another agency having a substantial interest in the determination of the request or with two or more offices in the Agency having a substantial subject matter interest in the request.

(*2*) If the request cannot be processed within the time limits prescribed above, the Agency will provide the requester with an opportunity to limit the request so that it may be processed within the 10-day extended time limit for response. The requester may also arrange an alternative time frame with the Agency for processing the request or a modified request. The Agency's FOIA Public Liaison is available to assist with any issues that may arise.

(vii) *Preservation of FOIA request files.* The Agency will preserve files created in response to requests for information under the FOIA and files created in responding to administrative appeals under the FOIA until disposition or destruction is authorized by Title 44 of the United States Code or the National Archives and Records Administration's General Records Schedule 4.2, item 020. Records will not be disposed of or destroyed while they are the subject of a pending request, appeal, or lawsuit under the FOIA.

(d)(1) *Fees.* For purposes of this section, the following definitions apply:

(i) *Direct costs* means those expenditures which are actually incurred in searching for and duplicating and, in the case of commercial use requests, reviewing documents to respond to a FOIA request.

(ii) *Search* refers to the process of looking for and retrieving records or information responsive to a request. It includes page-by-page or line-by-line identification of material within documents and also includes reasonable efforts to locate and retrieve information from records maintained in electronic form or format. The Agency will ensure that searches are done in the most efficient and least expensive manner reasonably possible.

(iii) *Duplication* refers to the process of making a copy of a record, or the information contained in it, necessary to respond to a FOIA request. Such copies can take the form of paper, microfilm, videotape, audiotape, or electronic records (*e.g.*, magnetic tape or disk), among others. The Agency will honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format by the office responding to the request.

(iv) *Review* refers to the process of examining documents located in response to a request that is for commercial use to determine whether any portion of it is exempt from disclosure. It includes processing any documents for disclosure, *e.g.*, doing all that is necessary to redact and prepare them for disclosure. Review time includes time spent considering any formal objection to disclosure made by a business submitter under paragraph (c)(2)(iv) of this section, but does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(v) *Commercial use request* refers to a request from or on behalf of a person who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made, which can include furthering those interests through litigation.

(vi) *Educational institution* refers to a preschool, a public or private elementary or secondary school, an institution of undergraduate higher education, an institution of graduate higher education, an institution of professional education, or an institution of vocational education, that operates a program of scholarly research. To be in this category, a requester must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are not sought for a commercial use but are sought to further scholarly research.

(vii) *Representative of the news media* refers to any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term *news* means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large and publishers of periodicals (but only in instances where they can qualify as disseminators of *news*) who make their products available for purchase or subscription by the general public. For ''freelance'' journalists to be regarded as working for a news organization, they must demonstrate a solid basis for expecting publication through that organization. A publication contract is the clearest proof, but the Agency will also look to the past publication record of a requester in making this determination. To be in this category, a requester must not be seeking the requested records for commercial use. However, a request for records supporting the news dissemination function of the requester will not be considered to be for a commercial use.

(viii) *Working days*, as used in this section, means calendar days excepting Saturdays, Sundays, and legal holidays.

(2) *Fee schedule.* Requesters will be subject to a charge of fees for the full allowable direct costs of document search, review, and duplicating, as appropriate, in accordance with the following schedules, procedures, and conditions:

(i) *Schedule of charges:*

(A) For each one-quarter hour or portion thereof of clerical time $3.10.

(B) For each one-quarter hour or portion thereof of professional time $9.25.

(C) For each sheet of duplication (not to exceed 8½ by 14 inches) of requested records $0.12.

(D) All other direct costs of preparing a response to a request will be charged to the requester in the same amount as incurred by the Agency. Such costs will include, but not be limited to: Certifying that records are true copies; sending records to requesters or receiving records from the Federal records storage centers by special methods such as express mail; and, where applicable, conducting computer searches for information and for providing information in electronic format.

(ii) Fees incurred in responding to information requests are to be charged in accordance with the following categories of requesters:

(A) Commercial use requesters will be assessed charges to recover the full direct costs for searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought.

(B) Educational institution requesters will be assessed charges for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for commercial use, but are sought in furtherance of scholarly research. Requesters must reasonably describe the records sought.

(C) Requesters who are representatives of the news media will be assessed charges for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category, a requester must meet the criteria in paragraph (d)(1)(vii) of this section, and the request must not be made for commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester will not be considered to be a request for commercial use. Requesters must reasonably describe the records sought.

(D) All other requesters, not elsewhere described, will be assessed

charges to recover the full reasonable direct cost of searching for and reproducing records that are responsive to the request, except that the first 100 pages of reproduction and the first 2 hours of search time will be furnished without charge. Requesters must reasonably describe the records sought.

(E) Absent a reasonably based factual showing that a requester may be placed in a particular user category, fees will be imposed as provided for in the commercial use requester category.

(iii) *Unusual fee circumstances.* (A) In no event will fees be imposed on any requester when the total charges are less than $5, which is the Agency's cost of collecting and processing the fee itself.

(B) If the Agency reasonably believes that a requester or a group of requesters acting together is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Agency may aggregate those requests and charge accordingly. The Agency may presume that multiple requests of this type made within a 30-day period have been made to avoid fees. Where requests are separated by a longer period, the Agency will aggregate them only where there exists a solid basis for determining that aggregation is warranted under all the circumstances involved. Multiple requests involving unrelated matters will not be aggregated.

(iv) *Requests for fee waiver or reduction.* Documents are to be furnished without charge or at reduced levels if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the Government and is not primarily in the commercial interest of the requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return will not be presumed to primarily serve the public interest. A fee waiver or reduction is justified where the public interest standard is satisfied and that public interest is greater in magnitude than that of any identified commercial interest in disclosure. Where only some of the requested records satisfy the requirements for a fee waiver, a waiver will be granted for those records.

(v) *Failure to pay fees.* If a requester fails to pay chargeable fees that were incurred as a result of the Agency's processing of the information request, beginning on the 31st day following the date on which the notification of charges was sent, the Agency may assess interest charges against the requester in the manner prescribed in 31 U.S.C. Section 3717. Where appropriate, other steps permitted by federal debt collection statutes, including disclosure to consumer reporting agencies, use of collection agencies, and offset, will be used by the Agency to encourage payment of amounts overdue.

(vi) *Assumption of financial responsibility for processing requests.* Each request for records must contain a specific statement assuming financial liability, in full or to a specified maximum amount, for charges, in accordance with paragraphs (d)(2)(i) and (ii) of this section, which may be incurred by the Agency in responding to the request. If the anticipated charges exceed the maximum limit stated by the person making the request, or if the request contains no assumption of financial liability or charges, the requester will be notified and afforded an opportunity to assume financial liability. In either case, the request for records will not be deemed received for purposes of the applicable time limit for response until a written assumption of financial liability is received. The Agency may require a requester to make an advance payment of anticipated fees under the following circumstances:

(A) If the anticipated charges are likely to exceed $250, the Agency will notify the requester of the likely cost and obtain satisfactory assurance of full payment when the requester has a history of prompt payment of FOIA fees, or require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(B) If a requester has previously failed to pay fees that have been charged in processing a request within 30 days of the date the notification of fees was sent, the requester will be required to pay the entire amount of fees that are owed, plus interest as provided for in paragraph (d)(2)(v) of this section, before the Agency will process a

further information request. In addition, the Agency may require advance payment of fees that the Agency estimates will be incurred in processing the further request before the Agency commences processing that request. When the Agency acts under paragraph (d)(2)(vi)(A) or (B) of this section, the administrative time limits for responding to a request or an appeal from initial determinations will begin to run only after the Agency has received the fee payments required in paragraph (d)(2) of this section.

(vii) *Fees may be charged even if no documents are provided.* Charges may be imposed even though the search discloses no records responsive to the request, or if records located are determined to be exempt from disclosure.

§ 102.118 Present and former Board employees prohibited from producing documents and testifying; production of witnesses' statements after direct testimony.

(a) *Prohibition on producing files and documents.* Except as provided in § 102.117 respecting requests cognizable under the Freedom of Information Act, no present or former employee or specially designated agent of the Agency will produce or present any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a *subpoena duces tecum* or otherwise, without the written consent of the Board or the Chairman of the Board if the document is in Washington, DC, and in control of the Board; or of the General Counsel if the document is in a Regional Office of the Board or is in Washington, DC, and in the control of the General Counsel. A request that such consent be granted must be in writing and must identify the documents to be produced, the nature of the pending proceeding, and the purpose to be served by the production of the documents.

(b) *Prohibition on testifying.* No present or former employee or specially designated agent of the Agency will testify on behalf of any party to any cause pending in any court or before the Board, or any other board, commission, or other administrative agency of the United States, or of any State, territory, or the District of Columbia, or any subdivisions thereof, with respect to any information, facts, or other matter coming to that person's knowledge in that person's official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the Board or the Chairman of the Board if the person is in Washington, DC, and subject to the supervision or control of the Board or was subject to such supervision or control when formerly employed at the Agency; or of the General Counsel if the person is in a Regional Office of the Agency or is in Washington, DC, and subject to the supervision or control of the General Counsel or was subject to such supervision or control when formerly employed at the Agency. A request that such consent be granted must be in writing and must identify the person whose testimony is desired, the nature of the pending proceeding, and the purpose to be served by the testimony of the official.

(c) *Motion to quash subpoena.* Whenever any subpoena *ad testificandum* or subpoena *duces tecum,* the purpose of which is to adduce testimony or require the production of records as described above, has been served on any present or former employee or specially designated agent of the Agency, that person will, unless otherwise expressly directed by the Board or the Chairman of the Board or the General Counsel, as the case may be, move pursuant to the applicable procedure, whether by petition to revoke, motion to quash, or otherwise, to have such subpoena invalidated on the ground that the evidence sought is privileged against disclosure by this Rule.

(d) *Prohibition on disclosure of personal information.* No present or former employee or specially designated agent of the Agency will, by any means of communication to any person or to another agency, disclose personal information about an individual from a record in a system of records maintained by this Agency, as more fully described in the notices of systems of records published by this Agency in accordance with the provisions of Section (e)(4) of the Privacy Act of 1974, 5 U.S.C. 552a(e)(4), or

by the Notices of Government-wide Systems of Personnel Records published by the Civil Service Commission in accordance with those statutory provisions, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be in accordance with the provisions of Section (b)(1) through (11), both inclusive, of the Privacy Act of 1974, 5 U.S.C. 552a(b)(1) through (11).

(e) *Production of statement for cross-examination.* Notwithstanding the prohibitions of paragraphs (a) and (b) of this section, after a witness called by the General Counsel or by the Charging Party has testified in a hearing upon a complaint under Section 10(c) of the Act, the Administrative Law Judge must, upon motion of the Respondent, order the production of any statement, as defined paragraph (g) of this section, of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified.

(1) If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the Administrative Law Judge must order the statement to be delivered directly to the respondent for examination and use for the purpose of cross-examination.

(2) If the General Counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the Administrative Law Judge will order the General Counsel to deliver the statement for the inspection of the Administrative Law Judge *in camera*. Upon delivery, the Administrative Law Judge will excise the portions of such statement which do not relate to the subject matter of the testimony of the witness except that the Administrative Law Judge has discretion to decline to excise portions which, although not relating to the subject matter of the testimony of the witness, do relate to other matters raised by the pleadings. With the material excised, the Administrative Law Judge will then direct delivery of the statement to the Respondent for use on cross-examination. If any portion of the statement is withheld and the Respondent objects to the withholding, the General Counsel will preserve the entire text of the statement, and, if the Respondent files exceptions with the Board based upon such withholding, make the entire text available to the Board for the purpose of determining the correctness of the ruling of the Administrative Law Judge. If the General Counsel elects not to comply with an order of the Administrative Law Judge directing delivery to the Respondent of any statement, or portion thereof as the Administrative Law Judge may direct, the Administrative Law Judge will strike from the record the testimony of the witness.

(f) *Production of statement in postelection hearings.* The provisions of paragraph (e) of this section will also apply after any witness has testified in any postelection hearing pursuant to §102.69(d) and any party has moved for the production of any statement, as defined in paragraph (g) of this section, of the witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the Administrative Law Judge under paragraph (e) of this section will be exercised by the Hearing Officer presiding.

(g) *Definition of statement.* The term *statement* as used in this section means:

(1) A written statement made by the witness and signed or otherwise adopted or approved by the witness; or

(2) A stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by the witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of the oral statement.

[82 FR 11768, Feb. 24, 2017, as amended at 82 FR 43699, Sept. 19, 2017]

§ 102.119 Privacy Act Regulations: Notification as to whether a system of records contains records pertaining to requesting individuals; requests for access to records, amendment of such records, or accounting of disclosures; time limits for response; appeal from denial of requests; fees for document duplication; files and records exempted from certain Privacy Act requirements.

(a)(1) An individual will be informed whether a system of records maintained by the Agency contains a record pertaining to such individual. An inquiry may be made in writing or in person during normal business hours to the official of the Agency designated for that purpose and at the address set forth in a notice of a system of records published by this Agency, in a Notice of Systems of Government-wide Personnel Records published by the Office of Personnel Management, or in a Notice of Government-wide Systems of Records published by the Department of Labor. Copies of such notices, and assistance in preparing an inquiry, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. The inquiry may contain sufficient information, as defined in the notice, to identify the record.

(2) Reasonable verification of the identity of the inquirer, as described in paragraph (e) of this section, will be required to assure that information is disclosed to the proper person. The Agency will acknowledge the inquiry in writing within 10 days (excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment will supply the information requested. If, for good cause shown, the Agency cannot supply the information within 10 days, the inquirer will within that time period be notified in writing of the reasons therefor and when it is anticipated the information will be supplied. An acknowledgment will not be provided when the information is supplied within the 10-day period. If the Agency refuses to inform an individual whether a system of records contains a record pertaining to an individual, the inquirer will be notified in writing of that determination and the reasons therefor, and of the right to obtain review of that determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (a)(2) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(b)(1) An individual will be permitted access to records pertaining to such individual contained in any system of records described in the notice of system of records published by the Agency, or access to the accounting of disclosures from such records. The request for access must be made in writing or in person during normal business hours to the person designated for that purpose and at the address set forth in the published notice of system of records. Copies of such notices, and assistance in preparing a request for access, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. Reasonable verification of the identity of the requester, as described in paragraph (e) of this section, will be required to assure that records are disclosed to the proper person. A request for access to records or the accounting of disclosures from such records will be acknowledged in writing by the Agency within 10 days of receipt (excluding Saturdays, Sundays, and legal public holidays) and, wherever practicable, the acknowledgment will inform the requester whether access will be granted and, if so, the time and location at which the records or accounting will be made available. If access to the record of accounting is to be granted, the record or accounting will normally be provided within 30 days (excluding Saturdays, Sundays, and legal public holidays) of the request, unless for good cause shown the Agency is unable to do so, in which case the individual will be informed in writing within that 30-day period of the reasons therefor and when it is anticipated that access will be granted. An acknowledgment of a request will not be provided if the record is made available within the 10-day period.

(2) If an individual's request for access to a record or an accounting of disclosure from such a record under the

provisions of this paragraph (b) is denied, the notice informing the individual of the denial will set forth the reasons therefor and advise the individual of the right to obtain a review of that determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (b)(2) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(c) An individual granted access to records pertaining to such individual contained in a system of records may review all such records. For that purpose, the individual may be accompanied by a person of the individual's choosing, or the record may be released to the individual's representative who has written consent of the individual, as described in paragraph (e) of this section. A first copy of any such record or information will ordinarily be provided without charge to the individual or representative in a form comprehensible to the individual. Fees for any other copies of requested records will be assessed at the rate of 12 cents for each sheet of duplication.

(d) An individual may request amendment of a record pertaining to such individual in a system of records maintained by the Agency. A request for amendment of a record must be in writing and submitted during normal business hours to the person designated for that purpose and at the address set forth in the published notice for the system of records containing the record of which amendment is sought. Copies of such notices, and assistance in preparing a request for amendment, may be obtained from any Regional Office of the Board or at the Board offices in Washington, DC. The requester must provide verification of identity as described in paragraph (e) of this section, and the request must set forth the specific amendment requested and the reason for the requested amendment. The Agency will acknowledge in writing receipt of the request within 10 days of receipt (excluding Saturdays, Sundays, and legal public holidays) and, whenever practicable, the acknowledgement will advise the individual of the determination of the request. If the review of the request for amendment cannot be completed and a determination made within 10 days, the review will be completed as soon as possible, normally within 30 days (Saturdays, Sundays, and legal public holidays excluded) of receipt of the request unless unusual circumstances preclude completing the review within that time, in which event the requester will be notified in writing within that 30-day period of the reasons for the delay and when the determination of the request may be expected. If the determination is to amend the record, the requester will be so notified in writing and the record will be amended in accordance with that determination. If any disclosures accountable under the provisions of 5 U.S.C. 552a(c) have been made, all previous recipients of the record which was amended must be advised of the amendment and its substance. If it is determined that the request may not be granted, the requester will be notified in writing of that determination and of the reasons therefor, and advised of the right to obtain review of the adverse determination under the provisions of paragraph (f) of this section. The provisions of this paragraph (d) do not apply to the extent that requested information from the relevant system of records has been exempted from this Privacy Act requirement.

(e) Verification of the identification of individuals required under paragraphs (a), (b), (c), and (d) of this section to assure that records are disclosed to the proper person will be required by the Agency to an extent consistent with the nature, location, and sensitivity of the records being disclosed. Disclosure of a record to an individual will normally be made upon the presentation of acceptable identification. Disclosure of records by mail may be made on the basis of the identifying information set forth in the request. Depending on the nature, location, and sensitivity of the requested record, a signed notarized statement verifying identity may be required by the Agency. Proof of authorization as representative to have access to a record of an individual must be in writing, and a signed notarized statement of such authorization may be required by the Agency if the record requested is of a sensitive nature.

(f)(1) Review may be obtained with respect to:

(i) A refusal, under paragraph (a) or (g) of this section, to inform an individual if a system of records contains a record concerning that individual;

(ii) A refusal, under paragraph (b) or (g) of this section, to grant access to a record or an accounting of disclosure from such a record; or

(iii) A refusal, under paragraph (d) of this section, to amend a record.

(iv) The request for review may be made to the Chairman of the Board if the system of records is maintained in the office of a Member of the Board, the Office of the Executive Secretary, the Office of the Solicitor, the Office of Congressional and Public Affairs, or the Division of Administrative Law Judges. Consistent with the provisions of Section 3(d) of the Act, and the delegation of authority from the Board to the General Counsel, the request may be made to the General Counsel if the system of records is maintained by an office of the Agency other than those enumerated above. Either the Chairman of the Board or the General Counsel may designate in writing another officer of the Agency to review the refusal of the request. Such review will be completed within 30 days (excluding Saturdays, Sundays, and legal public holidays) from the receipt of the request for review unless the Chairman of the Board or the General Counsel, as the case may be, for good cause shown, extends such 30-day period.

(2) If, upon review of a refusal under paragraph (a) or (g) of this section, the reviewing officer determines that the individual may be informed of whether a system of records contains a record pertaining to that individual, such information will be promptly provided. If the reviewing officer determines that the information was properly denied, the individual will be so informed in writing with a brief statement of the reasons therefor.

(3) If, upon review of a refusal under paragraph (b) or (g) of this section, the reviewing officer determines that access to a record or to an accounting of disclosures may be granted, the requester will be so notified and the record or accounting will be promptly made available to the requester. If the reviewing officer determines that the request for access was properly denied, the individual will be so informed in writing with a brief statement of the reasons therefor, and of the right to judicial review of that determination under the provisions of 5 U.S.C. 552a(g)(1)(B).

(4) If, upon review of a refusal under paragraph (i) of this section, the reviewing official grants a request to amend, the requester will be so notified, the record will be amended in accordance with the determination, and, if any disclosures accountable under the provisions of 5 U.S.C. 552a(c) have been made, all previous recipients of the record which was amended will be advised of the amendment and its substance. If the reviewing officer determines that the denial of a request for amendment may be sustained, the Agency will advise the requester of the determination and the reasons therefor, and that the individual may file with the Agency a concise statement of the reason for disagreeing with the determination, and may seek judicial review of the Agency's denial of the request to amend the record. In the event a statement of disagreement is filed, that statement:

(i) Will be made available to anyone to whom the record is subsequently disclosed together with, at the discretion of the Agency, a brief statement summarizing the Agency's reasons for declining to amend the record; and

(ii) Will be supplied, together with any Agency statements, to any prior recipients of the disputed record to the extent that an accounting of disclosure was made.

(g) To the extent that portions of systems of records described in notices of Government-wide systems of records published by the Office of Personnel Management are identified by those notices as being subject to the management of an officer of this Agency, or an officer of the Agency is designated as the official to contact for information, access, or contents of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment will be in accordance with the provisions of 5 CFR 297.101 through 297.501, as promulgated by the Office of

Personnel Management. To the extent that portions of systems of records described in notices of Government-wide systems of records published by the Department of Labor are identified by those notices as being subject to the management of an officer of the Agency, or an officer of the Agency is designated as the official to contact for information, access, or contents of those records, individual requests for access to those records, requests for their amendment, and review of denials of requests for amendment will be in accordance with the provisions of this section. Review of a refusal to inform an individual whether such a system of records contains a record pertaining to that individual and review of a refusal to grant an individual's request for access to a record in such a system may be obtained in accordance with the provisions of paragraph (f) of this section.

(h) Pursuant to 5 U.S.C. 552a(j)(2), the system of records maintained by the Office of the Inspector General of the National Labor Relations Board that contains Investigative Files will be exempted from the provisions of 5 U.S.C. 552a, except subsections (b), (c)(1) and (2), (e)(4)(A) through (F), (e)(6), (7), (9), (10), and (11), and (i), from 29 CFR 102.117(c) and (d), and from 29 CFR 102.119(a), (b), (c), (d), (e), and (f), insofar as the system contains investigatory material compiled for criminal law enforcement purposes.

(i) Pursuant to 5 U.S.C. 552a(k)(2), the system of records maintained by the Office of the Inspector General of the National Labor Relations Board that contains the Investigative Files must be exempted from 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f), from 29 CFR 102.117(c) and (d), and from 29 CFR 102.119(a), (b), (c), (d), (e), and (f), insofar as the system contains investigatory material compiled for law enforcement purposes not within the scope of the exemption at 29 CFR 102.119(h).

(j) Privacy Act exemptions contained in paragraphs (h) and (i) of this section are justified for the following reasons:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at that individual's request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. Accounting for each disclosure would alert the subjects of an investigation to the existence of the investigation and the fact that they are subjects of the investigation. The release of such information to the subjects of an investigation would provide them with significant information concerning the nature of the investigation and could seriously impede or compromise the investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel, and their families and lead to the improper influencing of witnesses, the destruction of evidence, or the fabrication of testimony.

(2) 5 U.S.C. 552a(c)(4) requires an agency to inform any person or other agency about any correction or notation of dispute made by the agency in accordance with subsection (d) of the Act. Since this system of records is being exempted from subsection (d) of the Act, concerning access to records, this section is inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act.

(3) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to the individual, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records. Granting access to records in this system of records could inform the subject of an investigation of an actual or potential criminal violation, of the existence of that investigation, of the nature and scope of the information and evidence obtained as to the individual's activities, or of the identity of confidential sources, witnesses, and law enforcement personnel and could provide information to enable the subject to avoid detection or apprehension. Granting access to such information could seriously impede or compromise an investigation, endanger the physical safety of confidential sources, witnesses, law enforcement personnel, and their families, lead to the improper influencing of witnesses,

the destruction of evidence, or the fabrication of testimony, and disclose investigative techniques and procedures. In addition, granting access to such information could disclose classified, security-sensitive, or confidential business information and could constitute an unwarranted invasion of the personal privacy of others.

(4) 5 U.S.C. 552a(e)(1) requires each agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. The application of this provision could impair investigations and law enforcement because it is not always possible to detect the relevance or necessity of specific information in the early stages of an investigation. Relevance and necessity are often questions of judgment and timing, and it is only after the information is evaluated that the relevance and necessity of such information can be established. In addition, during the course of the investigation, the investigator may obtain information which is incidental to the main purpose of the investigative jurisdiction of another agency. Such information cannot readily be segregated. Furthermore, during the course of the investigation, the investigator may obtain information concerning the violation of laws other than those which are within scope of the investigator's jurisdiction. In the interest of effective law enforcement, OIG investigators may retain this information, since it can aid in establishing patterns of criminal activity and can provide valuable leads for other law enforcement agencies.

(5) 5 U.S.C. 552a(e)(2) requires an agency to collect information to the greatest extent practicable directly from the subject individual when the information may result in adverse determinations about an individual's rights, benefits, and privileges under Federal programs. The application of this provision could impair investigations and law enforcement by alerting the subject of an investigation, thereby enabling the subject to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Moreover, in certain circumstances, the subject of an investigation cannot be required to provide information to investigators and information must be collected from other sources. Furthermore, it is often necessary to collect information from sources other than the subject of the investigation to verify the accuracy of the evidence collected.

(6) 5 U.S.C. 552a(e)(3) requires an agency to inform each person whom it asks to supply information, on a form that can be retained by the person, of the authority under which the information is sought and whether disclosure is mandatory or voluntary; of the principal purposes for which the information is intended to be used; of the routine uses which may be made of the information; and of the effects on the person, if any, of not providing all or any part of the requested information. The application of this provision could provide the subject of an investigation with substantial information about the nature of that investigation that could interfere with the investigation. Moreover, providing such a notice to the subject of an investigation could seriously impede or compromise an undercover investigation by revealing its existence and could endanger the physical safety of confidential sources, witnesses, and investigators by revealing their identities.

(7) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual, at the individual's request, if the system of records contains a record pertaining to the individual, how to gain access to such a record, and how to contest its content. Since this system of records is being exempted from subsection (f) of the Act, concerning agency rules, and subsection (d) of the Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (f) and (d) of the Act. Although the system would be exempt from these requirements, OIG has published information concerning its notification, access, and contest procedures because, under certain circumstances, OIG could decide it is appropriate for an individual to have access to all or a

portion of the individual's records in this system of records.

(8) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, OIG has published such a notice in broad generic terms.

(9) 5 U.S.C. 552a(e)(5) requires an agency to maintain its records with such accuracy, relevance, timeliness, and completeness as is reasonably necessary to assure fairness to the individual in making any determination about the individual. Since the Act defines *maintain* to include the collection of information, complying with this provision could prevent the collection of any data not shown to be accurate, relevant, timely, and complete at the moment it is collected. In collecting information for criminal law enforcement purposes, it is not possible to determine in advance what information is accurate, relevant, timely, and complete. Facts are first gathered and then placed into a logical order to prove or disprove objectively the criminal behavior of an individual. Material which seems unrelated, irrelevant, or incomplete when collected can take on added meaning or significance as the investigation progresses. The restrictions of this provision could interfere with the preparation of a complete investigative report, thereby impeding effective law enforcement.

(10) 5 U.S.C. 552a(e)(8) requires an agency to make reasonable efforts to serve notice on an individual when any record on such individual is made available to any person under compulsory legal process when such process becomes a matter of public record. Complying with this provision could prematurely reveal an ongoing criminal investigation to the subject of the investigation.

(11) 5 U.S.C. 552a(f)(1) requires an agency to promulgate rules that establish procedures whereby an individual can be notified in response to the individual's request if any system of records named by the individual contains a record pertaining to the individual. The application of this provision could impede or compromise an investigation or prosecution if the subject of an investigation were able to use such rules to learn of the existence of an investigation before it could be completed. In addition, mere notice of the fact of an investigation could inform the subject and others that their activities are under or may become the subject of an investigation and could enable the subjects to avoid detection or apprehension, to influence witnesses improperly, to destroy evidence, or to fabricate testimony. Since this system would be exempt from subsection (d) of the Act, concerning access to records, the requirements of subsection (f)(2) through (5) of the Act, concerning agency rules for obtaining access to such records, are inapplicable to the extent that this system of records will be exempted from subsection (d) of the Act. Although this system would be exempt from the requirements of subsection (f) of the Act, OIG has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of the individual's records in this system of records.

(12) 5 U.S.C. 552a(g) provides for civil remedies if an agency fails to comply with the requirements concerning access to records under subsections (d)(1) and (3) of the Act; maintenance of records under subsection (e)(5) of the Act; and any other provision of the Act, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual. Since this system of records would be exempt from subsections (c) (3) and (4), (d), (e)(1), (2), and (3) and (4)(G) through (I), (e)(5), and (8), and (f) of the Act, the provisions of subsection (g) of the Act would be inapplicable to the extent that this system of records will be exempted from those subsections of the Act.

(k) Pursuant to 5 U.S.C. 552a(k)(2), the system of records maintained by

the NLRB containing Agency Disciplinary Case Files (Nonemployees) are exempt from the provisions of 5 U.S.C. 552a (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) insofar as the system contains investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2).

(l) The Privacy Act exemption set forth in paragraph (k) of this section is claimed on the ground that the requirements of subsections (c)(3), (d), (e)(1), (e)(4) (G), (H), and (I), and (f) of the Privacy Act, if applied to Agency Disciplinary Case Files, would seriously impair the ability of the NLRB to conduct investigations of alleged or suspected violations of the NLRB's misconduct rules, as set forth in paragraphs (j)(1), (3), (4), (7), (8), and (11) of this section.

(m) Pursuant to 5 U.S.C. 552a(k)(2), investigatory material compiled for law enforcement purposes that is contained in the Next Generation Case Management System (NxGen) (NLRB–33), are exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f). This information was formerly contained within the following legacy systems, which remain accessible and which also are exempt pursuant to 5 U.S.C. 552a(k)(2), as follows:

(1) The following three legacy systems of records are exempt in their entirety from provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f), because the systems contain investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2): Case Activity Tracking System (CATS) and Associated Regional Office Files (NLRB–25), Regional Advice and Injunction Litigation System (RAILS) and Associated Headquarters Files (NLRB–28), and Appeals Case Tracking System (ACTS) and Associated Headquarters Files (NLRB–30).

(2) Pursuant to 5 U.S.C. 552a(k)(2), limited categories of information from the following four systems of records are exempt from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (e)(4)(H), (e)(4)(I), and (f), insofar as the systems contain investigatory material compiled for law enforcement purposes, other than material within the scope of 5 U.S.C. 552a(j)(2):

(i) The legacy Judicial Case Management Systems-Pending Case List (JCMS–PCL) and Associated Headquarters Files (NLRB–21)—information relating to requests to file injunctions under 29 U.S.C. 160(j), requests to initiate federal court contempt proceedings, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes;

(ii) The legacy Solicitor's System (SOL) and Associated Headquarters Files (NLRB–23)—information relating to requests to file injunctions under 29 U.S.C. 160(j), requests to initiate federal court contempt proceedings, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes;

(iii) The legacy Special Litigation Case Tracking System (SPLIT) and Associated Headquarters Files (NLRB–27)—information relating to investigative subpoena enforcement cases, injunction and mandamus actions regarding Agency cases under investigation, bankruptcy case information in matters under investigation, Freedom of Information Act cases involving investigatory records, certain requests that the Board initiate litigation or intervene in non-Agency litigation, and any other investigatory material compiled for law enforcement purposes; and

(iv) The Freedom of Information Act Tracking System (FTS) and Associated Agency Files (NLRB–32)—information requested under the Freedom of Information Act, 5 U.S.C. 552, that relates to the Agency's investigation of unfair labor practice and representation cases or other proceedings described in paragraphs (m)(1) and (2) of this section.

(n) The reasons for exemption under 5 U.S.C. 552a(k)(2) are as follows:

(1) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at such individual's request. These accountings must state the date, nature, and purpose of each disclosure of a record, and the name and address of the recipient.

Providing such an accounting of investigatory information to a party in an unfair labor practice or representation matter under investigation could inform that individual of the precise scope of an Agency investigation, or the existence or scope of another law enforcement investigation. Accordingly, this Privacy Act requirement could seriously impede or compromise either the Agency's investigation, or another law enforcement investigation, by causing the improper influencing of witnesses, retaliation against witnesses, destruction of evidence, or fabrication of testimony.

(2) 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to such individual, to request amendment to such records, to request review of an agency decision not to amend such records, and, where the Agency refuses to amend records, to submit a statement of disagreement to be included with the records. Such disclosure of investigatory information could seriously impede or compromise the Agency's investigation by revealing the identity of confidential sources or confidential business information, or causing the improper influencing of witnesses, retaliation against witnesses, destruction of evidence, fabrication of testimony, or unwarranted invasion of the privacy of others. Amendment of the records could interfere with ongoing law enforcement proceedings and impose an undue administrative burden by requiring investigations to be continuously reinvestigated.

(3) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence.

(4) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual, at the individual's request, if the system of records contains a record pertaining to the individual, for gaining access to such a record, and for contesting its content. Because certain information from these systems of records is exempt from subsection (d) of the Act concerning access to records, and consequently, from subsection (f) of the Act concerning Agency rules governing access, these requirements are inapplicable to that information.

(5) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of sources of information, to protect against the disclosure of investigative techniques and procedures, to avoid threats or reprisals against informers by subjects of investigations, and to protect against informers refusing to give full information to investigators for fear of having their identities as sources revealed.

(6) 5 U.S.C. 552a(f) requires an agency to promulgate rules for notifying individuals of Privacy Act rights granted by subsection (d) of the Act concerning access and amendment of records. Because certain information from these systems is exempt from subsection (d) of the Act, the requirements of subsection (f) of the Act are inapplicable to that information.

(o) Pursuant to 5 U.S.C. 552a(k)(1), (2), (3), (5), (6), and (7) of the Privacy Act, the system of records maintained by the NLRB containing Personnel Security Records shall be exempted from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) insofar as the system may contain:

(1) Records properly classified pursuant to an Executive Order, within the meaning of section 552(b)(1);

(2) Investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2);

(3) Information maintained in connection with providing protective services to the President of the United States or other individuals pursuant to section 3056 of title 18 of the U.S. Code;

(4) Investigatory material compiled solely for the purpose of determining suitability, eligibility or qualifications

for Federal civilian employment and Federal contact or access to classified information;

(5) Testing and examination materials used for a personnel investigation for employment or promotion in the Federal service;

(6) Evaluation materials, compiled during the course of a personnel investigation, that are used solely to determine potential for promotion in the armed services.

(p) The Privacy Act exemptions contained in paragraph (o) of this section are justified for the following reasons:

(1)(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his/her request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records.

(ii) Personnel investigations may contain properly classified information which pertains to national defense and foreign policy obtained from another Federal agency. Application of exemption 5 U.S.C. 552a(k)(1) is necessary to preclude an individual's access to and amendment of such classified information under 5 U.S.C. 552a(d).

(iii) Personnel investigations may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption 5 U.S.C. 552a(k)(2) is necessary to preclude an individual's access to or amendment of such records under 5 U.S.C. 552a(c)(3) and (d).

(iv) Personnel investigations may also contain information obtained from another Federal agency that relates to providing protective services to the President of the United States or other individuals pursuant to 18 U.S.C. 3056. Application of exemption 5 U.S.C. 552a(k)(3) is necessary to preclude an individual's access to and amendment of such records under 5 U.S.C. 552a(d).

(v) Exemption 5 U.S.C. 552a(k)(5) is claimed with respect to the requirements of 5 U.S.C. 552a(c)(3) and (d) because this system contains investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal employment. To the extent that the disclosure of material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the applicability of exemption 5 U.S.C. 552a(k)(5) will be required to honor promises of confidentiality should an individual request access to or amendment of the record, or access to the accounting of disclosures of the record. Similarly, personnel investigations may contain evaluation material used to determine potential for promotion in the armed services. Application of exemption 5 U.S.C. 552a(k)(7) is necessary to the extent that the disclosure of data would compromise the anonymity of a source under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence. Both of these exemptions are necessary to safeguard the integrity of background investigations by minimizing the threat of harm to confidential sources, witnesses, and law enforcement personnel. Additionally, these exemptions reduce the risks of improper influencing of sources, the destruction of evidence, and the fabrication of testimony.

(vi) All information in this system that meets the criteria articulated in exemption 5 U.S.C. 552a(k)(6) is exempt from the requirements of 5 U.S.C. 552a(d), relating to access to and amendment of records by an individual. This exemption is claimed because portions of this system relate to testing or examining materials used solely to determine individual qualifications for appointment or promotion to the Federal service. Access to or amendment to this information by an individual would compromise the objectivity and

fairness of the testing or examining process.

(2) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence. This system of records is exempt from this requirement because in the course of personnel background investigations, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to favorably or unfavorably adjudicate a specific investigation at a specific point in time. However, in the interests of protecting the public trust and national security, it is appropriate to retain all information that may aid in establishing patterns in such areas as criminal conduct, alcohol and drug use, financial dishonesty, allegiance, foreign preference or influence, and psychological conditions, that are relevant to future personnel security or suitability determinations.

(3) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a FEDERAL REGISTER notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to him/her, how to gain access to such a record and how to contest its content. Since this system of records is being exempted from subsection (f) of the Privacy Act, concerning agency rules, and subsection (d) of the Privacy Act, concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (f) and (d) of the Privacy Act. Although the system would be exempt from these requirements, the NLRB has published information concerning its notification, access, and contest procedures because, under certain circumstances, it may be appropriate for a subject to have access to a portion of that individual's records in this system of records.

(4) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, the agency has published source information in the accompanying notice in broad generic terms.

(5) 5 U.S.C. 552a(f) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to a request if any system of records named by the individual contains a record pertaining to that individual. The application of this provision could compromise the progress of an investigation concerning the suitability, eligibility, and fitness for service of applicants for Federal employment and impede a prompt assessment of the appropriate access to the Agency's facilities. Although this system would be exempt from the requirements of subsection (f) of the Privacy Act, the Agency has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of that individual's records in this system of records.

(q) Pursuant to 5 U.S.C. 552a(k)(1), (2), and (5), the system of records maintained by the NLRB containing NLRB iTrak and Banned Entry List records shall be exempted from the provisions of 5 U.S.C. 552a(c)(3), (d), (e)(1), (e)(4)(G), (H), and (I), and (f) insofar as the system may contain:

(1) Records properly classified pursuant to an Executive order, within the meaning of 5 U.S.C. 552(b)(1);

(2) Investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2); and

(3) Investigatory material compiled solely for the purpose of determining

suitability, eligibility, or qualifications for Federal civilian employment, military service, Federal contracts or access to classified information.

(r) The Privacy Act exemptions contained in paragraph (q) of this section are justified for the following reasons:

(1)(i) 5 U.S.C. 552a(c)(3) requires an agency to make the accounting of each disclosure of records available to the individual named in the record at his/her request. These accountings must state the date, nature, and purpose of each disclosure of a record and the name and address of the recipient. 5 U.S.C. 552a(d) requires an agency to permit an individual to gain access to records pertaining to him/her, to request amendment to such records, to request a review of an agency decision not to amend such records, and to contest the information contained in such records.

(ii) iTrak and Banned Entry List records may contain properly classified information which pertains to national defense and foreign policy obtained from another Federal agency. Application of exemption (k)(1) is necessary to preclude an individual's access to and amendment of such classified information under 5 U.S.C. 552a(d), which would pose a risk of harm to national defense and foreign policy interests.

(iii) iTrak and Banned Entry List records may contain investigatory material compiled for law enforcement purposes other than material within the scope of 5 U.S.C. 552a(j)(2). Application of exemption (k)(2) is necessary to preclude an individual's access to or amendment of such records under 5 U.S.C. 552a(c)(3) and (d), which would pose a risk of harm to law enforcement interests. Specifically, this exemption is necessary to safeguard the integrity of law enforcement investigations by minimizing the threat of harm to confidential sources, witnesses, and law enforcement personnel. Additionally, this exemption reduces the risks of improper influencing of sources, the destruction of evidence, and the fabrication of testimony.

(iv) Exemption (k)(5) is claimed with respect to the requirements of 5 U.S.C. 552a(c)(3) and (d) because this system contains investigatory material compiled solely for determining suitability, eligibility, and qualifications for Federal employment. To the extent that the disclosure of material would reveal the identity of a source who furnished information to the Government under an express promise that the identity of the source would be held in confidence, or, prior to September 27, 1975, under an implied promise that the identity of the source would be held in confidence, the applicability of exemption (k)(5) will be required to honor promises of confidentiality should an individual request access to or amendment of the record, or access to the accounting of disclosures of the record. This exemption is necessary to safeguard the integrity of security investigations by minimizing the threat of harm to confidential sources, witnesses, and law enforcement personnel. Additionally, this exemption reduces the risks of improper influencing of sources, the destruction of evidence, and the fabrication of testimony.

(2) 5 U.S.C. 552a(e)(1) requires an agency to maintain in its records only such information about an individual as is relevant and necessary to accomplish a purpose of the agency required by statute or by Executive order of the President. This requirement could foreclose investigators from acquiring or receiving information the relevance and necessity of which is not readily apparent and could only be ascertained after a complete review and evaluation of all the evidence. This system of records is exempt from this requirement because in the course of security investigations, the accuracy of information obtained or introduced occasionally may be unclear, or the information may not be strictly relevant or necessary to favorably or unfavorably adjudicate a specific investigation at a specific point in time. However, in the interests of protecting the public trust and national security, it is appropriate to retain all information that may aid in establishing patterns in such areas as criminal conduct, alcohol and drug use, financial dishonesty, allegiance, foreign preference or influence, and psychological conditions, that are relevant to future security determinations.

(3) 5 U.S.C. 552a(e)(4)(G) and (H) require an agency to publish a FEDERAL

REGISTER notice concerning its procedures for notifying an individual, at his/her request, if the system of records contains a record pertaining to him/her, how to gain access to such a record, and how to contest its content. Since this system of records is being exempted from subsection (f) of the Privacy Act concerning agency rules, and subsection (d) of the Privacy Act concerning access to records, these requirements are inapplicable to the extent that this system of records will be exempt from subsections (d) and (f) of the Act. Although the system would be exempt from these requirements, the NLRB has published information concerning its notification, access, and contest procedures because, under certain circumstances, it may be appropriate for a subject to have access to a portion of that individual's records in this system of records.

(4) 5 U.S.C. 552a(e)(4)(I) requires an agency to publish a FEDERAL REGISTER notice concerning the categories of sources of records in the system of records. Exemption from this provision is necessary to protect the confidentiality of the sources of information, to protect the privacy and physical safety of confidential sources and witnesses, and to avoid the disclosure of investigative techniques and procedures. Although the system will be exempt from this requirement, the agency has published source information in the accompanying notice in broad generic terms.

(5) 5 U.S.C. 552a(f) requires an agency to promulgate rules which shall establish procedures whereby an individual can be notified in response to a request if any system of records named by the individual contains a record pertaining to that individual. The application of this provision could compromise the progress of a law enforcement investigation regarding security and impede a prompt assessment of the appropriate access to the Agency's facilities. Although this system would be exempt from the requirements of subsection (f) of the Act, the Agency has promulgated rules which establish agency procedures because, under certain circumstances, it could be appropriate for an individual to have access to all or a portion of that individual's records in this system of records.

[82 FR 11754, Feb. 24, 2017, as amended at 84 FR 70425, Dec. 23, 2020; 85 FR 75855, Nov. 27, 2020]

Subpart L—Post-Employment Restrictions on Activities by Former Officers and Employees

§ 102.120 Post-employment restrictions on activities by former officers and employees.

Former officers and employees of the Agency who were attached to any of its Regional Offices or the Washington staff are subject to the applicable post-employment restrictions imposed by 18 U.S.C. 207. Guidance concerning those restrictions may be obtained from the Designated Agency Ethics Officer and any applicable regulations issued by the Office of Government Ethics.

[82 FR 11768, Feb. 24, 2017]

Subpart M—Construction of Rules

SOURCE: 82 FR 11768, Feb. 24, 2017, unless otherwise noted.

§ 102.121 Rules to be liberally construed.

The Rules and Regulations in this part will be liberally construed to effectuate the purposes and provisions of the Act.

§§ 102.122–102.123 [Reserved]

§ 102.124 Petitions for issuance, amendment, or repeal of rules.

Any interested person may petition the Board, in writing, for the issuance, amendment, or repeal of a rule or regulation. An original of such petition must be filed with the Board and must state the rule or regulation proposed to be issued, amended, or repealed, together with a statement of grounds in support of such petition.

§ 102.125 Action on petition.

Upon the filing of such petition, the Board will consider the same and may either grant or deny the petition in whole or in part, conduct an appropriate hearing thereon, or make other disposition of the petition. Should the

petition be denied in whole or in part, prompt notice will be given of the denial, accompanied by a simple statement of the grounds unless the denial is self-explanatory.

Subpart N [Reserved]

Subpart O—Amendments

SOURCE: 82 FR 11778, Feb. 24, 2017, unless otherwise noted.

Subpart P—Ex Parte Communications

AUTHORITY: Sec. 6, National Labor Relations Act, as amended (49 Stat. 452; 29 U.S.C. 156).

SOURCE: 42 FR 13113, Mar. 8, 1977, unless otherwise noted.

§ 102.126 Unauthorized communications.

(a) No interested person outside this Agency may, in an on-the-record proceeding of the types defined in § 102.128, make or knowingly cause to be made any prohibited *ex parte* communication to Board agents of the categories designated in that Section relevant to the merits of the proceeding.

(b) No Board agent of the categories defined in § 102.128, participating in a particular proceeding as defined in that section, may:

(i) Request any prohibited *ex parte* communications; or

(ii) Make or knowingly cause to be made any prohibited *ex parte* communications about the proceeding to any interested person outside this Agency relevant to the merits of the proceeding.

[82 FR 11778, Feb. 24, 2017]

§ 102.127 Definitions.

When used in this subpart:

(a) The term *person outside this Agency*, to whom the prohibitions apply includes any individual outside this Agency, partnership, corporation, association, or other entity, or an agent thereof, and the General Counsel or the General Counsel's representative when prosecuting an unfair labor practice proceeding before the Board pursuant to Section 10(b) of the Act.

(b) The term *ex parte communication* means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, subject however, to the provisions of §§ 102.129 and 102.130.

[42 FR 13113, Mar. 8, 1977, as amended at 82 FR 11778, Feb. 24, 2017]

§ 102.128 Types of on-the-record proceedings; categories of Board agents; duration of prohibition.

Unless otherwise provided by specific order of the Board entered in the proceeding, the prohibition of § 102.126 will be applicable in the following types of on-the-record proceedings to unauthorized *ex parte* communications made to the designated categories of Board agents who participate in the decision, from the stage of the proceeding specified until the issues are finally resolved by the Board for the purposes of that proceeding under prevailing rules and practices:

(a) In a pre-election proceeding pursuant to Section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to Section 9(b) of the Act, in which a formal hearing is held, communications to the Regional Director and the Director's staff who review the record and prepare a draft of the decision, and Board Members and their staff, from the time the hearing is opened.

(b) In a postelection proceeding pursuant to Section 9(c)(1) or 9(e) of the Act, in which a formal hearing is held, communications to the Hearing Officer, the Regional Director and the Director's staff who review the record and prepare a draft of the report or decision, and Board Members and their staff, from the time the hearing is opened.

(c) In a postelection proceeding pursuant to Section 9(c)(1) or 9(e), or in a unit clarification or certification amendment proceeding pursuant to Section 9(b) of the Act, in which no formal hearing is held, communications to Board Members and their staff, from the time the Regional Director's report or decision is issued.

(d) In a proceeding pursuant to Section 10(k) of the Act, communications

to Board Members and their staff, from the time the hearing is opened.

(e) In an unfair labor practice proceeding pursuant to Section 10(b) of the Act, communications to the Administrative Law Judge assigned to hear the case or to make rulings upon any motions or issues therein and Board Members and their staff, from the time the complaint and/or Notice of Hearing is issued, or the time the communicator has knowledge that a complaint or Notice of Hearing will be issued, whichever occurs first.

(f) In any other proceeding to which the Board by specific order makes the prohibition applicable, to the categories of personnel and from the stage of the proceeding specified in the order.

[82 FR 11778, Feb. 24, 2017]

§ 102.129 Communications prohibited.

Except as provided in §102.130, *ex parte* communications prohibited by §102.126 include:

(a) Such communications, when written, if copies are not contemporaneously served by the communicator on all parties to the proceeding in accordance with the provisions of §102.5(g).

(b) Such communications, when oral, unless advance notice is given by the communicator to all parties in the proceeding and adequate opportunity afforded to them to be present.

[82 FR 11778, Feb. 24, 2017]

§ 102.130 Communications not prohibited.

Ex parte communications prohibited by §102.126 do not include oral or written communications or requests:

(a) Which relate solely to matters which the Hearing Officer, Regional Director, Administrative Law Judge, or Board Member is authorized by law or Board Rules to entertain or dispose of on an *ex parte* basis.

(b) For information solely with respect to the status of a proceeding.

(c) Which all the parties to the proceeding agree, or which the responsible official formally rules, may be made on an *ex parte* basis.

(d) Proposing settlement or an agreement for disposition of any or all issues in the proceeding.

(e) Which concern matters of general significance to the field of labor-management relations or administrative practice and which are not specifically related to pending on-the-record proceedings.

(f) From the General Counsel to the Board when the General Counsel is acting as counsel for the Board.

[82 FR 11778, Feb. 24, 2017]

§ 102.131 Solicitation of prohibited communications.

No person may knowingly and willfully solicit the making of an unauthorized *ex parte* communication by any other person.

[82 FR 11778, Feb. 24, 2017]

§ 102.132 Reporting of prohibited communications; penalties.

(a) Any Board agent of the categories defined in §102.128 to whom a prohibited oral *ex parte* communication is attempted to be made shall refuse to listen to the communication, inform the communicator of this rule, and advise the communicator that anything may be said in writing with copies to all parties. Any Board agent who receives, or who makes or knowingly causes to be made, an unauthorized *ex parte* communication will place or cause to be placed on the public record of the proceeding:

(1) The communication, if it was written;

(2) A memorandum stating the substance of the communication, if it was oral;

(3) All written responses to the prohibited communication; and

(4) Memoranda stating the substance of all oral responses to the prohibited communication.

(b) The Executive Secretary, if the proceeding is then pending before the Board, the Administrative Law Judge, if the proceeding is then pending before any such judge, or the Regional Director, if the proceeding is then pending before a Hearing Officer or the Regional Director, will serve copies of all such materials placed on the public record of the proceeding on all other parties to the proceeding and on the attorneys of record for the parties. Within 14 days after service of such copies,

any party may file with the Executive Secretary, Administrative Law Judge, or Regional Director serving the communication, and serve on all other parties, a statement setting forth facts or contentions to rebut those contained in the prohibited communication. All such responses will be placed in the public record of the proceeding, and provision may be made for any further action, including reopening of the record which may be required under the circumstances. No action taken pursuant to this provision will constitute a waiver of the power of the Board to impose an appropriate penalty under § 102.133.

[82 FR 11778, Feb. 24, 2017]

§ 102.133 Penalties and enforcement.

(a) Where the nature and circumstances of a prohibited communication made by or caused to be made by a party to the proceeding are such that the interests of justice and statutory policy may require remedial action, the Board, the Administrative Law Judge, or the Regional Director, as the case may be, may issue to the party making the communication a Notice to Show Cause, returnable before the Board within a stated period not less than 7 days from the date of issuance, why the Board may not determine that the interests of justice and statutory policy require that the claim or interest in the proceeding of a party who knowingly makes a prohibited communication, or knowingly causes a prohibited communication to be made may be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(b) Upon notice and hearing, the Board may censure, suspend, or revoke the privilege of practice before the Agency of any person who knowingly and willfully makes or solicits the making of a prohibited *ex parte* communication. However, before the Board institutes formal proceedings under this paragraph (b), it will first advise the person or persons concerned in writing that it proposes to take such action and that they may show cause, within a period to be stated in such written advice, but not less than 7 days from the date thereof, why it may not take such action.

(c) The Board may censure, or, to the extent permitted by law, suspend, dismiss, or institute proceedings for the dismissal of, any Board agent who knowingly and willfully violates the prohibitions and requirements of this rule.

[82 FR 11778, Feb. 24, 2017]

§ 102.134 [Reserved]

Subpart Q—Procedure Governing Matters Affecting Employment-Management Agreements Under the Postal Reorganization Act

§ 102.135 Postal Reorganization Act.

(a) *Employment-management agreements.* All matters within the jurisdiction of the National Labor Relations Board pursuant to the Postal Reorganization Act (chapter 12 of title 39, U.S. Code, as revised) are governed by the provisions of subparts A, B, C, D, F, G, H, J, K, L, M, O, and P of this part, insofar as applicable.

(b) *Inconsistencies.* To the extent that any provision of this subpart is inconsistent with any provision of title 39, United States Code, the provision of title 39 governs.

(c) *Exceptions.* For the purposes of this subpart, references in the subparts cited in paragraphs (a) and (b) of this section to:

(1) *Employer* is deemed to include the Postal Service;

(2) *Act* will in the appropriate context mean *Postal Reorganization Act;*

(3) *Section 9(c) of the Act* and cited paragraphs will mean *39 U.S.C. 1203(c) and 1204;* and

(4) *Section 9(b) of the Act* will mean *39 U.S.C. 1202.*

[82 FR 11779, Feb. 24, 2017]

Subpart R—Advisory Committees

§ 102.136 Establishment and use of advisory committees.

Advisory committees may from time to time be established or used by the Agency in the interest of obtaining advice or recommendations on issues of concern to the Agency. The establishment, use, and functioning of such committees will be in accordance with

the provisions of the Federal Advisory Committee Act, 5 U.S.C. App. 2, applicable Rules and Regulations.

[82 FR 11779, Feb. 24, 2017]

Subpart S—Open Meetings

SOURCE: 82 FR 11779, Feb. 24, 2017, unless otherwise noted.

§ 102.137 Public observation of Board meetings.

Every portion of every meeting of the Board will be open to public observation, except as provided in § 102.139, and Board Members will not jointly conduct or dispose of Agency business other than in accordance with the provisions of this subpart.

§ 102.138 Definition of *meeting.*

For purposes of this subpart, *meeting* means the deliberations of at least three Members of the full Board, or the deliberations of at least two Members of any group of three Board Members to whom the Board has delegated powers which it may itself exercise, where such deliberations determine or result in the joint conduct or disposition of official Agency business, but does not include deliberations to determine whether a meeting may be closed to public observation in accordance with the provisions of this subpart.

§ 102.139 Closing of meetings; reasons.

(a) Except where the Board determines that the public interest requires otherwise, meetings, or portions thereof, will not be open to public observation where the deliberations concern the issuance of a subpoena, the Board's participation in a civil action or proceeding or an arbitration, or the initiation, conduct, or disposition by the Board of particular representation or unfair labor practice proceedings under Section 8, 9, or 10 of the Act, or any court proceedings collateral or ancillary thereto.

(b) Meetings, or portions thereof, may also be closed by the Board, except where it determines that the public interest requires otherwise, when the deliberations concern matters or information falling within the reasons for closing meetings specified in 5 U.S.C. 552b(c)(1) (secret matters concerning national defense or foreign policy); (c)(2) (internal personnel rules and practices); (c)(3) (matters specifically exempted from disclosure by statute); (c)(4) (privileged or confidential trade secrets and commercial or financial information); (c)(5) (matters of alleged criminal conduct or formal censure); (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy); (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes); or (c)(9)(B) (disclosure would significantly frustrate implementation of a proposed Agency action).

§ 102.140 Action necessary to close meeting; record of votes.

A meeting will be closed to public observation under § 102.139, only when a majority of the Board Members who will participate in the meeting vote to take such action.

(a) When the meeting deliberations concern matters specified in § 102.139(a), the Board Members will vote at the beginning of the meeting, or portion of the meeting, on whether to close such meeting, or portion of the meeting, to public observation, and on whether the public interest requires that a meeting which may properly be closed may nevertheless be open to public observation. A record of such vote, reflecting the vote of each Board Member, will be kept and made available to the public at the earliest practicable time.

(b) When the meeting deliberations concern matters specified in § 102.139(b), the Board will vote on whether to close such meeting, or portion of the meeting, to public observation, and on whether there is a public interest which requires that a meeting which may properly be closed may nevertheless be open to public observation. The vote will be taken at a time sufficient to permit inclusion of information concerning the open or closed status of the meeting in the public announcement of the vote. A single vote may be taken with respect to a series of meetings at which the deliberations will concern the same particular matters where such subsequent meetings are scheduled to be held within 30 days after the

initial meeting. A record of such vote, reflecting the vote of each Board Member, will be kept and made available to the public within one day after the vote is taken.

(c) Whenever any person whose interests may be directly affected by deliberations during a meeting, or a portion of a meeting, requests that the Board close the meeting, or a portion of the meeting, to public observation for any of the reasons specified in 5 U.S.C. 552b(c)(5) (matters of alleged criminal conduct or formal censure), (c)(6) (personal information where disclosure would cause a clearly unwarranted invasion of personal privacy), or (c)(7) (certain materials or information from investigatory files compiled for law enforcement purposes), the Board Members participating in the meeting, upon request of any one of its Members, will vote on whether to close such meeting, or a portion of the meeting, for that reason. A record of such vote, reflecting the vote of each Board Member participating in the meeting will be kept and made available to the public within 1 day after the vote is taken.

(d) After public announcement of a meeting as provided in §102.141, a meeting, or portion of a meeting, announced as closed may be opened, or a meeting, or portion of a meeting, announced as open may be closed, only if a majority of the Board Members who will participate in the meeting determine by a recorded vote that Board business so requires and that an earlier announcement of the change was not possible. The change made and the vote of each Board Member on the change will be announced publicly at the earliest practicable time.

(e) Before a meeting may be closed pursuant to §102.139, the Solicitor of the Board will certify that in the Solicitor's opinion the meeting may properly be closed to public observation. The certification will set forth each applicable exemptive provision for such closing. Such certification will be retained by the Agency and made publicly available as soon as practicable.

§102.141 Notice of meetings; public announcement and publication.

(a) A public announcement setting forth the time, place, and subject matter of meetings or portions of meetings closed to public observation pursuant to the provisions of §102.139(a) will be made at the earliest practicable time.

(b) Except for meetings closed to public observation pursuant to the provisions of §102.139(a), the Agency will publicly announce each meeting to be held at least 7 days before the scheduled date of the meeting. The announcement will specify the time, place, and subject matter of the meeting, whether it is to be open to public observation or closed, and the name, address, and phone number of an Agency official designated to respond to requests for information about the meeting. The 7-day period for advance notice may be shortened only upon a determination by a majority of the Board Members who will participate in the meeting that Agency business requires that such meeting be called at an earlier date, in which event the public announcements will be made at the earliest practicable time. A record of the vote to schedule a meeting at an earlier date will be kept and made available to the public.

(c) Within 1 day after the vote to close a meeting, or any portion of a meeting, pursuant to the provisions of §102.139(b), the Agency will make publicly available a full written explanation of its action closing the meeting, or portion of a meeting, together with a list of all persons expected to attend the meeting and their affiliation.

(d) If after public announcement required by paragraph (b) of this section has been made, the time and place of the meeting are changed, a public announcement will be made at the earliest practicable time. The subject matter of the meeting may be changed after the public announcement only if a majority of the Members of the Board who will participate in the meeting determine that Agency business so requires and that no earlier announcement of the change was possible. When such a change in subject matter is approved a public announcement of the change will be made at the earliest practicable time. A record of the vote to change the subject matter of the meeting will be kept and made available to the public.

(e) All announcements or changes issued pursuant to the provisions of paragraphs (b) and (d) of this section, or pursuant to provisions of §102.140(d), will be submitted for publication in the FEDERAL REGISTER immediately following their release to the public.

(f) Announcements of meetings made pursuant to the provisions of this section shall be made publicly available by the executive secretary.

§102.142 Transcripts, recordings, or minutes of closed meetings; public availability; retention.

(a) For every meeting or portion of a meeting closed under the provisions of §102.139, the presiding officer will prepare a statement setting forth the time and place of the meeting and the persons present, which statement will be retained by the Agency. For each such meeting or portion of a meeting there will also be maintained a complete transcript or electronic recording of the proceedings, except that for meetings closed pursuant to §102.139(a) the Board may, in lieu of a transcript or electronic recording, maintain a set of minutes fully and accurately summarizing any action taken, the reasons for taking the action, and views on the action taken, documents considered, and the Board Members' vote on each roll call vote.

(b) The Agency will promptly make available to the public copies of transcripts, recordings, or minutes maintained as provided in accordance with paragraph (a) of this section, except to the extent the items contain information which the Agency determines may be withheld pursuant to the provisions of 5 U.S.C. 552(c). Copies of transcripts or minutes, or transcriptions of electronic recordings including the identification of speakers, will, to the extent determined to be publicly available, be furnished to any person, subject to the payment of duplication costs in accordance with the schedule of fees set forth in §102.117(c)(2)(iv), and the actual cost of transcription.

(c) The Agency will maintain a complete verbatim copy of the transcript, a complete electronic recording, or a complete set of the minutes for each meeting or portion of a meeting closed to the public, for a period of at least one year after the close of the Agency proceeding of which the meeting was a part, but in no event for a period of less than 2 years after such meeting.

Subpart T—Awards of Fees and Other Expenses

AUTHORITY: Equal Access to Justice Act, Pub. L. 96–481, 94 Stat. 2325.

SOURCE: 46 FR 48087, Sept. 30, 1981, unless otherwise noted.

§102.143 "Adversary adjudication" defined; entitlement to award; eligibility for award.

(a) The term *adversary adjudication*, as used in this subpart, means unfair labor practice proceedings pending before the Board on a complaint and backpay proceedings under §§102.52 through 102.59 pending before the Board on a Notice of Hearing at any time after October 1, 1984.

(b) A Respondent in an adversary adjudication who prevails in that proceeding, or in a significant and discrete substantive portion of that proceeding, and who otherwise meets the eligibility requirements of this section, is eligible to apply for an award of fees and other expenses allowable under the provisions of §102.145.

(c) Applicants eligible to receive an award are as follows:

(1) An individual with a net worth of not more than $2 million;

(2) A sole owner of an unincorporated business who has a net worth of not more than $7 million, including both personal and business interests, and not more than 500 employees;

(3) A charitable or other tax-exempt organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) with not more than 500 employees;

(4) A cooperative association as defined in Section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)) with not more than 500 employees; and

(5) Any other partnership, corporation, association, unit of local government, or public or private organization with a net worth of not more than $7 million and not more than 500 employees.

(d) For the purpose of eligibility, the net worth and number of employees of

an applicant will be determined as of the date of the complaint in an unfair labor practice proceeding or the date of the Notice of Hearing in a backpay proceeding.

(e) An applicant who owns an unincorporated business will be considered as an ''individual'' rather than a ''sole owner of unincorporated business'' if the issues on which the applicant prevails are related primarily to personal interests rather than to business interests.

(f) The employees of an applicant include all persons who regularly perform services for remuneration for the applicant, under the applicant's direction and control. Part-time employees shall be included on a proportional basis.

(g) The net worth and number of employees of the applicant and all of its affiliates will be aggregated to determine eligibility. Any individual, corporation, or other entity that directly or indirectly controls or owns a majority of the voting shares or other interest of the applicant, or any corporation or other entity of which the applicant directly or indirectly owns or controls a majority of the voting shares or other interest, will be considered an affiliate for purposes of this part, unless such treatment would be unjust and contrary to the purposes of the Equal Access to Justice Act (94 Stat. 2325) in light of the actual relationship between the affiliated entities. In addition, financial relationships of the applicant other than those described in this paragraph may constitute special circumstances that would make an award unjust.

(h) An applicant that participates in an adversary adjudication primarily on behalf of one or more other persons or entities that would be ineligible is not itself eligible for an award.

[46 FR 48087, Sept. 30, 1981, as amended at 51 FR 17733, May 15, 1986; 51 FR 36224, Oct. 9, 1986; 82 FR 11781, Feb. 24, 2017]

§ 102.144 Standards for awards.

(a) An eligible applicant may receive an award for fees and expenses incurred in connection with an adversary adjudication or in connection with a significant and discrete substantive portion of that proceeding, unless the position of the General Counsel over which the applicant has prevailed was substantially justified. The burden of proof that an award should not be made to an eligible applicant is on the General Counsel, who may avoid an award by showing that the General Counsel's position in the proceeding was substantially justified.

(b) An award will be reduced or denied if the applicant has unduly or unreasonably protracted the adversary adjudication or if special circumstances make the award sought unjust.

[46 FR 48087, Sept. 30, 1981, as amended at 51 FR 17733, May 15, 1986]

§ 102.145 Allowable fees and expenses.

(a) Awards will be based on rates customarily charged by persons engaged in the business of acting as attorneys, agents and expert witnesses, even if the services were made available without charge or at a reduced rate to the applicant.

(b) No award for the attorney or agent fees under these Rules may exceed $75 per hour. However, an award may also include the reasonable expenses of the attorney, agent, or witness as a separate item, if the attorney, agent, or expert witness ordinarily charges clients separately for such expenses.

(c) In determining the reasonableness of the fee sought for an attorney, agent, or expert witness, the following matters will be considered:

(1) If the attorney, agent, or expert witness is in practice, that person's customary fee for similar services, or, if an employee of the applicant, the fully allocated cost of the services;

(2) The prevailing rate for similar services in the community in which the attorney, agent, or expert witness ordinarily performs services;

(3) The time actually spent in the representation of the applicant; and

(4) The time reasonably spent in light of the difficulty or complexity of the issues in the adversary adjudicative proceeding.

(d) The reasonable cost of any study, analysis, engineering report, test, project or similar matter prepared on behalf of an applicant may be awarded, to the extent that the charge for the

service does not exceed the prevailing rate for similar services, and the study or other matter was necessary for preparation of the applicant's case.

[46 FR 48087, Sept. 30, 1981, as amended at 82 FR 11782, Feb. 24, 2017]

§ 102.146 Rulemaking on maximum rates for attorney or agent fees.

Any person may file with the Board a petition under § 102.124 for rulemaking to increase the maximum rate for attorney or agent fees. The petition should specify the rate the petitioner believes may be established and explain fully why the higher rate is warranted by an increase in the cost of living or a special factor (such as the limited availability of qualified attorneys or agents for the proceedings involved).

[82 FR 11782, Feb. 24, 2017]

§ 102.147 Contents of application; net worth exhibit; documentation of fees and expenses.

(a) An application for an award of fees and expenses under the Act must identify the applicant and the adversary adjudication for which an award is sought. The application must state the particulars in which the applicant has prevailed and identify the positions of the General Counsel in that proceeding that the applicant alleges were not substantially justified. Unless the applicant is an individual, the application must also state the number, category, and work location of employees of the applicant and its affiliates and describe briefly the type and purpose of its organization or business.

(b) The application must include a statement that the applicant's net worth does not exceed $2 million (if an individual) or $7 million (for all other applicants, including their affiliates). However, an applicant may omit this statement if:

(1) It attaches a copy of a ruling by the Internal Revenue Service that it qualifies as an organization described in Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. 501(c)(3)) or, in the case of a tax-exempt organization not required to obtain a ruling from the Internal Revenue Service on its exempt status, a statement that describes the basis for the applicant's belief that it qualifies under such Section; or

(2) It states that it is a cooperative association as defined in Section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)).

(c) The application must state the amount of fees and expenses for which an award is sought.

(d) The application may also include any other matters that the applicant wishes this Agency to consider in determining whether and in what amount an award should be made.

(e) The application must be signed by the applicant or an authorized officer or attorney of the applicant. It must also contain or be accompanied by a written verification under oath or under penalty of perjury that the information provided in the application is true.

(f) Each applicant, except a qualified tax-exempt organization or cooperative association, must provide with its application a detailed exhibit showing the net worth of the applicant and any affiliates (as defined in § 102.143(g)) when the adversary adjudicative proceeding was initiated. The exhibit may be in any form convenient to the applicant that provides full disclosure of the applicant's and its affiliates' assets and liabilities and is sufficient to determine whether the applicant qualifies under the standards in this part. The Administrative Law Judge may require an applicant to file such additional information as may be required to determine its eligibility for an award.

(g)(1) Unless otherwise directed by the Administrative Law Judge, the net worth exhibit will be included in the public record of the fee application proceeding. An applicant that objects to public disclosure of information in any portion of the exhibit may submit that portion of the exhibit in a sealed envelope labeled *Confidential Financial Information*, accompanied by a motion to withhold the information from public disclosure. The motion must describe the information sought to be withheld and explain, in detail, why public disclosure of the information would adversely affect the applicant and why disclosure is not required in the public interest. The exhibit must be served on the General Counsel but need not be served on any other party to the proceeding. If the Administrative Law

Judge finds that the information may not be withheld from disclosure, it will be placed in the public record of the proceeding.

(2) If the Administrative Law Judge grants the motion to withhold from public disclosure, the exhibit will remain sealed, except to the extent that its contents are required to be disclosed at a hearing. The granting of the motion to withhold from public disclosure will not determine the availability of the document under the Freedom of Information Act in response to a request made under the provisions of §102.117. Notwithstanding that the exhibit may be withheld from public disclosure, the General Counsel may disclose information from the exhibit to others if required in the course of an investigation to verify the claim of eligibility.

(h) The application must be accompanied by full documentation of the fees and expenses for which an award is sought. A separate itemized statement must be submitted for each professional firm or individual whose services are covered by the application, showing the dates and the hours spent in connection with the proceeding by each individual, a description of the specific services performed, the rate at which each fee has been computed, any expenses for which reimbursement is sought, the total amount claimed, and the total amount paid or payable by the applicant or by any other person or entity for the services provided. The Administrative Law Judge may require the applicant to provide vouchers, receipts, or other substantiation for any expenses claimed.

[46 FR 48087, Sept. 30, 1981, as amended at 51 FR 17733, May 15, 1986; 51 FR 36224, Oct. 9, 1986; 82 FR 11782, Feb. 24, 2017]

§ 102.148 When an application may be filed; place of filing; service; referral to Administrative Law Judge; stay of proceeding.

(a) An application may be filed after entry of the final order establishing that the applicant has prevailed in an adversary adjudication proceeding or in a significant and discrete substantive portion of that proceeding, but in no case later than 30 days after the entry of the Board's final order in that proceeding. The application for an award must be filed with the Board in Washington, DC, together with a certificate of service. The application must be served on the Regional Director and on all parties to the adversary adjudication in the same manner as other pleadings in that proceeding, except as provided in §102.147(g)(1) for financial information alleged to be confidential.

(b) Upon filing, the application will be referred by the Board to the Administrative Law Judge who heard the adversary adjudication upon which the application is based, or, in the event that proceeding had not previously been heard by an Administrative Law Judge, it will be referred to the Chief Administrative Law Judge for designation of an Administrative Law Judge, in accordance with §102.34, to consider the application. When the Administrative Law Judge to whom the application has been referred is or becomes unavailable, the provisions of §§102.34 and 102.36 will apply.

(c) Proceedings for the award of fees, but not the time limit of this section for filing an application for an award, will be stayed pending final disposition of the adversary adjudication in the event any person seeks reconsideration or review of the decision in that proceeding.

(d) For purposes of this section the withdrawal of a complaint by a Regional Director under §102.18 will be treated as a final order, and an appeal under §102.19 will be treated as a request for reconsideration of that final order.

[82 FR 11783, Feb. 24, 2017]

§ 102.149 Filing of documents; service of documents; motions for extension of time.

(a) All motions and pleadings after the time the case is referred by the Board to the Administrative Law Judge until the issuance of the Administrative Law Judge's decision must be filed with the Administrative Law Judge together with proof of service. Copies of all documents filed must be served on all parties to the adversary adjudication.

(b) Motions for extensions of time to file motions, documents, or pleadings

permitted by §102.150 or by §102.152 must be filed with the Chief Administrative Law Judge, the Deputy Chief Administrative Law Judge, or an Associate Chief Administrative Law Judge, as the case may be, no later than 3 days before the due date of the document. Notice of the request must be immediately served on all other parties and proof of service furnished.

[82 FR 11783, Feb. 24, 2017]

§102.150 Answer to application; reply to answer; comments by other parties.

(a) Within 35 days after service of an application, the General Counsel may file an answer to the application. Unless the General Counsel requests an extension of time for filing or files a statement of intent to negotiate under paragraph (b) of this section, failure to file a timely answer may be treated as a consent to the award requested. The filing of a motion to dismiss the application will stay the time for filing an answer to a date 35 days after issuance of any order denying the motion. Within 21 days after service of any motion to dismiss, the applicant may file a response. Review of an order granting a motion to dismiss an application in its entirety may be obtained by filing a request with the Board in Washington, DC, pursuant to §102.27.

(b) If the General Counsel and the applicant believe that the issues in the fee application can be settled, they may jointly file a statement of their intent to negotiate toward a settlement. The filing of such a statement will extend the time for filing an answer for an additional 35 days.

(c) The answer must explain in detail any objections to the award requested and identify the facts relied on in support of the General Counsel's position. If the answer is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits must be provided or a request made for further proceedings under §102.152.

(d) Within 21 days after service of an answer, the applicant may file a reply. If the reply is based on alleged facts not already in the record of the adversary adjudication, supporting affidavits must be provided or a request made for further proceedings under §102.152.

(e) Any party to an adversary adjudication other than the applicant and the General Counsel may file comments on a fee application within 35 days after it is served and on an answer within 21 days after it is served. A commenting party may not participate further in the fee application proceeding unless the Administrative Law Judge determines that such participation is required in order to permit full exploration of matters raised in the comments.

[82 FR 11783, Feb. 24, 2017]

§102.151 Settlement.

The applicant and the General Counsel may agree on a proposed settlement of the award before final action on the application. If a prevailing party and the General Counsel agree on a proposed settlement of an award before an application has been filed, the proposed settlement must be filed with the application. All such settlements are subject to approval by the Board.

[82 FR 11783, Feb. 24, 2017]

§102.152 Further proceedings.

(a) Ordinarily, the determination of an award will be made on the basis of the documents in the record. The Administrative Law Judge, however, upon request of either the applicant or the General Counsel, or on the General Counsel's own initiative, may order further proceedings, including an informal conference, oral argument, additional written submission, or an evidentiary hearing. An evidentiary hearing will be held only when necessary for resolution of material issues of fact.

(b) A request that the Administrative Law Judge order further proceedings under this section must specifically identify the disputed issues and the evidence sought to be adduced, and must explain why the additional proceedings are necessary to resolve the issues.

(c) An order of the Administrative Law Judge scheduling further proceedings will specify the issues to be considered.

(d) Any evidentiary hearing held pursuant to this section will be open to

the public and will be conducted in accordance with §§102.30 through 102.43, except §§102.33, 102.34, and 102.38.

(e) Rulings of the Administrative Law Judge are reviewable by the Board only in accordance with the provisions of §102.26.

[82 FR 11783, Feb. 24, 2017]

§102.153 Administrative Law Judge's decision; contents; service; transfer of case to the Board; contents of record in case.

(a) Upon conclusion of proceedings under §§102.147 through 102.152, the Administrative Law Judge will prepare a decision, which will include written findings and conclusions as necessary to dispose of the application. The Administrative Law Judge will transmit the decision to the Board. Upon receipt of the decision, the Board will enter an order transferring the case to the Board and will serve copies on all the parties of the Judge's decision and the Board's order, setting forth the date of the transfer.

(b) The record in a proceeding on an application for an award of fees and expenses includes the application and any amendments or attachments, the net worth exhibit, the answer and any amendments or attachments, any reply to the answer, any comments by other parties, motions, rulings, orders, stipulations, written submissions, the transcript of any oral argument, the transcript of any hearing, exhibits, and depositions, together with the Administrative Law Judge's decision and exceptions, any cross-exceptions or answering briefs as provided in §102.46, and the record of the adversary adjudication upon which the application is based.

[82 FR 11783, Feb. 24, 2017]

§102.154 Exceptions to Administrative Law Judge's decision; briefs; action of the Board.

Procedures before the Board, including the filing of exceptions to the Administrative Law Judge's decision and briefs, and action by the Board, will be in accordance with §§102.46, 102.47, 102.48, and 102.50. The Board will issue a decision on the application or remand the proceeding to the Administrative Law Judge for further proceedings.

[82 FR 11783, Feb. 24, 2017]

§102.155 Payment of award.

To obtain payment of an award made by the Board, the applicant must submit to the Director of the Division of Administration, a copy of the Board's final decision granting the award, accompanied by a statement that the applicant will not seek court review of the decision. If such statement is filed, the Agency will pay the amount of the award within 60 days, unless judicial review of the award or of the underlying decision has been sought.

[82 FR 11783, Feb. 24, 2017]

Subpart U—Debt-Collection Procedures by Administrative Offset

SOURCE: 62 FR 55164, Oct. 23, 1997, unless otherwise noted.

§102.156 Administrative offset; purpose and scope.

The regulations in this subpart specify the Agency procedures that will be followed to implement the administrative offset procedures set forth in the Debt Collection Act of 1982 (Pub. L. 97–365), 31 U.S.C. 3716.

[82 FR 11784, Feb. 24, 2017]

§102.157 Definitions.

(a) The term *administrative offset* means the withholding of money payable by the United States to, or held by the United States on behalf of, a person to satisfy a debt owed the United States by that person.

(b) The term *debtor* is any person against whom the Board has a claim.

(c) The term *person* does not include any agency of the United States, or any state or local government.

(d) The terms *claim* and *debt* are synonymous and interchangeable. They refer to an amount of money or property which has been determined by an appropriate Agency official to be owed to the United States from any person, organization, or entity, except another Federal agency.

(e) A debt is considered *delinquent* if it has not been paid by the date specified in the Agency's initial demand letter (§ 102.161), unless satisfactory payment arrangements have been made by that date, or if, at any time thereafter, the debtor fails to satisfy the debtor's obligations under a payment agreement with the Agency.

[62 FR 55164, Oct. 23, 1997, as amended at 82 FR 11784, Feb. 24, 2017]

§ 102.158 Agency requests for administrative offsets and cooperation with other Federal agencies.

Unless otherwise prohibited by law, the Agency may request that monies due and payable to a debtor by another Federal agency be administratively offset in order to collect debts owed the Agency by the debtor. In requesting an administrative offset, the Agency will provide the other Federal agency holding funds of the debtor with written certification stating:

(a) That the debtor owes the Board a debt (including the amount of debt); and

(b) That the Agency has complied with the applicable Federal Claims Collection Standards, including any hearing or review.

§ 102.159 Exclusions.

(a)(1) The Agency is not authorized by the Debt Collection Act of 1982 (31 U.S.C. 3716) to use administrative offset with respect to:

(i) Debts owed by any State or local government;

(ii) Debts arising under or payments made under the Social Security Act, the Internal Revenue Code of 1954, or the tariff laws of the United States; or

(iii) When a statute explicitly provides for or prohibits using administrative offset to collect the claim or type of claim involved.

(2) No claim that has been outstanding for more than 10 years after the Board's right to collect the debt first accrued may be collected by means of administrative offset, unless facts material to the right to collect the debt were not known, and could not reasonably have been known, by the official of the Agency who was charged with the responsibility to discover and collect such debts until within 10 years of the initiation of the collection action. A determination of when the debt first accrued may be made according to existing laws regarding the accrual of debts, such as under 28 U.S.C. 2415. Unless otherwise provided by contract or law, debts or payments owed the Board which are not subject to administrative offset under 31 U.S.C. 3716 may be collected by administrative offset under the common law or other applicable statutory authority, pursuant to this paragraph (a) or Board regulations established pursuant to such other statutory authority.

(b) Collection by offset against a judgment obtained by a debtor against the United State will be accomplished in accordance with 31 U.S.C. 3728.

[82 FR 11784, Feb. 24, 2017]

§ 102.160 Agency responsibilities.

(a) The Agency will provide appropriate written or other guidance to Agency officials in carrying out this subpart, including the issuance of guidelines and instructions. The Agency will also take such administrative steps as may be appropriate to carry out the purposes and ensure the effective implementation of this subpart.

(b) Before collecting a claim by means of administrative offset, the Agency must ensure that administrative offset is feasible, allowable and appropriate, and must notify the debtor of the Agency's policies for collecting a claim by means of administrative offset.

(c) Whether collection by administrative offset is feasible is a determination to be made by the Agency on a case-by-case basis, in the exercise of sound discretion. The Agency shall consider not only whether administrative offset can be accomplished, both practically and legally, but also whether administrative offset will further and protect the best interests of the United States Government. In appropriate circumstances, the Agency may give due consideration to the debtor's financial condition, and it is not expected that administrative offset will be used in every available instance, particularly where there is another readily available source of funds. The Agency may also consider whether administrative offset would substantially

interfere with or defeat the purposes of the program authorizing the payments against which offset is contemplated.

(d) Administrative offset must be considered by the Agency only after attempting to collect a claim under 31 U.S.C. 3711(a).

[62 FR 55164, Oct. 23, 1997, as amended at 82 FR 11784, Feb. 24, 2017]

§ 102.161 Notification.

(a) The Agency must send a written demand to the debtor in terms which inform the debtor of the consequences of failure to cooperate. In the demand letter, the Agency must provide the name of an Agency employee who can provide a full explanation of the claim. When the Agency deems it appropriate to protect the Government's interests (for example, to prevent the statute of limitations, 28 U.S.C. 2415, from expiring), written demand may be preceded by other appropriate actions.

(b) In accordance with guidelines established by the Agency, the Agency official responsible for collection of the debt must send written notice to the debtor, informing the debtor, as appropriate, of the:

(1) Nature and amount of the Board's claim;

(2) Date by which payment is to be made (which normally may be not more than 30 days from the date that the initial notification was mailed or hand delivered);

(3) Agency's intent to collect by administrative offset and of the debtor's rights in conjunction with such an offset;

(4) Agency's intent to collect, as appropriate, interest, penalties, administrative costs and attorneys fees;

(5) Rights of the debtor to a full explanation of the claim, of the opportunity to inspect and copy Agency records with respect to the claim and to dispute any information in the Agency's records concerning the claim;

(6) Debtor's right to administrative appeal or review within the Agency concerning the Agency's claim and how such review must be obtained;

(7) Debtor's opportunity to enter into a written agreement with the Agency to repay the debt; and

(8) Date on which, or after which, an administrative offset will begin.

[82 FR 11784, Feb. 24, 2017]

§ 102.162 Examination and copying of records related to the claim; opportunity for full explanation of the claim.

Following receipt of the demand letter specified in §102.161, and in conformity with Agency guidelines governing such requests, the debtor may request to examine and copy publicly available records pertaining to the debt, and may request a full explanation of the Agency's claim.

§ 102.163 Opportunity for repayment.

(a) The Agency must afford the debtor the opportunity to repay the debt or enter into a repayment plan which is agreeable to the Agency and is in a written form signed by the debtor. The Agency may deem a repayment plan to be abrogated if the debtor, after the repayment plan is signed, fails to comply with the terms of the plan.

(b) The Agency has discretion and may exercise sound judgment in determining whether to accept a repayment agreement in lieu of administrative offset.

[82 FR 11785, Feb. 24, 2017]

§ 102.164 Review of the obligation.

(a) The debtor shall have the opportunity to obtain review by the Agency of the determination concerning the existence or amount of the debt as set forth in the notice. In cases where the amount of the debt has been fully liquidated, the review is limited to ensuring that the liquidated amount is correctly represented in the notice.

(b) The debtor seeking review shall make the request in writing to the Agency, not more than 15 days from the date the demand letter was received by the debtor. The request for review shall state the basis for challenging the determination. If the debtor alleges that the Agency's information relating to the debt is not accurate, timely, relevant or complete, the debtor shall provide information or documentation to support this allegation.

(c) The Agency may effect an administrative offset against a payment to be made to a debtor prior to the completion of the due process procedures required by this subpart, if failure to take the offset would substantially prejudice the Agency's ability to collect the debt; for example, if the time before the payment is to be made would not reasonably permit the completion of due process procedures. Administrative offset effected prior to completion of due process procedures must be promptly followed by the completion of those procedures. Amounts recovered by administrative offset, but later found not owed to the Agency, will be promptly refunded.

(d) Upon completion of the review, the Agency's reviewing official shall transmit to the debtor the Agency's decision. If appropriate, this decision shall inform the debtor of the scheduled date on or after which administrative offset will begin. The decision shall also, if appropriate, indicate any changes in information to the extent such information differs from that provided in the initial notification to the debtor under § 102.161.

(e) Nothing in this subpart will preclude the Agency from *sua sponte* reviewing the obligation of the debtor, including reconsideration of the Agency's determination concerning the debt, and the accuracy, timeliness, relevance, and completeness of the information on which the debt is based.

[62 FR 55164, Oct. 23, 1997, as amended at 82 FR 11785, Feb. 24, 2017]

§ 102.165 Cost shifting.

Costs incurred by the Agency in connection with referral of debts for administrative offset will be added to the debt and thus increase the amount of the offset. Such costs may include administrative costs and attorneys fees.

§ 102.166 Additional administrative collection action.

Nothing contained in this subpart is intended to preclude the Agency from utilizing any other administrative or legal remedy which may be available.

§ 102.167 Prior provision of rights with respect to debt.

To the extent that the rights of the debtor in relation to the same debt have been previously provided for under some other statutory or regulatory authority, the Agency is not required to duplicate those efforts before effecting administrative offset.

Subpart V—Debt Collection Procedures By Federal Income Tax Refund Offset

SOURCE: 62 FR 55166, Oct. 23, 1997, unless otherwise noted.

§ 102.168 Federal income tax refund offset; purpose and scope.

The regulations in this subpart specify the Agency procedures that will be followed to implement the federal income tax refund offset procedures set forth in 26 U.S.C. 6402(d) of the Internal Revenue Code (Code), 31 U.S.C. 3720A, and 301.6402–6 of the Treasury Regulations on Procedure and Administration (26 CFR 301.6402–6). This statute and the implementing regulations of the Internal Revenue Service (IRS) at 26 CFR 301.6402–6 authorize the IRS to reduce a tax refund by the amount of a past-due legally enforceable debt owed to the United States. The regulations apply to past-due legally enforceable debts owed to the Agency by individuals and business entities. The regulations are not intended to limit or restrict debtor access to any judicial remedies to which the debtor may otherwise be entitled.

[82 FR 11785, Feb. 24, 2017]

§ 102.169 Definitions.

(a) *Tax refund offset* refers to the IRS income tax refund offset program operated under authority of 31 U.S.C. 3720A.

(b) *Past-due legally enforceable debt* is a delinquent debt administratively determined to be valid, whereon no more than 10 years have lapsed since the date of delinquency (unless reduced to judgment), and which is not discharged under a bankruptcy proceeding or subject to an automatic stay under 11 U.S.C. 362.

(c) *Individual* refers to a taxpayer identified by a social security number (SSN).

(d) *Business entity* refers to an entity identified by an employer identification number (EIN).

(e) *Taxpayer mailing address* refers to the debtor's current mailing address as obtained from IRS.

(f) *Memorandum of understanding* refers to the agreement between the Agency and IRS outlining the duties and responsibilities of the respective parties for participation in the tax refund offset program.

[62 FR 55166, Oct. 23, 1997, as amended at 82 FR 11785, Feb. 24, 2017]

§ 102.170 Agency referral to IRS for tax referral effect; Agency responsibilities.

(a) As authorized and required by law, the Agency may refer past-due legally enforceable debts to the Internal Revenue Service (IRS) for collection by offset from any overpayment of income tax that may otherwise be due to be refunded to the taxpayer. By the date and in the manner prescribed by the IRS, the Agency may refer for tax refund offset past-due legally enforceable debts. Such referrals shall include the following information:

(1) Whether the debtor is an individual or a business entity;

(2) The name and taxpayer identification number (SSN or EIN) of the debtor who is responsible for the debt;

(3) The amount of the debt; and

(4) A designation that the Agency is referring the debt and (as appropriate) Agency account identifiers.

(b) The Agency will ensure the confidentiality of taxpayer information as required by the IRS in its Tax Information Security Guidelines.

(c) As necessary, the Agency will submit updated information at the times and in the manner prescribed by the IRS to reflect changes in the status of debts or debtors referred for tax refund offset.

(d) Amounts erroneously offset will be refunded by the Agency or the IRS in accordance with the Memorandum of Understanding.

[62 FR 55166, Oct. 23, 1997, as amended at 82 FR 11785, Feb. 24, 2017]

§ 102.171 Cost shifting.

Costs incurred by the Agency in connection with referral of debts for tax refund offset will be added to the debt and thus increase the amount of the offset. Such costs may include administrative costs and attorneys fees.

§ 102.172 Minimum referral amount.

The minimum amount of a debt otherwise eligible for Agency referral to the IRS is $25 for individual debtors and $100 for business debtors. The amount referred may include the principal portion of the debt, as well as any accrued interest, penalties, administrative cost charges, and attorney fees.

§ 102.173 Relation to other collection efforts.

(a) Tax refund offset is intended to be an administrative collection remedy to be used consistent with IRS requirements for participation in the program, and the costs and benefits of pursuing alternative remedies when the tax refund offset program is readily available. To the extent practical, the requirements of the program will be met by merging IRS requirements into the Agency's overall requirements for delinquent debt collection.

(b) As appropriate, debts of an individual debtor of $100 or more will be reported to a consumer or commercial credit reporting agency before referral for tax refund offset.

(c) Debts owed by individuals will be screened for administrative offset potential using the most current information reasonably available to the Agency, and will not be referred for tax refund offset where administrative offset potential is found to exist.

[62 FR 55166, Oct. 23, 1997, as amended at 82 FR 11785, Feb. 24, 2017]

§ 102.174 Debtor notification.

(a) The Agency must send appropriate written demand to the debtor in terms which inform the debtor of the consequences of failure to repay debts or claims owed to the Board.

(b) Before the Agency refers a debt to the IRS for tax refund offset, it will make a reasonable attempt to notify the debtor that:

(1) The debt is past-due;

(2) Unless the debt is repaid or a satisfactory repayment agreement is established within 60 days thereafter, the debt will be referred to the IRS for offset from any overpayment of tax remaining after taxpayer liabilities of greater priority have been satisfied; and

(3) The debtor will have a minimum of 60 days from the date of notification to present evidence that all or part of the debt is not past due or legally enforceable, and the Agency will consider this evidence in a review of its determination that the debt is past due and legally enforceable. The debtor will be advised where and to whom evidence is to be submitted.

(c) The Agency will make a reasonable attempt to notify the debtor by using the most recent address information available to the Agency or obtained from the IRS, unless written notification to the Agency is received from the debtor stating that notices from the Agency are to be sent to a different address.

(d) The notification required by paragraph (b) of this section and sent to the address specified in paragraph (c) of this section may, at the option of the Agency, be incorporated into demand letters required by paragraph (a) of this section.

[62 FR 55166, Oct. 23, 1997, as amended at 82 FR 11785, Feb. 24, 2017]

§ 102.175 Agency review of the obligation.

(a) The Agency official responsible for collection of the debt will consider any evidence submitted by the debtor as a result of the notification required by § 102.174 and notify the debtor of the result. If appropriate, the debtor will also be advised where and to whom to request a review of any unresolved dispute.

(b) The debtor will be granted 30 days from the date of the notification required by paragraph (a) of this section to request a review of the determination of the Agency official responsible for collection of the debt on any unresolved dispute. The debtor will be advised of the result.

[82 FR 11785, Feb. 24, 2017]

§ 102.176 [Reserved]

Subpart W—Misconduct by Attorneys or Party Representatives

§ 102.177 Exclusion from hearings; refusal of witness to answer questions; misconduct by attorneys and party representatives before the Agency; procedures for processing misconduct allegations.

(a) Any attorney or other representative appearing or practicing before the Agency must conform to the standards of ethical and professional conduct required of practitioners before the courts, and the Agency will be guided by those standards in interpreting and applying the provisions of this section.

(b) Misconduct by any person at any hearing before an Administrative Law Judge, Hearing Officer, or the Board may be grounds for summary exclusion from the hearing. Notwithstanding the procedures set forth in paragraph (e) of this section for handling allegations of misconduct, the Administrative Law Judge, Hearing Officer, or Board has the authority in the proceeding in which the misconduct occurred to admonish or reprimand, after due notice, any person who engages in misconduct at a hearing.

(c) The refusal of a witness at any such hearing to answer any question which has been ruled to be proper may, in the discretion of the Administrative Law Judge or Hearing Officer, be grounds for striking all testimony previously given by such witness on related matters.

(d) Misconduct by an attorney or other representative at any stage of any Agency proceeding, including but not limited to misconduct at a hearing, may be grounds for discipline. Such misconduct of an aggravated character may be grounds for suspension and/or disbarment from practice before the Agency and/or other sanctions.

(e) All allegations of misconduct pursuant to paragraph (d) of this section, except for those involving the conduct of Agency employees, will be handled in accordance with the following procedures:

(1) Allegations that an attorney or party representative has engaged in

misconduct may be brought to the attention of the Investigating Officer by any person. The Investigating Officer, for purposes of this paragraph (e)(1), is the head of the Division of Operations-Management, or designee.

(2) The Investigating Officer or designee will conduct such investigation as is deemed appropriate and will have the usual powers of investigation provided in Section 11 of the Act. Following the investigation, the Investigating Officer will make a recommendation to the General Counsel, who will make the determination whether to institute disciplinary proceedings against the attorney or party representative. The General Counsel's authority to make this determination is not delegable to the Regional Director or other personnel in the Regional Office. If the General Counsel determines not to institute disciplinary proceedings, all interested persons will be notified of the determination, which is final.

(3) If the General Counsel decides to institute disciplinary proceedings against the attorney or party representative, the General Counsel or designee will serve the respondent with a complaint which will include: A statement of the acts which are claimed to constitute misconduct including the approximate date and place of such acts together with a statement of the discipline recommended; notification of the right to a hearing before an Administrative Law Judge with respect to any material issues of fact or mitigation; and an explanation of the method by which a hearing may be requested. The complaint will not be issued until the respondent has been notified of the allegations in writing and has been afforded a reasonable opportunity to respond.

(4) Within 14 days of service of the disciplinary complaint, the Respondent must file an answer admitting or denying the allegations, and may request a hearing. If no answer is filed or no material issue of fact or relevant to mitigation warranting a hearing is raised, the matter may be submitted directly to the Board. If no answer is filed, then the allegations will be deemed admitted.

(5) Sections 102.24 through 102.51, rules applicable to unfair labor practice proceedings, apply to disciplinary proceedings under this section to the extent that they are not contrary to the provisions of this section.

(6) The hearing will be conducted at a reasonable time, date, and place. In setting the hearing date, the Administrative Law Judge will give due regard to the Respondent's need for time to prepare an adequate defense and the need of the Agency and the Respondent for an expeditious resolution of the allegations.

(7) The hearing will be public unless otherwise ordered by the Board or the Administrative Law Judge.

(8) Any person bringing allegations of misconduct or filing a petition for disciplinary proceedings against an attorney or party representative will be given notice of the scheduled hearing. Any such person will not be a party to the disciplinary proceeding, however, and will not be afforded the rights of a party to call, examine or cross-examine witnesses and introduce evidence at the hearing, to file exceptions to the Administrative Law Judge's decision, or to appeal the Board's decision.

(9) The Respondent will, upon request, be provided with an opportunity to read the transcript or listen to a recording of the hearing.

(10) The General Counsel must establish the alleged misconduct by a preponderance of the evidence.

(11) At any stage of the proceeding prior to hearing, the Respondent may submit a settlement proposal to the General Counsel, who may approve the settlement or elect to continue with the proceedings. Any formal settlement reached between the General Counsel and the Respondent, providing for entry of a Board order reprimanding, suspending, disbarring or taking other disciplinary action against the Respondent, is subject to final approval by the Board. In the event any settlement, formal or informal, is reached after opening of the hearing, such settlement must be submitted to the Administrative Law Judge for approval. In the event the Administrative Law Judge rejects the settlement, either the General Counsel or the Respondent may appeal such

ruling to the Board as provided in §102.26.

(12) If it is found that the Respondent has engaged in misconduct in violation of paragraph (d) of this section, the Board may issue a final order imposing such disciplinary sanctions as it deems appropriate, including, where the misconduct is of an aggravated character, suspension and/or disbarment from practice before the Agency, and/or other sanctions.

(f) Any person found to have engaged in misconduct warranting disciplinary sanctions under paragraph (d) of this section may seek judicial review of the administrative determination.

[82 FR 11785, Feb. 24, 2017]

Subpart X—Special Procedures When the Board Lacks a Quorum

SOURCE: 76 FR 77700, Dec. 14, 2011, unless otherwise noted.

§102.178 Normal operations should continue.

The policy of the National Labor Relations Board is that during any period when the Board lacks a quorum normal Agency operations should continue to the greatest extent permitted by law.

§102.179 Motions for default judgment, summary judgment, or dismissal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, all motions for default judgment, summary judgment, or dismissal filed or pending pursuant to §102.50 will be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to §102.46.

[82 FR 11786, Feb. 24, 2017]

§102.180 Requests for special permission to appeal referred to Chief Administrative Law Judge.

During any period when the Board lacks a quorum, any request for special permission to appeal filed or pending pursuant to §102.26 will be referred to the Chief Administrative Law Judge in Washington, DC, for ruling. Such rulings by the Chief Administrative Law Judge, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board in reviewing the record if exception to the ruling or order is included in the statement of exceptions filed with the Board pursuant to §102.46.

[82 FR 11786, Feb. 24, 2017]

§102.181 Administrative and procedural requests referred to Executive Secretary.

During any period when the Board lacks a quorum, administrative and procedural requests that would normally be filed with the Office of the Executive Secretary for decision by the Board prior to the filing of a request for review under §102.67, or exceptions under §§102.46 and 102.69, will be referred to the Executive Secretary for ruling. Rulings by the Executive Secretary, and orders in connection therewith, may not be appealed directly to the Board, but will be considered by the Board if such matters are raised by a party in its request for review or exceptions.

[82 FR 11786, Feb. 24, 2017]

§102.182 Representation cases should be processed to certification.

During any period when the Board lacks a quorum, the second proviso of §102.67(b) regarding the automatic impounding of ballots will be suspended. To the extent practicable, all representation cases may continue to be processed and the appropriate certification should be issued by the Regional Director notwithstanding the pendency of a request for review, subject to revision or revocation by the Board pursuant to a request for review filed in accordance with this subpart.

[82 FR 11786, Feb. 24, 2017]

PART 103—OTHER RULES

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103.100 Offers of reinstatement to employees in Armed Forces.

AUTHORITY: 29 U.S.C. 156, in accordance with the procedure set forth in 5 U.S.C. 553.

Subpart A—Jurisdictional Standards

§ 103.1 Colleges and universities.

The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any private nonprofit college or university which has a gross annual revenue from all sources (excluding only contributions which, because of limitation by the grantor, are not available for use for operating expenses) of not less than $1 million.

[35 FR 18370, Dec. 3, 1970]

§ 103.2 Symphony orchestras.

The Board will assert its jurisdiction in any proceeding arising under sections 8, 9, and 10 of the Act involving any symphony orchestra which has a gross annual revenue from all sources (excluding only contributions which are because of limitation by the grantor not available for use for operating expenses) of not less than $1 million.

[38 FR 6177, Mar. 7, 1973]

§ 103.3 Horseracing and dogracing industries.

The Board will not assert its jurisdiction in any proceeding under sections 8, 9, and 10 of the Act involving the horseracing and dogracing industries.

[38 FR 9507, Apr. 17, 1973]

Subpart B—Election Procedures

§ 103.20 Election procedures and blocking charges.

(a) Whenever any party to a representation proceeding files an unfair labor practice charge together with a request that the charge block the election process, or whenever any party to a representation proceeding requests that its previously filed unfair labor practice charge block the election process, the party shall simultaneously file, but not serve on any other party, a written offer of proof in support of the charge. The offer of proof shall provide the names of the witnesses who will testify in support of the charge and a summary of each witness's anticipated testimony. The party seeking to block the election process shall also promptly make available to the regional director the witnesses identified in its offer of proof.

(b) If charges are filed alleging violations other than those described in paragraph (c) of this section, the ballots will be promptly opened and counted at the conclusion of the election.

(c) If charges are filed that allege violations of section 8(a)(1) and 8(a)(2) or section 8(b)(1)(A) of the Act and that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition, or a charge is filed that alleges an employer has dominated a union in violation of section 8(a)(2) and seeks to disestablish a bargaining relationship, the regional director shall impound the ballots for up to 60 days from the conclusion of the election if the charge has not been withdrawn or dismissed prior to the conclusion of the election. If a complaint issues with respect to the

charge at any point prior to expiration of that 60-day post-election period, then the ballots shall continue to be impounded until there is a final determination regarding the charge and its effect, if any, on the election petition. If the charge is withdrawn or dismissed at any time during that 60-day period, or if the 60-day period ends without a complaint issuing, then the ballots shall be promptly opened and counted. The 60-day period will not be extended, even if more than one unfair labor practice charge is filed serially.

(d) For all charges described in paragraphs (b) or (c) of this section, the certification of results (including, where appropriate, a certification of representative) shall not issue until there is a final disposition of the charge and a determination of its effect, if any, on the election petition.

[85 FR 18399, Apr. 1, 2020]

§ 103.21 Processing of petitions filed after voluntary recognition.

(a) An employer's voluntary recognition of a labor organization as exclusive bargaining representative of an appropriate unit of the employer's employees under section 9(a) of the Act, and the first collective-bargaining agreement executed by the parties on or after the date of such voluntary recognition, will not bar the processing of an election petition unless:

(1) The employer and/or the labor organization notifies the Regional Office that recognition has been granted;

(2) The employer posts, in conspicuous places, including all places where notices to employees are customarily posted, a notice of recognition (provided by the Regional Office) informing employees that recognition has been granted and that they have a right to file a petition during a 45-day ''window period'' beginning on the date the notice is posted;

(3) The employer distributes the notice described in paragraph (a)(2) of this section electronically to employees in the petitioned-for unit, if the employer customarily communicates with its employees electronically; and

(4) 45 days from the posting date pass without a properly supported petition being filed.

(5) The notice described in paragraph (a)(2) of this section shall state as follows:

Federal law gives employees the right to form, join, or assist a union and to choose not to engage in these protected activities.

An employer may lawfully recognize a union based on evidence (such as signed authorization cards) indicating that a majority of employees in an appropriate bargaining unit desire its representation, without an election supervised by the National Labor Relations Board.

Once an employer recognizes a union as the employees' exclusive bargaining representative, the employer has an obligation to bargain with the union in good faith in an attempt to reach a collective-bargaining agreement, and that obligation is not delayed or otherwise impacted by this notice.

The National Labor Relations Board is an agency of the United States Government and does not endorse any choice about whether employees should keep the recognized union, file a petition to certify the recognized union, file a petition to decertify the recognized union, or support or oppose a representation petition filed by another union.

[Employer] on [date] recognized [Union] as the employees' exclusive bargaining representative based on evidence indicating that a majority of employees in [described bargaining unit] desire its representation.

All employees, including those who previously signed cards in support of [Union], have the right to be represented by a union of their choice or by no union at all.

Within 45 days from the date of this notice, a petition supported by 30 percent or more of the unit employees may be filed with the National Labor Relations Board for a secret-ballot election to determine whether or not the unit employees wish to be represented by [Union], or 30 percent or more of the unit employees can support another union's filing of a petition to represent them.

Any properly supported petition filed within the 45-day window period will be processed according to the National Labor Relations Board's normal procedures.

A petition may be filed within the 45-day window period even if [Employer] and [Union] have already reached a collective-bargaining agreement.

If no petition is filed within the 45-day window period, the Union's status as the unit employees' exclusive bargaining representative will be insulated from challenge for a reasonable period of time, and if [Employer] and [Union] reach a collective-bargaining agreement during that insulated reasonable period, an election cannot be held for the duration of that collective-bargaining agreement, up to 3 years.

(b) This section shall be applicable to an employer's voluntary recognition on or after the effective date of this rule.

[85 FR 18399, Apr. 1, 2020]

§ 103.22 Proof of majority-based bargaining relationship between employer and labor organization in the construction industry.

(a) A voluntary recognition or collective-bargaining agreement between an employer primarily engaged in the building and construction industry and a labor organization will not bar any election petition filed pursuant to section 9(c) or 9(e) of the Act absent positive evidence that the union unequivocally demanded recognition as the section 9(a) exclusive bargaining representative of employees in an appropriate bargaining unit, and that the employer unequivocally accepted it as such, based on a contemporaneous showing of support from a majority of employees in an appropriate unit. Collective-bargaining agreement language, standing alone, will not be sufficient to provide the showing of majority support.

(b) This section shall be applicable to an employer's voluntary recognition extended on or after the effective date of this rule and to any collective-bargaining agreement entered into on or after the date of voluntary recognition extended on or after the effective date of this rule.

[85 FR 18400, Apr. 1, 2020]

Subpart C—Appropriate Bargaining Units

§ 103.30 Appropriate bargaining units in the health care industry.

(a) This portion of the rule shall be applicable to acute care hospitals, as defined in paragraph (f) of this section: Except in extraordinary circumstances and in circumstances in which there are existing non-conforming units, the following shall be appropriate units, and the only appropriate units, for petitions filed pursuant to section 9(c)(1)(A)(i) or 9(c)(1)(B) of the National Labor Relations Act, as amended, except that, if sought by labor organizations, various combinations of units may also be appropriate:

(1) All registered nurses.

(2) All physicians.

(3) All professionals except for registered nurses and physicians.

(4) All technical employees.

(5) All skilled maintenance employees.

(6) All business office clerical employees.

(7) All guards.

(8) All nonprofessional employees except for technical employees, skilled maintenance employees, business office clerical employees, and guards.

Provided That a unit of five or fewer employees shall constitute an extraordinary circumstance.

(b) Where extraordinary circumstances exist, the Board shall determine appropriate units by adjudication.

(c) Where there are existing non-conforming units in acute care hospitals, and a petition for additional units is filed pursuant to sec. 9(c)(1)(A)(i) or 9(c)(1)(B), the Board shall find appropriate only units which comport, insofar as practicable, with the appropriate unit set forth in paragraph (a) of this section.

(d) The Board will approve consent agreements providing for elections in accordance with paragraph (a) of this section, but nothing shall preclude regional directors from approving stipulations not in accordance with paragraph (a), as long as the stipulations are otherwise acceptable.

(e) This rule will apply to all cases decided on or after May 22, 1989.

(f) For purposes of this rule, the term:

(1) *Hospital* is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(e), as revised 1988);

(2) *Acute care hospital* is defined as: either a short term care hospital in which the average length of patient stay is less than thirty days, or a short term care hospital in which over 50% of all patients are admitted to units where the average length of patient stay is less than thirty days. Average length of stay shall be determined by reference to the most recent twelve month period preceding receipt of a representation petition for which data

is readily available. The term ''acute care hospital'' shall include those hospitals operating as acute care facilities even if those hospitals provide such services as, for example, long term care, outpatient care, psychiatric care, or rehabilitative care, but shall exclude facilities that are primarily nursing homes, primarily psychiatric hospitals, or primarily rehabilitation hospitals. Where, after issuance of a subpoena, an employer does not produce records sufficient for the Board to determine the facts, the Board may presume the employer is an acute care hospital.

(3) *Psychiatric hospital* is defined in the same manner as defined in the Medicare Act, which definition is incorporated herein (currently set forth in 42 U.S.C. 1395x(f)).

(4) The term *rehabilitation hospital* includes and is limited to all hospitals accredited as such by either Joint Committee on Accreditation of Healthcare Organizations or by Commission for Accreditation of Rehabilitation Facilities.

(5) A *non-conforming unit* is defined as a unit other than those described in paragraphs (a) (1) through (8) of this section or a combination among those eight units.

(g) Appropriate units in all other health care facilities: The Board will determine appropriate units in other health care facilities, as defined in section 2(14) of the National Labor Relations Act, as amended, by adjudication.

[54 FR 16347, Apr. 21, 1989]

Subpart D—Joint Employers

SOURCE: 85 FR 11235, Feb. 26, 2020, unless otherwise noted.

§ 103.40 Joint employers.

(a) An employer, as defined by Section 2(2) of the National Labor Relations Act (the Act), may be considered a joint employer of a separate employer's employees only if the two employers share or codetermine the employees' essential terms and conditions of employment. To establish that an entity shares or codetermines the essential terms and conditions of another employer's employees, the entity must possess and exercise such substantial direct and immediate control over one or more essential terms or conditions of their employment as would warrant finding that the entity meaningfully affects matters relating to the employment relationship with those employees. Evidence of the entity's indirect control over essential terms and conditions of employment of another employer's employees, the entity's contractually reserved but never exercised authority over the essential terms and conditions of employment of another employer's employees, or the entity's control over mandatory subjects of bargaining other than the essential terms and conditions of employment is probative of joint-employer status, but only to the extent it supplements and reinforces evidence of the entity's possession or exercise of direct and immediate control over a particular essential term and condition of employment. Joint-employer status must be determined on the totality of the relevant facts in each particular employment setting. The party asserting that an entity is a joint employer has the burden of proof.

(b) ''Essential terms and conditions of employment'' means wages, benefits, hours of work, hiring, discharge, discipline, supervision, and direction.

(c) ''Direct and Immediate Control'' means the following with respect to each respective essential employment term or condition:

(1) *Wages.* An entity exercises direct and immediate control over wages if it actually determines the wage rates, salary or other rate of pay that is paid to another employer's individual employees or job classifications. An entity does not exercise direct and immediate control over wages by entering into a cost-plus contract (with or without a maximum reimbursable wage rate).

(2) *Benefits.* An entity exercises direct and immediate control over benefits if it actually determines the fringe benefits to be provided or offered to another employer's employees. This would include selecting the benefit plans (such as health insurance plans and pension plans) and/or level of benefits provided to another employer's employees. An

entity does not exercise direct and immediate control over benefits by permitting another employer, under an arm's-length contract, to participate in its benefit plans.

(3) *Hours of work*. An entity exercises direct and immediate control over hours of work if it actually determines work schedules or the work hours, including overtime, of another employer's employees. An entity does not exercise direct and immediate control over hours of work by establishing an enterprise's operating hours or when it needs the services provided by another employer.

(4) *Hiring*. An entity exercises direct and immediate control over hiring if it actually determines which particular employees will be hired and which employees will not. An entity does not exercise direct and immediate control over hiring by requesting changes in staffing levels to accomplish tasks or by setting minimal hiring standards such as those required by government regulation.

(5) *Discharge*. An entity exercises direct and immediate control over discharge if it actually decides to terminate the employment of another employer's employee. An entity does not exercise direct and immediate control over discharge by bringing misconduct or poor performance to the attention of another employer that makes the actual discharge decision, by expressing a negative opinion of another employer's employee, by refusing to allow another employer's employee to continue performing work under a contract, or by setting minimal standards of performance or conduct, such as those required by government regulation.

(6) *Discipline*. An entity exercises direct and immediate control over discipline if it actually decides to suspend or otherwise discipline another employer's employee. An entity does not exercise direct and immediate control over discipline by bringing misconduct or poor performance to the attention of another employer that makes the actual disciplinary decision, by expressing a negative opinion of another employer's employee, or by refusing to allow another employer's employee to access its premises or perform work under a contract.

(7) *Supervision*. An entity exercises direct and immediate control over supervision by actually instructing another employer's employees how to perform their work or by actually issuing employee performance appraisals. An entity does not exercise direct and immediate control over supervision when its instructions are limited and routine and consist primarily of telling another employer's employees what work to perform, or where and when to perform the work, but not how to perform it.

(8) *Direction*. An entity exercises direct and immediate control over direction by assigning particular employees their individual work schedules, positions, and tasks. An entity does not exercise direct and immediate control over direction by setting schedules for completion of a project or by describing the work to be accomplished on a project.

(d) ''Substantial direct and immediate control'' means direct and immediate control that has a regular or continuous consequential effect on an essential term or condition of employment of another employer's employees. Such control is not ''substantial'' if only exercised on a sporadic, isolated, or de minimis basis.

(e) ''Indirect control'' means indirect control over essential terms and conditions of employment of another employer's employees but not control or influence over setting the objectives, basic ground rules, or expectations for another entity's performance under a contract.

(f) ''Contractually reserved authority over essential terms and conditions of employment'' means the authority that an entity reserves to itself, under the terms of a contract with another employer, over the essential terms and conditions of employment of that other employer's employees, but that has never been exercised.

Subpart E [Reserved]

Subpart F—Remedial Orders

§ 103.100 Offers of reinstatement to employees in Armed Forces.

When an employer is required by a Board remedial order to offer an employee employment, reemployment, or reinstatement, or to notify an employee of his or her entitlement to reinstatement upon application, the employer shall, if the employee is serving in the Armed Forces of the United States at the time such offer or notification is made, also notify the employee of his or her right to reinstatement upon application in accordance with the Military Selective Service Act of 1967, as amended, after discharge from the Armed Forces.

[37 FR 21939, Oct. 17, 1972, as amended at 38 FR 9506, Apr. 17, 1973]

PARTS 104–199 [RESERVED]

CHAPTER II—OFFICE OF LABOR-MANAGEMENT STANDARDS, DEPARTMENT OF LABOR

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PARTS 200–214 [RESERVED]

PART 215—GUIDELINES, SECTION 5333(b), FEDERAL TRANSIT LAW

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AUTHORITY: Secretary's Order No. 4–2007, 72 FR 26159, May 8, 2007.

SOURCE: 60 FR 62969, Dec. 7, 1995, unless otherwise noted.

§ 215.1 Purpose.

The purpose of these guidelines is to provide information concerning the Department of Labor's administrative procedures in processing applications for assistance under the Federal Transit law, as codified at 49 U.S.C. chapter 53.

[73 FR 47055, Aug. 13, 2008]

§ 215.2 General.

Upon receipt of copies of applications for Federal assistance subject to 49 U.S.C. 5333(b), together with a request for the certification of employee protective arrangements from the Department of Transportation, the Department of Labor will process those applications, which must be in final form. The Federal Transit Administration will provide the Department with the information necessary to enable the Department to certify the project.

[60 FR 62969, Dec. 7, 1995, as amended at 73 FR 47055, Aug. 13, 2008]

§ 215.3 Employees represented by a labor organization.

(a)(1) If affected employees are represented by a labor organization, it is expected that where appropriate, protective arrangements shall be the product of negotiation/discussion, pursuant to these guidelines.

(2) In instances where states or political subdivisions are subject to legal restrictions on bargaining with employee organizations, the Department of Labor will utilize special procedures to satisfy the Federal statute in a manner which does not contravene state or local law. For example, employee protective terms and conditions, acceptable to both employee and applicant representatives, may be incorporated into a resolution adopted by the involved local government.

(3) If an application involves a grant to a state administrative agency or designated recipient that will pass assistance through to subrecipients, the Department will refer and process each subrecipient's respective portion of the project in accordance with this section. If a state administrative agency or designated recipient has previously provided employee protections on behalf of subrecipients in accordance with the terms of a negotiated agreement, the referral will be based on those terms and conditions.

(4) The referral procedures set forth in paragraphs (b) through (h) of this section are not applicable to the following grants:

(i) Grants to applicants for the Over-the-Road Bus Accessibility Program, and grant applications for the Other Than Urbanized Program; a special warranty will be applied to such grants under the procedures in § 215.7.

(ii) Grants to applicants serving populations under 200,000 under the Job Access and Reverse Commute Program or grants to capitalize State Infrastructure Bank accounts under the State Infrastructure Bank Program.

(iii) Grants involving only capital assistance for replacement of equipment and/or facilities of like-kind; these will be certified by the Department without referral on the basis of existing agreements or the Unified Protective Arrangement as referenced in paragraphs (b)(1) or (b)(2) of this section. Where application of the existing protective agreement(s) or the Unified Protective Arrangement would not satisfy the requirements of the statute in the circumstances presented, the Department will make necessary modifications to the existing protections to ensure that the requirements of the statute are satisfied.

(5) The Department will notify labor organizations representing potentially

affected transit employees of the certification of grants without referral under paragraph (a)(4) of this section and inform them of their rights under the applicable protective arrangements.

(b) Upon receipt from the Federal Transit Administration of an application involving affected employees represented by a labor organization, the Department will refer a copy of the application and proposed terms for certification to that organization and to the applicant, and will also provide a copy to subrecipients with unions in their service area.

(1) For applicants with existing protections the Department's referral will be based on those protective terms and conditions that are appropriate to the grant and are set by:

(i) A signed negotiated agreement or formal acceptance of the July 23, 1975 National (Model) Agreement;

(ii) Agreed-upon terms adopted by a State or local government through a resolution or similar instrument;

(iii)) A determination of protective terms by the Department that modifies in whole or in part negotiated or adopted protections; or

(iv) A protective arrangement that has been modified to include provisions that are more protective than the Unified Protective Arrangement referred to in paragraph (b)(2) of this section.

(2) For applicants without protective terms and conditions set by an arrangement described in paragraph (b)(1) of this section, the referral will be based on the terms and conditions of the Unified Protective Arrangement.

(c) Following referral and notification under paragraph (b) of this section, and subject to the exceptions defined in § 215.5, parties will be expected to engage in good faith efforts to reach mutually acceptable protective arrangements through negotiation/discussion within the timeframes designated under paragraphs (d) and (e) of this section.

(d) As part of the Department of Labor's review of an application, a time schedule for case processing will be established by the Department of Labor and specified in its referral and notification letters under paragraph 215.3(b) or subsequent written communications to the parties.

(1) Parties will be given fifteen (15) days from the date of the referral and notification letters to submit objections, if any, to the referred terms. The parties are encouraged to engage in negotiations/discussions during this period with the aim of arriving at a mutually agreeable solution to objections any party has to the terms and conditions of the referral.

(2) Within ten (10) days of the date for submitting objections, the Department of Labor will:

(i) Determine whether the objections raised are sufficient; and

(ii) Take one of the two steps described in paragraphs (d)(5) and (6) of this section, as appropriate.

(3) The Department of Labor will consider an objection to be sufficient when:

(i) The objection raises material issues that may require alternative employee protections under 49 U.S.C. 5333(b); or

(ii) The objection concerns changes in legal or factual circumstances that may materially affect the rights or interests of employees.

(4) The Department of Labor will consult with the Federal Transit Administration for technical advice as to the validity of objections.

(5) If the Department of Labor determines that there are no sufficient objections, the Department will issue its certification to the Federal Transit Administration.

(6) If the Department of Labor determines that an objection is sufficient, the Department, as appropriate, will direct the parties to commence or continue negotiations/discussions, limited to issues that the Department deems appropriate and limited to a period not to exceed thirty (30) days. The parties will be expected to negotiate/discuss expeditiously and in good faith. The Department of Labor may provide mediation assistance during this period where appropriate. The parties may agree to waive any negotiations/discussions if the Department, after reviewing the objections, develops new terms and conditions acceptable to the parties. At the end of the designated negotiation/discussion period, if all issues

have not been resolved, each party must submit to the Department its final proposal and a statement describing the issues still in dispute.

(7) The Department will issue a certification to the Federal Transit Administration within five (5) days after the end of the negotiation/discussion period designated under paragraph (d)(6) of this section. The certification will be based on terms and conditions agreed to by the parties that the Department concludes meet the requirements of 49 U.S.C. 5333(b). To the extent that no agreement has been reached, the certification will be based on terms and conditions determined by the Department which are no less protective than the terms and conditions included in the referral pursuant to § 215.3(b)(1).

(8) Notwithstanding that a certification has been issued to the Federal Transit Administration pursuant to paragraph (d)(7) of this section, no action may be taken which would result in irreparable harm to employees if such action concerns matters subject to the steps set forth in paragraph (e) of this section.

(e) If the certification referred to in paragraph (d)(7) of this section is not based on full mutual agreement of the parties, the Department of Labor will take the following steps to resolve outstanding differences:

(1) The Department will set a schedule that provides for final resolution of the disputed issue(s) within sixty (60) days of the certification referred to in paragraph (d)(7) of this section.

(2) Within ten (10) days of the issuance of the certification referred to in paragraph (d)(7) of this section, and after reviewing the parties' descriptions of the disputed issues, the Department will define the issues still in dispute and set a schedule for final resolution of all such issues.

(3) The Department may establish a briefing schedule, usually allowing no more than twenty (20) days for opening briefs and no more than ten (10) days for reply briefs, when the Department deems reply briefs to be beneficial. In either event, the Department will issue a final certification to the Federal Transit Administration no later than thirty (30) days after the last briefs are due.

(4) The Department of Labor will decide the manner in which the dispute will be resolved. In making this decision, the Department may consider the form(s) of dispute resolution employed by the parties in their previous dealings as well as various forms of third party dispute resolution that may be appropriate. Any dispute resolution proceedings will normally be expected to commence within thirty (30) days of the certification referred to in paragraph (d)(7) of this section, and the Department will render a final determination, including the bases therefor, within thirty (30) days of the commencement of the proceedings.

(5) The Department will make available final decisions it renders on disputed issues.

(f) Nothing in these guidelines restricts the parties from continuing to negotiate/discuss over final terms and conditions and seeking a final certification of an agreement that meets the requirements of the Act prior to the issuance of a final determination by the Department.

(g) If, subsequent to the issuance of the certification referred to in paragraph (d)(7) of this section, the parties reach an agreement on one or more disputed issues that meets the requirements of the Act, and/or the Department of Labor issues a final decision containing revised terms and conditions, the Department will take appropriate steps to substitute the new terms and conditions for those previously certified to the Federal Transit Administration.

(h) Notwithstanding the foregoing, the Department retains the right to withhold certification where circumstances inconsistent with the statute so warrant until such circumstances have been resolved.

[60 FR 62969, Dec. 7, 1995, as amended at 64 FR 40992, July 28, 1999; 73 FR 47055, Aug. 13, 2008]

§ 215.4 Employees not represented by a labor organization.

(a) The certification made by the Department of Labor will afford the same level of protection to those employees

who are not represented by labor organizations.

(b) If there is no labor organization representing employees, the Department of Labor will set forth the protective terms and conditions in the letter of certification.

§ 215.5 Processing of amendments.

(a) Grant modifications in the form of grant amendments will be transmitted by the Federal Transit Administration to the Department for review. Applications amending a grant for which the Department has already certified fair and equitable arrangements to protect the interests of transit employees affected by the project, will be processed by the Department following one of the two procedures described in paragraphs (a)(1) and (2) of this section.

(1) When an application amends a grant for which the Department has previously certified fair and equitable arrangements and the amendment makes changes to a project that may necessitate alternative employee protections, the Department will conclude that the amendment materially amends the existing assistance agreement. The Department will refer and/or process the labor certification provisions of such an amended grant according to procedures specified under §§ 215.3 and 215.4, as appropriate.

(2) When an application amends in a manner that is not material a grant for which the Department has already certified fair and equitable arrangements, the Department will, on its own initiative and without referral to the parties, certify the subject grant on the same terms and conditions as were certified for the project as originally constituted. The Department's processing of these applications will be expedited and copies will be forwarded to interested parties.

(b) Budget Revisions that make minor changes within the scope of the existing grant agreement and do not require a Federal Transit Administration grant amendment, as set forth in Federal Transit Administration guidance, will be covered under the Department's original certifications.

[73 FR 47056, Aug. 13, 2008]

§ 215.6 The Model Agreement.

The Model (or National) Agreement mentioned in paragraphs (b)(1)(i) and (b)(2) of § 215.3 refers to the agreement executed on July 23, 1975 by representatives of the American Public Transit Association (now known as the American Public Transportation Association) and the Amalgamated Transit Union and Transport Workers Union of America and on July 31, 1975 by representatives of the Railway Labor Executives' Association, Brotherhood of Locomotive Engineers, Brotherhood of Railway and Airline Clerks and International Association of Machinists and Aerospace Workers. The agreement is intended to serve as a ready-made employee protective arrangement for adoption by local parties in specific operating assistance project situations. The Department has determined that this agreement provides fair and equitable arrangements to protect the interests of employees in general purpose operating assistance project situations and meets the requirements of 49 U.S.C. 5333(b).

[60 FR 62969, Dec. 7, 1995, as amended at 73 FR 47056, Aug. 13, 2008]

§ 215.7 The Special Warranty.

(a) The Special Warranty mentioned in paragraph (b)(2) of § 215.3 refers to the protective arrangements developed for application to the Other Than Urbanized program. The warranty arrangement represents the understandings of the Department of Labor and the Department of Transportation, reached in May 1979, with respect to the protections to be applied for such grants. The Special Warranty provides fair and equitable arrangements to protect the interests of employees and meets the requirements of 49 U.S.C. 5333(b). The Special Warranty Arrangement applicable to OTRB and Other Than Urbanized grants will be derived from the terms and conditions of the May 1979 Special Section 13(c) Warranty, and the Department's subsequent experience under 49 U.S.C. 5333(b). From time to time, the Department may update this Special Warranty Arrangement to reflect developments in the employee protection program.

(b) The requirements of 49 U.S.C. 5333(b) for OTRB and ''Other Than Urbanized'' grants are satisfied through application of a Special Warranty Arrangement certified by the Department of Labor; a copy of the current arrangement will be included on the OLMS *Web site*.

(c) The Federal Transit Administration will include the current version of the Special Warranty Arrangement, through reference in its Master Agreement, in each OTRB and Other Than Urbanized grant of assistance under the statute.

(1) The Federal Transit Administration will notify the Department that it is funding an OTRB or Other Than Urbanized grant by transmitting to the Department an information copy of each grant application upon approval of the grant.

(i) Each grant of assistance for an Other Than Urbanized program will contain a labor section identifying labor organizations representing transit employees of each subrecipient, the labor organizations representing employees of other transit providers in the service area, and a list of those transit providers. A sample format is posted on the OLMS *Web site* to facilitate the inclusion of this information in the grant application.

(ii) OTRB grants of assistance will contain a labor section identifying labor organizations representing employees of the recipient.

(2) The Department will notify labor organizations representing potentially affected transit employees of the approval of Other Than Urbanized and OTRB grants and inform them of their rights under the Special Warranty Arrangement.

[60 FR 62969, Dec. 7, 1995, as amended at 73 FR 47056, Aug. 13, 2008]

§ 215.8 Department of Labor contact.

Questions concerning the subject matter covered by this part should be addressed to Chief, Division of Statutory Programs, U.S. Department of Labor, 200 Constitution Avenue, NW., Washington, DC 20210; phone number 202–693–0126 or e-mailed to *OLMS-TransitGrant@dol.gov*.

[64 FR 40995, July 28, 1999, as amended at 73 FR 47057, Aug. 13, 2008]

PARTS 216–299 [RESERVED]

CHAPTER III—NATIONAL RAILROAD ADJUSTMENT BOARD

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PART 300 [RESERVED]

PART 301—RULES OF PROCEDURE

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AUTHORITY: Sec. 3, 44 Stat. 578, as amended; 45 U.S.C. 153.

SOURCE: Circular 1, Oct. 10, 1934, unless otherwise noted.

§ 301.1 General duties.

(a) It shall be the duty of all carriers, their officers, agents and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any disputes between the carrier and the employees thereof.

(b) All disputes between a carrier or carriers, and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

§ 301.2 Classes of disputes.

(a) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this act (June 21, 1934, 48 Stat. 1185; 45 U.S.C. 151–162), shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

(b) No petition shall be considered by any division of the Board unless the subject matter has been handled in accordance with the provisions of the Railway Labor Act, approved June 21, 1934.

§ 301.3 Organization.

The National Railroad Adjustment Board was organized as of July 31, 1934, in accordance with the provisions of the Railway Labor Act, approved June 21, 1934. The said Adjustment Board is composed of four Divisions, whose proceedings shall be independent of one another. The First, Second and Third Divisions thereof are each composed of 10 members, and the Fourth Division thereof is composed of 6 members.

§ 301.4 Jurisdiction.

(a) *First Division.* The First Division will have jurisdiction over disputes involving train-and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees.

(b) *Second Division.* The Second Division will have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, car men, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers.

(c) *Third Division.* The Third Division will have jurisdiction over disputes involving station tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees.

(d) *Fourth Division.* The Fourth Division will have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the First, Second, and Third Divisions.

§ 301.5 Form of submission.

(a) *Parties.* All parties to the dispute must be stated in each submission.

(b) *Statement of claim.* Under the caption ''statement of claims'' the petitioner or petitioners must clearly state the particular question upon which an award is desired.

(c) *Statement of facts.* In a ''joint statement of facts,'' if possible, briefly, but fully set forth the controlling facts involved. In the event of inability to agree upon a ''joint statement of facts,'' then each party shall show separately the facts as they respectively believe them to be.

(d) *Position of employees.* Under the caption ''position of employees'' the employees must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of employees' position must affirmatively show the same to have been presented to the carrier and made a part of the particular question in dispute.

(e) *Position of carrier.* Under the caption ''position of carrier'' the carrier must clearly and briefly set forth all relevant, argumentative facts, including all documentary evidence submitted in exhibit form, quoting the agreement or rules involved, if any; and all data submitted in support of carrier's position must affirmatively show the same to have been presented to the employees or duly authorized representative thereof and made a part of the particular question in dispute.

(f) *Signatures.* All submissions must be signed by the parties submitting the same.

(g) *Ex parte submission.* In event of an ex parte submission the same general form of submission is required. The petitioner will serve written notice upon the appropriate Division of the Adjustment Board of intention to file an ex parte submission on a certain date (30 days hence), and at the same time provide the other party with copy of such notice. For the purpose of identification such notice will state the question involved and give a brief description of the dispute. The Secretary of the appropriate Division of the Adjustment Board will immediately thereupon advise the other party of the receipt of such notice and request that the submission of such other party be filed with such Division within the same period of time.

§ 301.6 General.

(a) To conserve time and expedite proceedings all parties within the scope of the Adjustment Board should prepare submissions in such manner that the pertinent and related facts and all supporting data bearing upon the dispute will be fully set forth, thus obviating the need of lengthy briefs and unnecessary oral discussions.

(b) All submissions shall be typewritten or machine prepared, addressed to the Secretary of the appropriate Division of the Adjustment Board, and fifteen copies thereof filed by the petitioner or petitioners.

(c) Parties to a dispute are required to state in all submissions whether or not an oral hearing is desired.

§ 301.7 Hearings.

(a) Oral hearings will be granted if requested by the parties or either of them and due notice will be given the parties of the time and date of the hearing.

(b) The parties are, however, charged with the duty and responsibility of including in their original written submission all known relevant, argumentative facts and documentary evidence.

§ 301.8 Appearances.

Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect.

§ 301.9 Awards.

All awards of the Adjustment Board shall be signed by order of the appropriate Division thereof and shall be attested by the signature of its Secretary, as indicated thus:

NATIONAL RAILROAD ADJUSTMENT BOARD,

By Order of_____Division

Attest:_____

[Secretary]

PARTS 302–399 [RESERVED]

CHAPTER IV—OFFICE OF LABOR-MANAGEMENT STANDARDS, DEPARTMENT OF LABOR

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PART 400 [RESERVED]

PART 401—MEANING OF TERMS USED IN THIS SUBCHAPTER

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AUTHORITY: Secs. 3, 208, 301, 401, 402, 73 Stat. 520, 529, 530, 532, 534 (29 U.S.C. 402, 438, 461, 481, 482); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012; §401.4 also issued under sec. 320 of Title III of the Bankruptcy Reform Act of 1978, Pub. L. 95–598, 92 Stat. 2678.

SOURCE: 28 FR 14380, Dec. 27, 1963, unless otherwise noted.

§401.1 Commerce.

Commerce means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

§401.2 State.

State includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331–1343).

§401.3 Industry affecting commerce.

Industry affecting commerce means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry ''affecting commerce'' within the meaning of the Labor Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended.

§401.4 Person.

Person includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 of the United States Code, or receivers.

[45 FR 70445, Oct. 24, 1980, as amended at 59 FR 15115, Mar. 31, 1994]

§401.5 Employer.

Employer means any employer or any group or association of employers engaged in an industry affecting commerce (a) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (b) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

§401.6 Employee.

Employee means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this Act.

§ 401.7 Labor dispute.

Labor dispute includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

§ 401.8 Trusteeship.

Trusteeship means any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.

§ 401.9 Labor organization.

Labor organization means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

§ 401.10 Labor organization engaged in an industry affecting commerce.

A labor organization shall be deemed to be engaged in an industry affecting commerce if it:

(a) Is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(b) Although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(c) Has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (a) or (b) of this section; or

(d) Has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (a) or (b) of this section as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(e) Is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this section, other than a State or local central body.

§ 401.11 Secret ballot.

Secret ballot means the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice with respect to any election or vote taken upon any matter, which is cast in such a manner that the person expressing such choice cannot be identified with the choice expressed.

§ 401.12 Trust in which a labor organization is interested.

Trust in which a labor organization is interested means a trust or other fund or organization (a) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (b) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

§ 401.13 Labor relations consultant.

Labor relations consultant means any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities.

§ 401.14 Officer.

Officer means any constitutional officer, any person authorized to perform

the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

§ 401.15 Member or member in good standing.

Member or *member in good standing*, when used in reference to a labor organization, includes any person who has fulfilled the requirements for membership in such organization, and who neither has voluntarily withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of such organization.

§ 401.16 Secretary.

Secretary means the Secretary of Labor.

§ 401.17 Act.

Act means the Labor-Management Reporting and Disclosure Act of 1959.

§ 401.18 Office.

Office means the Office of Labor-Management Standards, United States Department of Labor.

[62 FR 6092, Feb. 10, 1997, as amended at 78 FR 8024, Feb. 5, 2013]

§ 401.19 Director.

''Director'' means the Director of the Office of Labor-Management Standards, head of the Office of Labor-Management Standards.

[78 FR 8024, Feb. 5, 2013]

PART 402—LABOR ORGANIZATION INFORMATION REPORTS

Sec.

402.1 Labor organization constitution and bylaws.
402.2 Labor organization initial information report.
402.3 Filing of initial reports.
402.4 Subsequent reports.
402.5 Terminal reports.
402.6 Receipt of reports and documents.
402.7 Effect of acknowledgment and filing by the Office of Labor-Management Standards.
402.8 Personal responsibility of signatories of reports.
402.9 Maintenance and retention of records.
402.10 Dissemination and verification of reports.
402.11 Attorney-client communications exempted.
402.12 Publication of reports required by this part.
402.13 OMB control number.

AUTHORITY: Secs. 201, 207, 208, 73 Stat. 524, 529 (29 U.S.C. 431, 437, 438); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 28 FR 14381, Dec. 27, 1963, unless otherwise noted.

§ 402.1 Labor organization constitution and bylaws.

Every labor organization shall adopt a constitution and bylaws consistent with the provisions of the Act applicable thereto, within 90 days after the date the labor organization first becomes subject to the Act. This shall not, however, require the formal readoption by a labor organization of such a constitution and bylaws which it has previously adopted and under which it is operating when the report prescribed by § 402.2 is filed. As used in this part *constitution and bylaws* means the basic written rules governing the organization.

[28 FR 14381, Dec. 27, 1963, as amended at 40 FR 58856, Dec. 19, 1975]

§ 402.2 Labor organization initial information report.

Every labor organization shall file a report signed by its president and secretary or corresponding principal officers containing the information required to be filed by section 201(a) of the Act, and found necessary to be reported under section 208 thereof by the Secretary, on United States Department of Labor Form LM–1[1] entitled, ''Labor Organization Information Report''. There shall be attached to such report and made a part thereof a copy of the constitution and bylaws adopted by the reporting labor organization.

[28 FR 14381, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985; 78 FR 8024, Feb. 5, 2013]

§ 402.3 Filing of initial reports.

(a) Every labor organization shall file with the Office of Labor-Management Standards the report and (subject to

[1] Filed as part of the original document.

the provisions of paragraph (b) of this section, where applicable) a copy of its constitution and bylaws required by section 201(a) of the Act and § 402.2, together with one additional copy of each, within 90 days after the date on which it first becomes subject to the Act.

(b) A labor organization subject to paragraph (a) of this section may adopt or may have adopted as its constitution and bylaws (whether by formal action or by virtue of affiliation with a parent organization) a constitution and bylaws of a national or international labor organization which the national or international organization is required to file under section 201(a) of the Act and this part. In such a case, a filing by the national or international labor organization of copies of such constitution and bylaws will be accepted as a filing of such documents by each such adopting labor organization within the meaning of section 201(a) of the Act and this part, if the following conditions are met:

(1) The national or international labor organizations shows in its report filed under paragraph (a) of this section that copies of its constitution and bylaws are being filed on behalf of such adopting organizations as well as on its own behalf, and files such number of additional copies as the Office of Labor-Management Standards may request, and

(2) The adopting labor organization shows in its report filed under paragraph (a) of this section that the national or international constitution and bylaws are also its constitution and bylaws and that copies are filed on its behalf by the national or international labor organization.

If the constitution and bylaws of the adopting labor organization include other documents, this shall be shown in such report and copies shall be filed as provided in paragraph (a) of this section.

[28 FR 14381, Dec. 27, 1963, as amended at 35 FR 2990, Feb. 13, 1970; 40 FR 58856, Dec. 19, 1975; 50 FR 31309, Aug. 1, 1985]

§ 402.4 Subsequent reports.

(a) Except as noted elsewhere in this paragraph, every labor organization which revises the most recent constitution and bylaws it has filed with the Office of Labor-Management Standards shall file two dated copies of its revised constitution and bylaws at the time it files its annual financial report as provided in part 403 of this chapter. However, a labor organization which has as its constitution and bylaws a uniform constitution and bylaws prescribed by the reporting labor organization's parent national or international labor organization in accordance with § 402.3(b) is not required to file copies of a revised uniform constitution and bylaws if the parent national or international labor organization files as many copies of the revised constitution and bylaws with the Office of Labor-Management Standards as the Office may request.

(b) Every labor organization which changes the practices and procedures for which separate statements must be filed pursuant to subsection 201(a)(5)(A) through (M) of the Act shall file with the Office of Labor-Management Standards two copies of an amended Form LM–1, signed by its president and secretary or corresponding principal officers. The amended Form LM–1 shall be filed when the labor organization files its annual financial report as provided in part 403 of this chapter.

[58 FR 67604, Dec. 21, 1993]

§ 402.5 Terminal reports.

(a) Any labor organization required to file reports under the provisions of this part, which ceases to exist by virtue of dissolution or any other form of termination of its existence as a labor organization, or which loses its identity as a reporting labor organization through merger, consolidation or otherwise, shall file a report containing a detailed statement of the circumstances and effective date of such termination or loss of reporting identity, and if the latter, such report shall also state the name and mailing address of the labor organization into which it has been consolidated, merged, or otherwise absorbed. Such report shall be submitted on Form LM–2 in connection with the terminal financial report required by § 403.5 of this chapter and shall be signed by the president and treasurer, or corresponding principal officers, of the labor organization at the time of its

termination or loss of reporting identity and, together with a copy thereof, shall be filed with the Office of Labor-Management Standards within 30 days of the effective date of such termination or loss of reporting identity, as the case may be.

(b) Labor organizations which qualify to use Form LM–3, the Labor Organization Annual Report, pursuant to §§ 403.4 and 403.5 of this chapter may file the terminal report called for in this section on Form LM–3. This report must be signed by the president and treasurer, or corresponding principal officers, of the labor organization.

(c) Labor organizations which qualify to use Form LM–4, the Labor Organization Annual Report, pursuant to §§ 403.4 and 403.5 of this chapter may file the terminal report called for in this section on Form LM–4. The report must be signed by the president and treasurer, or corresponding principal officers, of the labor organization.

[28 FR 14381, Dec. 27, 1963, as amended at 62 FR 6092, Feb. 10, 1997]

§ 402.6 Receipt of reports and documents.

Upon receipt of all reports and documents submitted for filing under the provisions of this part, the Office of Labor-Management Standards shall assign to the initial information report filed by each labor organization, an identifying number. This number thereafter shall be entered by the reporting labor organization on all subsequent or terminal reports and all other documents which it thereafter submits for filing under this part, as well as on all communications directed to the Office concerning such reports and documents.

§ 402.7 Effect of acknowledgment and filing by the Office of Labor-Management Standards.

Acknowledgment by the Office of Labor-Management Standards of the receipt of reports and documents submitted for filing under this part, is intended solely to inform the sender of the receipt thereof by the Office, and neither such acknowledgment nor the filing of such reports and documents by the Office constitutes express or implied approval thereof, or in any manner indicates that the content of any such report or document fulfills the reporting or other requirements of the Act, or of the regulations in this chapter, applicable thereto.

§ 402.8 Personal responsibility of signatories of reports.

Each individual required to sign any report under section 201(a) of the Act and under this part shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false.

§ 402.9 Maintenance and retention of records.

Every person required to file any report under this part shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Office of Labor-Management Standards may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

§ 402.10 Dissemination and verification of reports.

Every labor organization required to submit a report under section 201(a) of the Act and under this part shall make available to all its members the information required to be contained in such report, including the copy of the constitution and bylaws required to be filed therewith, and every such labor organization and its officers shall be under a duty to permit such member for just cause to examine any books, records, and accounts necessary to verify such report and constitution and bylaws.

[28 FR 14381, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985]

§ 402.11 Attorney-client communications exempted.

Nothing contained in this part shall be construed to require an attorney who is a member in good standing of

the bar of any State, to include in any report required to be filed pursuant to the provisions of section 201(a) of the Act, and of this part, any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

§ 402.12 Publication of reports required by this part.

Inspection and examination of any report or other document filed as required by this part, and the furnishing by the Office of Labor-Management Standards of copies thereof to any person requesting them, shall be governed by part 70 of this title.

[35 FR 2990, Feb. 13, 1970]

§ 402.13 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1245–0003.

[59 FR 15115, Mar. 31, 1994, as amended at 63 FR 33779, June 19, 1998; 78 FR 8024, Feb. 5, 2013]

PART 403—LABOR ORGANIZATION ANNUAL FINANCIAL REPORTS

Sec.

403.1 Fiscal year for reports required by this part.
403.2 Annual financial report.
403.3 Form of annual financial report—detailed report.
403.4 Simplified annual reports for smaller labor organizations.
403.5 Terminal financial report.
403.6 Personal responsibility of signatories of reports.
403.7 Maintenance and retention of records.
403.8 Dissemination and verification of reports.
403.9 Attorney-client communications exempted.
403.10 Publication of reports required by this part.
403.11 OMB control number.

AUTHORITY: Secs. 201, 207, 208, 301, 73 Stat. 524, 529, 530 (29 U.S.C. 431, 437, 438, 461); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 28 FR 14383, Dec. 27, 1963, unless otherwise noted.

§ 403.1 Fiscal year for reports required by this part.

(a) As used in this part, unless otherwise defined, the term *fiscal year* means the calendar year or other period of 12 consecutive calendar months, on the basis of which financial accounts are kept by a labor organization reporting under this part. Where a labor organization designates a new fiscal year period prior to the expiration of a previously established fiscal year period, the resultant period of less than 12 consecutive calendar months, and thereafter the newly established fiscal year, shall in that order each constitute a fiscal year for purposes of the report required to be filed by section 201(b) of the Act, and of the regulations in this part.

(b) A labor organization which is subject to section 201(b) of the Act for only a portion of its fiscal year because the labor organization first becomes subject to the Act during such fiscal year, may consider such portion as the entire fiscal year in making its report under this part.

[28 FR 14383, Dec. 27, 1963, as amended at 42 FR 59070, Nov. 15, 1977]

§ 403.2 Annual financial report.

(a) Every labor organization shall, as prescribed by the regulations in this part, file with the Office of Labor-Management Standards within 90 days after the end of each of its fiscal years, a financial report signed by its president and treasurer, or corresponding principal officers.

(b) Every labor organization shall include in its annual financial report filed as provided in paragraph (a) of this section, in such detail as may be necessary accurately to disclose its financial condition and operations for its preceding fiscal year and in such categories as prescribed by the Secretary under the provisions of this part, the information required by section 201(b) of the Act and found by the Secretary under section 208 thereof to be necessary in such report.

(c) If, on the date for filing the annual financial report of a labor organization required under section 201(b) of the Act and this section, such labor organization is in trusteeship, the labor

organization which has assumed trusteeship over such labor organization shall file such report as provided in § 408.5 of this chapter.

(d)(1) Every labor organization with annual receipts of $250,000 or more shall file a report on Form T-1 for each trust that meets the following conditions:

(i) The trust is of the type defined by section 3(l) of the LMRDA, *i.e.*, the trust was created or established by the labor organization or the labor organization appoints or selects a member of the trust's governing board; and the trust has as a primary purpose to provide benefits to the members of the labor organization or their beneficiaries (29 U.S.C. 402(1)); and the labor organization, alone or with other labor organizations, either:

(A) Appoints or selects a majority of the members of the trust's governing board; or

(B) Makes contributions to the trust that exceed 50 percent of the trust's receipts during the trust's fiscal year; and

(ii) None of the exemptions discussed in paragraph (d)(3) of this section apply.

(iii) For purposes of paragraph (d)(1)(i)(B) of this section, contributions by an employer pursuant to a collective bargaining agreement with a labor organization shall be considered contributions by the labor organization.

(2) A separate report shall be filed on Form T-1 for each such trust within 90 days after the end of the labor organization's fiscal year in the detail required by the instructions accompanying the form and constituting a part thereof, and shall be signed by the president and treasurer, or corresponding principal officers, of the labor organization. Only the parent labor organization (*i.e.*, the national/international or intermediate labor organization) must file the Form T-1 report for covered trusts in which both the parent labor organization and its affiliates satisfy the financial or managerial domination test set forth in paragraph (d)(1)(i) of this section. The affiliates must continue to identify the trust in their Form LM-2 Labor Organization Annual Report, and include a statement that the parent labor organization will file a Form T-1 report for the trust.

(3) No Form T-1 should be filed for any trust (or a plan of which the trust is part) that:

(i) Meets the statutory definition of a labor organization and already files a Form LM-2, Form LM-3, Form LM-4, or simplified LM report;

(ii) The LMRDA exempts from reporting;

(iii) Meets the definition of a subsidiary organization pursuant to Part X of the instructions for the Form LM-2 Labor Organization Annual Report;

(iv) Established as a Political Action Committee (PAC) if timely, complete and publicly available reports on the PAC are filed with a Federal or state agency;

(v) Established as a political organization under 26 U.S.C. 527 if timely, complete, and publicly available reports are filed with the Internal Revenue Service (IRS);

(vi) Constitutes a federal employee health benefit plan subject to the provisions of the Federal Employees Health Benefits Act (FEHBA);

(vii) Constitutes any for-profit commercial bank established or operating pursuant to the Bank Holding Act of 1956, 12 U.S.C. 184;

(viii) Is an employee benefit plan within the meaning of 29 U.S.C. 1002(3) that is subject to Title I of the Employee Retirement Income Security Act pursuant to 29 U.S.C. 1003, and that files an annual report in accordance with 29 U.S.C. 1021 and 1024, and applicable rules and requirements, for a plan year ending during the reporting period of the labor organization; or

(ix) Constitutes a credit union subject to the Federal Credit Union Act, 12 U.S.C. 1751.

(4) A labor organization may complete only Items 1 through 15 and Items 26 through 27 (Signatures) of Form T-1 if an annual audit prepared according to standards set forth in the Form T-1 instructions was performed and a copy of that audit is filed with the Form T-1.

(5) If such labor organization is in trusteeship on the date for filing the annual financial report, the labor organization that has assumed trusteeship

over such subordinate labor organization shall file such report as provided in § 408.5 of this chapter.

[28 FR 14383, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985; 68 FR 58447, Oct. 9, 2003; 71 FR 57737, Sept. 29, 2006; 73 FR 57449, Oct. 2, 2008; 75 FR 74959, Dec. 1, 2010; 78 FR 8024, Feb. 5, 2013; 85 FR 13441, Mar. 6, 2020]

§ 403.3 Form of annual financial report—detailed report.

Every labor organization shall, except as expressly provided otherwise in this part, file an annual financial report as required by § 403.2, prepared on United States Department of Labor Form LM–2, ''Labor Organization Annual Report,'' in the detail required by the instructions accompanying the form and constituting a part thereof.

NOTE: Form LM–2 was revised at 58 FR 67594, December 21, 1993.

[28 FR 14383, Dec. 27, 1963, as amended at 62 FR 6092, Feb. 10, 1997]

§ 403.4 Simplified annual reports for smaller labor organizations.

(a)(1) If a labor organization, not in trusteeship, has gross annual receipts totaling less than $250,000 for its fiscal year, it may elect, subject to revocation of the privileges as provided in section 208 of the Act, to file the annual financial report called for in section 201(b) of the Act and § 403.3 of this part on United States Department of Labor Form LM–3 entitled ''Labor Organization Annual Report,'' in accordance with the instructions accompanying such form and constituting a part thereof.

(2) If a labor organization, not in trusteeship, has gross annual receipts totaling less than $10,000 for its fiscal year, it may elect, subject to revocation of the privileges as provided in section 208 of the Act, to file the annual financial report called for in section 201(b) of the Act and § 403.3 on United States Department of Labor Form LM–4 entitled ''Labor Organization Annual Report'' in accordance with the instructions accompanying such form and constituting a part thereof.

(b) A local labor organization not in trusteeship, which has no assets, no liabilities, no receipts and no disbursements during the period covered by the annual report of the national organization with which it is affiliated need not file the annual report required by § 403.2 if the following conditions are met:

(1) It is governed by a uniform constitution and bylaws filed on its behalf pursuant to § 402.3(b) of this chapter, and does not have governing rules of its own;

(2) Its members are subject to uniform fees and dues applicable to all members of the local labor organizations for which such simplified reports are submitted;

(3) The national organization with which it is affiliated assumes responsibility for the accuracy of, and submits with its annual report, a separate letter-size sheet for each local labor organization containing the following information with respect to each local organization in the format illustrated below as part of this regulation:

(i) The name and designation number or other identifying information;

(ii) The file number which the Office of Labor-Management Standards has assigned to it;

(iii) The mailing address;

(iv) The beginning and ending date of the reporting period which must be the same as that of the report for the national organization;

(v) The names and titles of the president and treasurer or corresponding principal officers as of the end of the reporting period;

(4) At least thirty days prior to first submitting simplified annual reports in accordance with this section, the national organization notifies the Office of Labor-Management Standards in writing of its intent to begin submitting simplified annual reports for affiliated local labor organizations;

(5) The national organization files the terminal report required by 29 CFR 403.5(a) on Form LM–3 or LM–4, as may be appropriate, clearly labeled on the form as a terminal report, for any local labor organization which has lost its identity through merger, consolidation, or otherwise if the national organization filed a simplified annual report on behalf of the local labor organization for its last reporting period; and

(6) The national organization with which it is affiliated assumes responsibility for the accuracy of, and submits with its annual report and the simplified annual reports for the affiliated local labor organizations, the following certification properly completed and signed by the president and treasurer of the national organization:

CERTIFICATION

We, the undersigned, duly authorized officers of [name of national organization], hereby certify that the local labor organizations individually listed on the attached documents come within the purview of 29 CFR 403.4(b) for the reporting period from [beginning date of national organization's fiscal year] through [ending date of national organization's fiscal year], namely:

(1) they are local labor organizations; (2) they are not in trusteeship; (3) they have no assets, liabilities, receipts, or disbursements; (4) they are governed by a uniform constitution and bylaws, and fifty copies of the most recent uniform constitution and bylaws have been filed with the Office of Labor-Management Standards; (5) they have no governing rules of their own; and (6) they are subject to the following uniform schedule of fees and dues: [specify schedule for dues, initiation fees, fees required from transfer members, and work permit fees, as applicable].

Each document attached contains the specific information called for in 29 CFR 403.4(b)(3)(i)–(v), namely: (i) the local labor organization's name and designation number; (ii) the file number assigned the organization by the Office of Labor-Management Standards; (iii) the local labor organization's mailing address; (iv) the beginning and ending date of the reporting period; and (v) the names and titles of the president and treasurer or corresponding principal officers of the local labor organization as of [the ending date of the national organization's fiscal year].

Furthermore, we certify that the terminal reports required by 29 CFR 403.4(b)(5) and 29 CFR 403.5(a) have been filed for any local labor organizations which have lost their identity through merger, consolidation, or otherwise on whose behalf a simplified annual report was filed for the last reporting period.

(FORMAT FOR SIMPLIFIED ANNUAL REPORTING)

SIMPLIFIED ANNUAL REPORT

Affiliation name:

Designation name and number:

Unit name:

Mailing address:

Name of person:

Number and street:

City, State and zip:

File number:

Period covered:

From Through

Names and Titles of president and treasurer or corresponding principal officers

For certification see NHQ file folder file number:
President
Where signed
Date
Treasurer
Where signed
Date

[28 FR 14383, Dec. 27, 1963, as amended at 37 FR 10669, May 26, 1972; 41 FR 27318, July 2, 1976; 45 FR 7525, Feb. 1, 1980; 50 FR 31309, Aug. 1, 1985; 50 FR 31310, Aug. 1, 1985; 57 FR 49290, 49357, Oct. 30, 1992; 62 FR 6092, Feb. 10, 1997; 64 FR 71623, Dec. 21, 1999; 65 FR 21141, Apr. 20, 2000; 81 FR 33389, May 26, 2016]

§ 403.5 Terminal financial report.

(a) Any labor organization required to file a report under the provisions of this part, which during its fiscal year loses its identity as a reporting labor organization through merger, consolidation, or otherwise, shall, within 30 days after such loss, file a terminal financial report with the Office of Labor-Management Standards, on Form LM–2, LM–3, or LM–4, as may be appropriate, signed by the president and treasurer or corresponding principal officers of the labor organization immediately prior to the time of its loss of reporting identity.

(b) Every labor organization which has assumed trusteeship over a subordinate labor organization shall file within 90 days after the termination of such trusteeship on behalf of the subordinate labor organization a terminal financial report with the Office of Labor-Management Standards, on Form LM–2 and in conformance with the requirements of this part.

(c) For purposes of the reports required by paragraphs (a) and (b) of this section, the period covered thereby

shall be the portion of the labor organization's fiscal year ending on the effective date of its loss of reporting identity, or the portion of the subordinate labor organization's fiscal year ending on the effective date of the termination of trusteeship over such subordinate labor organization, as the case may be.

(d) If a labor organization filed or was required to file a report on a trust pursuant to Sec. 403.2(d) and that trust loses its identity during its subsequent fiscal year through merger, consolidation, or otherwise, the labor organization shall, within 30 days after such loss, file a terminal report on Form T-1, with the Office of Labor-Management Standards, signed by the president and treasurer or corresponding principal officers of the labor organization. For purposes of the report required by this paragraph, the period covered thereby shall be the portion of the trust's fiscal year ending on the effective date of the loss of its reporting identity.

[28 FR 14383, Dec. 27, 1963, as amended at 50 FR 31309, 31310, Aug. 1, 1985; 62 FR 6092, Feb. 10, 1997; 68 FR 58447, Oct. 9, 2003; 71 FR 57737, Sept. 29, 2006; 73 FR 57449, Oct. 2, 2008; 75 FR 74959, Dec. 1, 2010; 85 FR 13442, Mar. 6, 2020]

§ 403.6 Personal responsibility of signatories of reports.

Each individual required to sign a report under section 201(b) of the Act and under this part shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false.

§ 403.7 Maintenance and retention of records.

Every person required to file any report under this part shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Office of Labor-Management Standards may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

§ 403.8 Dissemination and verification of reports.

(a) Every labor organization required to submit a report under section 201(b) of the Act and under this part shall make available to all its members the information required to be contained in such reports, and every such labor organization and its officers shall be under a duty to permit such member for just cause to examine any books, records, and accounts necessary to verify such report.

(b)(1) If a labor organization is required to file a report under this part using the Form LM–2 and indicates that it has failed or refused to disclose information required by the Form concerning any disbursement, or receipt not otherwise reported on Statement B, to an individual or entity in the amount of $5,000 or more, or any two or more disbursements, or receipts not otherwise reported on Statement B, to an individual or entity that, in the aggregate, amount to $5,000 or more, because disclosure of such information may be adverse to the organization's legitimate interests, then the failure or refusal to disclose the information shall be deemed ''just cause'' for purposes of paragraph (a) of this section.

(2) Disclosure may be adverse to a labor organization's legitimate interests under this paragraph if disclosure would reveal confidential information concerning the organization's organizing or negotiating strategy or individuals paid by the labor organization to work in a non-union facility in order to assist the labor organization in organizing employees, provided that such individuals are not employees of the labor organization who receive more than $10,000 in the aggregate in the reporting year from the union.

(3) This provision does not apply to disclosure that is otherwise prohibited by law or that would endanger the health or safety of an individual, or that would consist of individually identifiable health information the trust is required to protect under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Regulation.

(c) In all other cases, a union member has the burden of establishing ''just cause'' for purposes of paragraph (a) of this section.

[28 FR 14383, Dec. 27, 1963, as amended at 68 FR 58447, Oct. 9, 2003; 71 FR 57737, Sept. 29, 2006; 73 FR 57449, Oct. 2, 2008; 75 FR 74959, Dec. 1, 2010; 85 FR 13442, Mar. 6, 2020]

§ 403.9 Attorney-client communications exempted.

Nothing contained in this part shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of section 201(b) of the Act, and of this part, any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

§ 403.10 Publication of reports required by this part.

Inspection and examination of any report or other document filed as required by this part, and the furnishing by the Office of Labor-Management Standards of copies thereof to any person requesting them, shall be governed by part 70 of this title.

[35 FR 2990, Feb. 13, 1970]

§ 403.11 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1245–0003.

[59 FR 15115, Mar. 31, 1994, as amended at 63 FR 33779, June 19, 1998; 78 FR 8024, Feb. 5, 2013]

PART 404—LABOR ORGANIZATION OFFICER AND EMPLOYEE REPORTS

Sec.

404.1 Definitions.
404.2 Annual report.
404.3 Form of annual report.
404.4 [Reserved]
404.5 Attorney-client communications exempted.
404.6 Personal responsibility of signatories of reports.
404.7 Maintenance and retention of records.
404.8 Publication of reports required by this part.
404.9 OMB control number.

AUTHORITY: Secs. 202, 207, 208, 73 Stat. 525, 529 (29 U.S.C. 432, 437, 438); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 28 FR 14384, Dec. 27, 1963, unless otherwise noted.

§ 404.1 Definitions.

As used in this part the term:

(a) Benefit with monetary value means anything of value, tangible or intangible, including any interest in personal or real property, gift, insurance, retirement, pension, license, copyright, forbearance, bequest or other form of inheritance, office, options, agreement for employment or property, or property of any kind. For reporting purposes, the following are excepted: pension, health, or other benefit payments from a trust that are provided pursuant to a written specific agreement covering such payments.

(b) Dealing means to engage in a transaction (bargain, sell, purchase, agree, contract) or to in any way traffic or trade, including solicitation of business.

(c) *Employer* means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

(d)(1) *Fiscal year* means the calendar year or other period of 12 consecutive calendar months, on the basis of which financial accounts of the labor organization officer or employee are kept. Where a labor organization officer or employee designates a new fiscal year period prior to the expiration of a previously established fiscal year period,

the resultant period of less than 12 consecutive calendar months, and thereafter the newly established fiscal year, shall in that order constitute the fiscal year for purposes of the reports required to be filed by section 202(a) of the Act and the regulations in this part.

(2) A labor organization officer or employee who is subject to section 202(a) of the Act for only a portion of his fiscal year because the labor organization officer or employee first becomes subject to the Act during such fiscal year, may consider such portion as the entire fiscal year in making this report under this part.

(e) Income means all income from whatever source derived, including, but not limited to, compensation for services, fees, commissions, wages, salaries, interest, rents, royalties, copyrights, licenses, dividends, annuities, honorarium, income and interest from insurance and endowment contracts, capital gains, discharge of indebtedness, share of partnership income, bequests or other forms of inheritance, and gifts, prizes or awards.

(f) *Labor organization employee* means any individual (other than an individual performing exclusively custodial or clerical services) employed by a labor organization within the meaning of any law of the United States relating to the employment of employees.

(g) *Labor organization officer* means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body. An officer is:

(1) A person identified as an officer by the constitution and bylaws of the labor organization;

(2) Any person authorized to perform the functions of president, vice president, secretary, or treasurer;

(3) Any person who in fact has executive or policy-making authority or responsibility; and

(4) A member of a group identified as an executive board or a body which is vested with functions normally performed by an executive board.

(h) Minor child means a son, daughter, stepson, or stepdaughter under 21 years of age.

(i) Trust in which a labor organization is interested means a trust or other fund or organization:

(1) Which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and

(2) A primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

[28 FR 14384, Dec. 27, 1963, as amended at 50 FR 31310, Aug. 1, 1985; 72 FR 36158, July 2, 2007; 76 FR 66489, Oct. 26, 2011]

§ 404.2 Annual report.

Every labor organization officer and employee who in any fiscal year has been involved in transactions of the type described in section 202(a) of the Act, or who holds or has held any interest in an employer or a business of the type referred to therein, or who has received any payments of the type referred to in that section, or who holds or has held an interest in or derived income or economic benefit with monetary value from a business any part of which consists of dealing with a trust in which his labor organization is interested, or whose spouse or minor child has been involved in such transactions, holds or has held any such interests, or has received such payments, is required to file with the Office of Labor-Management Standards, within 90 days after the end of his fiscal year, a signed report containing the detailed information required therein by section 202(a) of the Act, and found by the Secretary under section 208 thereof to be necessary in such report.

[28 FR 14384, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985; 78 FR 8024, Feb. 5, 2013]

§ 404.3 Form of annual report.

On and after the effective date of this section, every labor organization officer and employee required to file an annual report under § 404.2 shall file such report on United States Department of Labor Form LM–30 entitled

''Labor Organization Officer and Employee Report,'' together with a true copy thereof, in the detail required by the instructions accompanying such form and constituting a part thereof.

§ 404.4 [Reserved]

§ 404.5 Attorney-client communications exempted.

Nothing contained in this part shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of section 202(a) of the Act and of this part any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

§ 404.6 Personal responsibility of signatories of reports.

Every labor organization officer or employee required to file a report under section 202(a) of the Act and under this part shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false.

§ 404.7 Maintenance and retention of records.

Every person required to file any report under this part shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Office of Labor-Management Standards may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, financial and investment statements, contracts, correspondence, and applicable resolutions, in their original electronic and paper formats, and any electronic programs by which they are maintained, available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

[72 FR 36159, July 2, 2007]

§ 404.8 Publication of reports required by this part.

Inspection and examination of any report or other document filed as required by this part, and the furnishing by the Office of Labor-Management Standards of copies thereof to any person requesting them, shall be governed by part 70 of this title.

[35 FR 2990, Feb. 13, 1970]

§ 404.9 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1245–0003.

[59 FR 15116, Mar. 31, 1994, as amended at 63 FR 33779, June 19, 1998; 78 FR 8024, Feb. 5, 2013]

PART 405—EMPLOYER REPORTS

Sec.

405.1 Definitions.
405.2 Annual report.
405.3 Form of annual report.
405.4 Terminal report.
405.5 Special reports.
405.6 Exceptions from the filing requirements of § 405.2.
405.7 Relation of section 8(c) of the National Labor Relations Act, as amended, to the reporting requirements of § 405.2.
405.8 Personal responsibility of signatories of reports.
405.9 Maintenance and retention of records.
405.10 Publication of reports required by this part.
405.11 OMB control number.

AUTHORITY: Secs. 203, 207, 208, 73 Stat. 526, 529 (29 U.S.C. 433, 437, 438); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 28 FR 14384, Dec. 27, 1963, unless otherwise noted.

§ 405.1 Definitions.

As used in this part the term:

(a) *Fiscal year* means the calendar year or other period of 12 consecutive calendar months, on the basis of which financial accounts are kept by an employer. Where an employer designates a new fiscal year period prior to the expiration of a previously established fiscal year period, the resultant period of less than 12 consecutive calendar months, and thereafter the newly established

fiscal year, shall in that order constitute the fiscal year for purposes of the reports required to be filed by section 203(a) of the Act and of the regulations in this part.

(b) *Corresponding principal officers* shall include any person or persons performing or authorized to perform principal executive functions corresponding to those of president and treasurer, of any employer engaged in whole or in part in the performance of the activities described in section 203(a) of the Act.

[28 FR 14384, Dec. 27, 1963, as amended at 42 FR 59070, Nov. 15, 1977]

§ 405.2 Annual report.

Every employer who in any fiscal year has made any payment, loan, promise, agreement, arrangement or expenditure of the kind described and required by section 203(a) of the Act to be reported, shall, as prescribed by the regulations in this part, file with the Office of Labor-Management Standards, within 90 days after the end of each of its fiscal years, a report signed by its president and treasurer, or corresponding principal officers, together with a true copy thereof, containing the detailed information required therein by section 203(a) of the Act and found by the Secretary under section 208 thereof to be necessary in such report.

[28 FR 14384, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985; 78 FR 8025, Feb. 5, 2013]

§ 405.3 Form of annual report.

On and after the effective date of this section, every employer required to file an annual report by section 203(a) of the Act and § 405.2 shall file such report on the United States Department of Labor Form LM–10 entitled, ''Employer Report''[1] in the detail required by the instructions[1] accompanying such form and constituting a part thereof.

[28 FR 14384, Dec. 27, 1963, as amended at 38 FR 10715, May 1, 1973; 42 FR 59070, Nov. 15, 1977]

§ 405.4 Terminal report.

(a) Every employer required to file a report under the provisions of this part, who during its fiscal year loses its identity as a reporting employer through merger, consolidation, dissolution, or otherwise, shall, within 30 days of the effective date thereof, file a terminal employer report, and one copy, with the Office of Labor-Management Standards on Form LM–10 signed by the president and treasurer or corresponding principal officers of such employer immediately prior to the time of the employer's loss of reporting identity, together with a statement of the effective date of such termination or loss of reporting identity, and if the latter, the name and mailing address of the employer entity into which it has been merged, consolidated or otherwise absorbed.

(b) For purposes of the report required by paragraph (a) of this section, the period covered thereby shall be the portion of the employer's fiscal year ending on the effective date of the employer's termination or loss of reporting identity.

§ 405.5 Special reports.

In addition to the report on Form LM–10, the Office of Labor-Management Standards may require from employers subject to the Act the submission of special reports on pertinent information, including but not necessarily confined to reports with respect to specifically identified personnel on the matters referred to in the second paragraph under the instructions for Question 8A of Form LM–10.

[42 FR 59070, Nov. 15, 1977, as amended at 81 FR 16020, Mar. 24, 2016; 83 FR 33842, July 18, 2018]

§ 405.6 Exceptions from the filing requirements of § 405.2.

Nothing contained in this part shall be construed to require:

(a) An employer to file a report unless said employer has made an expenditure, payment, loan, agreement, or arrangement of the kind described in section 203(a) of the Act;

(b) Any employer to file a report covering the services of any person by reason of his (1) giving or agreeing to give advice to such employer or (2) representing or agreeing to represent such

[1] Filed as part of the original document.

employer before any court, administrative agency, or tribunal of arbitration or (3) engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder;

(c) Any employer to file a report covering expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer;

(d) An attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this part any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

§ 405.7 Relation of section 8(c) of the National Labor Relations Act, as amended, to the reporting requirements of § 405.2.

While nothing contained in section 203 of the Act shall be construed as an amendment to, or modification of the rights protected by section 8(c) of the National Labor Relations Act, as amended, activities protected by such section of the said Act are not for that reason exempted from the reporting requirements of section 203(a) of the Labor-Management Reporting and Disclosure Act of 1959 and § 405.2, and, if otherwise subject to such reporting requirements, are required to be reported if they have been engaged in during the course of the reporting fiscal year. However, the information required to be reported in Question 8C of Form LM–10 does not include matters protected by section 8(c) of the National Labor Relations Act, as amended, because the definition in section 203(g) of the term ''interfere with, restrain, or coerce'', which is used in Question 8C does not cover such matters.

[42 FR 59070, Nov. 15, 1977, as amended at 81 FR 16020, Mar. 24, 2016; 83 FR 33842, July 18, 2018]

§ 405.8 Personal responsibility of signatories of reports.

Each individual required to sign a report under section 203(a) of the Act and under this part shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false.

§ 405.9 Maintenance and retention of records.

Every person required to file any report under this part shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Office of Labor-Management Standards may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

§ 405.10 Publication of reports required by this part.

Inspection and examination of any report or other document filed as required by this part, and the furnishing by the Office of Labor-Management Standards of copies thereof to any person requesting them, shall be governed by part 70 of this title.

[35 FR 2990, Feb. 13, 1970]

§ 405.11 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1245–0003.

[59 FR 15116, Mar. 31, 1994, as amended at 63 FR 33779, June 19, 1998; 78 FR 8025, Feb. 5, 2013]

PART 406—REPORTING BY LABOR RELATIONS CONSULTANTS AND OTHER PERSONS, CERTAIN AGREEMENTS WITH EMPLOYERS

Sec.
406.1 Definitions.
406.2 Agreement and activities report.

406.3 Receipts and disbursements report.
406.4 Terminal report.
406.5 Persons excepted from filing reports.
406.6 Relation of section 8(c) of the National Labor Relations Act to this part.
406.7 Personal responsibility of signatories of reports.
406.8 Maintenance and retention of records.
406.9 Publication of reports required by this part.
406.10 OMB control number.

AUTHORITY: Secs. 203, 207, 208, 73 Stat. 526, 529 (29 U.S.C. 433, 437, 438); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 28 FR 14385, Dec. 27, 1963, unless otherwise noted.

§ 406.1 Definitions.

As used in this part, the term:

(a) *Corresponding principal officers* means any person or persons performing or authorized to perform, principal executive functions corresponding to those of president and treasurer of any entity engaged in whole or in part in the performance of the activities described in section 203(b) of the Labor-Management Reporting and Disclosure Act of 1959.

(b) *Fiscal year* means the calendar year or other period of 12 consecutive calendar months, on the basis of which financial accounts are kept by a person. Where a person designates a new fiscal year prior to the expiration of a previously established fiscal year period, the resultant period of less than 12 consecutive calendar months, and thereafter the newly established fiscal year, shall in that order constitute the fiscal years.

(c) *Undertake* means not only the performing of activities, but also the agreeing to perform them or to have them performed.

(d) *A direct or indirect party to an agreement or arrangement* includes persons who have secured the services of another or of others in connection with an agreement or arrangement of the type referred to in § 406.2 as well as persons who have undertaken activities at the behest of another or of others with knowledge or reason to believe that they are undertaken as a result of an agreement or arrangement between an employer and any other person, except bona fide regular officers, supervisors or employees of their employer to the extent to which they undertook to perform services as such bona fide regular officers, supervisors or employees of their employer.

[28 FR 14385, Dec. 27, 1963, as amended at 42 FR 59070, Nov. 15, 1977; 63 FR 33779, June 19, 1998]

§ 406.2 Agreement and activities report.

(a) Every person who as a direct or indirect party to any agreement or arrangement with an employer undertakes, pursuant to such agreement or arrangement, any activities where an object thereof is, directly or indirectly, (1) to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or, (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; shall, as prescribed by the regulations in this part, file a report with the Office of Labor-Management Standards, and one copy thereof, on Form LM–20[1] entitled ''Agreement and Activities Report (required of persons, including labor relations consultants and other individuals and organizations)'' in the detail required by such form and the instructions accompanying such form and constituting a part thereof. The report shall be filed within 30 days after entering into an agreement or arrangement of the type described in this section. If there is any change in the information reported (other than that required by Item C. 10, (c) of the Form), it must be filed in a report clearly marked ''Amended Report'' within 30 days of the change.

(b) The report shall be signed by the president and treasurer or corresponding principal officers of the reporting person. If the report is filed by

[1] Filed as part of the original document.

an individual in his own behalf, it need only bear his signature.

[28 FR 14385, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985; 81 FR 16021, Mar. 24, 2016; 83 FR 33842, July 18, 2018]

§ 406.3 Receipts and disbursements report.

(a) Every person who, as a direct or indirect party to any agreement or arrangement, undertakes any activities of the type described in § 406.2 pursuant to such agreement or arrangement and who, as a result of such agreement or arrangement made or received any payment during his fiscal year, shall, as prescribed by the regulations in this part, file a report and one copy thereof, with the Office of Labor-Management Standards, on Form LM–21[1] entitled ''Receipts and Disbursements Report (required of persons, including labor relations consultants, other individuals and organizations)'', in the detail required by such form and the instructions accompanying such form and constituting a part thereof. The report shall be filed within 90 days after the end of such person's fiscal year during which payments were made or received as a result of such an agreement or arrangement.

(b) The report shall be signed by the president and treasurer or corresponding principal officers of the reporting person. If the report is filed by an individual in his own behalf, it need only bear his signature.

[28 FR 14385, Dec. 27, 1963, as amended at 50 FR 31310, Aug. 1, 1985]

§ 406.4 Terminal report.

(a) Every person required to file a report pursuant to the provisions of this part who during his fiscal year loses his identity as a reporting entity through merger, consolidation, dissolution, or otherwise shall within 30 days of the effective date thereof or of the effective date of this section, whichever is later, file a terminal report, and one copy thereof, with the Office of Labor-Management Standards, on Form LM–21 signed by the president and treasurer or corresponding principal officers immediately prior to the time of the person's loss of reporting identity (or by the person himself if he is an individual), together with a statement of the effective date of termination or loss of reporting identity, and if the latter, the name and mailing address of the entity into which the person reporting has been merged, consolidated or otherwise absorbed.

(b) For purposes of the report referred to in paragraph (a) of this section, the period covered thereby shall be the portion of the reporting person's fiscal year ending on the effective date of the termination or loss of identity.

[28 FR 14385, Dec. 27, 1963, as amended at 50 FR 31310, Aug. 1, 1985]

§ 406.5 Persons excepted from filing reports.

Nothing contained in this part shall be construed to require:

(a) Any person to file a report under this part unless he was a direct or indirect party to an agreement or arrangement of the kind described in § 406.2;

(b) Any person to file a report covering the services of such person by reason of his (1) giving or agreeing to give advice to an employer; or (2) representing or agreeing to represent an employer before any court, administrative agency, or tribunal of arbitration; or (3) engaging or agreeing to engage in collective bargaining on behalf of an employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder;

(c) Any regular officer, or employee of an employer to file a report in connection with services rendered as such regular officer, supervisor or employee to such employer;

(d) An attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this part any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

§ 406.6 Relation of section 8(c) of the National Labor Relations Act to this part.

While nothing contained in section 203 of the Act shall be construed as an amendment to, or modification of the rights protected by, section 8(c) of the

National Labor Relations Act, as amended (61 Stat. 142; 29 U.S.C. 158 (c)), activities protected by such section of the said Act are not for that reason exempted from the reporting requirements of this part and, if otherwise subject to such reporting requirements, are required to be reported. Consequently, information required to be included in Forms LM–20 and 21 must be reported regardless of whether that information relates to activities which are protected by section 8(c) of the National Labor Relations Act, as amended.

§ 406.7 Personal responsibility of signatories of reports.

Each individual required to file a report under this part shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false.

§ 406.8 Maintenance and retention of records.

Every person required to file any report under this part shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Office of Labor-Management Standards may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

§ 406.9 Publication of reports required by this part.

Inspection and examination of any report or other document filed as required by this part, and the furnishing by the Office of Labor-Management Standards of copies thereof to any person requesting them, shall be governed by part 70 of this title.

[35 FR 2990, Feb. 13, 1970]

§ 406.10 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1245–0003.

[59 FR 15116, Mar. 31, 1994, as amended at 63 FR 46888, Sept. 3, 1998; 78 FR 8025, Feb. 5, 2013]

PART 408—LABOR ORGANIZATION TRUSTEESHIP REPORTS

Sec.
408.1 Definitions.
408.2 Initial trusteeship report.
408.3 Form of initial report.
408.4 Semiannual trusteeship report.
408.5 Annual financial report.
408.6 Amendments to the Labor Organization Information Report filed by or on behalf of the subordinate labor organization.
408.7 Terminal trusteeship financial report.
408.8 Terminal trusteeship information report.
408.9 Personal responsibility of signatories of reports.
408.10 Maintenance and retention of records.
408.11 Dissemination and verification of reports.
408.12 Publication of reports required by this part.
408.13 OMB control number.

AUTHORITY: Secs. 202, 207, 208, 73 Stat. 525, 529 (29 U.S.C. 432, 437, 438); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 28 FR 14387, Dec. 27, 1963, unless otherwise noted.

§ 408.1 Definitions.

(a) *Corresponding principal officers* shall include any person or persons performing or authorized to perform principal executive functions corresponding to those of president and treasurer, of any labor organization which has assumed or imposed a trusteeship over a labor organization within the meaning of section 301(a) of the Labor-Management Reporting and Disclosure Act of 1959.

(b) *Trusteeship* means any receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws.

(c) *Policy determining body* means any body which is convened by the parent labor organization or other labor organization which is composed of delegates from labor organizations and

which formulates policy on such matters as wages, hours, or other conditions of employment or recommends or takes any action in the name of the participating labor organizations. Such a body includes, for example, a district council, area conference or joint board.

§ 408.2 Initial trusteeship report.

Every labor organization which has or assumes trusteeship over any subordinate labor organization shall file with the Office of Labor-Management Standards within 30 days after the imposition of any such trusteeship, a trusteeship report, pursuant to § 408.3, together with a true copy thereof, signed by its president and treasurer, or corresponding principal officers, as well as by the trustees of such subordinate labor organization.

[28 FR 14387, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985]

§ 408.3 Form of initial report.

On and after the effective date of this section, every labor organization required to file an initial report under § 408.2 shall file such report on United States Department of Labor Form LM–15 entitled ''Trusteeship Report'' in the detail required by the instructions accompanying such form and constituting a part thereof.

[28 FR 14387, Dec. 27, 1963, as amended at 42 FR 59070, Nov. 15, 1977]

§ 408.4 Semiannual trusteeship report.

Every labor organization required to file an initial report under § 408.2 shall thereafter during the continuance of trusteeship over the subordinate labor organization, file with the said Office of Labor-Management Standards semiannually, and not later than six months after the due date of the initial trusteeship report, a semiannual trusteeship report on Form LM–15 containing the information required by that form except for the Statement of Assets and Liabilities. If in answer to Item 9 of Form LM–15, there was (a) a convention or other policy determining body to which the subordinate organization sent delegates or would have sent delegates if not in trusteeship or (b) an election of officers of the labor organization assuming trusteeship, Form LM–15A should be used to report the required information with respect thereto.

[42 FR 59070, Nov. 15, 1977]

§ 408.5 Annual financial report.

During the continuance of a trusteeship, the labor organization which has assumed trusteeship over a subordinate labor organization, shall file with the Office of Labor-Management Standards on behalf of the subordinate labor organization the annual financial report and any Form T–1 reports required by part 403 of this chapter, signed by the president and treasurer or corresponding principal officers of the labor organization which has assumed such trusteeship, and the trustees of the subordinate labor organization on Form LM–2.

[28 FR 14387, Dec. 27, 1963, as amended at 68 FR 58448, Oct. 9, 2003]

§ 408.6 Amendments to the Labor Organization Information Report filed by or on behalf of the subordinate labor organization.

During the continuance of a trusteeship, the labor organization which has assumed trusteeship over a subordinate labor organization, shall file with the Office of Labor-Management Standards on behalf of the subordinate labor organization any change in the information required by part 402 of this chapter in accordance with the procedure set out in § 402.4.

[63 FR 33779, June 19, 1998]

§ 408.7 Terminal trusteeship financial report.

Each labor organization which has assumed trusteeship over a subordinate labor organization shall file within 90 days after the termination of such trusteeship on behalf of the subordinate labor organization a terminal financial report, and one copy, with the Office of Labor-Management Standards, on Form LM–2 and in conformance with the requirements of part 403 of this chapter.

§ 408.8 Terminal trusteeship information report.

There shall be filed at the same time that the terminal trusteeship financial

report is filed a terminal trusteeship information report on Form LM–16. If in answer to Item 6 of Form LM–16, there was (a) a convention or other policy determining body to which the subordinate organization sent delegates or would have sent delegates if not in trusteeship or (b) an election of officers of the labor organization assuming trusteeship, Form LM–15A should be used to report the required information with respect thereto.

[40 FR 58856, Dec. 19, 1975]

§ 408.9 Personal responsibility of signatories of reports.

Each individual required to sign a report under this part shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false.

§ 408.10 Maintenance and retention of records.

Every person required to file any report under this part shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the documents filed with the Office of Labor-Management Standards may be verified, explained or clarified, and checked for accuracy and completeness, and shall include vouchers, worksheets, receipts, and applicable resolutions, and shall keep such records available for examination for a period of not less than five years after the filing of the documents based on the information which they contain.

§ 408.11 Dissemination and verification of reports.

Every labor organization required to submit a report shall make available the information required to be contained in such report to all of its members, and every such labor organization and its officers shall be under a duty to permit such member for just cause to examine any books, records, and accounts necessary to verify such report.

§ 408.12 Publication of reports required by this part.

Inspection and examination of any report or other document filed as required by this part, and the furnishing by the Office of Labor-Management Standards of copies thereof to any person requesting them, shall be governed by part 70 of this title.

[35 FR 2990, Feb. 13, 1970]

§ 408.13 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1245–0003.

[59 FR 15116, Mar. 31, 1994, as amended at 63 FR 46888, Sept. 3, 1998; 78 FR 8025, Feb. 5, 2013]

PART 409—REPORTS BY SURETY COMPANIES

Sec.
409.1 Definitions.
409.2 Annual report.
409.3 Time for filing annual report.
409.4 Personal responsibility for filing of reports.
409.5 Maintenance and retention of records.
409.6 Publication of reports required by this part.
409.7 OMB control number.

AUTHORITY: Secs. 207, 208, 211; 79 Stat. 888; 88 Stat. 852 (29 U.S.C. 437, 438, 441); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 31 FR 11177, Aug. 24, 1966, unless otherwise noted.

§ 409.1 Definitions.

As used in this part, the term:

(a) *Fiscal year* means the calendar year, or other period of 12 consecutive calendar months. Once reported on one basis, a change in the reporting year shall be effected only upon prior approval by the Office of Labor-Management Standards.

(b) *Corresponding principal officers* shall include any person or persons performing or authorized to perform principal executive functions corresponding to those of president and treasurer of any surety underwriting a bond for which reports are required under section 211 of the Labor-Management Reporting and Disclosure Act of 1959.

§ 409.2 Annual report.

Each surety company having in force any bond required by section 502 of the

Labor-Management Reporting and Disclosure Act of 1959 or section 412 of the Employee Retirement Income Security Act during the fiscal year, shall file with the Office of Labor-Management Standards a report, on U.S. Department of Labor Form S–1 entitled ''Surety Company Annual Report''[1] signed by the president and treasurer or corresponding principal officers, in the detail required by the instructions accompanying such form and constituting a part thereof.

[42 FR 59070, Nov. 15, 1977, as amended at 50 FR 31309, Aug. 1, 1985; 50 FR 31310, Aug. 1, 1985]

§ 409.3 Time for filing annual report.

Each surety company required to file an annual report by section 211 of the Labor-Management Reporting and Disclosure Act of 1959 and § 409.2 shall file such report within 150 days after the end of the fiscal year. The period of 150 days within which reports must be filed is stipulated in lieu of the statutory period of 90 days (sec. 207(b), 73 Stat. 529, 29 U.S.C. 437(b) as amended by 79 Stat. 888) pursuant to a finding under section 211 (79 Stat. 888) of the Act that information required to be reported cannot be practicably ascertained within 90 days of the end of the fiscal year.

[31 FR 11177, Aug. 24, 1966, as amended at 50 FR 31310, Aug. 1, 1985]

§ 409.4 Personal responsibility for filing of reports.

Each individual required to file a report under section 211 of the Labor-Management Reporting and Disclosure Act of 1959, shall be personally responsible for the filing of such reports and for the accuracy of the information contained therein.

§ 409.5 Maintenance and retention of records.

Each surety required to file any report under this part shall maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic information and data from which the reports filed with the Office of Labor-Management Standards may be verified, explained or clarified and checked for accuracy and completeness, and shall keep such records available for examination for a period of not less than 5 years after the filing of the reports based on the information which they contain.

§ 409.6 Publication of reports required by this part.

Part 70 of this title shall govern inspection and examination of any report or other document filed as required by this part, and the furnishing by the Office of Labor-Management Standards of copies thereof to any person requesting them.

[35 FR 2990, Feb. 13, 1970]

§ 409.7 OMB control number.

The collecting of information requirements in this part have been approved by the Office of Management and Budget and assigned OMB control number 1245–0003.

[59 FR 15116, Mar. 31, 1994, as amended at 63 FR 33779, June 19, 1998; 78 FR 8025, Feb. 5, 2013]

PART 417—PROCEDURE FOR REMOVAL OF LOCAL LABOR ORGANIZATION OFFICERS

GENERAL

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417.13 Initial decision of Administrative Law Judge.
417.14 Form and time for filing of appeal with the Administrative Review Board.

[1] Filed as part of the original document.

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417.16 Initiation of proceedings.
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417.19 Director's representative.
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417.23 Report to the Director.
417.24 Appeal to the Director.
417.25 Certification of results of vote.

AUTHORITY: Secs. 401, 402, 73 Stat. 533, 534 (29 U.S.C. 481, 482); Secretary's Order No. 03-2012, 77 FR 69376, November 16, 2012; Secretary's Order No. 01-2020.

SOURCE: 29 FR 8264, July 1, 1964, unless otherwise noted.

GENERAL

§ 417.1 Purpose and scope.

Section 401(h) of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. 481) provides that if, upon application of any member of a local labor organization, the Secretary of Labor finds, after hearing in accordance with the Administrative Procedure Act, that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot. Section 401(i) (29 U.S.C. 481) requires the Secretary to promulgate rules and regulations prescribing minimum standards and procedures for determining the adequacy of the removal procedures referred to in section 401(h). Section 402(a) (29 U.S.C. 482) provides that a member of a labor organization who has exhausted the available internal remedies of such organization and of any parent body, or who has invoked such remedies without obtaining a final decision within three months, may file a complaint with the Secretary within one month thereafter alleging violation of section 401 (including violation of the constitution and bylaws of the labor organization pertaining to the removal of officers). Section 402(b) (29 U.S.C. 482) provides that upon suit initiated by the Secretary, a Federal court may direct the conduct of a hearing and vote upon the removal of officers under the supervision of the Secretary, and in accordance with such rules and regulations as the Secretary may prescribe. It is the purpose of this part to implement those sections by prescribing regulations relating to the procedures and standards for determining the adequacy of removal procedures and the procedures for holding elections for the removal of officers.

§ 417.2 Definitions.

(a) *Chief, DOE* means the Chief of the Division of Enforcement within the Office of Labor-Management Standards.

(b) *Adequate procedure* shall mean any procedure which affords reasonable and equitable opportunity for (1) trial of an officer(s) charged with serious misconduct, and (2) removal of such an officer(s) if found guilty, and which contains the elements set forth in each of the subparagraphs of this paragraph: *Provided, however,* That any other procedure which provides otherwise reasonable and equitable measures for removal from office may also be considered adequate:

(1) A reasonable opportunity is afforded for filing charges of serious misconduct against any elected officer(s) without being subject to retaliatory threats, coercion, or acts of intimidation.

(2) The charges of serious misconduct are communicated to the accused officer(s), and reasonable notice is given the members of the organization, reasonably in advance of the time for hearing thereon.

(3) Subject to reasonable restrictions, a fair and open hearing upon such charges is held after adequate notice and adequate opportunity is afforded for testimony or the submission of evidence in support of or in opposition to such charges. Within a reasonable time following such hearing, a decision is reached as to the guilt or innocence of the accused.

(4) If the hearing upon such charges is held before a trial committee or

other duly authorized body, reasonable notice of such body's findings is given to the membership of the organization promptly.

(5) If such accused officer(s) is found guilty, he may be removed by a procedure which includes:

(i) A secret ballot vote of the members at an appropriately called meeting, or

(ii) A vote of a trial committee or other duly authorized body, subject to appeal and review by the members voting by a secret ballot at an appropriately called meeting.

(6) Within a reasonable time after the charges of serious misconduct are filed with the labor organization final disposition (including appellate procedures) is made of the charges.

(c) *Elected officer* means any constitutional officer, any person authorized to perform the functions of president, vice-president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

(d) *Cause shown* means substantial evidence of serious misconduct.

(e) *Interested person* means any person or organization whose interests are or may be affected by a proceeding.

(f) *Court* means the district court of the United States in the district in which the labor organization in question maintains its principal office.

[29 FR 8264, July 1, 1964, as amended at 29 FR 8480, July 7, 1964; 29 FR 9537, July 14, 1964; 50 FR 31310, Aug. 1, 1985; 62 FR 6093, Feb. 10, 1997; 63 FR 33779, June 19, 1998; 78 FR 8025, Feb. 5, 2013]

Subpart A—Procedures To Determine Adequacy of Constitution and Bylaws for Removal of Officers of Local Labor Organizations

§ 417.3 Initiation of proceedings.

(a) Any member of a local labor organization who has reason to believe that:

(1) An elected officer(s) of such organization has been guilty of serious misconduct, and

(2) The constitution and bylaws of his organization do not provide an adequate procedure for the removal of such officer(s), may file with the Office of Labor-Management Standards a written application, which may be in the form of a letter, for initiation of proceedings under section 401(h) of the Act.

(b) An application filed under paragraph (a) of this section shall set forth the facts upon which it is based including a statement of the basis for the charge that an elected officer(s) is guilty of serious misconduct; and shall contain:

(1) Information identifying the labor organization and the officer or officers involved, and

(2) Any data such member desires the Office of Labor-Management Standards to consider in connection with his application.

§ 417.4 Pre-hearing conference.

(a) Upon receipt of an application filed under § 417.3, the Chief, DOE shall cause an investigation to be conducted of the allegations contained therein, and if he finds probable cause to believe that the constitution and bylaws of the labor organization do not provide an adequate procedure for the removal of an elected officer(s) guilty of serious misconduct he shall:

(1) Advise the labor organization of his findings and

(2) Afford such labor organization the opportunity for a conference to be set not earlier than 10 days thereafter except where all interested persons elect to confer at an earlier time. Any such conference shall be conducted for the purpose of hearing the views of interested persons and attempting to achieve a settlement of the issue without formal proceedings.

(b)(1) If:

(i) The labor organization declines the opportunity to confer afforded under paragraph (a) of this section, and fails to undertake compliance with the provisions of section 401(h) of the Act, or if

(ii) After consideration of any views presented by the labor organization the Chief, DOE still finds probable cause to believe that the removal procedures are not adequate and if agreement for the adoption of adequate procedures for removal has not been achieved and the labor organization refuses to enter into

a stipulation to comply with the provisions of section 401(h) of the Act, the Chief, DOE shall submit his findings and recommendations to the Director.

(2) Upon consideration of the Chief, DOE's recommendations, the Director may order a hearing to be conducted before an Administrative Law Judge duly assigned by him to receive evidence and arguments (i) on the applicability of section 401(h) of the Act to the labor organization involved, and (ii) on the question of whether its constitution and bylaws provide an adequate procedure for the removal of an elected union officer guilty of serious misconduct.

[29 FR 8264, July 1, 1964, as amended at 50 FR 31310, Aug. 1, 1985; 62 FR 6093, Feb. 10, 1997; 78 FR 8025, Feb. 5, 2013]

§ 417.5 Notice.

Notice of hearing shall be given not less than 10 days before such hearing is held unless the parties agree to a shorter notice period. Such notice shall be transmitted to the labor organization and the officer(s) accused of misconduct and other interested persons, insofar as they are known, and shall inform them of:

(a) The time, place, and nature of the hearings;

(b) The legal authority and jurisdiction under which the hearing is to be held; and

(c) The matters of fact and law asserted.

The Labor organization shall inform its members of the provisions of the notice and copies of the notice shall be made available for inspection at the offices of the labor organization.

§ 417.6 Powers of Administrative Law Judge.

The designated Administrative Law Judge shall have authority:

(a) To give notice concerning and to conduct hearings;

(b) To administer oaths and affirmations;

(c) To issue subpoenas;

(d) To rule upon offers of proof and receive relevant evidence;

(e) To take or cause depositions to be taken whenever the ends of justice would be served thereby;

(f) To regulate the course of the hearing;

(g) To hold conferences for the settlement or simplification of the issues by consent of the parties;

(h) To dispose of procedural requests or other matters;

(i) To limit the number of witnesses at hearings, or limit or exclude evidence or testimony which may be irrelevant, immaterial, or cumulative;

(j) If appropriate or necessary to exclude persons or counsel from participation in hearings for refusing any proper request for information or documentary evidence, or for contumacious conduct;

(k) To grant continuances or reschedule hearings for good cause shown;

(l) To consider and decide procedural matters;

(m) To take any other actions authorized by the regulations in this part.

The Administrative Law Judge's authority in the case shall terminate upon his filing of the record and his initial decision with the Director, or when he shall have withdrawn from the case upon considering himself disqualified, or upon termination of his authority by the Director for good cause stated. However, the Administrative Law Judge's authority may be reinstated upon referral of some or all the issues by the Director for rehearing. This authority will terminate upon certification of the rehearing record to the Director.

[29 FR 8264, July 1, 1964, as amended at 78 FR 8025, Feb. 5, 2013]

§ 417.7 Transcript.

An official reporter shall make the only official transcript of the proceedings. Copies of the official transcript shall be made available upon request addressed to the Director in accordance with the provisions of part 70 of this title.

[50 FR 31310, Aug. 1, 1985, as amended at 63 FR 33779, June 19, 1998; 78 FR 8025, Feb. 5, 2013]

§ 417.8 Appearances.

The Department of Labor does not maintain a register of persons or attorneys who may participate at hearings.

Any interested person may appear and be heard in person or be represented by counsel.

§ 417.9 Evidence; contumacious or disorderly conduct.

(a) Formal rules of evidence or procedure in use in courts of law or equity shall not obtain. Rules of evidence are to be within the discretion of the Administrative Law Judge. However, it shall be the policy to exclude testimony or matter which is irrelevant, immaterial, or unduly repetitious.

(b) Contumacious or disorderly conduct at a hearing may be ground for exclusion therefrom. The refusal of a witness at any hearing to answer any questions which have been ruled to be proper shall, in the discretion of the Administrative Law Judge be ground for striking all testimony previously given by such witness on related matter.

(c) At any stage of the hearing the Administrative Law Judge may call for further evidence or testimony on any matter. After the hearing has been closed, no further information shall be received on any matter, except where provision shall have been made for it at the hearing, or except as the Administrative Law Judge or Director may direct by reopening the hearing.

[29 FR 8264, July 1, 1964, as amended at 29 FR 8480, July 7, 1964; 78 FR 8025, Feb. 5, 2013]

§ 417.10 Rights of participants.

Every interested person shall have the right to present oral or documentary evidence, to submit evidence in rebuttal, and to conduct such examination or cross-examination as may be required for a full and true disclosure of the facts (subject to the rulings of the Administrative Law Judge), and to object to admissions or exclusions of evidence. The Department of Labor, through its officers and attorneys shall have all rights accorded interested persons by the provisions of this subpart A.

§ 417.11 Objections to evidence.

Objections to the admission or exclusion of evidence may be made orally or in writing, but shall be in short form, stating the grounds for such objection. The transcript shall not include argument or debate thereon except as required by the Administrative Law Judge. Rulings on such objections shall be a part of the transcript. No such objections shall be deemed waived by further participation in the hearing. Formal exceptions are unnecessary and will not be taken to rulings on objections.

§ 417.12 Proposed findings and conclusions.

Within 10 days following the close of hearings, interested persons may submit proposed findings and conclusions to the Administrative Law Judge, together with supporting reasons therefor, which shall become a part of the record.

§ 417.13 Initial decision of Administrative Law Judge.

Within 25 days following the period for submitting proposed findings and conclusions, the Administrative Law Judge shall consider the whole record, file an initial decision as to the adequacy of the constitution and bylaws for the purpose of removing officers with the Administrative Review Board, and forward a copy to each party participating in the hearing. His decision shall become a part of the record and shall include a statement of his findings and conclusions, as well as the reasons or basis therefor, upon all material issues.

[29 FR 8264, July 1, 1964, as amended at 78 FR 8025, Feb. 5, 2013]

§ 417.14 Form and time for filing of appeal with the Administrative Review Board.

(a) An interested person may appeal from the Administrative Law Judge's initial decision by filing written exceptions with the Administrative Review Board within 15 days of the issuance of the Administrative Law Judge's initial decision (or such additional time as the Administrative Review Board may allow), together with supporting reasons for such exceptions, in accordance with 29 CFR part 26. Blanket appeals shall not be received. Impertinent or scandalous matter may be stricken by the Administrative Review Board, or an appeal containing such matter or

lacking in specification of exceptions may be dismissed.

(b) In the absence of either an appeal to the Administrative Review Board or review of the Administrative Law Judge's initial decision by the Administrative Review Board on his own motion, such initial decision shall become the decision of the Administrative Review Board.

[29 FR 8264, July 1, 1964, as amended at 78 FR 8025, Feb. 5, 2013; 86 FR 1785, Jan. 11, 2021]

§ 417.15 Decision of the Administrative Review Board.

Upon appeal filed with the Administrative Review Board pursuant to § 417.14, or within its discretion upon its own motion, the complete record of the proceedings shall be certified to it; it shall notify all interested persons who participated in the proceedings; and it shall review the record, the exceptions filed and supporting reasons, and shall issue a decision as to the adequacy of the constitution and bylaws for the purpose of removing officers, or shall order such further proceedings as it deems appropriate. Its decision shall become a part of the record and shall include a statement of its findings and conclusions, as well as the reasons or basis therefor, upon all material issues.

[86 FR 1785, Jan. 11, 2021]

Subpart B—Procedures Upon Failure of Union To Take Appropriate Remedial Action Following Subpart A Procedures

§ 417.16 Initiation of proceedings.

(a) Any member of a local labor organization may file a complaint with the Office of Labor-Management Standards alleging that following a finding by the Administrative Review Board pursuant to subpart A that the constitution and bylaws of the labor organization pertaining to the removal of officers are inadequate, or a stipulation of compliance with the provisions of section 401(h) of the Act reached with the Chief, DOE in connection with a prior charge of the inadequacy of a union's constitution and bylaws to remove officers, as provided in subpart A of this part, the labor organization (1) has failed to act within a reasonable time, or (2) has violated the procedures agreed to with the Chief, DOE, or (3) has violated the principles governing adequate removal procedures under § 417.2(b).

(b) The complaint must be filed pursuant to section 402(a) of the Act within one calendar month after one of the two following conditions has been met:

(1) The member has exhausted the remedies available to him under the constitution and bylaws of the organization, or

(2) The member has invoked such remedies without obtaining a final decision within three calendar months after invoking them.

[59 FR 65716, Dec. 21, 1994, as amended at 62 FR 6093, Feb. 10, 1997; 78 FR 8025, Feb. 5, 2013]

§ 417.17 Investigation of complaint and court action.

The Office of Labor-Management Standards shall investigate such complaint, and if upon such investigation the Secretary finds probable cause to believe that a violation of section 401(h) of the Act has occurred and has not been remedied, the Secretary shall within 60 days after the filing of such complaint, bring a civil action against the labor organization in the district court of the United States for the district in which such labor organization maintains its principal office, to direct the conduct of a hearing and vote upon the removal of officer(s) under the supervision of the Director as provided in section 402(b) of the Act.

[59 FR 65717, Dec. 21, 1994, as amended at 78 FR 8025, Feb. 5, 2013]

§ 417.18 Hearings—removal of officers of local labor organizations.

Hearings pursuant to order of the court and concerning the removal of officers under section 402(b) of the Act shall be for the purpose of introducing testimony and evidence showing why an officer or officers accused of serious misconduct should or should not be removed. Hearings shall be conducted by the officers of the labor organization (subject to § 417.19) in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with title IV of the Act, or with the provisions of this part

417: *Provided, however,* That no officer(s) accused of serious misconduct shall participate in such hearings in any capacity except as witness or counsel.

§ 417.19 Director's representative.

The Director shall appoint a representative or representatives whose functions shall be to supervise the hearing and vote. Such representative(s) shall have final authority to issue such rulings as shall be appropriate or necessary to insure a full and fair hearing and vote. Upon his own motion or upon consideration of the petition of any interested person the Director's Representative may disqualify any officer(s) or member(s) of the union from participation in the conduct of the hearing (except in the capacity of witness or counsel).

[29 FR 8264, July 1, 1964, as amended at 29 FR 8480, July 7, 1964 ; 78 FR 8025, Feb. 5, 2013]

§ 417.20 Notice of hearing.

Notice of hearing, not less than 10 days in advance of the date set for such hearing, shall be transmitted to the officer or officers accused of serious misconduct and other interested persons, insofar as they are known, and shall inform them of (a) the time, place, and nature of the hearing; (b) the legal authority and jurisdiction under which the hearing is to be held; (c) the matters of fact and law asserted; and (d) their rights to challenge the appointment of certain of, or all of, the officers of the union to conduct the hearing in accordance with this subpart. The labor organization shall promptly inform its members of the provisions of the notice. Copies of the notice shall be made available for inspection at the office of the labor organization.

§ 417.21 Transcript.

It shall be within the discretion of the Director to require an official reporter to make an official transcript of the hearings. In the event he does so require, copies of the official transcript shall be made available upon request addressed to the Director in accordance with the provisions of part 70 of this title.

[50 FR 31310, Aug. 1, 1985, as amended at 63 FR 33779, June 19, 1998; 78 FR 8025, Feb. 5, 2013]

§ 417.22 Vote among members of the labor organization.

Within a reasonable time after completion of the hearing, and after proper notice thereof, a secret ballot vote shall be conducted among the members of the labor organization in good standing on the issue of whether the accused officer or officers shall be removed from office. The vote shall be in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of the Act or this part 417. The presiding officer or officers at the taking of such vote shall entertai objections or suggestions as to the rules for conducting the vote, eligibility of voters, and such other matters as may be pertinent; and shall rule on such questions, shall establish procedures for the conduct of the vote, and for tabulation of the ballots; and shall appoint observers and compile a list of eligible voters. All rulings of the presiding officer or officers shall be subject to the provisions of § 417.19.

§ 417.23 Report to the Director.

Following completion of the hearing and vote, the Director's Representative shall file a report with the Director setting out the results of the balloting; and pertinent details of the hearing and vote. Notice thereof shall be given to the membership of such labor organization promptly and copies shall be furnished to all interested parties.

[29 FR 8264, July 1, 1964, as amended at 78 FR 8025, Feb. 5, 2013]

§ 417.24 Appeal to the Director.

(a) Within 15 days after mailing of the report of the Director's Representative, any interested party may appeal the conduct of the hearing or vote or both by filing written exceptions with the Director. Blanket appeals shall not be received. Impertinent or scandalous

matter may be stricken by the Director, or an appeal containing such matter or lacking in specifications may be dismissed.

(b) Upon review of the whole record, the Director shall issue a decision or may order further hearing, a new vote, or such further proceedings as he deems appropriate.

[29 FR 8264, July 1, 1964, as amended at 50 FR 31310, Aug. 1, 1985; 78 FR 8025, Feb. 5, 2013]

§ 417.25 Certification of results of vote.

Upon receipt of the report of the Director's Representative on the hearing and vote on removal, the Director shall certify the results of the vote to the court as required by section 402(c) of the Act.

[29 FR 8264, July 1, 1964, as amended at 78 FR 8025, Feb. 5, 2013]

PART 451—LABOR ORGANIZATIONS AS DEFINED IN THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

Sec.
451.1 Introductory statement.
451.2 General.
451.3 Requirements of section 3(i).
451.4 Labor organizations under section 3(j).
451.5 ''State or local central body.''
451.6 Extraterritorial application.

AUTHORITY: Secs. 3, 208, 401, 73 Stat. 520, 529, 532 (29 U.S.C. 402, 438, 481); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 28 FR 14388, Dec. 27, 1963, unless otherwise noted.

§ 451.1 Introductory statement.

(a) This part discusses the meaning and scope of sections 3(i) and 3(j) of the Labor-Management Reporting and Disclosure Act of 1959[1] (hereinafter referred to as the Act). These provisions define the terms ''labor organization'' and ''labor organization * * * in an industry affecting commerce'' for purposes of the Act.[2]

(b) The Act imposes on labor organizations various obligations and prohibitions relating generally, among other things, to the reporting of information and election and removal of officers. Requirements are also imposed on the officers, representatives, and employees of labor organizations. In addition, certain rights are guaranteed the members thereof. It thus becomes a matter of importance to determine what organizations are included within the applicability of the Act.

(c) The provisions of the Act, other than title I and amendments to other statutes contained in section 505 and title VII, are subject to the general investigatory authority of the Secretary of Labor embodied in section 601[3] (and delegated by him to the Director), which empowers him to investigate whenever he believes it necessary in order to determine whether any person has violated or is about to violate such provisions. The correctness of an interpretation of these provisions can be determined finally and authoritatively only by the courts. It is necessary, however, for the Director to reach informed conclusions as to the meaning of the law to enable him to carry out his statutory duties of administration and enforcement. The interpretations of the Director contained in this part, which are issued upon the advice of the Solicitor of Labor, indicate the construction of the law which will guide him in performing his duties unless and until he is directed otherwise by authoritative rulings of the courts or unless and until he subsequently decides that a prior interpretation is incorrect. However, the omission to discuss a particular problem in this part, or in interpretations supplementing it, should not be taken to indicate the adoption

[1] 73 Stat. 520, 521, 29 U.S.C. 402.

[2] It should be noted that the definition of the term ''labor organization,'' as well as other terms, in section 3 are for purposes of those portions of the Act included in titles I, II, III, IV, V (except section 505) and VI. They do not apply to title VII, which contains amendments of the National Labor Relations Act, as amended, nor to section 505 of title V, which amends section 302 (a), (b), and (c) of the Labor Management Relations Act, 1947, as amended. The terms used in title VII and section 505 of title V have the same meaning as they have under the National Labor Relations Act, as amended, and the Labor Management Relations Act, 1947, as amended.

[3] Sec. 601, 73 Stat. 539, 29 U.S.C. 521.

of any position by the Director with respect to such problem or to constitute an administrative interpretation or practice. Interpretations of the Director with respect to the meaning of the terms ''labor organization'' and ''labor organization * * * in an industry affecting commerce,'' as used in the Act, are set forth in this part to provide those affected by the provisions of the Act with ''a practical guide * * * as to how the office representing the public interest in its enforcement will seek to apply it.'' [4]

(d) To the extent that prior opinions and interpretations relating to the meaning of ''labor organization'' and ''labor organization * * * in an industry affecting commerce'' are inconsistent or in conflict with the principles stated in this part, they are hereby rescinded and withdrawn.

[28 FR 14388, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985; 78 FR 8026, Feb. 5, 2013]

§ 451.2 General.

A ''labor organization'' under the Act must qualify under section 3(i). It must also be engaged in an industry affecting commerce. In accordance with the broad language used and the manifest congressional intent, the language will be construed broadly to include all labor organizations of any kind other than those clearly shown to be outside the scope of the Act.

§ 451.3 Requirements of section 3(i).

(a) *Organizations which deal with employers.* (1) The term ''labor organization'' includes ''any organization of any kind, any agency, or employee representation committee, group, association, or plan * * * in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, * * *.'' The quoted language is deemed sufficiently broad to encompass any labor organization irrespective of size or formal attributes. While it is necessary for employees to participate therein, such participating employees need not necessarily be the employees of the employer with whom the organization deals. In determining who are ''employees'' for purposes of this provision, resort must be had to the broad definition of ''employee'' contained in section 3(f) of the Act. [5] It will be noted that the term includes employees whose work has ceased for certain specified reasons, including any current labor dispute.

(2) To come within the quoted language in section 3(i) the organization must exist for the purpose, in whole or in part, of dealing with employers concerning grievances, etc. In determining whether a given organization exists wholly or partially for such purpose, consideration will be given not only to formal documents, such as its constitution or bylaws, but the actual functions and practices of the organization as well. Thus, employee committees which regularly meet with management to discuss problems of mutual interest and handle grievances are ''labor organizations'', even though they have no formal organizational structure. [6]

(3) Since the types of labor organizations described in subparagraph (2) of this paragraph are those which deal with employers, it is necessary to consider the definition of ''employer'' contained in section 3(e) of the Act in determining the scope of the language under consideration. [7] The term ''employer'' is broadly defined to include

[4] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 138.

[5] Sec. 3(f) reads: '' 'Employee' means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this Act.''

[6] *National Labor Relations Board* v. *Cabot Carbon Co.*, 360 U.S. 203.

[7] Sec. 3(e) reads: '' 'Employer' means any employer or any group or association of employers engaged in an industry affecting commerce, (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an

Continued

''any employer or any group or association of employers engaged in an industry affecting commerce'' which is ''an employer within the meaning of any law of the United States relating to the employment of any employees * * *.'' Such laws would include, among others, the Railway Labor Act, as amended, the Fair Labor Standards Act, as amended, the Labor Management Relations Act, as amended, and the Internal Revenue Code. The fact that employers may be excluded from the application of any of the foregoing acts would not preclude their qualification as employers for purposes of this Act. For example, employers of agricultural labor who are excluded from the application of the Labor Management Relations Act, as amended, would appear to be employers within the meaning of this Act.

(4) In defining ''employer,'' section 3(e) expressly excludes the ''United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.'' The term ''political subdivision'' includes, among others, counties and municipal governments. A labor organization composed entirely of employees of the governmental entities excluded by section 3(e) would not be a labor organization for the purposes of the Act with the exception of a labor organization composed of employees of the United States Postal Service which is subject to the Act by virtue of the Postal Reorganization Act of 1970. (Organizations composed of Federal government employees that meet the definition of ''labor organization'' in the Civil Service Reform Act or the Foreign Service Act are subject to the standards of conduct requirements of those Acts, 5 U.S.C. 7120 and 22 U.S.C. 4117, respectively. In addition, labor organizations subject to the Congressional Accountability Act of 1995 are subject to the standards of conduct provisions of the Civil Service Reform Act pursuant to 2 U.S.C. 1351(a)(1). The regulations implementing the standards of conduct requirements are contained in parts 457–459 of this title.) However, in the case of a national, international or intermediate labor organization composed both of government locals and non-government or mixed locals, the parent organization as well as its mixed and non-government locals would be ''labor organizations'' and subject to the Act. In such case, the locals which are composed entirely of government employees would not be subject to the Act, although elections in which they participate for national officers or delegates would be so subject.[8]

(b) *Organizations which may or may not deal with employers.* Regardless of whether it deals with employers concerning terms and conditions of employment and regardless of whether it is composed of employees, any conference, general committee, joint or system board, or joint council engaged in an industry affecting commerce and which is subordinate to a national or international labor organization is a ''labor organization'' for purposes of the Act. Included are the area conferences and the joint councils of the International Brotherhood of Teamsters and similar units of other national and international labor organizations.

[28 FR 14388, Dec. 27, 1963, as amended at 42 FR 59071, Nov. 15, 1977; 50 FR 31310, Aug. 1, 1985; 62 FR 6093, Feb. 10, 1997]

§ 451.4 Labor organizations under section 3(j).

(a) *General.* Section 3(j) sets forth five categories of labor organizations which ''shall be deemed to be engaged in an industry affecting commerce'' within the meaning of the Act. Any organization which qualifies under section 3(i) and falls within any one of these categories listed in section 3(j) is subject to the requirements of the Act.

(b) *Certified employee representatives.* This category includes all organizations certified as employee representatives under the Railway Labor Act, as amended, or under the National Labor Relations Act, as amended.

employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.''

[8] See also, § 452.12 of this chapter which discusses the election provisions of the Act.

(c) *Labor organizations recognized or acting as employee representatives though not certified.* This category includes local, national, or international labor organizations which, though not formally certified, are recognized or acting as the representatives of employees of an employer engaged in an industry affecting commerce. Federations, such as the American Federation of Labor and Congress of Industrial Organizations, are included in this category,[9] although expressly excepted from the election provisions of the Act.[10]

(d) *Organizations which have chartered local or subsidiary bodies.* This category includes any labor organization that has chartered a local labor organization or subsidiary body which is within either of the categories discussed in paragraph (b) or (c) of this section. Under this provision, a labor organization not otherwise subject to the Act, such as one composed of Government employees, would appear to be ''engaged in an industry affecting commerce'' and, therefore, subject to the Act if it charters one or more local labor organizations which deal with an ''employer'' as defined in section 3(c).[11] This category includes, among others, a federation of national or international organizations which directly charters local bodies.[12]

(e) *Local or subordinate bodies which have been chartered by a labor organization.* This category includes any labor organization that has been chartered by an organization within either of the categories discussed in paragraph (b) or (c) of this section as the local or subordinate body through which such employees may enjoy membership or become affiliated with the chartering organization.

(f) *Intermediate bodies.* Included in this category is any conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the categories discussed in paragraphs (b), (c), (d) and (e) of this section. Excluded from this definition, however, are State or local central bodies.[13] (It should be noted that the above listing is included in the Act as words of illustration, not of limitation.) The following is a description of typical intermediate bodies:

(1) *Conference.* A conference is an organic body within a national or international labor organization formed on a geographical area, trade division, employer-wide or similar basis and composed of affiliate locals of the parent national or international organization. The various conferences of the International Brotherhood of Teamsters, for example, are in this category.

(2) *General committees.* Typical of those bodies are the general committees of the railroad labor organizations. The term includes any subordinate unit of a national railroad labor organization, regardless of the title or designation of such unit, which under the constitution and bylaws of the organization of which it is a unit, is authorized to represent that organization on a particular railroad or portion thereof in negotiating with respect to wages and working conditions.[14] General committees are sometimes known as system boards of adjustment, general grievance committees, and general committees of adjustment. They are to be distinguished from system boards of adjustment established under the Railway Labor Act, which are composed of management and labor members. These joint labor-management boards are not included within the definition of a labor organization under the Act.

(3) *Joint or system boards.* As mentioned above, in connection with railroad labor organizations the term ''general committee'' includes system boards. However, as used here the term has a broader meaning and includes, among others, boards which have members from more than one labor organization.

(4) *Joint councils.* A joint council is composed of locals not necessarily of the same national or international

[9] See *National Labor Relations Board* v. *Highland Park Mfg. Co.,* 341 U.S. 322. See also paragraph (d) of this section.

[10] Act, sec. 401(a).

[11] See § 451.3(a).

[12] See also paragraph (c) of this section.

[13] For discussion of State and local central bodies see § 451.5.

[14] See definition of term ''General Committee'' under Railroad Retirement Act in 20 CFR 201.1(k).

labor organization located in a particular area, such as a city or county. These bodies are sometimes called joint boards, joint executive boards, joint councils, or district councils. Included, for example, are councils of building and construction trades labor organizations.

[28 FR 14388, Dec. 27, 1963, as amended at 42 FR 59071, Nov. 15, 1977]

§ 451.5 "State or local central body."

(a) The definition of ''labor organization'' in section 3(i) and the examples of labor organizations deemed to be engaged in an industry affecting commerce in section 3(j)(5) both except from the term ''labor organization'' a ''State or local central body.'' As used in these two sections, the phrase *State or local central body* means an organization that:

(1) Is chartered by a federation of national or international unions; and

(2) Admits to membership local unions and subordinate bodies of national or international unions that are affiliated with the chartering federation within the State or local central body's territory and any local unions or subordinate bodies directly affiliated with the federation in such territory; and

(3) Exists primarily to carry on educational, legislative and coordinating activities.

(b) The term does not include organizations of local unions or subordinate bodies (1) of a single national or international union; or (2) of a particular department of a federation or similar association of national or international unions.

[29 FR 8060, June 25, 1964]

§ 451.6 Extraterritorial application.

(a) It is not the purpose of the Act to impose on foreign labor organizations any regulation of the activities they carry on under the laws of the countries in which they are domiciled or have their principal place of business. The applicability of the Act is limited to the activities of persons or organizations within the territorial jurisdiction of the United States. The foregoing would be applicable, for example, to Canadian locals affiliated with international labor organizations organized within the United States.

(b) On the other hand, labor organizations otherwise subject to the Act are not relieved of the requirements imposed upon them with respect to actions taken by them in the United States or which will have effect in the United States, by virtue of the fact that they have foreign members or affiliates that participate in these actions. For example, a national or international labor organization which conducts its required election of officers by referendum or at a convention of delegates must comply with the election provisions of the Act,[16] even though members of foreign locals participate in the balloting, or delegates of foreign locals participate in the election at the convention.

(c) Similarly, the provisions of the Act with respect to imposition of trusteeships[17] are applicable to United States national or international labor organizations subject to this Act even though the action of the United States organization is taken with respect to a foreign local.

PART 452—GENERAL STATEMENT CONCERNING THE ELECTION PROVISIONS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

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AUTHORITY: Secs. 401, 402, 73 Stat. 532, 534 (29 U.S.C. 481, 482); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 38 FR 18324, July 9, 1973, unless otherwise noted.

Subpart A—General Considerations

§ 452.1 Introductory statement.

(a) This part discusses the meaning and scope of the provisions of title IV of the Labor-Management Reporting and Disclosure Act[1] (hereinafter referred to as the Act), which deal with the election of officers of labor organizations. These provisions require periodic election of union officers, and prescribe minimum standards to insure that such elections will be fairly conducted. Specific provisions are included to assure the right of union members to participate in selecting their officers without fear of interference or reprisal, and to protect the right to nominate candidates, run for office, and vote in officer elections. Title IV also sets forth the rights of candidates, provides for secret ballots in appropriate cases, and requires notice of nominations and elections, preservation of election records, and other safeguards to insure fair elections. However, the Act does not prescribe complete, detailed procedures for the nomination and election of union officers.

(b) Interpretations of the Director with respect to the election provisions of title IV are set forth in this part to provide those affected by these provisions of the Act with ''a practical guide * * * as to how the office representing the public interest in its enforcement will seek to apply it.''[2] The correctness of an interpretation can be determined finally and authoritatively only by the courts. It is necessary, however, for the Director to reach informed conclusions as to the meaning of the law to enable him to carry out his statutory duties of administration and enforcement. The interpretations of the Director contained in this part, which are issued upon the advice of the Solicitor of Labor, indicate the construction of the law which will guide him in performing his duties unless and until he is directed otherwise by authoritative rulings of the courts or unless and until he subsequently announces that a prior interpretation is incorrect. However,

[1] 73 Stat. 532–535, 29 U.S.C. 481–483.

[2] *Skidmore* v. *Swift & Co.*, 323 U.S. 134 at 138 (1944).

the fact that a particular problem is not discussed in this part, or in interpretations supplementing it, should not be taken to indicate the adoption of any position by the Director with respect to such problem or to constitute an administrative interpretation or practice.

(c) To the extent that prior opinions and interpretations relating to the election of officers of labor organizations under the Act are inconsistent or in conflict with the principles stated in this part, they are hereby rescinded and withdrawn.

[38 FR 18324, July 9, 1973, as amended at 78 FR 8026, Feb. 5, 2013]

§ 452.2 Application of union constitution and bylaws.

Elections required to be held as provided in title IV are to be conducted in accordance with the validly adopted constitution and bylaws of the labor organizations insofar as they are not inconsistent with the provisions of the Act.

[38 FR 18324, July 9, 1973, as amended at 63 FR 33780, June 19, 1998]

§ 452.3 Interpretations of constitution and bylaws.

The interpretation consistently placed on a union's constitution by the responsible union official or governing body will be accepted unless the interpretation is clearly unreasonable.[3]

§ 452.4 Investigatory provision—application.

The provisions of section 601 of the Act provide general investigatory authority to investigate alleged violations of the Act including violations of title IV. However, section 601 in and of itself provides no remedy, and the section must be read in conjunction with the remedy and statutory scheme of section 402, i.e., exhaustion of internal union remedies and a complaint to the Secretary following completion of the election before suit can be filed. In view of the remedy provided, an investigation prior to completion of an election may have the effect of publicizing the activities or unsubstantiated allegations of one faction to the prejudice of the opposition. To avoid this result, and as a matter of sound statutory construction, the Department will exercise its investigatory authority only in circumstances in which the outcome of the election could not be affected by the investigation.[4] Thus, the Department ordinarily will employ its investigatory authority only where the procedural requirements for a title IV investigation have been met; but in unusual circumstances or where necessary to collect or preserve evidence an investigation may be conducted after the conclusion of balloting.

§ 452.5 Effect of violation on outcome.

Since the remedy under section 402 is contingent upon a finding by the court, among other things, that the violation ''may have affected the outcome of an election''[5] the Secretary as a matter of policy will not file suit to enforce the election provisions unless the violations found are such that the outcome may have been affected.[6]

[38 FR 18324, July 9, 1973, as amended at 50 FR 31310, Aug. 1, 1985; 63 FR 33780, June 19, 1998]

§ 452.6 Delegation of enforcement authority.

The authority of the Secretary under the Act has been delegated in part to the Director.

[38 FR 18324, July 9, 1973, as amended at 50 FR 31309, Aug. 1, 1985; 78 FR 8026, Feb. 5, 2013]

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[3] *English* v. *Cunningham,* 282 F.2d 848 (C.A.D.C. 1960).

[4] However questions involving the use of force or violence or the threat of the use of force or violence under circumstances which may violate section 610 (29 U.S.C. 530) of the Act will be referred promptly to the Department of Justice for appropriate action.

[5] Act, sec. 402(b) (29 U.S.C. 482).

[6] *Dunlop* v. *Bachowski,* 421 U.S. 560, 570 (1975), citing *Wirtz* v. *Glass Bottle Blowers,* 389 U.S. 463, 472 (1968) and *Schonfeld* v. *Wirtz,* 285 F. Supp. 705, 707–708 (S.D.N.Y. 1966).

Subpart B—Other Provisions of the Act Affecting Title IV

§ 452.7 Bill of Rights, title I.

The provisions of title I, ''Bill of Rights of Members of Labor Organizations''[7] (particularly section 101(a)(1) ''Equal Rights,'' section 101(a)(2) ''Freedom of Speech and Assembly,'' and section 101(a)(5) ''Safeguards against Improper Disciplinary Action'') are related to the rights pertaining to elections. Direct enforcement of title I rights, as such, is limited to civil suit in a district court of the United States by the person whose rights have been infringed.[8] The exercise of particular rights of members is subject to reasonable rules and regulations in the labor organization's constitution and bylaws.[9]

§ 452.8 Trusteeship provisions, title III.

Placing a labor organization under trusteeship consistent with title III, may have the effect of suspending the application of title IV to the trusteed organization (see § 452.15).

§ 452.9 Prohibition against certain persons holding office; section 504.

Among the safeguards for labor organizations provided in title V is a prohibition against the holding of office by certain classes of persons.[10] This provision makes it a crime for any person willfully to serve in certain positions, including as an elected officer of a labor organization, for a period of three to thirteen years after conviction or imprisonment for the commission of specified offenses, including violation of titles II or III of the Act, or conspiracy or attempt to commit such offenses. It is likewise a crime for any labor organization or officer knowingly to permit such a person to serve in such positions. Persons subject to the prohibition applicable to convicted criminals may serve if their citizenship rights have been fully restored after being taken away by reason of the conviction, or if, following the procedures set forth in the Act, it is determined that their service would not be contrary to the purposes of the Act.

[50 FR 31310, Aug. 1, 1985]

§ 452.10 Retaliation for exercising rights.

Section 609, which prohibits labor organizations or their officials from disciplining members for exercising their rights under the Act, and section 610, which makes it a crime for any person to use or threaten force or violence for the purpose of interfering with or preventing the exercise of any rights protected under the Act, apply to rights relating to the election of officers under title IV.

Subpart C—Coverage of Election Provisions

§ 452.11 Organizations to which election provisions apply.

Title IV of the Act contains election provisions applicable to national and international labor organizations, except federations of such organizations, to intermediate bodies such as general committees, conferences, system boards, joint boards, or joint councils, certain districts, district councils and similar organizations and to local labor organizations.[11] The provisions do not apply to State and local central bodies, which are explicitly excluded from the definition of ''labor organization''.[12] The characterization of a particular organizational unit as a ''local,'' ''intermediate,'' etc., is determined by its functions and purposes rather than the formal title by which it is known or how it classifies itself.

§ 452.12 Organizations comprised of government employees.

An organization composed entirely of government employees (other than employees of the United States Postal Service) is not subject to the election

[7] 73 Stat. 522, 29 U.S.C. 411.

[8] But the Secretary may bring suit to enforce section 104 (29 U.S.C. 414).

[9] Act, sec. 101(a)(1), 101(a)(2), and 101(b) (29 U.S.C. 411).

[10] Act, sec. 504(a) (29 U.S.C. 504), as amended by the Comprehensive Crime Control Act of 1984, Public Law 98–473, secs. 229, 235, 803 and 804. See text at footnote 23 for a list of the disabling crimes.

[11] For the scope of the term ''labor organization,'' see part 451 of this chapter.

[12] See § 451.5 of this chapter for a definition of ''State or local central body.''

provisions of the Act. Section 3(e) of the Act, defining the term ''employer,'' specifically excludes the United States Government, its wholly owned corporations, and the States and their political subdivisions from the scope of that term, and section 3(f) defines an ''employee'' as an individual employed by an ''employer.'' Since a ''labor organization'' is defined in section 3(i) as one in which ''employees'' participate and which exists in whole or in part for the purpose of ''dealing with employers,'' an organization composed entirely of government employees would not be a ''labor organization''[13] as that term is defined in the Act. However, section 1209 of the Postal Reorganization Act provides that organizations of employees of the United States Postal Service shall be subject to the Labor-Management Reporting and Disclosure Act. A national, international or intermediate labor organization which has some locals of government employees not covered by the Act and other locals which are mixed or are composed entirely of employees covered by the Act would be subject to the election requirements of the Act. Its mixed locals would also be subject to the Act. The requirements would not apply to locals composed entirely of government employees not covered by the Act, except with respect to the election of officers of a parent organization which is subject to those requirements or the election of delegates to a convention of such parent organization, or to an intermediate body to which the requirements apply.

[38 FR 18324, July 9, 1973, as amended at 50 FR 31311, Aug. 1, 1985; 63 FR 33780, June 19, 1998]

§ 452.13 Extraterritorial application.

Although the application of the Act is limited to the activities of persons and organizations within the territorial jurisdiction of the United States,[14] an international, national or intermediate body is not exempted from the requirements of the Act by virtue of the participation of its foreign locals or foreign membership in its elections. For example, votes received from Canadian members in referendum elections held by an international must have been cast under procedures meeting the minimum requirements of the Act, and Canadian delegates participating at conventions of the international at which officers are elected must have been elected by secret ballot.

§ 452.14 Newly formed or merged labor organizations.

The initial selection of officers by newly formed or merged labor organizations is not subject to the requirements of title IV.[15] Such labor organizations may have temporary or provisional officers serve until a regular election subject to the Act can be scheduled. An election under all the safeguards prescribed in these regulations must be held within a reasonable period after the organization begins to function. What would be a reasonable time for this purpose depends on the circumstances, but after the formation or consolidation of the labor organization, a regular election subject to title IV may not be deferred longer than the statutory period provided for that type of organization. However, when a preexisting labor organization changes its affiliation without substantially altering its basic structure or identity the terms of its officers may not be extended beyond the maximum period specified by the Act for the type of labor organization involved.

§ 452.15 Effect of trusteeship.

Establishment of a valid trusteeship may have the effect of suspending the operation of the election provisions of the Act. When the autonomy otherwise available to a subordinate labor organization has been suspended consistent with the provisions of title III of the Act, officers of the organization under

[13] Most labor organizations composed of Federal Government employees are subject to the standards of conduct provisions of the Civil Service Reform Act, 5 U.S.C. 7120, or the Foreign Service Act, 22 U.S.C. 4117. The regulations implementing those statutory provisions are contained in parts 457–459 of this chapter.

[14] See § 451.6 of this chapter.

[15] However, the other provisions of the Act are applicable immediately upon such formation or merger.

trusteeship may be relieved of their duties and temporary officers appointed by the trustee if necessary to assist him in carrying out the purposes for which the trusteeship was established. However, when a regular election of officers or an election for purposes of terminating the trusteeship is being held during the trusteeship, title IV would apply.

§ 452.16 Offices which must be filled by election.

Section 401 of the Act identifies the types of labor organizations whose officers must be elected and prescribes minimum standards and procedures for the conduct of such elections. Under that section officers of national or international labor organizations (except federations of such organizations), local labor organizations, and intermediate bodies such as general committees, system boards, joint boards, joint councils, conferences, certain districts, district councils and similar organizations must be elected.[16]

§ 452.17 Officer.

Section 3(n) of the Act defines the word ''officer'' and it is this definition which must be used as a guide in determining what particular positions in a labor organization are to be filled in the manner prescribed in the Act. For purposes of the Act, ''officer'' means ''any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.''

§ 452.18 Constitutional officers.

A constitutional officer refers to a person holding a position identified as an officer by the constitution and bylaws of the labor organization. Thus, for example, a legislative representative of a labor organization who performs no executive functions and whose duties are confined to promoting the interests of members in legislative matters is nevertheless an officer who is required to be elected where the labor organization's constitution identifies the holder of such a position as an officer. On the other hand, legislative representatives who are required to be elected by the constitution and bylaws of a labor organization are not considered to be officers within the meaning of the Act if they are not designated as such by the constitution, are not members of any executive board or similar governing body, and do not perform executive functions. As defined in the Act, however, the term ''officer'' is not limited to individuals in positions identified as such or provided for in the constitution or other organic law of the labor organization.[17] The post of Honorary President, President Emeritus or Past President that is to be assumed by the retiring chief executive officer of a union would not be an officer position unless it is designated as an officer position by the union's constitution, or the holder of the position performs executive functions or serves on an executive board or similar governing body.

§ 452.19 Executive functions.

The definitional phrase ''a person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization'' brings within the term ''officer'' any person who in fact has executive or policy-making authority or responsibility, although he may not occupy a position identified as an officer under the constitution and bylaws of the organization. Authorization to perform such functions need not be contained in any provision of the constitution or bylaws or other document but may be inferred from actual practices or conduct. On the other hand, a person is not an officer merely because he performs ministerial acts for a designated officer who alone has responsibility. The normal functions performed by business agents and shop

[16] See § 452.23 for a discussion of the frequency with which the different types of labor organizations must conduct elections of officers. See part 451 of this chapter for the scope of the term ''labor organization.''

[17] Cf. *NLRB* v. *Coca-Cola Bottling Co.*, 350 U.S. 264 (1956). See also, Daily Cong. Rec. 5867, Sen., Apr. 23, 1959.

stewards, such as soliciting memberships, presenting or negotiating employee grievances within the work place, and negotiating contracts are not ''other executive functions'' as that phrase is used in section 3(n) of the Act. However, a directing business representative or a business manager usually exercises such a degree of executive authority as to be considered an officer and, therefore, must be elected. The duties normally pertaining to membership on a bargaining committee do not come within the phrase ''other executive functions.'' However, persons occupying such non-executive positions may be ''officers'' if they are ex officio members of the organization's executive board (or similar governing body) or if the constitution or bylaws of the union designate such positions as officers.

§ 452.20 Nature of executive functions.

(a) The functions that will bring a particular position with a title other than president, vice-president, secretary-treasurer, or executive board member within the definition of ''officer'' cannot be precisely defined. They are the functions typically performed by officers holding these titles in current labor union practice. Decisions in each case will require a practical judgment. As a general rule, a person will be regarded as being authorized to perform the functions of president if he is the chief or principal executive officer of the labor organization. Similarly, he will be regarded as being authorized to perform the functions of treasurer if he has principal responsibility for control and management of the organization's funds and fiscal operation. A member of any group, committee, or board which is vested with broad governing or policymaking authority will be regarded as a member of an ''executive board or similar governing body.'' The name or title that the labor organization assigns to the position is not controlling.

(b) The purpose of the election requirement of the Act is to assure that persons in positions of control in labor organizations will be responsive to the desires of the members.[18] Professional and other staff members of the labor organization who do not determine the organization's policies or carry on its executive functions and who are employed merely to implement policy decisions and managerial directives established by the governing officials of the organization are not officers and are not required to be elected.

§ 452.21 Members of executive board.

The phrase ''a member of its executive board or similar governing body'' refers to a member of a unit identified as an executive board or a body, whatever its title, which is vested with functions normally performed by an executive board. Members of a committee which is actually the executive board or similar governing body of the union are considered officers within the meaning of section 3(n) of the Act even if they are not so designated by the union's constitution and bylaws. For example, members of an ''Executive-Grievance Committee'' which exercises real governing powers are officers under the Act. However, it should be noted that committee membership alone will not ordinarily be regarded as an indication of officer status, unless the committee or its members meet the requirements contained in section 3(n) of the Act.

§ 452.22 Delegates to a convention.

Under certain circumstances, delegates to a convention of a national or international labor organization, or to an intermediate body, must be elected by secret ballot among the members in good standing of the labor organization they represent even though such delegates are not ''officers'' of the organization. Such election is required by the Act[19] when the delegates are to nominate or elect officers of a national or international labor organization, or of an intermediate body. There is, of course, no requirement that delegates be elected in accordance with the provisions of title IV if they do not nominate or elect officers, unless delegates are designated as ''officers'' in the

[18] See, for example, S. Rept. 187, 86th Cong., 1st sess., p. 7.

[19] Act, sec. 401(a) and 401(d) (29 U.S.C. 481).

union's constitution and bylaws or unless, by virtue of their position, they serve as members of the executive board or similar governing body of the union.

Subpart D—Frequency and Kinds of Elections

§ 452.23 Frequency of elections.

The Act requires that all national and international labor organizations (other than federations of such labor organizations) elect their officers not less often than every five years. Officers of intermediate bodies, such as general committees, system boards, joint boards, joint councils, conferences, and certain districts, district councils and similar organizations, must be elected at least every four years, and officers of local labor organizations not less often than every three years.

§ 452.24 Terms of office.

The prescribed maximum period of three, four, or five years is measured from the date of the last election.[20] It would not be consistent with these provisions of the Act for officers elected for the maximum terms allowable under the statute to remain in office after the expiration of their terms without a new election. Failure to hold an election for any office after the statutory period has expired constitutes a continuing violation of the Act, which may be brought to the attention of the Secretary in the form of a complaint filed in accordance with the appropriate procedure. Title IV establishes only maximum time intervals between elections for officers. Labor organizations covered by these provisions may hold elections of officers with greater frequency than the specified maximum period. For example, a local labor organization is required to hold an election of officers at least once every three years, but it must hold an election every year if its governing rules so provide. It should be noted, moreover, that the provisions of title IV apply to all regular elections of officers in labor organizations subject to the Act. Thus, if a labor organization chooses to hold elections of officers more frequently than the statutory maximum intervals, it must observe the minimum standards set forth in title IV for the conduct of such elections.

§ 452.25 Vacancies in office.

Title IV governs the regular periodic elections of officers in labor organizations subject to the Act. No requirements are imposed with respect to the filling by election or other method of any particular office which may become vacant between such regular elections. If, for example, a vacancy in office occurs in a local labor organization, it may be filled by appointment, by automatic succession, or by a special election which need not conform to the provisions of title IV. The provisions of section 504 of the Act, which prohibit certain persons from holding office, are applicable to such situations. While the enforcement procedures of section 402 are not available to a member in connection with the filling of an interim vacancy, remedies may be available to an aggrieved member under section 102 of the Act or under any pertinent State or local law.

§ 452.26 Elections in local labor organizations.

Local labor organizations must conduct their regular elections of officers by secret ballot among the members in good standing. All members in good standing of the local labor organization must be given an opportunity to vote directly for candidates to fill the offices that serve them. Indirect election of officers of a local labor organization would violate section 401(b) of the Act. For example, a procedure whereby the local's membership elects an executive board or some similar body by secret ballot which in turn selects (either from among its own membership or from the local's membership at large) the persons to fill specific offices would not comply with the Act.[21] Similarly, the election of a chief steward by the

[20] See § 452.14 for a discussion of the selection of officers in a new or newly-merged labor organization.

[21] *Wirtz* v. *Independent Petroleum Workers of America*, 75 LRRM 2340, 63 L.C. ¶11,190 (N.D. Ind. 1970).

shop stewards would violate the Act if the chief steward, by virtue of that position, also serves as a member of the executive board, since members of the executive board must be elected directly by secret ballot among the members in good standing.

§ 452.27 National, international organizations, and intermediate bodies.

The officers of a national or international labor organization or of an intermediate body must be elected either directly by secret ballot among the members in good standing or indirectly by persons acting in a representative capacity who have been elected by secret ballot among all members in good standing.[22]

§ 452.28 Unopposed candidates.

An election of officers or delegates that would otherwise be required by the Act to be held by secret ballot need not be held by secret ballot when all candidates are unopposed and the following conditions are met: (a) The union provides a reasonable opportunity for nominations; (b) write-in votes are not permitted, as evidenced by provisions in the constitution and bylaws, by an official interpretation fairly placed on such documents, or by established union practice; and (c) the union complies with all other provisions of title IV.

§ 452.29 Primary elections.

Where a union holds primary elections or similar procedures for eliminating candidates prior to the final vote in connection with regular elections subject to these provisions, the primary election or other procedure must be conducted in accordance with the same standards required under the Act for the final election.

§ 452.30 Run-off elections.

A run-off election must meet the standards set forth in title IV if the original election was subject to the requirements of the Act. For example, if the run-off is to be held at the same meeting as the original election, the original notice of election must have so stated and all records pertaining to the run-off must be retained.

§ 452.31 One candidate for several offices.

Where a union constitution or other validly adopted rule provides that a single elected officer will perform the functions of more than one office, a separate election need not be held for each office.

Subpart E—Candidacy for Office; Reasonable Qualifications

§ 452.32 Persons who may be candidates and hold office; secret ballot elections.

Section 401(e) provides that in any election of officers required by the Act which is held by secret ballot, every member in good standing with the exceptions explained in sections following shall be eligible to be a candidate and to hold office. This provision is applicable not only to the election of officers in local labor organizations, but also to elections of officers in national or international and intermediate labor organizations where those elections are held by secret ballot referendum among the members, and to the election of delegates to conventions at which officers will be elected.

§ 452.33 Persons who may be candidates and hold office; elections at conventions.

Where elections of national or international labor organizations or of intermediate bodies are held at a convention of delegates elected by secret ballot, protection of the right to be a candidate and to hold office is afforded by the requirement in section 401(f) that the convention be conducted in accordance with the constitution and bylaws of the labor organization insofar as they are not inconsistent with the provisions of title IV. If members in good standing are denied the right to be candidates by the imposition of unreasonable qualifications on eligibility for office such qualifications would be inconsistent with the provisions of title IV.

[22] See § 452.119 and following for discussion of indirect elections.

§ 452.34 Application of section 504, LMRDA.

The eligibility of members of labor organizations to be candidates and to hold office in such organizations is subject only to the provisions of section 504(a), which bars individuals convicted of certain crimes from holding office in labor organizations[23] and to reasonable qualifications uniformly imposed. A person who is barred from serving in union office by section 504(a) is not eligible to be a candidate. However, a labor organization may permit a person who is barred from holding union office by section 504(a) to be a candidate for office if the section 504 disability will terminate by the customary date for the installation of officers. A labor organization may within reasonable limits adopt stricter standards than those contained in section 504(a) by extending the period of disability or by barring from union office persons who have been convicted of crimes other than those specified.

[38 FR 18324, July 9, 1973, as amended at 50 FR 31311, Aug. 1, 1985]

§ 452.35 Qualifications for candidacy.

It is recognized that labor organizations may have a legitimate institutional interest in prescribing minimum standards for candidacy and officeholding in the organization. On the other hand, a dominant purpose of the Act is to ensure the right of members to participate fully in governing their union and to make its officers responsive to the members. A basic assumption underlying the concept of ''free and democratic elections,'' is that voters will exercise common sense and good judgment in casting their ballots. In union elections as in political elections, the good judgment of the members in casting their votes should be the primary determinant of whether a candidate is qualified to hold office. Therefore, restrictions placed on the right of members to be candidates must be closely scrutinized to determine whether they serve union purposes of such importance, in terms of protecting the union as an institution, as to justify subordinating the right of the individual member to seek office and the interest of the membership in a free, democratic choice of leaders.

§ 452.36 Reasonableness of qualifications.

(a) The question of whether a qualification is reasonable is a matter which is not susceptible of precise definition, and will ordinarily turn on the facts in each case. However, court decisions in deciding particular cases have furnished some general guidelines. The Supreme Court in *Wirtz* v. *Hotel, Motel and Club Employees Union, Local 6*, 391 U.S. 492 at 499 (1968) held that:

> Congress plainly did not intend that the authorization in section 401(e) of 'reasonable qualifications uniformly imposed' should be given a broad reach. The contrary is implicit in the legislative history of the section and in its wording that 'every member in good standing shall be eligible to be a candidate and to hold office * * *.' This conclusion is buttressed by other provisions of the Act which stress freedom of members to nominate candidates for Office. Unduly restrictive candidacy qualifications can result in the abuses of entrenched leadership that the LMRDA was expressly enacted to curb. The check of democratic elections as a preventive measure is seriously impaired by candidacy qualifications which substantially deplete the ranks of those who might run in opposition to incumbents.

Union qualifications for office should not be based on assumptions that certain experience or qualifications are necessary. Rather it must be assumed

[23] The disabling crimes set forth in the Act, sec. 504(a), as amended by sec. 803 of the Comprehensive Crime Control Act of 1984, Public Law 98–473, (29 U.S.C. 504) are robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury, or a violation of title II or III of this Act, any felony involving abuse or misuse of a position or employment in a labor organization or employee benefit plan to seek or obtain an illegal gain at the expense of the members of the labor organization or the beneficiaries of the employee benefit plan, or conspiracy to commit any such crimes or attempt to commit any such crimes or a crime in which any of the foregoing crimes is an element.''

NOTE: The U.S. Supreme Court, on June 7, 1965, held unconstitutional as a bill of attainder the section 504 provision which imposes criminal sanctions on Communist Party members for holding union office; *U.S.* v. *Brown*, 381 U.S. 437.

that the labor organization members will exercise common sense and judgment in casting their ballots. ''Congress' model of democratic elections was political elections in this country'' (*Wirtz* v. *Local 6*, 391 U.S. at 502) and a qualification may not be required without a showing that citizens assumed to make discriminating judgments in public elections cannot be relied on to make such judgments when voting as union members.

(b) Some factors to be considered, therefore, in assessing the reasonableness of a qualification for union office are:

(1) The relationship of the qualification to the legitimate needs and interests of the union;

(2) The relationship of the qualification to the demands of union office;

(3) The impact of the qualification, in the light of the Congressional purpose of fostering the broadest possible participation in union affairs;

(4) A comparison of the particular qualification with the requirements for holding office generally prescribed by other labor organizations; and

(5) The degree of difficulty in meeting a qualification by union members.

§ 452.37 Types of qualifications.

Ordinarily the following types of requirements may be considered reasonable, depending on the circumstances in which they are applied and the effect of their application:

(a) *Period of prior membership.* It would ordinarily be reasonable for a local union to require a candidate to have been a member of the organization for a reasonable period of time, not exceeding two years, before the election. However, if a member is involuntarily compelled to transfer from one local to another, such a requirement would not be reasonable if he is not given credit for his prior period of membership.

(b) *Continuity of good standing.* A requirement of continuous good standing based on punctual payment of dues will be considered a reasonable qualification only if (1) it provides a reasonable grace period during which members may make up missed payments without loss of eligibility for office,[24] and (2) the period of time involved is reasonable. What are reasonable periods of time for these purposes will depend upon the circumstances. Section 401(e) of the Act provides that a member whose dues have been withheld by the employer for payment to the labor organization pursuant to his voluntary authorization provided for in a collective bargaining agreement may not be declared ineligible to vote or be a candidate for office by reason of alleged delay or default in the payment of dues. If during the period allowed for payment of dues in order to remain in good standing, a member on a dues checkoff system has no earnings from which dues can be withheld, section 401(e) does not relieve the member of the responsibility of paying his dues in order to remain in good standing.

§ 452.38 Meeting attendance requirements.

(a) It may be reasonable for a labor organization to establish a requirement of attendance at a specified number of its regular meetings during the period immediately preceding an election, in order to insure that candidates have a demonstrated interest in and familiarity with the affairs of the organization. In the past, it was ordinarily considered reasonable to require attendance at no more than 50 percent of the meetings over a period not exceeding two years. Experience has demonstrated that it is not feasible to establish arbitrary guidelines for judging the reasonableness of such a qualification. Its reasonableness must be gauged in the light of all the circumstances of the particular case, including not only the frequency of meetings, the number of meetings which

[24] In *Goldberg* v. *Amarillo General Drivers, Teamsters Local 577,* 214 F. Supp. 74 (N.D. Tex. 1963), the disqualification of five nominees for union office for failure to satisfy a constitutional provision requiring candidates for office to have maintained continuous good standing for two years by paying their dues on or before the first business day of the current month, in advance, was held to be unreasonable. See also *Wirtz* v. *Local Unions No. 9, 9–A and 9–B, International Union of Operating Engineers,* 254 F. Supp. 980 (D. Colo. 1965), aff'd. 366 F. 2d 911 (CA 10 1966), vacated as moot 387 U.S. 96 (1967).

must be attended and the period of time over which the requirement extends, but also such factors as the nature, availability and extent of excuse provisions, whether all or most members have the opportunity to attend meetings, and the impact of the rule, i.e., the number or percentage of members who would be rendered ineligible by its application.[25]

(a—1) In *Steelworkers, Local 3489* v. *Usery*, 429 U.S. 305, 94 LRRM 2203, 79 L.C. ¶11,806 (1977), the Supreme Court found that this standard for determining validity of meeting attendance qualifications was the type of flexible result that Congress contemplated when it used the word ''reasonable.'' The Court concluded that Congress, in guaranteeing every union member the opportunity to hold office, subject only to ''reasonable qualifications,'' disabled unions from establishing eligibility qualifications as sharply restrictive of the openness of the union political process as the Steelworkers' attendance rule. The rule required attendance at fifty percent of the meetings for three years preceding the election unless prevented by union activities or working hours, with the result that 96.5 percent of the members were ineligible.

(b) Other guidance is furnished by lower court decisions which have held particular meeting attendance requirements to be unreasonable under the following circumstances: One meeting during each quarter for the three years preceding nomination, where the effect was to disqualify 99 percent of the membership (*Wirtz* v. *Independent Workers Union of Florida*, 65 LRRM 2104, 55 L.C. par. 11,857 (M.D. Fla., 1967)); 75 percent of the meetings held over a two-year period, with absence excused only for work or illness, where over 97 percent of the members were ineligible (*Wirtz* v. *Local 153, Glass Bottle Blowers Ass'n*, 244 F. Supp. 745 (W.D. Pa., 1965), order vacating decision as moot, 372 F. 2d 86 (C.A. 3 1966), reversed 389 U.S. 463; decision on remand, 405 F.2d 176 (C.A. 3 1968)); *Wirtz* v. *Local 262, Glass bottle Blowers Ass'n.*, 290 F. Supp. 965 (N.D. Cal., 1968)); attendance at each of eight meetings in the two months between nomination and election, where the meetings were held at widely scattered locations within the State (*Hodgson* v. *Local Union No. 624 A-B, International Union of Operating Engineers*, 80 LRRM 3049, 68 L.C. par. 12,816 (S.D. Miss. Feb. 19, 1972)); attendance at not less than six regular meetings each year during the twenty-four months prior to an election which has the effect of requiring attendance for a period that must begin no later than eighteen months before a biennial election (*Usery* v. *Local Division 1205, Amalgamated Transit Union*, 545 F. 2d 1300 (C.A. 1, 1976)).

[38 FR 18324, July 3, 1973, as amended at 42 FR 39105, Aug. 2, 1977; 42 FR 41280, Aug. 16, 1977; 42 FR 45306, Sept. 9, 1977; 50 FR 31311, Aug. 1, 1985; 60 FR 57178, Nov. 14, 1995]

§ 452.39 Participation in insurance plan.

In certain circumstances, in which the duties of a particular office require supervision of an insurance plan in more than the formal sense, a union may require candidates for such office to belong to the plan.

§ 452.40 Prior office holding.

A requirement that candidates for office have some prior service in a lower office is not considered reasonable.[26]

[25] If a meeting attendance requirement disqualifies a large portion of members from candidacy, that large antidemocratic effect alone may be sufficient to render the requirement unreasonable. In *Doyle* v. *Brock*, 821 F.2d 778 (D.C. Circuit 1987), the court held that the impact of a meeting attendance requirement which disqualified 97% of the union's membership from candidacy was by itself sufficient to make the requirement unreasonable notwithstanding any of the other factors set forth in 29 CFR 452.38(a).

[26] *Wirtz* v. *Hotel, Motel and Club Employees Union, Local 6*, 391 U.S. 492 at 504. The Court stated that the union, in applying such a rule, ''* * * assumes that rank and file union members are unable to distinguish qualified from unqualified candidates for particular offices without a demonstration of a candidate's performance in other offices. But Congress' model of democratic elections was political elections in this Country, and they are not based on any such assumption. Rather, in those elections the assumption is that voters will exercise common sense and judgment in casting their ballots. Local 6 made no showing that citizens assumed to make discriminating judgments in public elections

§ 452.41 Working at the trade.

(a) It would ordinarily be reasonable for a union to require candidates to be employed at the trade or even to have been so employed for a reasonable period. In applying such a rule an unemployed member is considered to be working at the trade if he is actively seeking such employment. Such a requirement should not be so inflexible as to disqualify those members who are familiar with the trade but who because of illness, economic conditions, or other good reasons are temporarily not working.

(b) It would be unreasonable for a union to prevent a person from continuing his membership rights on the basis of failure to meet a qualification which the union itself arbitrarily prevents the member from satisfying. If a member is willing and able to pay his union dues to maintain his good standing and his right to run for office, it would be unreasonable for the union to refuse to accept such dues merely because the person is temporarily unemployed. Where a union constitution requires applicants for membership to be actively employed in the industry served by the union, a person who becomes a member would not be considered to forfeit his membership in the union or any of the attendant rights of membership merely because he is discharged or laid off.

(c) Ordinarily members working parttime at the trade may not for that reason alone be denied the right to run for office.

(d) A labor organization may postpone the right to run for office of members enrolled in a bona fide apprenticeship program until such members complete their apprenticeship.

§ 452.42 Membership in particular branch or segment of the union.

A labor organization may not limit eligibility for office to particular branches or segments of the union where such restriction has the effect of depriving those members who are not in such branch or segment of the right to become officers of the union.[27]

§ 452.43 Representative categories.

In the case of a position which is representative of a unit defined on a geographic, craft, shift, or similar basis, a labor organization may by its constitution or bylaws limit eligibility for candidacy and for holding office to members of the represented unit. For example, a national or international labor organization may establish regional vice-presidencies and require that each vice-president be a member of his respective region. This kind of limitation would not be considered reasonable, however, if applied to general officers such as the president, vice-president, recording secretary, financial secretary, and treasurer. If eligibility of delegates to a convention which will elect general officers is limited to special categories of members, all such categories within the organization must be represented.

§ 452.44 Dual unionism.

While the Act does not prohibit a person from maintaining membership or holding office in more than one labor organization, it would be considered reasonable for a union to bar from candidacy for office persons who hold membership in a rival labor organization.

§ 452.45 Multiple office holding.

An officer may hold more than one office in a labor organization so long as this is consistent with the constitution and bylaws of the organization.

§ 452.46 Characteristics of candidate.

A labor organization may establish certain restrictions on the right to be a candidate on the basis of personal characteristics which have a direct bearing on fitness for union office. A union may, for example, require a minimum age for candidacy. However, a union may not establish such rules if they would be inconsistent with any other

cannot be relied on to make such judgments when, voting as union members * * *.''

[27] *Hodgson* v. *Local Unions No. 18, etc., IUOE,* 440 F. 2d 485 (C.A. 6), cert. den. 404 U.S. 852 (1971); *Hodgson* v. *Local 610, Unit. Elec. Radio & Mach. Work. of Am.,* 342 F. Supp. 1344 (W.D. Pa. 1972).

Federal law. Thus, it ordinarily may not limit eligibility for office to persons of a particular race, color, religion, sex, or national origin since this would be inconsistent with the Civil Rights Act of 1964.[28] Nor may it establish a general compulsory retirement age or comparable age restriction on candidacy since this would be inconsistent with the Age Discrimination in Employment Act of 1967, as amended. A union may not require candidates for office to be registered voters and to have voted in public elections during the year preceding their nominations. Nor may it require that candidates have voted in the previous union election to be eligible. Such restrictions may not be said to be relevant to the members' fitness for office.

[53 FR 8751, Mar. 17, 1988, as amended at 53 FR 23233, June 21, 1988]

§ 452.47 Employer or supervisor members.

Inasmuch as it is an unfair labor practice under the Labor Management Relations Act (LMRA) for any employer (including persons acting in that capacity) to dominate or interfere with the administration of any labor organization, it follows that employers, while they may be members, may not be candidates for office or serve as officers. Thus, while it is recognized that in some industries, particularly construction, members who become supervisors, or contractors traditionally keep their union membership as a form of job security or as a means of retaining union benefits, such persons may not be candidates for or hold office.[29] Whether a restriction on officeholding by members who are group leaders or others performing some supervisory duties is reasonable depends on the particular circumstances. For instance, if such persons might be considered ''supervisors''[30] under the LMRA, their right to be candidates under the Act may be limited. Another factor in determining the reasonableness of a ban on such persons is the position (if any) of the NLRB on the status of the particular employees involved. If, for example, the NLRB has determined that certain group leaders are part of the bargaining unit, it might be unreasonable for the union to prohibit them from running for office. An overall consideration in determining whether a member may fairly be denied the right to be a candidate for union office as an employer or supervisor is whether there is a reasonable basis for assuming that the person involved would be subject to a conflict of interest in carrying out his representative duties for employees and rank and file union members.

[38 FR 18324, July 3, 1973, as amended at 39 FR 37360, Oct. 21, 1974]

§ 452.48 Employees of union.

A labor organization may in its constitution and bylaws prohibit members who are also its full-time non-elective employees from being candidates for union office, because of the potential conflict of interest arising from the employment relationship which could be detrimental to the union as an institution.

§ 452.49 Other union rules.

(a) Unions may establish such other reasonable rules as are necessary to protect the members against leaders who may have committed serious offenses against the union. For example, a union may, after appropriate proceedings, bar from office persons who have misappropriated union funds, even if such persons were never indicted and convicted in a court of law for their offenses. Of course, the union would have to provide reasonable precautions to insure that no member is

[28] *Shultz* v. *Local 1291, International Longshoremen's Association*, 338 F. Supp. 1204 (E.D. Pa.), aff'd, 461 F.2d 1262 (C.A. 3 1972).

[29] See Nassau and Suffolk Contractors' Association, 118 NLRB No. 19 (1957). See also *Local 636, Plumbers* v. *NLRB*, 287 F.2d 354 (C.A. D.C. 1961).

[30] Under section 2(11) of the Labor Management Relations Act, supervisors include individuals ''having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.''

made ineligible to hold office on the basis of unsupported allegations and that any rights guaranteed him by the constitution and bylaws are protected. Similarly, a union may require an elected officer to sign an affidavit averring that he is not barred from serving as an officer by the provisions of section 504 of the Act since the union and its officers may not permit a person to serve as an officer if he is so barred (see footnote 23).

(b) It would not violate the Act for a union to prohibit successive terms in office or to limit the number of years an officer may serve. Such rules are intended to encourage as many members as possible to seek positions of leadership in the organization.

§ 452.50 Disqualification as a result of disciplinary action.

Section 401(e) was not intended to limit the right of a labor organization to take disciplinary action against members guilty of misconduct. So long as such action is conducted in accordance with section 101(a)(5), a union may, for example, if its constitution and bylaws so provide, bar from office for a period of time any member who is guilty of specific acts, such as strikebreaking, detrimental to the union as an institution. However, if a union has improperly disciplined a member and barred him from candidacy, the Secretary may, in an appropriate case, treat him as a member in good standing entitled to all of the rights of members guaranteed by title IV.

§ 452.51 Declaration of candidacy.

A union may not adopt rules which in their effect discourage or paralyze any opposition to the incumbent officers. Therefore, it would not be a reasonable qualification to require members to file a declaration of candidacy several months in advance of the nomination meeting since such a requirement would have such effect and ''serves no reasonable purpose which cannot otherwise be satisfied without resort to this procedure.'' [31]

[31] *Wirtz* v. *Local 30, IUOE,* 242 F. Supp. 631 (S.D. N.Y. 1965) reversed as moot 366 F.2d 438 (C.A. 2, 1966), reh. den. 366 F.2d 438.

§ 452.52 Filing fee.

It would be unreasonable to require candidates for office to pay a filing fee because a fee limits the right of members to a reasonable opportunity to nominate the candidates of their choice and there is no objective relationship between the requirement and the ability to perform the duties of the office.

§ 452.53 Application of qualifications for office.

Qualifications for office which may seem reasonable on their face may not be proper if they are applied in an unreasonable manner or if they are not applied in a uniform way. An essential element of reasonableness is adequate advance notice to the membership of the precise terms of the requirement. A qualification which is not part of the constitution and bylaws or other duly enacted rules of the organization may not be the basis for denial of the right to run for office, unless required by Federal or State law. [32] Qualifications must be specific and objective. They must contain specific standards of eligibility by which any member can determine in advance whether or not he is qualified to be a candidate. For example, a constitutional provision which states that ''a candidate shall not be eligible to run for office who intends to use his office as a cloak to effect purposes inimical to the scope and policies of the union'' would not be a reasonable qualification within the meaning of section 401(e) because it is so general as to preclude a candidate from ascertaining whether he is eligible and would permit determinations of eligibility based on subjective judgments. Further, such a requirement is by its nature not capable of being uniformly imposed as required by section 401(e).

§ 452.54 Retroactive rules.

(a) The reasonableness of applying a newly adopted restriction on candidacy

[32] *Wirtz* v. *Local Union 559, United Brotherhood of Carpenters and Joiners of America,* 61 LRRM 2618, 53 L.C. ¶11.044 (W.D. Ky. 1966); *Hodgson* v. *Longshoremen's Local 1655 New Orleans Dray Clerks,* 79 LRRM 2893, 67 L.C. ¶12,466 (E.D. La. January 5, 1972).

retroactively depends in part upon the nature of the requirement. It would be unreasonable for a labor organization to enforce eligibility requirements which the members had no opportunity to satisfy. For example, it would not be reasonable for a union to apply a newly adopted meeting attendance requirement retroactively since members would have no opportunity to comply with such requirement prior to its effective date.[33] When such a rule is in effect the membership is entitled to advance notice of the requirements of the rule and of the means to be used in verifying attendance. It would not be unreasonable, however, for a union to adopt and enforce a rule disqualifying persons convicted of a felony from being candidates or holding office.

(b) It would not be proper for a labor organization to amend its constitution after an election to make eligible a person who had been elected but who was not eligible at the time of the election.

Subpart F—Nominations for Office

§ 452.55 Statutory provisions concerning nomination.

In elections subject to the provisions of title IV a reasonable opportunity must be afforded for the nomination of candidates. Although the Act does not prescribe particular forms of nomination procedures, it does require that the procedures employed be reasonable and that they conform to the provisions of the labor organization's constitution and bylaws insofar as they are not inconsistent with the provisions of title IV.

§ 452.56 Notice.

(a) To meet this requirement, the labor organization must give timely notice reasonably calculated to inform all members of the offices to be filled in the election as well as the time, place, and form for submitting nominations. Such notice should be distinguished from the notice of election, discussed in § 452.99. Notice of nominations need not necessarily be given at least 15 days before nominations are held, nor is it required to be given by mail. In an election which is to be held by secret ballot, accordingly, notice of nominations may be given in any manner reasonably calculated to reach all members in good standing and in sufficient time to permit such members to nominate the candidates of their choice, so long as it is in accordance with the provisions of the labor organization's constitution or bylaws. Mailing such notice to the last known address of each member within a reasonable time prior to the date for making nominations would satisfy this requirement. Likewise, timely publication in the union newspaper with sufficient prominence to be seen by all members would be adequate notice. The method of making nominations, whether by mail, petition, or at meetings, could affect the determination of the timeliness of the notice. The nomination notice may be combined with the election notice if the requirements of both are met. Posting of a nomination notice may satisfy the requirement of a reasonable opportunity for making nominations if such posting is reasonably calculated to inform all members in good standing in sufficient time to permit such members to nominate the candidates of their choice.

(b) The requirement of a reasonable opportunity for the nomination of candidates has been met only when the members of a labor organization are fully informed of the proper method of making such nominations.

§ 452.57 Procedures for nomination.

(a) Since the Act does not prescribe particular procedures for the nomination of candidates, the labor organization is free to employ any method that will provide a reasonable opportunity for making nominations. There are various methods which, if properly and fairly employed, would be considered reasonable under the Act. For example, nominations may be by petition, or from the floor at a nomination meeting.

(b) Whether a particular procedure is sufficient to satisfy the requirements of the Act is a question which will depend upon the particular facts in each case. While a particular procedure may

[33] *Hodgson* v. *Longshoremen's Local 1655, New Orleans Dray Clerks,* 79 LRRM 2893, 67 L.C. ¶12,466 (E.D. La. January 5, 1972)

not on its face violate the requirements of the Act, its application in a given instance may make nomination so difficult as to deny the members a reasonable opportunity to nominate.

§ 452.58 Self-nomination.

A system of self-nomination, if this is the only method for making nominations, deprives union members of a reasonable opportunity to nominate candidates and thus is inconsistent with the provisions of title IV.[34] Self-nomination is permissible only if the members are afforded additional methods whereby they may nominate the candidates of their choice.

§ 452.59 Presence of nominee.

A requirement that members must be present at the nomination meeting in order to be nominated for office might be considered unreasonable in certain circumstances; for example, in the absence of a provision for an alternative method under which a member who is unavoidably absent from the nomination meeting may be nominated, such a restriction might be regarded as inconsistent with the requirement in section 401(e) that there be a reasonable opportunity to nominate and to be a candidate.

§ 452.60 Nominations for national, international or intermediate body office.

(a) When officers of a national or international labor organization or of an intermediate body are to be elected by secret ballot among the members of the constituent local unions, it is not unreasonable for the organization to employ a nominating procedure whereby each local may nominate only one candidate for each office. When such a procedure is employed the organization may require that each candidate be nominated by a certain number of locals before his name will appear on the ballot. The reasonableness of the number of local union nominations or endorsements required depends upon the size and dispersion of the organization.

(b) Nominations for national, international or intermediate body office by locals or other subordinate organizations differ from primary elections in that they are not subject to all the technical requirements of secret ballot elections.[35] However, where nominations are made by locals or other subordinate organizations fundamental safeguards must be observed including the right of members to vote for and support the candidates of their choice without improper interference.

§ 452.61 Elimination contests—local unions.

(a) A procedure in a local under which nominees compete in an elimination process to reduce the number of candidates in the final balloting is also part of the election process and must be conducted by secret ballot.

(b) When such an elimination process is used it would be unreasonable for some nominees, such as those selected by a nominating committee, to be exempt from the process since they would thus be given an unfair advantage over other nominees.

§ 452.62 Disqualification of candidates; procedural reasons.

A candidate who is otherwise eligible for office may not be disqualified because of the failure of a union officer to perform his duties which are beyond the candidate's control. For example, the failure of a local recording secretary to perform his duty to complete and forward a candidate's nomination certificate to the district may not be used as the basis for disqualifying the candidate.

§ 452.63 Nominations at conventions.

In elections at conventions at which nominations are also made, delegates who have been elected by secret ballot must be given ample opportunity to

[34] See *Wirtz* v. *National Maritime Union of America,* 399 F.2d 544 (C.A. 2 1968).

[35] In *Hodgson* v. *United Mine Workers of America,* the Court directed that the nomination proceedings within the local unions be conducted by secret ballot and in accordance with the provisions of title IV. [80 LRRM 3451, 68 L.C. ¶12,786 (D.D.C. June 15, 1972)]. This Order indicates that the use of secret ballot nominating procedures may be an appropriate remedial measure in a supervised election.

nominate candidates on behalf of themselves or the members they represent. A union may adopt a rule limiting access to the convention floor to delegates. However, once the candidates have been nominated, they must be accorded equal opportunity to campaign.[36] Where delegates are instructed by locals to nominate candidates, the constitution of the organization or the convention rules should provide a specific procedure for the implementation of nominating instructions issued by any local to its delegate.

§ 452.64 Write-in votes.

The Act neither requires nor prohibits write-in candidacy or write-in votes. These matters are governed by appropriate provisions of the union's constitution and bylaws, applicable resolutions, or the established practice of the union.

§ 452.65 Interval between nominations and election.

The Act specifies no time interval between nominations and election. Thus, both may be scheduled to be held at the same meeting if, during a reasonable period prior to such nomination-election meeting, every member eligible to hold office who intends to run for office is afforded the protection provided in section 401(c), including sufficient opportunity to campaign for office.

Subpart G—Campaign Safeguards

§ 452.66 Statutory provisions.

The opportunity for members to have a free, fair, and informed expression of their choices among candidates seeking union office is a prime objective of title IV of the Act. Voters can best be assured opportunity for an informed choice if certain campaign rights are guaranteed to candidates and their supporters. To this end, the statute provides that adequate safeguards to insure a fair election shall be provided, and states certain specific safeguards. These safeguards apply not only to candidates for officer positions as defined in the Act but also to candidates for delegate posts, if the delegates are to nominate or elect officers.

§ 452.67 Distribution of campaign literature.

The Act imposes the duty on the union and its officers to comply with all reasonable requests of any candidate to distribute his campaign literature to the membership at his expense. When the organization or its officers authorize distribution of campaign literature on behalf of any candidate, similar distribution under the same conditions must be made for any other candidate, if he requests it. In order to avoid charges of disparity of treatment among candidates, it is advised that a union inform all candidates in advance of the conditions under which distribution will be made and promptly advise them of any change in those conditions.

§ 452.68 Distribution to less than full membership.

Although section 401(c) specifies distribution to ''all members in good standing,'' a labor organization must also honor requests for distribution of literature to only a portion of the membership if such distribution is practicable. Each candidate may choose his own ways of campaigning for election according to his own ingenuity and resources. For example, some candidates for national or international union office may desire to limit distribution to delegates, but others may want to appeal directly to the membership or parts thereof in an effort to influence particular constituencies to choose delegates favorable to their candidacy.

§ 452.69 Expenses of campaign literature.

Each candidate must be treated equally with respect to the expense of such distribution. Thus, a union and its officers must honor a candidate's request for distribution where the candidate is willing and able to bear the expense of such distribution. However, should the candidate be unable to bear such expense, there is no requirement that the union distribute the literature of the candidate free of charge. In the

[36] See § 452.79.

event the union distributes any candidate's literature without charge, however, all other candidates are entitled to have their literature distributed on the same basis. Since labor organizations have an affirmative duty to comply with all reasonable requests of any candidate to distribute campaign literature (at the candidate's expense), a union rule refusing all such distributions would not be proper, even though applied in a nondiscriminatory fashion. In view of the fact that expenses of distribution are to be borne by the candidate a labor organization may not refuse to distribute campaign literature merely because it may have a small staff which cannot handle such distribution for all candidates. If this is the case, the organization may employ additional temporary staff or contract the job to a professional mailer and charge the expense incurred to the candidates for whom the service is being rendered. The organization may require candidates to tender in advance the estimated costs of distributing their literature, if such requirement is applied uniformly.

§ 452.70 Contents of literature.

The Act does not and unions may not regulate the contents of campaign literature which candidates may wish to have distributed by the union. This is left to the discretion of each candidate. The labor organization may not require that it be permitted to read a copy of the literature before it is sent out, nor may it censor the statements of the candidates in any way, even though the statement may include derogatory remarks about other candidates. Furthermore, a union's contention that mailing of certain campaign literature may constitute libel for which it may be sued has been held not to justify its refusal to distribute the literature, since the union is under a statutory duty to distribute the material.[37]

[37] See *Philo* v. *Stellato,* (E.D. Mich. Civil No. 21244, May 24, 1961); *Ansley* v. *Fulco,* (Calif. Ct. of Appeal, First App. District, Div. Three, 1 Civil No. 29483, May 31, 1972).

§ 452.71 Inspection of membership lists.

(a) Each bona fide candidate for office has a right, once within 30 days prior to any election in which he is a candidate, to inspect a list containing the names and last known addresses of all members of the labor organization who are subject to a collective bargaining agreement requiring membership therein as a condition of employment. The right of inspection does not include the right to copy the list but does include the right to compare it with a personal list of members. It is the intent of the Act that such membership lists be made available for inspection at the candidates' option any time within the 30-day period. The list is not required to be maintained continuously and may be compiled immediately before each election. The form in which the list is to be maintained is not specified by the Act. Thus, a card index system may satisfy the requirements of the Act. The list may be organized alphabetically or geographically, or by local in a national or international labor organization.

(b) It is the duty of the labor organization and its officers to refrain from discrimination in favor of or against any candidate with respect to the use of lists of members. Thus, if a union permits any candidate to use such lists in any way other than the right of inspection granted by the Act, it must inform all candidates of the availability of the list for that purpose and accord the same privilege to all candidates who request it. Such privileges may include permitting inspection of the list where members are not subject to a collective bargaining agreement requiring membership as a condition of employment, inspecting the list more than once, or copying the list.

[38 FR 18324, July 9, 1973, as amended at 50 FR 31311, Aug. 1, 1985]

§ 452.72 Period of inspection.

The Act specifies the maximum period during which the right of inspection of membership lists is to be granted. The opportunity to inspect the lists must be granted once during the 30-day period prior to the casting of ballots in the election. Thus, where a mail ballot

system is employed under which ballots are returnable as soon as received by members, the right to inspect must be accorded within the 30-day period prior to the mailing of the ballots to members. It would be an unreasonable restriction to permit inspection of lists only after the ballots have been mailed or the balloting has commenced.

§ 452.73 Use of union funds.

In the interest of fair union elections, section 401(g) of the Act places two limitations upon the use of labor organization funds derived from dues, assessments, or similar levy. These limitations are:

(a) No such funds may be contributed or applied to promote the candidacy of any person in an election subject to title IV, either in an election within the organization expending the funds or in any other labor organization; and

(b) No such funds may be used for issuing statements involving candidates in the election.

This section is not intended to prohibit a union from assuming the cost of distributing to the membership on an equal basis campaign literature submitted to the union by the candidates pursuant to the rights granted by section 401(c), as previously discussed, nor does it prohibit the expenditure of such funds for notices, factual statements of issues not involving candidates, and other expenses necessary for the holding of the election.

§ 452.74 Expenditures permitted.

The Act does not prohibit impartial publication of election information. Thus, it would not be improper for a union to sponsor a debate at which all candidates for a particular office are afforded equal opportunity to express their views to the membership prior to an election. Similarly, a union may issue information sheets containing biographical data on all candidates so long as all candidates are given equal opportunity to submit such data.

§ 452.75 Union newspapers.

The provisions of section 401(g) prohibit any showing of preference by a labor organization or its officers which is advanced through the use of union funds to criticize or praise any candidate. Thus, a union may neither attack a candidate in a union-financed publication nor urge the nomination or election of a candidate in a union-financed letter to the members. Any such expenditure regardless of the amount, constitutes a violation of section 401(g).[38]

§ 452.76 Campaigning by union officers.

Unless restricted by constitutional provisions to the contrary, union officers and employes retain their rights as members to participate in the affairs of the union, including campaigning activities on behalf of either faction in an election. However, such campaigning must not involve the expenditure of funds in violation of section 401(g). Accordingly, officers and employees may not campaign on time that is paid for by the union, nor use union funds, facilities, equipment, stationery, etc., to assist them in such campaigning. Campaigning incidental to regular union business would not be a violation.

§ 452.77 Permissible use of union funds.

Certain uses of union funds are considered permissible under section 401(g). For example, a court ruled that money of a subordinate union may be contributed to a committee formed to challenge the results of a national union election under title IV when such contributions are properly authorized by the members in an effort to pursue election remedies both within and outside the union. In holding such activity to be outside the prohibitions of section 401(g), although the committee was formed by defeated candidates and their supporters, the court stated that ''* * * It does not promote the candidacy of any person if an election is declared invalid by a court under title IV's procedure despite the fact that in the rerun election the candidates may be identical. Neither the winner nor the loser of the disputed election gains votes by the setting

[38] *Hodgson* v. *Liquor Salesmen's Union, Local No. 2,* 334 F.Supp. 1369 (S.D. N.Y.) aff'd 444 F.2d 1344 (C.A. 2 1971); *Shultz* v. *Local Union 6799, United Steelworkers,* 426 F.2d 969 (C.A. 9 1970).

aside of the election. Such action is not a vote-getting device but merely returns the parties to their pre-election status; it does not place any candidate into office.'' [39]

[38 FR 18324, July 9, 1973, as amended at 63 FR 33780, June 19, 1998]

§ 452.78 Expenditures by employers.

(a) As an additional safeguard, section 401(g) provides that no money of an employer is to be contributed or applied to promote the candidacy of any person in an election subject to the provisions of title IV. This includes indirect as well as direct expenditures. Thus, for example, campaigning by union stewards on company time with the approval of the employer would violate section 401(g) unless it can be shown that they are on legitimate work assignments, and that their campaign activities are only incidental to the performance of their assigned task and do not interfere with its performance. This prohibition against the use of employer money includes any costs incurred by an employer, or anything of value contributed by an employer, in order to support the candidacy of any individual in an election. It would not, however, extend to ordinary business practices which result in conferring a benefit, such as, for example, a discount on the cost of printing campaign literature which is made available on the same terms to other customers.

(b) The prohibition against the use of employer money to support the candidacy of a person in any election subject to the provisions of title IV is not restricted to employers who employ members of the labor organization in which the election is being conducted, or who have any business or contractual relationship with the labor organization.

§ 452.79 Opportunity to campaign.

There must be a reasonable period prior to the election during which office-seekers and their supporters may engage in the campaigning that the Act contemplates and guarantees. What is a reasonable period of time would depend upon the circumstances, including the method of nomination and the size of the union holding the election, both in terms of the number of members and the geographic area in which it operates. For example, a candidate for office in a local labor organization was improperly disqualified and then appealed to the international union which directed that his name be placed on the ballot. A complaint was considered properly filed alleging election violations because the candidate's name was restored to the ballot two days prior to the election so that he was denied an equal opportunity to campaign. Similarly, in a mail ballot election a union's delay in the distribution of campaign literature until after the ballots have been distributed and some have been cast would not satisfy the requirement to distribute such literature in compliance with a reasonable request. [40] Such a delay would deny the candidate a reasonable opportunity to campaign prior to the election and would thus not meet the requirement for adequate safeguards to insure a fair election. Where access to the convention floor is limited exclusively to delegates at a convention at which officers are to be elected, there must, nevertheless, be equal opportunity for all nominees to campaign. Thus, if the privilege of addressing the convention is accorded to any of the nominees, it must be accorded to all nominees who request it, whether they are delegates or not.

§ 452.80 Bona fide candidates.

A person need not be formally nominated in order to be a bona fide candidate entitled to exercise the rights mentioned in §§ 452.67 and 452.71. [41] Thus, any qualified member seeking to be nominated and elected at a convention would be able to take advantage of the distribution rights even before the convention meets and thus attempt to influence members to select delegates

[39] *Retail Clerks Union, Local 648* v. *Retail Clerks International Association,* 299 F.Supp. 1012, 1024 (D.D.C. 1969).

[40] *Wirtz* v. *American Guild of Variety Artists,* 267 F. Supp. 527 (S.D.N.Y. 1967).

[41] *Yablonski* v. *United Mine Workers,* 71 LRRM 2606, 60 L.C. 10,204 (D.D.C. 1969).

favorable to his candidacy or to persuade the delegates to support his candidacy. A union may reasonably require that a person be nominated in order to be elected, but may not prevent a member who actively seeks office and is otherwise qualified from taking advantage of the campaign safeguards in the Act in an effort to gain the support necessary to be nominated.

§ 452.81 Rights in intermediate body elections.

While the literal language in section 401(c) relating to distribution of campaign literature and to discrimination with respect to the use of membership lists would seem to apply only to national, international and local labor organizations, two United States District Courts have held that these provisions also apply to intermediate bodies.[42] The Department of Labor considers these rulings to be consistent with the intent of Congress and, therefore, has adopted this position.

§ 452.82 Reprisal for exercising rights.

A member has a right to support the candidate of his choice without being subject to penalty, discipline, or improper interference or reprisal of any kind by the labor organization conducting the election or any member thereof.

§ 452.83 Enforcement of campaign safeguards.

Certain of the safeguards of section 401(c) are enforceable at the suit of any bona fide candidate. This special statutory right to sue is limited to the distribution of campaign literature by the labor organization and the forbearance of such organization from discrimination among candidates with respect to the use of membership lists. Of course, all title IV safeguards, including those discussed in this paragraph, are subject to enforcement as provided in section 402. It should be noted that the right of a bona fide candidate to sue in the circumstances described herein is limited to the period prior to election. After the election, the only remedy would be through a suit by the Secretary under section 402.

Subpart H—Right To Vote

§ 452.84 General.

Under the provisions of section 401(e), every member in good standing is entitled to vote in elections required under title IV which are to be held by secret ballot. The phrase ''member in good standing'' includes any person who has fulfilled the requirements for membership and who neither has withdrawn from membership nor has been expelled or suspended from membership after appropriate proceedings consistent with lawful provisions of the constitution and bylaws of the organization.[43]

§ 452.85 Reasonable qualifications on right to vote.

The basic right of members to vote in elections of the labor organization may be qualified by reasonable rules and regulations in its constitution and bylaws.[44]

§ 452.86 Vote conditioned on payment of dues.

A labor organization may condition the exercise of the right to vote upon the payment of dues, which is a basic obligation of membership. Such a rule must be applied uniformly. If a member has not paid his dues as required by the labor organization's constitution or bylaws he may not be allowed to vote. Thus, a rule which suspends a member's right to vote in an election of officers while the member is laid off and is not paying dues would not, in ordinary circumstances, be considered unreasonable, so long as it is applied in a nondiscriminatory manner. However, members must be afforded a reasonable opportunity to pay dues, including a grace period during which dues may be paid without any loss of rights. In the case where a member is laid off but desires to maintain his good standing and thus his membership rights by continuing to pay dues, it would be clearly unreasonable for the labor organization to refuse to accept his payment.

[42] *Antal* v. *UMW District 5*, 64 LRRM 2222, 54 L.C. 11,621 (W.D. Pa. 1966); *Schonfeld* v. *Rarback*, 49 L.C. 19,039 (S.D.N.Y. 1964).

[43] Act, sec. 3(o).

[44] Act, sec. 101(a)(1).

§ 452.87 Dues paid by checkoff.

A member in good standing whose dues are checked off by his employer pursuant to his voluntary authorization provided for in a collective bargaining agreement may not be disqualified from voting by reason of alleged delay or default in the payment of dues. For example, the constitution and bylaws of a labor organization call for suspension of members whose dues are three months in arrears. Dues to be paid directly by a member are two months in arrears when the union changes to a checkoff system. The member may not be denied the right to vote merely because the employer is late in submitting the checked off dues for the first month. It would not be inconsistent with the Act, however, for a union to require a new member who executes a checkoff authorization to pay one month's dues in advance on the date he becomes a member in order to be in good standing for the current month.

§ 452.88 Resumption of good standing.

While it is permissible for a labor organization to deny the right to vote to those delinquent in paying their dues (with the exceptions noted) or to those who have been suspended or disciplined in accordance with section 101(a)(5) of the Act, a provision under which such persons are disqualified from voting for an extended period of time after payment of back dues or after reinstatement would not be considered reasonable. After a member has resumed his good-standing status, it would be unreasonable to continue to deprive him of his right to vote for a period longer than that for a new member. A new member may reasonably be required to establish a relationship with the union by remaining in good standing for a continuous period of time, e.g., 6 months or a year, before being permitted to vote in an election of officers. However, while the right to vote may be deferred within reasonable limits, a union may not create special classes of nonvoting members.

§ 452.89 Apprentices.

A labor organization may condition the right to vote upon completion of a bona fide program of apprenticeship training which is designed to produce competent tradesmen in the industry the union serves.

§ 452.90 Visiting members.

A decision about the voting rights of visiting members is properly one for resolution by the union in accordance with the organization's constitution and bylaws or applicable resolutions. For purposes of the Act, a person is ordinarily considered to be a member of the local to which he pays his dues.

§ 452.91 Voting by employers, supervisors.

Voting in union elections by employers, self-employed persons, supervisors or other persons who are considered to be part of management is not precluded by title IV of the Act even if they are not required to maintain union membership as a condition of employment. However, as mentioned in the discussion of qualifications for candidacy (see § 452.47), such persons may not dominate or interfere with the administration of any labor organization.

§ 452.92 Unemployed members.

Members who are otherwise qualified to vote may not be disqualified from voting merely because they are currently unemployed or are employed on a part-time basis in the industry served by the union, provided, of course, that such members are paying dues.

§ 452.93 Retired members.

The right of retirees to vote may be restricted to the extent provided by the constitution and bylaws of the labor organization.

§ 452.94 Reasonable opportunity to vote.

The statutory protection of the right to vote implies that there must be a reasonable opportunity to vote. Thus, there is an obligation on the labor organization to conduct its periodic election of officers in such a way as to afford all its members a reasonable opportunity to cast ballots. A union may meet this obligation in a variety of ways, depending on factors such as the distance between the members' work site or homes and the polling place, the means of transportation available, the

nature of the members' occupations, and their hours of work. A reasonable opportunity to vote may require establishing multiple polling places or the use of a mail ballot referendum when the members are widely dispersed. It would also be reasonable for the time period for voting to be extended to accommodate members who might otherwise be prevented from voting due to conflicting work schedules. Shortening the voting period by a late opening of the polls would not, in itself, be improper unless the intent or practical effect of such action is to deprive members of their right to vote.

§ 452.95 Absentee ballots.

Where the union knows in advance that a substantial number or a particular segment of the members will not be able to exercise their right to vote in person, as, for example, when access to a polling place is impracticable for many members because of shipping assignments, absentee ballots or other means of voting must be made available.[45] In the event absentee ballots are necessary the organization must give its members reasonable notice of the availability of such ballots.[46]

Subpart I—Election Procedures; Rights of Members

§ 452.96 General.

The Act safeguards democratic processes by prescribing, in section 401, minimum standards for the regular periodic election of officers in labor organizations subject to its provisions. It does not, however, prescribe in detail election procedures which must be followed. Labor organizations are free to establish procedures for elections as long as they are fair to all members and are consistent with lawful provisions of the organization's constitution and bylaws and with section 401. The rights granted to members in section 401(e) refer to individuals, not labor organizations. For example, while locals may be members of an intermediate body, they are not entitled to the rights granted ''members'' in section 401(e).

§ 452.97 Secret ballot.

(a) A prime requisite of elections regulated by title IV is that they be held by secret ballot among the members or in appropriate cases by representatives who themselves have been elected by secret ballot among the members. A secret ballot under the Act is ''the expression by ballot, voting machine, or otherwise, but in no event by proxy, of a choice * * * cast in such a manner that the person expressing such choice cannot be identified with the choice expressed.''[47] Secrecy may be assured by the use of voting machines, or, if paper ballots are used, by providing voting booths, partitions, or other physical arrangements permitting privacy for the voter while he is marking his ballot. The ballot must not contain any markings which upon examination would enable one to identify it with the voter. Balloting by mail presents special problems in assuring secrecy. Although no particular method of assuring such secrecy is prescribed, secrecy may be assured by the use of a double envelope system for return of the voted ballots with the necessary voter identification appearing only on the outer envelope.

(b) Should any voters be challenged as they are casting their ballots, there should be some means of setting aside the challenged ballots until a decision regarding their validity is reached without compromising the secrecy requirement. For example, each such ballot might be placed in an envelope with the voter's name on the outside. Of course, it would be a violation of the secrecy requirement to open these envelopes and count the ballots one at a time in such a way that each vote could be identified with a voter.

(c) In a mail ballot election, a union may require members to sign the return envelope if the signatures may be used in determining eligibility. However, it would be unreasonable for a union to void an otherwise valid ballot

[45] *Goldberg* v. *Marine Cooks and Stewards Union*, 204 F. Supp. 844 (N.D. Cal. 1962).

[46] *Wirtz* v. *Local Union 262, Glass Bottle Blowers Association*, 290 F. Supp. 965 (N.D. Calif. 1968).

[47] Act, sec. 3(k).

merely because a member printed rather than signed his name if the union does not use the signatures to determine voter eligibility.

§ 452.98 Outside agencies.

There is nothing in the Act to prevent a union from employing an independent organization as its agent to handle the printing, mailing, and counting of ballots in such elections if all the standards of the Act are met.

§ 452.99 Notice of election.

Elections required by title IV to be held by secret ballot must be preceded by a notice of election mailed to each member at his last known home address not less than fifteen days prior to the election.[48] For purposes of computing the fifteen day period, the day on which the notices are mailed is not counted whereas the day of the election is counted. For example, if the election is to be held on the 20th day of the month, the notices must be mailed no later than the 5th day. The notice must include a specification of the date, time and place of the election and of the offices to be filled, and it must be in such form as to be reasonably calculated to inform the members of the impending election. Specification of the offices to be filled would not be necessary if it is a regular, periodic election of all officers and the notice so indicates. A statement in the union bylaws that an election will be held at a certain time does not constitute the notice required by the statute. Since the Act specifies that the notice must be mailed, other means of transmission such as posting on a bulletin board or hand delivery will not satisfy the requirement. A notice of election must be sent to every member as defined in section 3(o) of the Act, not only to members who are eligible to vote in the election. Where the notice, if mailed to the last known permanent or legal residence of the member, would not be likely to reach him because of a known extended absence from that place, the statutory phrase ''last known home address'' may reasonably be interpreted to refer to the last known temporary address of definite duration. A single notice for both nominations and election may be used if it meets the requirements of both such notices.[49]

[38 FR 18324, July 9, 1973, as amended at 63 FR 33780, June 19, 1998]

§ 452.100 Use of union newspaper as notice.

A labor organization may comply with the election notice requirement by publishing the notice in the organization's newspaper which is mailed to the last known home address of each member not less than fifteen days prior to the election. Where this procedure is used (a) the notice should be conspicuously placed on the front page of the newspaper, or the front page should have a conspicuous reference to the inside page where the notice appears, so that the inclusion of the election notice in a particular issue is readily apparent to each member; (b) the notice should clearly identify the particular labor organization holding the election; (c) the notice should specify the time and place of the election and the offices to be filled; and (d) a reasonable effort must be made to keep the mailing list of the publication current.

§ 452.101 Sample ballots as notice.

Sample ballots together with information as to the time and place of the election and the offices to be filled, if mailed fifteen days prior to the election, will fulfill the election notice requirements.

§ 452.102 Notice in mail ballot election.

If the election is conducted by mail and no separate notice is mailed to the members, the ballots must be mailed to the members no later than fifteen days prior to the date when they must be mailed back in order to be counted.

§ 452.103 Primary elections.

The fifteen-day election notice provision applies to a ''primary election'' at which nominees are chosen. Likewise, the fifteen-day election notice requirement applies to any runoff election

[48] Act, sec. 401(e).

[49] See § 452.56 for a discussion of the requirements for notices of nomination.

which may be held after an inconclusive election. However, a separate notice would not be necessary if the election notice for the first election advises the members of the possibility of a runoff election and specifies such details as the time and place of such runoff election as may be necessary.

§ 452.104 Proximity of notice to election.

(a) The statutory requirement for giving fifteen days' notice of election is a minimum standard. There is no objection to giving more notice than is required by law. However, it was clearly the intent of Congress to have members notified at a time which reasonably precedes the date of the election. For example, notice in a union publication which is expected to cover elections to be held six months later would not be considered reasonable.

(b) Should a union change the date of an election from the date originally announced in the mail notice to the members, it must mail a second notice, containing the corrected date, at least fifteen days before the election.

§ 452.105 Interference or reprisal.

Title IV expressly provides for the right of a member to vote for and otherwise support the candidates of his choice without being subject to penalty, discipline, or improper interference or reprisal of any kind by the labor organization conducting the election or any officer or member thereof.[50]

§ 452.106 Preservation of records.

In every secret ballot election which is subject to the Act, the ballots and all other records pertaining to the election must be preserved for one year.[51] The responsibility for preserving the records is that of the election officials designated in the constitution and bylaws of the labor organization or, if none is so designated, its secretary. Since the Act specifies that ballots must be retained, all ballots, marked or unmarked, must be preserved. Independent certification as to the number and kind of ballots destroyed may not be substituted for preservation. In addition, ballots which have been voided, for example, because they were received late or because they were cast for an ineligible candidate, must also be preserved.

§ 452.107 Observers.

(a) Under the provisions of section 401(c), each candidate must be permitted to have an observer (1) at the polls and (2) at the counting of the ballots. This right encompasses every phase and level of the counting and tallying process, including the counting and tallying of the ballots and the totaling, recording, and reporting of tally sheets. If there is more than one polling place, the candidate may have an observer at each location. If ballots are being counted at more than one location or at more than one table at a single location, a candidate is entitled to as many observers as necessary to observe the actual counting of ballots. The observer may note the names of those voting so that the candidates may be able to ascertain whether unauthorized persons voted in the election. The observers should be placed so that they do not compromise, or give the appearance of compromising, the secrecy of the ballot. The observer is not required to be a member of the labor organization unless the union's constitution and bylaws require him to be a member. There is no prohibition on the use of alternate observers, when necessary, or on a candidate serving as his own observer. Observers do not have the right to count the ballots.

(b) The right to have an observer at the polls and at the counting of the ballots extends to all candidates for office in an election subject to title IV, i.e., this includes elections in intermediate bodies as well as elections in locals and national and international labor organizations.

(c) In any secret ballot election which is conducted by mail, regardless

[50] Act, section 401(e). In *Wirtz* v. *Local 1752, ILA*, 56 LRRM 2303, 49 L.C. ¶18,998 (S.D. Miss. 1963), the court, under its equitable jurisdiction, granted a preliminary injunction on the motion of the Secretary to enjoin a union from taking disciplinary action against a member. The member had filed a complaint with the Secretary under section 402(a) that resulted in the Secretary filing suit under 402(b).

[51] Act, section 401(e).

of whether the ballots are returned by members to the labor organization office, to a mail box, or to an independent agency such as a firm of certified public accountants, candidates must be permitted to have an observer present at the preparation and mailing of the ballots, their receipt by the counting agency and at the opening and counting of the ballots.

(d) Paying election observers is the responsibility of the candidate they represent unless the union has a rule providing for the payment of observers. If the union does have such a rule, it must be uniformly applied to all candidates.

§ 452.108 Publication of results.

In any election which is required by the Act to be held by secret ballot, the votes cast by members of each local labor organization must be counted, and the results published, separately.[52] For example, where officers of an intermediate body are elected directly by members, the votes of each local must be tabulated and published separately. The publishing requirement is to assure that the results of the voting in each local are made known to all interested members. Thus, the presentation of the election report at a regular local membership meeting, and the entry of the report in the minutes, would normally accomplish this purpose in a local election. Such minutes would have to be available for inspection by members at reasonable times, unless copies of the report are made available. In an election that encompasses more than one local, publication may be accomplished by posting on appropriate bulletin boards, or in a union newspaper, or by any procedure which allows any member to obtain the information without unusual effort. Of course, the counting and reporting should account for all ballots cast in the election, although only valid votes will be counted in determining the successful candidates.

[52] Act, sec. 401(e). See also Senate Report 187, 86th Cong. 1st sess., p. 47; Daily Cong. Rec. p. 13682, Aug. 3, 1959, and p. A6573, July 29, 1959.

§ 452.109 Constitution of labor organization.

Elections must be conducted in accordance with the constitution and bylaws of the organization insofar as they are not inconsistent with the provisions of title IV.[53]

§ 452.110 Adequate safeguards.

(a) In addition to the election safeguards discussed in this part, the Act contains a general mandate in section 401(c), that adequate safeguards to insure a fair election shall be provided. Such safeguards are not required to be included in the union's constitution and bylaws, but they must be observed. A labor organization's wide range of discretion regarding the conduct of elections is thus circumscribed by a general rule of fairness. For example, if one candidate is permitted to have his nickname appear on the ballot, his opponent should enjoy the same privilege.

(b) A union's failure to provide voters with adequate instructions for properly casting their ballots may violate the requirement of adequate safeguards to insure a fair election.

§ 452.111 Campaigning in polling places.

There must not be any campaigning within a polling place[54] and a union may forbid any campaigning within a specified distance of a polling place.

§ 452.112 Form of ballot; slate voting.

The form of the ballot is not prescribed by the Act. Thus, a union may, if it so desires, include a proposed bylaw change or other similar proposal on a ballot along with the candidates for office so long as this is permissible under the union's constitution and bylaws. A determination as to the position of a candidate's name on the ballot may be made by the union in any reasonable manner permitted by its constitution and bylaws, consistent with the requirement of fairness and

[53] Act, sec. 401(e). Under 29 CFR 402.10, a labor organization is required to make available to all members a copy of its constitution and bylaws.

[54] See *Hodgson* v. *UMW*, 344 F.Supp. 17 (D.D.C. 1972).

the other provisions of the Act. For example, candidates may be listed according to their affiliation with a particular slate. However, while ''slate voting'' is permissible, the balloting must be consistent with the right of members to vote for the candidates of their choice. Thus, there must be provision for the voter to choose among individual candidates if he does not wish to vote for an entire slate. To avoid any misunderstanding in this regard, the voting instructions should specifically inform the voter that he need not vote for an entire slate.

§ 452.113 Sectional balloting.

The ballots may be prepared so that the names of candidates for positions representative of a particular area appear only on the ballots received by members living in that area.

§ 452.114 Write-in votes.

Where write-in votes are permitted in an election subject to title IV, details of the format of the ballot are left to the discretion of the union. Ordinarily, the Secretary would become involved in such matters only in the context of an election complaint under section 402 and then only if the arrangements for write-in votes were so unreasonable that the outcome of the election may have been affected. Of course, a union may, in accordance with its constitution and bylaws or as a matter of stated policy, refuse to permit write-in votes.

§ 452.115 Distribution of ballots.

So long as secrecy of the ballot is maintained, there is no restriction on how the ballots are distributed to the voters. Any method which actually provides each eligible voter with one blank ballot would be in conformance with the law.

§ 452.116 Determining validity of ballots.

Generally, a labor organization has a right to establish reasonable rules for determining the validity of ballots cast in an election. However, where the union has no published guides for determining the validity of a voted ballot, it must count any ballot voted in such a way as to indicate fairly the intention of the voter. An entire ballot may not be voided because of a mistake made in voting for one of the offices on the ballot.

§ 452.117 Majority of votes not required for election.

A labor organization may by its constitution and bylaws provide for the election of the candidate who receives the greatest number of votes, although he does not have a majority of all the votes cast. Alternatively, it may provide that where no candidate receives a majority of all the votes cast, a run-off election be held between the two candidates having the highest vote. Similarly, a labor organization conducting an election to choose five members of an executive board may designate as elected from among all the nominees the five candidates who receive the highest vote.

§ 452.118 Local unions agents in international elections.

An international union may establish internal rules which require local or intermediate union officials to act as agents of the international in conducting designated aspects of the international referendum election of officers. The consequences of the failure to perform as directed by such officials will, of course, depend on the totality of the circumstances involved.

§ 452.119 Indirect elections.

National or international labor organizations subject to the Act have the option of electing officers either directly by secret ballot among the members in good standing or at a convention of delegates or other representatives who have been elected by secret ballot among the members. Intermediate labor organizations subject to the Act have the option of electing officers either directly by secret ballot among the members in good standing or by labor organization officers or delegates elected by secret ballot vote of the members they represent. Local unions, in contrast, do not have the option of conducting their periodic elections of officers indirectly through representatives.

§ 452.120 Officers as delegates.

Officers of labor organizations who have been elected by secret ballot vote of their respective memberships may, by virtue of their election to office, serve as delegates to conventions at which officers will be elected, if the constitution and bylaws of the labor organization so provide. In such cases it is advisable to have a statement to this effect included on the ballots. Persons who have been appointed to serve unexpired terms of officers who are ex officio delegates to a convention at which officers will be elected may not vote for officers in such election.

§ 452.121 Limitations on national or international officers serving as delegates.

While officers of national or international labor organizations or of intermediate bodies who have been elected by a vote of the delegates to a convention may serve as delegates to conventions of their respective labor organizations if the constitution and bylaws so provide, they may not vote in officer elections at such conventions unless they have also been elected as delegates by a secret ballot vote of the members they are to represent. Of course, such officers may participate in the convention, i.e., they may preside over the convention, be nominated as candidates, or act in other capacities permitted under the organization's constitution and bylaws.

§ 452.122 Delegates from intermediate bodies; method of election.

A delegate from an intermediate body who participates in the election of officers at a national or international convention must have been elected by a secret ballot vote of the individual members of the constituent units of that body. He may not participate if he was elected by the delegates who make up the intermediate body. The secret ballot election required by the Act is an election among the general membership and not an election of delegates by other delegates.

§ 452.123 Elections of intermediate body officers.

Section 401(d) states that officers of intermediate bodies shall be elected either by secret ballot among the members in good standing or by labor organization officers representative of such members who have been elected by secret ballot. The phrase ''officers representative of such members'' includes delegates who have been elected by secret ballot to represent labor organizations in intermediate bodies. Such delegates may therefore participate in the election of officers of intermediate bodies regardless of whether they are characterized as officers of the labor organization they represent.

§ 452.124 Delegates from units which are not labor organizations.

To the extent that units, such as committees, which do not meet the definition of a labor organization under the Act[55] participate in the election of officers of a national or international labor organization or an intermediate body, through delegates to the convention or otherwise, the provisions of title IV are, nevertheless, applicable to the election of such delegates. The following example is typical in organizations of railway employees. The chairman of a local grievance committee, which is not a labor organization under the Act, is not an officer within the meaning of the Act. If such a local chairman is a delegate to the general grievance committee, which is considered to be an intermediate body under the Act, however, he must be elected by secret ballot vote of the members he represents, if he votes for officers of the general grievance committee.

§ 452.125 Delegates from labor organizations under trusteeship.

It would be unlawful under section 303(a)(1) of the Act to count the votes of delegates from a labor organization under trusteeship in any convention or election of officers of the organization imposing the trusteeship unless such delegates were chosen by secret ballot vote in an election in which all the

[55] Act, sec. 3 (i) and (j) and part 451 of this chapter.

members in good standing of the subordinate organization were eligible to participate.[56]

§ 452.126 Delegates to conventions which do not elect officers.

Delegates to conventions need not be elected by secret ballot when officers of the organization are elected by a secret ballot vote of the entire membership. However, if the only method of making nominations is by delegates, then the delegates must be elected by secret ballot.

§ 452.127 Proportionate representation.

When officers of a national, international or intermediate labor organization are elected at a convention of delegates who have been chosen by secret ballot, the structure of representation of the membership is a matter for the union to determine in accordance with its constitution and bylaws. There is no indication that Congress intended, in enacting title IV of the Act, to require representation in delegate bodies of labor organizations to reflect the proportionate number of members in each subordinate labor organization represented in such bodies. Questions of such proportionate representation are determined in accordance with the labor organization's constitution and bylaws insofar as they are not inconsistent with the election provisions of the Act. Congress did not attempt to specify the organizational structure or the system of representation which unions must adopt. However, all members must be represented; the union may not deny representation to locals below a certain size.

§ 452.128 Under-strength representation.

A local union may elect fewer delegates than it is permitted under the union constitution as long as the local is allowed to determine for itself whether or not it will send its full quota of delegates to the union convention. The delegates present from a local may cast the entire vote allotted to that local if this is permitted by the constitution and bylaws.

§ 452.129 Non-discrimination.

Further, distinctions in representational strength among or within locals may not be based on arbitrary and unreasonable factors such as race, sex, or class of membership based on type of employment.

§ 452.130 Expenses of delegates.

A local may elect two groups—one which would receive expenses while the other would be required to pay its own way, provided each member has an equal opportunity to run for the expense-paid as well as the non-expense-paid positions.

§ 452.131 Casting of ballots; delegate elections.

The manner in which the votes of the representatives are cast in the convention is not subject to special limitations. For example, the voting may be by secret ballot, by show of hands, by oral roll call vote, or if only one candidate is nominated for an office, by acclamation or by a motion authorizing the convention chairman to cast a unanimous vote of the delegates present.

§ 452.132 Proxy voting.

There is no prohibition on delegates in a convention voting by proxy, if the constitution and bylaws permit.

§ 452.133 Election of delegates not members of the labor organization.

A labor organization's constitution and bylaws may authorize the election of delegates who are not members of the subordinate labor organization they represent, provided the members of the subordinate organization are also eligible to be candidates.

§ 452.134 Preservation of records.

The credentials of delegates, and all minutes and other records pertaining to the election of officers at conventions, must be preserved for one year by the officials designated in the constitution and bylaws or by the secretary if no other officer is designated. This requirement applies not only to

[56] Section 303(b) of the LMRDA provides criminal penalties for violation of section 303(a)(1).

conventions of national or international labor organizations, but also to representative bodies of intermediate labor organizations.

Subpart J—Special Enforcement Provisions

§ 452.135 Complaints of members.

(a) Any member of a labor organization may file a complaint with the Office of Labor-Management Standards alleging that there have been violations of requirements of the Act concerning the election of officers, delegates, and representatives (including violations of election provisions of the organization's constitution and bylaws that are not inconsistent with the Act.).[57] The complaint may not be filed until one of the two following conditions has been met: (1) The member must have exhausted the remedies available to him under the constitution and bylaws of the organization and its parent body, or (2) he must have invoked such remedies without obtaining a final decision within three calendar months after invoking them.

(b) If the member obtains an unfavorable final decision within three calendar months after invoking his available remedies, he must file his complaint within one calendar month after obtaining the decision. If he has not obtained a final decision within three calendar months, he has the option of filing his complaint or of waiting until he has exhausted the available remedies within the organization. In the latter case, if the final decision is ultimately unfavorable, he will have one month in which to file his complaint.

§ 452.136 Investigation of complaint by Office of Labor-Management Standards, court action by the Secretary.

(a) The Office of Labor-Management Standards is required to investigate each complaint of a violation filed in accordance with the requirements of the Act and, if the Secretary finds probable cause to believe that a violation has occurred and has not been remedied, he is directed to bring within 60 days after the complaint has been filed a civil action against the labor organization in a Federal district court. In any such action brought by the Secretary the statute provides that if, upon a preponderance of the evidence after a trial upon the merits, the court finds (1) that an election has not been held within the time prescribed by the election provisions of the Act or (2) that a violation of these provisions ''may have affected the outcome of an election'', the court shall declare the election, if any, to be void and direct the conduct of an election under the supervision of the Secretary, and, so far as is lawful and practicable, in conformity with the constitution and bylaws of the labor organization.

(b) Violations of the election provisions of the Act which occurred in the conduct of elections held within the prescribed time are not grounds for setting aside an election unless they ''may have affected the outcome.'' The Secretary, therefore, will not institute court proceedings upon the basis of a complaint alleging such violations unless he finds probable cause to believe that they ''may have affected the outcome of an election.''

(b–1) The Supreme Court, in *Hodgson* v. *Local Union 6799, Steelworkers Union of America*, 403 U.S. 333, 91 S.Ct. 1841 (1971), ruled that the Secretary of Labor may not include in his complaint a violation which was known to the protesting member but was not raised in the member's protest to the union.

Complaints filed by the Department of Labor will accordingly be limited by that decision to the matters which may fairly be deemed to be within the scope of the member's internal protest and those which investigation discloses he could not have been aware of.

(c) Elections challenged by a member are presumed valid pending a final decision. The statute provides that until such time, the affairs of the labor organization shall be conducted by the elected officers or in such other manner as the union constitution and bylaws provide. However, after suit is filed by the Secretary the court has power to take appropriate action to preserve the labor organization's assets.

[38 FR 18324, July 3, 1973, as amended at 39 FR 37360, Oct. 21, 1974]

[57] Act, sec. 402(a).

Subpart K—Dates and Scope of Application

§ 452.137 Effective dates.

(a) Section 404 states when the election provisions of the Act become applicable.[58] In the case of labor organizations whose constitution and bylaws can be lawfully modified or amended by action of the organization's ''constitutional officers or governing body,'' the election provisions become applicable 90 days after the enactment of the statute (December 14, 1959). Where the modification of the constitution and bylaws of a local labor organization requires action by the membership at a general meeting or by referendum, the general membership would be a ''governing body'' within the meaning of this provision. In the cases where any necessary modification of the constitution and bylaws can be made only by a constitutional convention of the labor organization, the election provisions become applicable not later than the next constitutional convention after the enactment of the statute, or one year after the enactment of the statute, whichever is sooner.

(b) The statute does not require the calling of a special constitutional convention to make such modifications. However, if no convention is held within the one-year period, the executive board or similar governing body that has the power to act for the labor organization between conventions is empowered by the statute to make such interim constitutional changes as are necessary to carry out the provisions of title IV of the Act. Any election held thereafter would have to comply with the requirements of the Act.

§ 452.138 Application of other laws.

(a) Section 403[59] provides that no labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws, except as otherwise provided by the election provisions of the Act.

(b) The remedy[60] provided in the Act for challenging an election already conducted is exclusive.[61] However, existing rights and remedies to enforce the constitutions and bylaws of such organizations before an election has been held are unaffected by the election provisions. Section 603[62] which applies to the entire Act, states that except where explicitly provided to the contrary, nothing in the Act shall take away any right or bar any remedy of any union member under other Federal law or law of any State.

[38 FR 18324, July 9, 1973, as amended at 50 FR 31311, Aug. 1, 1985]

PART 453—GENERAL STATEMENT CONCERNING THE BONDING REQUIREMENTS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959

INTRODUCTION

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[58] Act, sec. 404.

[59] Act, sec. 403.

[60] Act, sec. 402.

[61] Act, sec. 403. See Daily Cong. Rec. 86th Cong., 1st sess., p. 9115, June 8, 1959, pp. 13017 and 13090, July 27, 1959. H. Rept. No. 741, p. 17; S. Rept. No. 187, pp. 21–22, 101, 104. Hearings, House Comm. on Education and Labor, 86th Cong., 1st sess., pt. 1, p. 1611. See also *Furniture Store Drivers Local 82* v. *Crowley*, 104 S.Ct. 2557 (1984).

[62] Act, sec. 603.

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AUTHORITY: Sec. 502, 73 Stat. 536; 79 Stat. 888 (29 U.S.C. 502); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 28 FR 14394, Dec. 27, 1963, unless otherwise noted.

INTRODUCTION

§ 453.1 Scope and significance of this part.

(a) *Functions of the Department of Labor.* This part discusses the meaning and scope of section 502 of the Labor-Management Reporting and Disclosure Act of 1959[1] (hereinafter referred to as the Act), which requires the bonding of certain officials, representatives, and employees of labor organizations and of trusts in which labor organizations are interested. The provisions of section 502 are subject to the general investigatory authority of the Secretary of Labor, embodied in section 601 of the Act (and delegated by him to the Director), which empowers him to investigate whenever he believes it necessary in order to determine whether any person has violated or is about to violate any provisions of the Act (except title I or amendments to other statutes made by section 505 or title VII). The Department of Labor is also authorized, under the general provisions of section 607, to forward to the Attorney General, for appropriate action, any evidence of violations of section 502 developed in such investigations, as may be found to warrant criminal prosecution under the Act or other Federal law.

(b) *Purpose and effect of interpretations.* Interpretations of the Director with respect to the bonding provisions are set forth in this part to provide those affected by these provisions of the Act with ''a practical guide * * * as to how the office representing the public interest in its enforcement will seek to apply it.''[2] The correctness of an interpretation can be determined finally and authoritatively only by the courts. It is necessary, however, for the Director to reach informed conclusions as to the meaning of the law to enable him to carry out his statutory duties of administration and enforcement. The interpretations of the Director contained in this part, which are issued upon the advice of the Solicitor of Labor, indicate the construction of the law which will guide him in performing his duties unless and until he is directed otherwise by authoritative rulings of the courts or unless and until he subsequently decides that a prior interpretation is incorrect. However, the omission to discuss a particular problem in this part, or in interpretations supplementing it, should not be taken to indicate the adoption of any position by the Director with respect to such problem or to constitute an administrative interpretation or practice.

(c) *Earlier interpretations superseded.* To the extent that prior opinions and interpretations under the Act, relating

[1] 73 Stat. 536; 29 U.S.C. 502.

[2] *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 138.

to the bonding of certain officials, representatives, and employees of labor organizations and of trusts in which labor organizations are interested, are inconsistent or in conflict with the principles stated in this part, they are hereby rescinded and withdrawn.

[28 FR 14394, Dec. 27, 1963, as amended at 50 FR 31309, Aug. 1, 1985; 78 FR 8026, Feb. 5, 2013]

CRITERIA FOR DETERMINING WHO MUST BE BONDED

§ 453.2 Provisions of the statute.

(a) Section 502(a) requires that:

> Every officer, agent, shop steward, or other representative or employee of any labor organization (other than a labor organization whose property and annual financial receipts do not exceed $5,000 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty on his part directly or through connivance with others.

(b) This section sets forth, in the above language and in its further provisions, the minimum requirements regarding the bonding of the specified personnel. There is no provision in the Act which precludes the bonding of such personnel in amounts exceeding those specified in section 502(a). Similarly, the Act contains no provision precluding the bonding of such personnel as are not required to be bonded by this section. Such excess coverage may be in any amount and in any form otherwise lawful and acceptable to the parties to such bonds.

[28 FR 14394, Dec. 27, 1963, as amended at 30 FR 14925, Dec. 2, 1965]

§ 453.3 Labor organizations within the coverage of section 502(a).

Any labor organization as defined in sections 3(i) and 3(j) of the Act[3] is a labor organization within the coverage of section 502(a) unless its property and annual financial receipts do not exceed $5,000 in value. The determination as to whether a particular labor organization is excepted from the application of section 502(a) is to be made at the beginning of each of its fiscal years on the basis of the total value of all its property at the beginning of, and its total financial receipts during, the preceding fiscal year of the organization.

§ 453.4 Trusts (in which a labor organization is interested) within the coverage of section 502(a).

Section 3(l) of the Act defines a *trust in which a labor organization is interested* as:

> * * * a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries.

Both the language and the legislative history[4] make it clear that this definition covers pension funds, health and welfare funds, profit sharing funds, vacation funds, apprenticeship and training funds, and funds or trusts of a similar nature which exist for the purpose of, or have as a primary purpose, the providing of the benefits specified in the definition. This is so regardless of whether these trusts, funds, or organizations are administered solely by labor organizations, or jointly by labor organizations and employers, or by a corporate trustee, unless they were neither created or established by a labor organization nor have any trustee or member of the governing body who was selected or appointed by a labor organization.

§ 453.5 Officers, agents, shop stewards, or other representatives or employees of a labor organization.

With respect to labor organizations, the term ''officer, agent, shop steward, or other representative'' is defined in section 3(q) of the Act to include ''elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority)''. Other individuals

[3] See part 451 of this chapter.

[4] Daily Cong. Rec., pp. 5858–59, Senate, April 23, 1959.

employed by a labor organization, including salaried non-supervisory professional staff, stenographic, and service personnel are ''employees'' and must be bonded if they handle[5] funds or other property of the labor organization.

§ 453.6 Officers, agents, shop stewards or other representatives or employees of a trust in which a labor organization is interested.

(a) *Officers, agents, shop stewards or other representatives.* While the definition of the collective term ''Officer, agent, shop steward, or other representative'' in section 3(q) of the Act is expressly applicable only ''when used with respect to a labor organization,'' the use of this term in connection with trusts in which a labor organization is interested makes it clear that, in that connection, it refers to personnel of such trusts in positions similar to those enumerated in the definition. Thus, the term covers trustees and key administrative personnel of trusts, such as the administrator of a trust, heads of departments or major units, and persons in similar positions. It covers such personnel, including trustees, regardless of whether they are representatives of or selected by labor organizations, or representatives of or selected by employers,[6] and such personnel must be bonded if they handle funds or other property of the trust within the meaning of section 502(a).

(b) *Independent institutions not included.* The analogy to the definition of the term ''officer, agent, shop steward, or other representative,'' when used with respect to a labor organization, shows that banks and other qualified financial institutions in which trust funds are deposited are not to be considered as ''agents'' or ''representatives'' of trusts within the meaning of section 502 and thus are not subject to the bonding requirement, even though they may also have administrative or management responsibilities with respect to such trusts. Similarly, the bonding requirement does not apply to brokers or other independent contractors who have contracted with trusts for the performance of functions which are normally not carried out by officials or employees of such trusts such as the buying of securities, the performance of other investment functions, or the transportation of funds by armored truck.

(c) *Employees of a trust in which a labor organization is interested.* As in the case of labor organizations, all individuals employed by a trust in which a labor organization is interested are ''employees,'' regardless of whether, technically, they are employed by the trust, by the trustees, by the trust administrator, or by trust officials in similar positions.

[28 FR 14394, Dec. 27, 1963, as amended at 50 FR 31311, Aug. 1, 1985]

§ 453.7 "Funds or other property" of a labor organization or of a trust in which a labor organization is interested.

The affirmative requirement for bonding the specified personnel is applicable only if they handle ''funds or other property'' of the labor organization or trust concerned. A consideration of the purpose of section 502 and a reading of the section as a whole, including provisions for fixing the amount of bonds, suffice to show that the term ''funds or other property'', as used in this section of the Act, encompasses more than cash alone but that it does not embrace all of the property of a labor organization or of a trust in

[5] For discussion of ''handle'', see § 453.8.

[6] See the contrast between section 308 of S. 1555 as passed by the Senate (''All officers, agents, representatives, and employees of any labor organization engaged in an industry affecting commerce who handle funds of such organization or of a trust in which such organization is interested shall be bonded * * *'') and section 502 of the Act as finally enacted. The change between the two versions originated in the House Committee on Education and Labor. Prior to the reporting of the bill (H.R. 8342) by that Committee, a joint subcommittee of that Committee held extensive hearings, during the course of which witnesses including President Meany of the AFL-CIO criticized the bonding provision of the Senate bill on the ground that it required only union personnel of joint employer-union trusts to be bonded. (See Record of Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Congress, 1st Session, on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474, pp. 1493–94, 1979.

which a labor organization is interested. The term does not include property of a relatively permanent nature, such as land, buildings, furniture, fixtures and office and delivery equipment used in the operations of a labor organization or trust. It does, however, include items in the nature of quick assets, such as checks and other negotiable instruments, government obligations and marketable securities, as well as cash, and other property held, not for use, but for conversion into cash or for similar purposes making it substantially equivalent to funds.

§ 453.8 Personnel who "handle" funds or other property.

(a) *General considerations.* Section 502(a) requires ''every'' person specified in its bonding requirement ''who handles'' funds or other property of the labor organization or trust to be bonded. It does not contain any exemption based on the amount of the funds or other property handled by particular personnel. Therefore, if the bonding requirement is otherwise applicable to such persons, the amount of the funds or the value of the property handled by them does not affect such applicability. In determining whether a person ''handles'' funds or other property within the meaning of section 502(a), however, it is important to consider the term ''handles'' in the light of the basic purpose which Congress sought to achieve by the bonding requirement and the language chosen to make that purpose effective. Thus, while it is clear that section 502(a) should be considered as representing the minimum requirements which Congress deemed necessary in order to insure the reasonable protection of the funds and other property of labor organizations and trusts within the coverage of the section, it is equally clear from the legislative history[7] and the language used that Congress was aware of cost considerations and did not intend to require unreasonable, unnecessary or duplicative bonding. In terms of these general considerations, more specific content may be assigned to the term ''handles'' by reference to the prohibition in section 502(a) against permitting any person not covered by an appropriate bond ''to receive, handle, disburse, or otherwise exercise custody or control'' of the funds or other property of a labor organization or of a trust in which a labor organization is interested. The phrase ''receive, handle, disburse, or otherwise exercise custody or control'' is not to be considered as expanding the scope of the term ''handles'' but rather as indicating facets of ''handles'' which in a specific prohibition, Congress believed should be clearly set forth.

(b) *Persons included generally.* The basic objective of section 502(a) is to provide reasonable protection of funds or other property rather than to insure against every conceivable possibility of loss. Accordingly, a person shall be deemed to be ''handling'' funds or other property, so as to require bonding under that section, whenever his duties or activities with respect to given funds or other property are such that there is a significant risk of loss by reason of fraud or dishonesty on the part of such person, acting either alone or in collusion with others.

(c) *Physical contact as criterion of ''handling.''* Physical dealing with funds or other property is, under the principles above stated, not necessarily a controlling criterion in every case for determining the persons who ''handle'' within the meaning of section 502(a). Physical contact with cash, checks or similar property generally constitutes ''handling.'' On the other hand, bonding may not be required for office personnel who from time to time perform counting, packaging, tabulating or similar duties which involve physical contact with checks, securities, or other funds or property but which are performed under conditions that cannot reasonably be said to give rise to significant risks with respect to the receipt, safekeeping or disbursement of funds or property. This may be the case where significant risks of fraud or dishonesty in the performance of duties of an essentially clerical character are

[7] House Report No. 1147, 86th Congress, 1st Session, p. 35; Daily Cong. Record 16419, Senate, Sept. 3, 1959; Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S. 505, S. 748, S. 76, S. 1002, S. 1137, and S. 1311, 86th Congress, 1st Session, p. 709.

precluded by the closeness of the supervision provided or by the nature of the funds or other property handled.

(d) *''Handling'' funds or other property without physical contact.* Personnel who do not physically handle funds or property may nevertheless ''handle'' within the meaning of section 502(a) where they have or perform significant duties with respect to the receipt, safekeeping or disbursement of funds or other property. For example, persons who have access to a safe deposit box or similar depository for the purpose of adding to, withdrawing, checking or otherwise dealing with its contents may be said to ''handle'' these contents within the meaning of section 502(a) even though they do not at any time during the year actually secure such access for such purposes. Similarly, those charged with general responsibility for the safekeeping of funds or other property such as the treasurer of a labor organization, should be considered as handling funds or other property. It should also be noted that the extent of actual authority to deal with funds or property may be immaterial where custody or other functions have been granted which create a substantial risk of fraud or dishonesty. Thus, if a bank account were maintained in the name of a particular officer or employee whose signature the bank were authorized to honor, it could not be contended that he did not ''handle'' funds merely because he had been forbidden by the organization or by his superiors to make deposits or withdrawals.

(e) *Disbursement of funds or other property.* It is clear from both the purpose and language of section 502(a) that personnel described in the section who actually disburse funds or other property, such as officers or trustees authorized to sign checks or persons who make cash disbursements, must be considered as handling such funds and property. Whether others who may influence, authorize or direct disbursements must also be considered to handle funds or other property can be determined only by reference to the specific duties or responsibilities of these persons in a particular labor organization or trust.

[28 FR 14394, Dec. 27, 1963, as amended at 30 FR 14925, Dec. 2, 1965]

§ 453.9 "Handling" of funds or other property by personnel functioning as a governing body.

(a)(1) *General considerations.* For many labor organizations and trusts special problems involving disbursements will be presented by those who, as trustees or members of an executive board or similar governing body, are, as a group, charged with general responsibility for the conduct of the business and affairs of the organization or trust. Often such bodies may approve contracts, authorize disbursements, audit accounts and exercise similar responsibilities.

(2) It is difficult to formulate any general rule for such cases. The mere fact that a board of trustees, executive board or similar governing body has general supervision of the affairs of a trust or labor organization, including investment policy and the establishment of fiscal controls, would not necessarily mean that the members of this body ''handle'' the funds or other property of the organization. On the other hand, the facts may indicate that the board or other body exercises such close, day-to-day supervision of those directly charged with the handling of funds or other property that it might be unreasonable to conclude that the members of such board were not, as a group, also participating in the handling of such funds and property.[8] Also, whether or not the members of a particular board of trustees or executive board handle funds or other property in their capacity as such, certain of these members may hold other offices or have other functions involving duties directly related to the receipt, safekeeping or disbursement of the funds or other property of the organization so that it would be necessary that they be bonded irrespective of their board membership.

(b) *Nature of responsibilities as affecting ''handling.''* With respect to particular responsibilities of boards of trustees, executive boards and similar bodies in disbursing funds or other property, much would depend upon the system of fiscal controls provided in a particular trust or labor organization.

[8] As to group coverage, see § 453.16.

The allocation of funds or authorization of disbursements for a particular purpose is not necessarily handling of funds within the meaning of the section. If the allocation or authorization merely permits expenditures by a disbursing officer who has responsibility for determining the validity or propriety of particular expenditures, then the action of the disbursing officer and not that of the board would constitute handling. But if pursuant to a direction of the board, the disbursing officer performed only ministerial acts without responsibility to determine whether the expenditures were valid or appropriate, then the board's action would constitute handling. In such a case, the absence of fraud or dishonesty in the acts of the disbursing officer alone would not necessarily prevent fraudulent or dishonest disbursements. The person or persons who are charged with or exercise responsibility for determining whether specific disbursements are bona fide, regular, and in accordance with the applicable constitution, trust instrument, resolution or other laws or documents governing the disbursement of funds or other property should be considered to handle such funds and property and be bonded accordingly.

[28 FR 14394, Dec. 27, 1963, as amended at 30 FR 14926, Dec. 2, 1965]

SCOPE OF THE BOND

§ 453.10 The statutory provision.

The statute requires that every covered person ''shall be bonded to provide protection against loss by reason of acts of fraud or dishonesty on his part directly or through connivance with others.''

[30 FR 14926, Dec. 2, 1965]

§ 453.11 The nature of the "duties" to which the bonding requirement relates.

The bonding requirement in section 502(a) relates only to duties of the specified personnel in connection with their handling of funds or other property to which this section refers. It does not have reference to the special duties imposed upon representatives of labor organizations by virtue of the positions of trust which they occupy, which are dealt with in section 501(a), and for which civil remedies for breach of the duties are provided in section 501(b). The fact that the bonding requirement is limited to personnel who handle funds or other property indicates the correctness of these conclusions. They find further support in the differences between sections 501(a) and 502(a) of the Act which sufficiently indicate that the scope of the two sections is not coextensive.

§ 453.12 Meaning of fraud or dishonesty.

The term ''fraud or dishonesty'' shall be deemed to encompass all those risks of loss that might arise through dishonest or fraudulent acts in handling of funds as delineated in §§ 453.8 and 453.9. As such, the bond must provide recovery for loss occasioned by such acts even though no personal gain accrues to the person committing the act and the act is not subject to punishment as a crime or misdemeanor, provided that within the law of the State in which the act is committed, a court would afford recovery under a bond providing protection against fraud or dishonesty. As usually applied under State laws, the term ''fraud or dishonesty'' encompasses such matters as larceny, theft, embezzlement, forgery, misappropriation, wrongful abstraction, wrongful conversion, willful misapplication or any other fraudulent or dishonest acts resulting in financial loss.

[30 FR 14926, Dec. 2, 1965]

AMOUNT OF BONDS

§ 453.13 The statutory provision.

Section 502(a) of the Act requires that the bond of each ''person'' handling ''funds or other property'' who must be bonded be fixed ''at the beginning of the organization's fiscal year * * * in an amount not less than 10 percentum of the funds handled by him and his predecessor or predecessors, if any, during the preceding fiscal year, but in no case more than $500,000.'' If there is no preceding fiscal year, the amount of each required bond is set at not less than $1,000 for local labor organizations and at not less than $10,000 for other labor organizations or for

trusts in which a labor organization is interested.

§ 453.14 The meaning of "funds."

While the protection of bonds required under the Act must extend to any actual loss from the acts of fraud or dishonesty in the handling of ''funds or other property'' (§ 453.7), the amount of the bond depends upon the ''funds'' handled by the personnel bonded and their predecessors, if any. ''Funds'' as here used is not defined in the Act. As in the case of ''funds or other property'' discussed earlier in § 453.7, the term would not include property of a relatively permanent nature such as land, buildings, furniture, fixtures, or property similarly held for use in the operations of the labor organization or trust rather than as quick assets. In its normal meaning, however, ''funds'' would include, in addition to cash, items such as bills and notes, government obligations and marketable securities, and in a particular case might well include all the ''funds or other property'' handled during the year in the positions occupied by the particular personnel for whom the bonding is required. In any event, it is clear that bonds fixed in the amount of 10 percent or more of the total ''funds or other property'' handled by the occupants of such positions during the preceding fiscal year would be in amounts sufficient to meet the statutory requirement. Of course, in situations where a significant saving in bonding costs might result from computing separately the amounts of ''funds'' and of ''other property'' handled, criteria for distinguishing particular items to be included in the quoted terms would prove useful. While the criteria to be applied in a particular case would depend on all the relevant facts concerning the specific items handled, it may be assumed as a general principle that at least those items which may be handled in a manner similar to cash and which involve a like risk of loss should be included in computing the amount of ''funds'' handled.

[30 FR 14926, Dec. 2, 1965]

§ 453.15 The meaning of funds handled "during the preceding fiscal year".

The funds handled by personnel required to be bonded and their predecessors during the course of a fiscal year would ordinarily include the total of whatever such funds were on hand at the beginning of the fiscal year plus any items received or added in the form of funds during the year for any reason, such as dues, fees and assessments, trust receipts, or items received as a result of sales, investments, reinvestments, or otherwise. It would not, however, be necessary to count the same item twice in arriving at the total funds handled by personnel during a year. Once an item properly within the category of ''funds'' had been counted as handled by personnel during a year, there would be no need to count it again should it subsequently be handled by the same personnel during the same year in some other connection.

§ 453.16 Funds handled by more than one person.

The amount of any required bond is determined by the total funds handled during a fiscal year by each ''person'' bonded, and any predecessors of such ''person''. The term ''person'', however, is defined in section 3(d) of the Act to include ''one or more'' of the various individuals or entities there listed, so that there may be numerous instances where the bond of a ''person'' may include several individuals. Wherever this is the case, the amount of the bond for that ''person'' would, of course, be based on the total funds handled by all who comprise the ''person'' included in the bond, without regard to the precise extent to which any particular individual might have handled such funds. This would be the situation, for example, in many cases of joint or group activity in the performance of a single function. It would also be true where various individuals performed the same type of function for an organization, even though they acted independently of one another. There would, however, be no objection to bonding each individual separately, and fixing the amount of his bond on the basis of the total funds which he individually handled during the year.

§ 453.17 Term of the bond.

The amount of any required bond must in each instance be based on funds handled ''during the preceding fiscal year,'' and must be fixed ''at the beginning'' of an organization's fiscal year—that is, as soon after the date when such year begins as the necessary information from the preceding fiscal year can practicably be ascertained. This does not mean, however, that a new bond must be obtained each year. There is nothing in the Act which prohibits a bond for a term longer than one year, with whatever advantages such a bond might offer by way of a lower premium, but at the beginning of each fiscal year during its term the bond must be in at least the requisite amount. If it is below that level at that time for any reason, it would then be necessary either to modify the existing bond to increase it to the proper amount or to obtain a supplementary bond. In either event, the terms upon which this could best be done would be left to the parties directly concerned.

FORM OF BONDS

§ 453.18 Bonds "individual or schedule in form".

(a) *General consideration.* In addition to such substantive matters as the personnel who must be bonded and the scope and the amount of the prescribed bonds, which have been discussed previously, the form of the bonds is the subject of a specific provision of section 502(a). Under this provision, a bond meeting the substantive requirements of the section may be either ''individual or schedule in form.'' These terms are not specially defined and could be descriptive of a variety of possible forms of bonds. According to trade usage, an individual bond is a single bond covering a single named individual to a designated amount, and bonds ''schedule in form'' may include either name schedule or position schedule bonds. A name schedule bond is typically a single bond covering a series or list of named individuals, each of whom is bonded separately to a designated amount. A position schedule bond is typically a single bond providing coverage with respect to any occupant or holder of one or more specified positions during the term of the bond, each office or position being covered to a designated amount. In a statute relating to trade or commerce, it is frequently helpful to consider whatever trade or commercial usages may have developed with respect to the statutory terms.[9] References to individual, schedule and position schedule bonds may be found in other acts of Congress and indicate a clear awareness of trade usages and terminology in this field.[10]

(b) *Particular forms of bonds.* If the phrase ''individual or schedule in form'' is considered in light of the trade usages, section 502(a) at least permits bonds which are individual, name schedule or position schedule in form. Of course, section 502(a) does not require any particular type of individual or schedule bonds where different types exist or may be developed. It could not be said, for example, that a bond which schedules positions according to similarities in duties, risks, or required amounts of coverage is not ''schedule in form'' within the meaning of section 502(a) merely because the particular form of scheduling involved was not employed in bonds current at the time the section became law. A more specific illustration would be a bond scheduling shop stewards as a group because of the similar duties they perform in collecting dues, or members of an executive board as a group because of the fact that duties are imposed upon the board as such. A bond of this type would be ''schedule in form'' within the meaning of section 502(a) and, assuming adequacy of amount and coverage of all persons whom it is necessary to bond, such a bond would be in conformity with the statute. Also, a bond scheduling positions or groups of positions according to amounts of funds handled by occupants of the positions could be viewed as ''schedule in form.''

(c) *Additional bonding.* Section 502(a) neither prevents additional bonding beyond that required by its terms nor prescribes the form in which such additional coverage may be taken. Thus, so

[9] See 2 Sutherland, Statutory Construction (3d ed. 1943) § 4919.

[10] Act of August 24, 1954, 68 Stat. 335, 12 U.S.C. 1766(g); Act of August 9, 1955, 69 Stat. 618, 6 U.S.C. 14.

long as a particular bond is schedule in form as to the personnel required to be bonded and schedules coverage of these persons in at least the minimum required amount, additional coverage either as to personnel or amount may be taken in any form either in the same or in separate bonds. A bond which provided name or position schedule coverage for all persons required to be bonded under section 502(a), each scheduled person or position being bonded in at least the required minimum amount, would clearly be ''schedule in form'' within the meaning of section 502(a) regardless of the extent or form of additional schedule or blanket coverage provided in the same bond.

§ 453.19 The designation of the "insured" on bonds.

Since section 502 is intended to protect the funds or other property of labor organizations and trusts in which labor organizations are interested, bonds under this section should allow for enforcement or recovery for the benefit of the labor organization or trust concerned by those ordinarily authorized to act for it in such matters. For example, in the case of a local labor organization, a bond would not be appropriate under section 502 if it protected only the interests of a national or international labor organization with which the local labor organization is affiliated or if it designated as the insured only some particular officer of the organization who does not legally represent it in similar formal instruments.

QUALIFIED AGENTS, BROKERS, AND SURETY COMPANIES FOR THE PLACING OF BONDS

§ 453.20 Corporate sureties holding grants of authority from the Secretary of the Treasury.

The provisions of section 502(a) require that any surety company with which a bond is placed pursuant to that section must be a corporate surety which holds a grant of authority from the Secretary of the Treasury under the Act of July 30, 1947 (6 U.S.C. 6–13), as an acceptable surety on Federal bonds. That Act provides, among other things, that in order for a surety company to be eligible for such grant of authority, it must be incorporated under the laws of the United States or of any State and the Secretary of the Treasury shall be satisfied of certain facts relating to its authority and capitalization. Such grants of authority are evidenced by Certificates of Authority which are issued by the Secretary of the Treasury and which expire on the June 30 following the date of their issuance. A list of the companies holding such Certificates of Authority is published annually in the FEDERAL REGISTER, usually in July. Changes in the list, occurring between July 1 and June 30, either by addition to or removal from the list of companies, are also published in the FEDERAL REGISTER following each such change.

[28 FR 14394, Dec. 27, 1963, as amended at 50 FR 31311, Aug. 1, 1985]

§ 453.21 Interests held in agents, brokers, and surety companies.

(a) Section 502(a) of the Act prohibits the placing of bonds required therein through any agent or broker or with any surety company in which any labor organization or any officer, agent, shop steward, or other representative of a labor organization has any direct or indirect interest. The purpose of this provision, as shown by its legislative history, is to insure against the existence of any ''financial or other influential'' interests which would affect the objectivity of the action of agents, brokers, or surety companies in bonding the personnel specified in the section.[11] It appears, therefore, that it was the intent of Congress to prevent the placing of bonds through agents or brokers, and with surety companies, in which any labor organization or any officer, agent, shop steward, or other representative of a labor organization holds more than a nominal interest.

(b) Since the statute provides that either a direct or indirect interest by a labor organization or by the specified persons may disqualify an agent,

[11] Daily Cong. Rec. 9114, Senate, June 8, 1959; Record of Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Congress, 1st Session, on H.R. 3540, H.R. 3302, H.R. 4473 and H.R. 4474, p. 1607.

broker, or surety company from having a bond placed through or with it, the disqualification would be effective if a labor organization or any of the specified persons are in a position to influence or control the activities or operations of such brokers, agents, or surety companies, by virtue of interests held either directly by them or by relatives or third parties which they own or control. The question of whether the relationship between the labor organization or the specified persons on the one hand, and another party or parties holding an interest in a broker, agent, or surety company on the other hand, is so close as to put the former in a position to influence or control the activities or operations of such broker, agent, or surety company through the latter, presents a question of fact which must necessarily be determined in each case in the light of all the pertinent circumstances.

(c) It is also to be noted that the statute does not appear to restrict the disqualification to cases in which a direct or indirect interest is held by a labor organization as a whole, or by a substantial number of officers, agents, shop stewards, or other representatives of a labor organization, but provides for the disqualification also in cases where any one officer, agent, shop steward, or other representative of a labor organization holds such an interest.

[28 FR 14394, Dec. 27, 1963, as amended at 63 FR 33780, June 19, 1998]

MISCELLANEOUS PROVISIONS

§ 453.22 Prohibition of certain activities by unbonded persons.

(a) Section 502(a) provides that persons who are not covered by bonds as required by that section shall not be permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property of a labor organization or of a trust in which a labor organization is interested. This prohibits personnel who are required to be bonded, as explained in § 453.8 from performing any of these acts without being covered by the required bonds. In addition, this provision makes it unlawful for any person with power to do so to delegate or assign the duties of receiving, handling, disbursing, or otherwise exercising custody or control of such funds or property to any person who is not bonded in accordance with the provisions of section 502(a).

(b) The legislative history of the Act indicates, however, that it was not the intent of Congress to make compliance with the bonding requirements of section 502(a) a condition on the right of banks or other financial institutions to serve as the depository of the funds of labor organizations or trusts. Similarly, it appears that the provisions of that section do not require the bonding of brokers or other independent contractors who have contracted with labor organizations or trusts for the performance of functions which are normally not carried out by such labor organizations' or trusts' own officials or employees, such as the buying of securities, the performance of other investment functions, or the transportation of funds by armored truck.[12]

§ 453.23 Persons becoming subject to bonding requirements during fiscal year.

Considering the purpose of section 502, the language of the prohibition should be considered to apply to persons who because of election, employment or change in duties begin to handle funds or other property during the course of a particular fiscal year. Bonds should be secured for such persons, in an amount based on the funds handled by their predecessors during the preceding fiscal year, before they are permitted to engage in any of the fund-handling activities referred to in the prohibition, unless coverage with respect to such persons is already provided by bonds in force meeting the requirements of section 502(a).

§ 453.24 Payment of bonding costs.

The Act does not prohibit payment of the cost of the bonds, required by section 502(a), by labor organizations or by trusts in which a labor organization is interested. The decision whether such costs are to be borne by the labor organization or trust or by the bonded person is left to the duly authorized

[12] See § 453.6(b).

discretion and agreement of the parties concerned in each case.

§ 453.25 Effective date of the bonding requirement.

While the bonding provision in section 502(a) became effective on September 14, 1959, its requirement for obtaining bonds does not become applicable to a labor organization or a trust in which a labor organization is interested, or to the personnel of any such organization, until the subsequent date when such organization's next fiscal year begins. This is so because the Act requires each such bond to be fixed at the beginning of the organization's fiscal year in an amount based on funds handled in the preceding fiscal year, and it could not well have been intended that the obtaining of a bond would be necessary in advance of the time when it would be possible to meet this requirement.

§ 453.26 Powers of the Secretary of Labor to exempt.

Section 502(a) of the Act provides that when in the opinion of the Secretary of Labor a labor organization has made other bonding arrangements which would provide the protection required at comparable cost or less, he may exempt such labor organization from placing a bond through a surety company holding a grant of authority from the Secretary of the Treasury under the Act of July 30, 1947 (6 U.S.C. 6–13), as acceptable surety on Federal bonds.

[30 FR 14926, Dec. 2, 1965]

SUBCHAPTER B—STANDARDS OF CONDUCT

PART 457—GENERAL

Subpart A—Purpose and Scope

Sec.
457.1 Purpose and scope.

Subpart B—Meaning of Terms as Used in This Subchapter

457.10 CSRA; FSA; CAA; LMRDA.
457.11 Agency, employee, labor organization, dues, Department, activity, employing office.
457.12 Authority; Board.
457.13 Director
457.14 Standards of conduct for labor organizations.
457.15 District Director.
457.16 Chief, DOE.
457.17 Administrative Law Judge.
457.18 Chief Administrative Law Judge.
457.19 Party.
457.20 Intervenor.

AUTHORITY: 5 U.S.C. 7120, 7134; 22 U.S.C. 4117; 2 U.S.C. 1351(a)(1); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012; Secretary's Order No. 02–2012, 77 FR 69378, November 16, 2012.

SOURCE: 50 FR 31311, Aug. 1, 1985, unless otherwise noted.

Subpart A—Purpose and Scope

§ 457.1 Purpose and scope.

The regulations contained in this subchapter are designed to implement 5 U.S.C. 7120 and 22 U.S.C. 4117, which relate to the standards of conduct for labor organizations in the Federal sector set forth in title VII of the Civil Service Reform Act of 1978 and chapter 10 of the Foreign Service Act of 1980. They prescribe procedures and basic principles which the Director of Labor will utilize in effectuating the standards of conduct required of labor organizations composed of Federal government employees that are covered by these Acts. (Regulations implementing the other provisions of title VII of the Civil Service Reform Act are issued by the Federal Labor Relations Authority, the General Counsel of the Federal Labor Relations Authority, and the Federal Service Impasses Panel in title 5 of the Code of Federal Regulations. Regulations implementing the other provisions of chapter 10 of the Foreign Service Act are issued by the Foreign Service Labor Relations Board, the Federal Labor Relations Authority, the General Counsel of the Federal Labor Relations Authority, and the Foreign Service Impasse Disputes Panel in title 22 of the Code of Federal Regulations.)[1]

[50 FR 31311, Aug. 1, 1985, as amended at 62 FR 6093, Feb. 10, 1997; 78 FR 8026, Feb. 5, 2013]

Subpart B—Meaning of Terms as Used in This Chapter

§ 457.10 CSRA; FSA; CAA; LMRDA.

CSRA means the Civil Service Reform Act of 1978; *FSA* means the Foreign Service Act of 1980; *CAA* means the Congressional Accountability Act of 1995; *LMRDA* means the Labor-Management Reporting and Disclosure Act of 1959, as amended.

[62 FR 6093, Feb. 10, 1997]

§ 457.11 Agency, employee, labor organization, dues, Department, activity, employing office.

Agency, *employee*, *labor organization*, and *dues*, when used in connection with the CSRA, have the meanings set forth in 5 U.S.C. 7103. *Employee*, *labor organization*, and *dues*, when used in connection with the FSA, have the meanings set forth in 22 U.S.C. 4102; *Department*, when used in connection with the FSA, means the Department of State, except that with reference to the exercise of functions under the FSA with respect to another agency authorized to utilize the Foreign Service personnel system, such term means that other agency. *Covered employee*, *employee*, *employing*

[1] Pursuant to section 220(a)(1) of the Congressional Accountability Act of 1995, 2 U.S.C. 1351(a)(1), labor organizations covered by that statute are subject to the standards of conduct provisions of the Civil Service Reform Act, 5 U.S.C. 7120, and are therefore subject to the regulations in this subchapter. Regulations implementing the Congressional Accountability Act were issued at 142 Cong. R. S12062 (daily ed., October 1, 1996) and 142 Cong. R. H10369 (Daily ed., September 12, 1996).

office, and *agency*, when used in connection with the CAA, have the meanings set forth in 2 U.S.C. 1301 and 1351(a)(2). *Activity* means any facility, organizational entity, or geographical subdivision or combination thereof of any agency or employing office.

[62 FR 6093, Feb. 10, 1997]

§ 457.12 Authority; Board.

Authority means the Federal Labor Relations Authority as described in the CSRA, 5 U.S.C. 7104 and 7105. *Board*, when used in connection with the FSA, means the Foreign Service Labor Relations Board as described in the FSA, 22 U.S.C. 4106(a). ''Board,'' when used in connection with the CAA, means the Board of Directors of the Office of Compliance as described in 2 U.S.C. 1301 and 1381(b).

[62 FR 6093, Feb. 10, 1997]

§ 457.13 Director.

Director means the Director of the Office of Labor-Management Standards, head of the Office of Labor-Management Standards.[2]

[78 FR 8026, Feb. 5, 2013]

§ 457.14 Standards of conduct for labor organizations.

Standards of conduct for labor organizations shall have the meaning as set forth in the CSRA, 5 U.S.C. 7120, and the FSA, 22 U.S.C. 4117, and as amplified in part 458 of this subchapter. The standards of conduct provisions of the CSRA and the regulations in this subchapter are applicable to labor organizations covered by the CAA pursuant to 2 U.S.C. 1351(a)(1).

[62 FR 6093, Feb. 10, 1997]

[2] Pursuant to Secretary of Labor's Orders No. 02–2012, 77 FR 69378 (November 16, 2012), and 03–2012, 77 FR 69376 (November 16, 2012), the Director of the Office of Labor-Management Standards has certain responsibilities and authority for implementing the standards of conduct provisions of the CSRA and the FSA.

§ 457.15 District Director.

District Director means the Director of a district office within the Office of Labor-Management Standards.

[78 FR 8026, Feb. 5, 2013]

§ 457.16 Chief, DOE.

Chief, DOE means the Chief of the Division of Enforcement within the Office of Labor-Management Standards.

[78 FR 8026, Feb. 5, 2013]

§ 457.17 Administrative Law Judge.

Administrative Law Judge means the Chief Administrative Law Judge or any Administrative Law Judge designated by the Chief Administrative Law Judge to conduct a hearing in cases under 5 U.S.C. 7120 or 22 U.S.C. 4117 as implemented by part 458 of this subchapter and such other matters as may be assigned.

§ 457.18 Chief Administrative Law Judge.

Chief Administrative Law Judge means the Chief Administrative Law Judge, U.S. Department of Labor, Washington, DC 20210.

§ 457.19 Party.

Party means any person, employee, group of employees, labor organization, Department, activity or agency:

(a) Filing a complaint, petition, request, or application;

(b) Named in a complaint, petition, request, or application; or

(c) Whose intervention in a proceeding has been permitted or directed by the Director, Chief Administrative Law Judge, or Administrative Law Judge, as the case may be.

[50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

§ 457.20 Intervenor.

Intervenor means a party in a proceeding whose intervention has been permitted or directed by the Director, Chief Administrative Law Judge, or Administrative Law Judge, as the case may be.

[50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

PART 458—STANDARDS OF CONDUCT

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AUTHORITY: 5 U.S.C. 7105, 7111, 7120, 7134; 22 U.S.C. 4107, 4111, 4117; 2 U.S.C. 1351(a)(1); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012; Secretary's Order No. 01–2020, 85 FR 13186 (March 6, 2020).

SOURCE: 45 FR 15158, Mar. 7, 1980, unless otherwise noted. Redesignated at 50 FR 31311, Aug. 1, 1985.

Subpart A—Substantive Requirements Concerning Standards of Conduct

§ 458.1 General.

The term *LMRDA* means the Labor-Management Reporting and Disclosure Act of 1959, as amended (29 U.S.C. 401 *et seq.*). Unless otherwise provided in this part or in the CSRA or FSA, any term in any section of the LMRDA which is incorporated into this part by reference, and any term in this part which is also used in the LMRDA, shall have the meaning which that term has under the LMRDA, unless the context in which it is used indicates that such meaning is not applicable. In applying the standards contained in this subpart the Director will be guided by the interpretations and policies followed by the Department of Labor in applying the provisions of the LMRDA and by applicable court decisions.

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

§ 458.2 Bill of rights of members of labor organizations.

(a)(1) *Equal rights.* Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) *Freedom of speech and assembly.* Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments or opinions; and to express at meetings of the labor organization his views upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided,* That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) *Dues, initiation fees, and assessments.* Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date this section is published shall not be increased, and no general or special assessment shall be levied upon such members, except:

(i) In the case of a local organization, (A) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (B) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(ii) In the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (A) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than 30 days written notice to the principal office of each local or constituent labor organization entitled to such notice, or (B) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (C) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided,* That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) *Protection of the right to sue.* No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceedings, or the right of any

member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a 4-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof.

(5) *Safeguards against improper disciplinary action*. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined, except for nonpayment of dues by such organization or by any officer thereof unless such member has been (i) served with written specific charges; (ii) given a reasonable time to prepare his defense; (iii) afforded a full and fair hearing.

(b) Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall not be a defense to any proceeding instituted against the labor organization under this part or under the CSRA or FSA.

(c) Nothing contained in this section shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization.

(d) It shall be the duty of the secretary or corresponding principal officer of each labor organization, in the case of a local labor organization, to forward a copy of each agreement made by such labor organization with an agency, Department or activity to any employee who requests such a copy and whose rights as such employee are directly affected by such agreement, and in the case of a labor organization other than a local labor organization, to forward a copy of any such agreement to each constituent unit which has members directly affected by such agreement; and such officer shall maintain at the principal office of the labor organization of which he is an officer, copies of any such agreement made or received by such labor organization, which copies shall be available for inspection by any member or by any employee whose rights are affected by such agreement. An employee's rights under this paragraph shall be enforceable in the same manner as the rights of a member.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31312, Aug. 1, 1985]

§ 458.3 Application of LMRDA labor organization reporting requirements.

The reporting provisions of parts 402, 403, and 408 of this chapter shall apply to labor organizations subject to the requirements of the CSRA or FSA.

(Approved by the Office of Management and Budget under control number 1215–0188)

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15116, Mar. 31, 1994; 63 FR 33780, June 19, 1998]

§ 458.4 Informing members of the standards of conduct provisions.

(a) Every labor organization subject to the requirements of the CSRA, the FSA, or the CAA shall inform its members concerning the standards of conduct provisions of the Acts and the regulations in this subchapter. Labor organizations shall provide such notice to members by October 2, 2006 and thereafter to all new members within 90 days of the time they join and to all members at least once every three years. Notice must be provided by hand delivery, U.S. mail or e-mail or a combination of the three as long as the method is reasonably calculated to reach all members. Such notice may be included with the required notice of local union elections. Where a union newspaper is used to provide notice, the notice must be conspicuously placed on the front page of the newspaper, or the front page should have a conspicuous reference to the inside page where the notice appears, so that the inclusion of the notice in a particular issue is readily apparent to each member.

(b) A labor organization may demonstrate compliance with the requirements of paragraph (a) of this section by showing that another labor organization provided an appropriate notice to all of its members during the necessary time frame.

(c) Labor organizations may use the Department of Labor publication

Union Member Rights and Officer Responsibilities under the Civil Service Reform Act (available on the OLMS Web site at *http://www.dol.gov/olms*) or may devise their own language as long as the notice accurately states all of the CSRA standards of conduct provisions as set forth in the fact sheet.

(d) If a labor organization has a Web site, the site must contain a conspicuous link to Union Member Rights and Officer Responsibilities under the Civil Service Reform Act or, alternatively, to the labor organization's own notice prepared in accordance with paragraph (c) of this section.

[71 FR 31492, June 2, 2006, as amended at 78 FR 8026, Feb. 5, 2013]

TRUSTEESHIPS

§ 458.26 Purposes for which a trusteeship may be established.

Trusteeships shall be established and administered by a labor organization over a subordinate body only in accordance with the constitution and bylaws of the organization which has assumed trusteeship over the subordinate body and for the purpose of (a) correcting corruption or financial malpractice, (b) assuring the performance of negotiated agreements or other duties of a representative of employees, (c) restoring democratic procedures, or (d) otherwise carrying out the legitimate objects of such labor organization.

§ 458.27 Prohibited acts relating to subordinate body under trusteeship.

During any period when a subordinate body of a labor organization is in trusteeship, (a) the votes of delegates or other representatives from such body in any convention or election of officers of the labor organization shall not be counted unless the representatives have been chosen by secret ballot in an election in which all the members in good standing of such subordinate body were eligible to participate; and (b) no current receipts or other funds of the subordinate body except the normal per capita tax and assessments payable by subordinate bodies not in trusteeship shall be transferred directly or indirectly to the labor organization which has imposed the trusteeship; *Provided, however,* That nothing contained in this section shall prevent the distribution of the assets of a labor organization in accordance with its constitution and bylaws upon the bona fide dissolution thereof.

§ 458.28 Presumption of validity.

In any proceeding involving § 458.26, a trusteeship established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing either before the executive board or before such other body as may be provided in accordance with its constitution and bylaws shall be presumed valid for a period of 18 months from the date of its establishment and shall not be subject to attack during such period except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for purposes allowable under § 458.26. After the expiration of 18 months the trusteeship shall be presumed invalid in any such proceeding, unless the labor organization shall show by clear and convincing proof that the continuation of the trusteeship is necessary for a purpose allowable under § 458.26.

ELECTIONS

§ 458.29 Election of officers.

Every labor organization subject to the CSRA or FSA shall conduct periodic elections of officers in a fair and democratic manner. All elections of officers shall be governed by the standards prescribed in sections 401 (a), (b), (c), (d), (e), (f) and (g) of the LMRDA to the extent that such standards are relevant to elections held pursuant to the provisions of 5 U.S.C. 7120 or 22 U.S.C. 4117 .

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated and amended at 50 FR 31311, 31312, Aug. 1, 1985]

ADDITIONAL PROVISIONS APPLICABLE

§ 458.30 Removal of elected officers.

When an elected officer of a local labor organization is charged with serious misconduct and the constitution and bylaws of such organization do not provide an adequate procedure meeting

the standards of § 417.2(b) of this chapter for removal of such officer, the labor organization shall follow a procedure which meets those standards.

[62 FR 6094, Feb. 10, 1997]

§ 458.31 Maintenance of fiscal integrity in the conduct of the affairs of labor organizations.

The standards of fiduciary responsibility prescribed in section 501(a) of the LMRDA are incorporated into this subpart by reference and made a part hereof.

§ 458.32 Provision for accounting and financial controls.

Every labor organization shall provide accounting and financial controls necessary to assure the maintenance of fiscal integrity.

§ 458.33 Prohibition of conflicts of interest.

(a) No officer or agent of a labor organization shall, directly or indirectly through his spouse, minor child, or otherwise (1) have or acquire any pecuniary or personal interest which would conflict with his fiduciary obligation to such labor organization, or (2) engage in any business or financial transaction which conflicts with his fiduciary obligation.

(b) Actions prohibited by paragraph (a) of this section include, but are not limited to, buying from, selling, or leasing directly or indirectly to, or otherwise dealing with the labor organization, its affiliates, subsidiaries, or trusts in which the labor organization is interested, or having an interest in a business any part of which consists of such dealings, except bona fide investments of the kind exempted from reporting under section 202(b) of the LMRDA. The receipt of salaries and reimbursed expenses for services actually performed or expenses actually incurred in carrying out the duties of the officer or agent is not prohibited.

§ 458.34 Loans to officers or employees.

No labor organization shall directly or indirectly make any loan to any officer or employee of such organization which results in a total indebtedness on the part of such officer or employee to the labor organization in excess of $2,000.

§ 458.35 Bonding requirements.

Every officer, agent, shop steward, or other representative or employee of any labor organization subject to the CSRA or FSA (other than a labor organization whose property and annual financial receipts do not exceed $5,000 in value), or of a trust in which a labor organization is interested, who handles funds or other property thereof shall be bonded in accordance with the principles of section 502(a) of the LMRDA. In enforcing this requirement the Director will be guided by the interpretations and policies followed by the Department of Labor in applying the provisions of section 502(a) of the LMRDA and by applicable court decisions.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

§ 458.36 Prohibitions against certain persons holding office or employment.

The prohibitions against holding office or employment in a labor organization contained in section 504(a) of the LMRDA are incorporated into this subpart by reference and made a part hereof. The prohibitions shall also be applicable to any person who has been convicted of, or who has served any part of a prison term resulting from his conviction of, violating 18 U.S.C. 1001 by making a false statement in any report required to be filed pursuant to this subpart, or who has been determined by the Director after an appropriate proceeding pursuant to §§ 458.66 through 458.92 to have willfully violated § 458.27: *Provided, however,* That the Director or such other person as he may designate may exempt a person from the prohibition against holding office or employment or may reduce the period of the prohibition where he determines that it would not be contrary to the purposes of the CSRA or the FSA and this section to permit a person barred from holding office or employment to hold such office or employment.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31312, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

§ 458.37 Prohibition of certain discipline.

No labor organization or any officer, agent, shop steward, or other representative or any employee thereof shall fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of the CSRA or FSA or this subchapter.

§ 458.38 Deprivation of rights under the CSRA or FSA by violence or threat of violence.

No labor organization or any officer, agent, shop steward, or other representative or any employee thereof shall use, conspire to use, or threaten to use force or violence to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of the CSRA or FSA or of this subchapter.

Subpart B—Proceedings for Enforcing Standards of Conduct

§ 458.50 Investigations.

(a) When he believes it necessary in order to determine whether any person has violated or is about to violate any provision of §§ 458.26 through 458.30, the Chief, DOE may cause an investigation to be conducted.

(b) When he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this part (other than §§ 458.2, 458.26 through 458.30 or 458.37), a District Director may conduct an investigation.

(c) The authority to investigate possible violations of this part (other than § 458.2 or 458.37) shall not be contingent upon receipt of a complaint.

[50 FR 31312, Aug. 1, 1985. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.51 Inspection of records and questioning.

In connection with such investigation the Chief, DOE or a District Director or his representative may inspect such records and question such persons as he may deem necessary to enable him to determine the relevant facts. Every labor organization, its officers, employees, agents, or representatives shall cooperate fully in any investigation and shall testify and produce the records or other documents requested in connection with the investigation. This section shall be enforced in accordance with the procedures in §§ 458.66 through 458.92.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31312, Aug. 1, 1985; 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.52 Report of investigation.

The Chief, DOE may report to interested persons concerning any matter which he deems to be appropriate as a result of an investigation of possible violations of §§ 458.26 through 458.30. The District Director may report to interested persons concerning any matter which he deems to be appropriate as a result of an investigation of possible violations of any provision of this part (other than §§ 458.2, 458.26 through 458.30 and 458.37).

[50 FR 31312, Aug. 1, 1985. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.53 Filing of complaints.

A complaint alleging violations of this part may be filed with any district office, or any other office of the Office of Labor-Management Standards.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985; 63 FR 33780, June 19, 1998]

Procedures Involving Bill of Rights or Prohibited Discipline

§ 458.54 Complaints alleging violations of § 458.2, Bill of rights of members of labor organization, or § 458.37, prohibition of certain discipline.

Any member of a labor organization whose rights under the provisions of § 458.2 or § 458.37 are alleged to have been infringed or violated, may file a complaint in accordance with § 458.53: *Provided, however*, That such member may be required to exhaust reasonable hearing procedures (but not to exceed a

4-month lapse of time) within such organization.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985]

§ 458.55 Content of complaint.

(a) The complaint shall contain appropriate identifying information and a clear and concise statement of the facts constituting the alleged violation.

(b) The complainant shall submit with his complaint a statement setting forth the procedures, if any, invoked to remedy the alleged violation, including the dates when such procedures were invoked and copies of any written ruling or decision which he has received.

§ 458.56 Service on respondent.

Upon the filing of a complaint, a copy of the complaint shall be served upon the respondent, and a written statement of such service shall be furnished to the District Director.

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.57 Additional information and report.

Upon the filing of a complaint pursuant to §§ 458.54 through 458.56, the District Director shall obtain such additional information as he deems necessary, including the positions of the parties and any offers of settlement.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985; 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.58 Dismissal of complaint.

If the District Director determines that a reasonable basis for the complaint has not been established, or that an offer of settlement satisfactory to the complainant has been made, he may dismiss the complaint. If he dismisses the complaint, he shall furnish the complainant with a written statement of the grounds for dismissal, sending a copy of the statement to the respondent.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985; 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.59 Review of dismissal.

The complainant may obtain a review of a dismissal by filing a request for review with the Director within fifteen (15) days of service of the notice of dismissal. A copy of such request shall be served on the District Director and the respondent, and a statement of service shall be filed with the Director. The request for review shall contain a complete statement of the facts and reasons upon which a request is based.

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997; 78 FR 8026, Feb. 5, 2013]

§ 458.60 Actionable complaint.

If it appears to the District Director that there is a reasonable basis for the complaint, and that no offer of settlement satisfactory to the complainant has been made, he shall refer the matter to the Chief Administrative Law Judge, U.S. Department of Labor, for the issuance of a notice of hearing as set forth in § 458.69.

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.61 Transfer and consolidation of cases.

In any matter arising pursuant to the regulations in this subchapter, whenever it appears necessary in order to effectuate the purposes of the CSRA or FSA or to avoid unnecessary costs or delay, the District Director may consolidate cases within his own area or may transfer such cases to any other area, for the purpose of consolidation with any proceedings which may have been instituted in, or transferred to, such area.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.62 Hearing procedures.

The proceedings following issuance of the notice of hearing shall be as provided in §§ 458.69 through 458.92 of this part.

PROCEDURES INVOLVING ELECTION OF OFFICERS

§ 458.63 Complaints alleging violations of § 458.29, election of officers.

(a) A member of a labor organization may file a complaint alleging violations of § 458.29 within 1 calendar month after he has (1) exhausted the remedies available under the constitution and bylaws of the labor organization and of any parent body, or (2) invoked such available remedies without obtaining a final decision within 3 calendar months of such invocation.

(b) The complaint shall contain a clear and concise statement of the facts constituting the alleged violation(s), the remedies which have been invoked under the constitution and bylaws of the labor organization and when such remedies were invoked.

(c) The complainant shall submit with his complaint a copy of any ruling or decision he has received in connection with the subject matter of his complaint.

§ 458.64 Investigations; dismissal of complaint.

(a) If it is determined after preliminary inquiry that a complaint is deficient in any of the following respects, the District Director shall conduct no investigation:

(1) The complainant is not a member of the labor organization which conducted the election being challenged;

(2) The labor organization is not subject to the CSRA or FSA;

(3) The election was not a regular periodic election of officers;

(4) The allegations, if true, do not constitute a violation or violations of § 458.29;

(5) The complainant has not complied with the requirements of § 458.63(a).

(b) If investigation discloses (1) that there has been no violation or (2) that a violation has occurred but could not have affected the outcome or (3) that a violation has occurred but has been remedied, the Chief, DOE shall issue a determination dismissing the complaint and stating the reasons for his action.

(c) A determination dismissing the complaint may be reviewed by the Director, but only on the basis of deciding whether the Chief, DOE's decision was arbitrary and capricious. The request for review must be made within fifteen (15) days after service of notice of dismissal.

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997; 78 FR 8026, Feb. 5, 2013]

§ 458.65 Procedures following actionable complaint.

(a) If the Chief, DOE concludes that there is probable cause to believe that a violation has occurred which may have affected the outcome and which has not been remedied, he shall proceed in accordance with §§ 458.66 through 458.92.

(b) The challenged election shall be presumed valid pending a final decision thereon as hereinafter provided in §§ 458.66 through 458.92, and in the interim the affairs of the organization shall be conducted by the officers elected or in such other manner as its constitution and bylaws may provide.

(c) When the Chief, DOE supervises an election pursuant to an order of the Administrative Review Board issued under § 458.70 or § 458.91, he shall certify to the Administrative Review Board the names of the persons elected. The Administrative Review Board shall thereupon issue an order declaring such persons to be the officers of the labor organization.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985; 62 FR 6094, FEb. 10, 1997; 78 FR 8026, Feb. 5, 2013; 81 FR 33389, May 26, 2016]

OTHER ENFORCEMENT PROCEDURES

§ 458.66 Procedures for institution of enforcement proceedings.

(a) Whenever it appears to the Chief, DOE that a violation of any provision of §§ 458.26 through 458.30 has occurred and has not been remedied, he shall immediately notify any appropriate person and labor organization. Within fifteen (15) days following receipt of such

notification, any such person or labor organization may request a conference with the Chief, DOE or his representative concerning such alleged violation.

(b) Whenever it appears to a District Director that a violation of this part (other than § 458.2, §§ 458.26–458.30, or § 458.37) has occurred and has not been remedied, he shall immediately notify any appropriate person and labor organization. Within fifteen (15) days following receipt of such notification, any such person or labor organization may request a conference with the District Director or his representative concerning such alleged violation.

(c) At any conference held pursuant to this section, the Chief, DOE or District Director may enter into an agreement providing for appropriate remedial action. If no person or labor organization requests such a conference, or upon failure to reach agreement following any such conference, the Chief, DOE or District Director shall institute enforcement proceedings by filing a complaint with the Chief Administrative Law Judge, U.S. Department of Labor, and shall cause a copy of the complaint to be served on each respondent named therein. If an agreement is reached and the Chief, DOE or District Director concludes that there has not been compliance with all the terms of the agreement, he may refer the matter to the Director for appropriate enforcement action or file a complaint with the Chief Administrative Law Judge.

[50 FR 31313, Aug. 1, 1985. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997; 78 FR 8026, Feb. 5, 2013]

§ 458.67 Standards complaint; initiation of proceedings.

A complaint filed under § 458.66 shall constitute the institution of a formal enforcement proceeding in the name of the Chief, DOE or District Director, who shall be the only complaining party in the proceeding and shall, where he believes it appropriate, refrain from disclosing the identity of any person who called the violation to his attention (except in proceedings involving violations of § 458.29, Election of officers). The complaint shall include the following:

(a) The name and identity of each respondent.

(b) A clear and concise statement of the facts alleged to constitute violations of the CSRA or FSA or of this part.

(c) A statement of the relief requested.

(d) In any complaint filed by the Chief, DOE on the basis of a complaint received from a member of a labor organization pursuant to § 458.63, a statement setting forth the procedures, if any, followed to invoke available remedies, including the dates when such procedures were invoked, and the substance of any ruling or decision received by the complaining member from the labor organization or any parent body.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985; 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.68 Answer.

(a) Within twenty (20) days from the service of the complaint the respondent shall file an answer thereto with the Chief Administrative Law Judge and shall serve a copy on all parties. The answer shall be signed by the respondent or his attorney or other agent or representative.

(b) The answer (1) shall contain a statement of the facts which constitute the grounds of defense, and shall specifically admit, explain, or deny each of the allegations of the complaint unless the respondent is without knowledge, in which case the answer shall so state; or (2) shall state that the respondent admits all of the allegations in the complaint. Failure to file an answer to or plead specifically to any allegation in the complaint shall constitute an admission of such allegation.

Subpart C—Hearing and Related Matters

§ 458.69 Notice of hearing.

The Chief Administrative Law Judge shall issue and cause to be served upon each of the parties a notice of hearing. The notice of hearing shall include the following:

(a) The name and identity of each party and the case number.

(b) A statement of the authority and jurisdiction under which the hearing is to be held.

(c) A statement of the time and place of the hearing which shall be not less than fifteen (15) days after service of the notice of hearing.

§ 458.70 Administrative Law Judge.

Each enforcement proceeding instituted pursuant to this part shall be conducted before an Administrative Law Judge designated by the Chief Administrative Law Judge for the Department of Labor except, however, that when the Administrative Law Judge approves a stipulated agreement for appropriate remedial action, he shall prepare his recommended decision and order adopting that agreement and transfer the case to the Administrative Review Board. The Administrative Review Board may order the remedial action set forth in the stipulated agreement or take such other action as it deems appropriate.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013; 81 FR 33389, May 26, 2016]

§ 458.71 Procedure upon admission of facts.

The admission of all the material allegations of fact in the complaint shall constitute a waiver of hearing. Upon such admission, the Administrative Law Judge without further hearing shall prepare his recommended decision and order in which he shall adopt as his proposed findings of fact the material facts alleged in the complaint.

§ 458.72 Motions and requests.

(a) Motions and requests made prior to the hearing shall be filed with the Chief Administrative Law Judge. The moving party shall serve a copy of all motions and requests on all other parties. Motions during the course of the hearing may be stated orally or filed in writing and shall be made part of the record. Each motion shall state the particular order, ruling, or action desired, and the grounds therefor. The Administrative Law Judge is authorized to rule upon all motions made prior to the filing of his report.

(b) A party may request the attendance of witnesses and/or the production of documents at a hearing held pursuant to this part, by written application before the hearing or orally during the hearing. Copies of an application filed before the opening of the hearing shall be served on the other parties, who may file written objections to the request within seven (7) days after such service. The Administrative Law Judge after consideration of any objections, shall grant the request provided the specified testimony and/or documents appear to be necessary to the matters under investigation. If the Administrative Law Judge denies the request he shall set forth the basis for his ruling. Upon the failure of any party or officer or employee of any party to comply with such a request which has been granted by the Administrative Law Judge, the Administrative Law Judge and the Administrative Review Board may disregard all related evidence offered by the party failing to comply with the request or take such other action as may be appropriate.

(c) Employees who have been determined to be necessary as witnesses at a hearing shall be granted official time only for such participation as occurs during their regular work hours and when they would otherwise be in a work or paid leave status. Participation as witnesses includes the time necessary to travel to and from the site of a hearing, and the time spent giving testimony and waiting to give testimony, when such time falls during regular work hours.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985; 78 FR 8026, Feb. 5, 2013]

§ 458.73 Prehearing conferences.

(a) Upon his own motion or the motion of the parties, the Administrative Law Judge may direct the parties or their counsel to meet with him for a conference to consider:

(1) Simplification of the issues;

(2) Necessity or desirability of amendments to pleadings for purposes of clarification, simplification, or limitations;

(3) Stipulations, admissions of fact, and contents and authenticity of documents;

(4) Limitation of the number of expert witnesses; and

(5) Such other matters as may tend to expedite the disposition of the proceeding.

(b) The record shall show the matters disposed of by order and by agreement in such prehearing conferences. The subsequent course of the proceeding shall be controlled by such action.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985]

§ 458.74 Conduct of hearing.

Hearings shall be conducted by an Administrative Law Judge and shall be open to the public unless otherwise ordered by the Administrative Law Judge.

§ 458.75 Intervention.

Any person desiring to intervene in a hearing shall file a motion in writing in accordance with the procedures set forth in § 458.72 or, if made at the hearing, may move orally on the record, stating the grounds upon which such person claims an interest. Such a motion shall be filed with the Administrative Law Judge who shall rule upon such motion.

§ 458.76 Duties and powers of the Administrative Law Judge.

It shall be the duty of the Administrative Law Judge to inquire fully into the facts as they relate to the matter before him and to prepare, serve and submit his recommended decision and order pursuant to § 458.88. Upon assignment to him and before transfer of the case to the Administrative Review Board, the Administrative Law Judge shall have the authority to:

(a) Grant requests for appearance of witnesses or production of ducuments;

(b) Rule upon offers of proof and receive relevant evidence;

(c) Take or cause depositions to be taken whenever the ends of justice would be served thereby;

(d) Limit lines of questioning or testimony which are immaterial, irrelevant, or unduly repetitious;

(e) Regulate the course of the hearing and if appropriate, exclude from the hearing persons who engage in misconduct and strike all related testimony of witnesses refusing to answer any questions ruled to be proper;

(f) Hold conferences for the settlement or simplification of the issues by consent of the parties or upon his own motion;

(g) Dispose of procedural requests, motions, or similar matters which shall be made part of the record of the proceeding, including motions to amend pleadings; also to recommend dismissal of cases or portions thereof, and to order hearings reopened prior to issuance of his recommended decision and order;

(h) Examine and cross-examine witnesses and introduce into the record documentary or other evidence;

(i) Request the parties at any time during the hearing to state their respective positions concerning any issue in the case or theory in support thereof;

(j) Continue, at his discretion, the hearing from day-to-day, or adjourn it to a later date or to a different place, by announcement thereof at the hearing or by other appropriate notice;

(k) Take official notice of any material fact not appearing in evidence in the record, which is among the traditional matters of judicial notice and also concerning which the Department of Labor by reason of its functions is presumed to be expert: *Provided*, That the parties shall be given adequate notice, at the hearing or by reference in the Administrative Law Judge's recommended decision and order, of the matters so noticed, and shall be given adequate opportunity to show the contrary;

(l) Correct or approve proposed corrections of the official transcript when deemed necessary; and

(m) Take any other action necessary under the foregoing and not prohibited by these regulations.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985; 78 FR 8026, Feb. 5, 2013]

§ 458.77 Rights of parties.

Any party shall have the right to appear at such hearing in person, by counsel, or by other representative, to examine and cross-examine witnesses,

and to introduce into the record documentary or other relevant evidence, except that the participation of any party shall be limited to the extent prescribed by the Administrative Law Judge. Two (2) copies of documentary evidence shall be submitted and a copy furnished to each of the other parties. Stipulations of fact may be introduced in evidence with respect to any issue.

§ 458.78 Rules of evidence.

The technical rules of evidence do not apply. Any evidence may be received, except that an Administrative Law Judge may exclude any evidence or offer of proof which is immaterial, irrelevant, unduly repetitious, or customarily privileged. Every party shall have a right to present his case by oral and documentary evidence and to submit rebuttal evidence.

§ 458.79 Burden of proof.

In a hearing concerning an alleged violation of §458.2 (Bill of rights of members of labor organizations) or §458.37 (Prohibition of certain discipline), the complainant shall have the burden of proving the allegations of the complaint by a preponderance of the evidence. In a hearing concerning an alleged violation of §§458.26–458.30, the Chief, DOE shall have the burden of proving the allegations of the complaint by a preponderance of the evidence. In a hearing concerning an alleged violation of other standards of conduct matters, the District Director shall have the burden of proving the allegations of the complaint by a preponderance of the evidence.

[45 FR 15158, Mar. 7, 1980. Redesignated and amended at 50 FR 31311, 31313, Aug. 1, 1985; 59 FR 15117, Mar. 31, 1994; 62 FR 6094, Feb. 10, 1997]

§ 458.80 Unavailability of Administrative Law Judges.

In the event the Administrative Law Judge designated to conduct the hearing becomes unavailable, the Chief Administrative Law Judge shall designate another Administrative Law Judge for the purpose of further hearing or issuance of a recommended decision and order on the record as made, or both.

§ 458.81 Objection to conduct of hearing.

(a) Any objection with respect to the conduct of the hearing, including any objection to the introduction of evidence, may be stated orally or in writing accompanied by a short statement of the grounds for such objection and included in the record. No such objection shall be deemed waived by further participation in the hearing. Such objection shall not stay the conduct of the hearing.

(b) Automatic exceptions will be allowed to all adverse rulings. Rulings by the Administrative Law Judge shall not be appealed prior to the transfer of the case to the Administrative Review Board, but shall be considered by the Administrative Review Board only upon the filing of exceptions to the Administrative Law Judge's recommended decision and order in accordance with §458.88.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8026, Feb. 5, 2013]

§ 458.82 Motions after a hearing.

All motions made after the transfer of the case to the Administrative Review Board, except motions to correct the record under §458.76(l), shall be made in writing to the Administrative Review Board. The moving party shall serve a copy of all motion papers on all other parties. A statement of service shall accompany the motion. Answers, if any, must be served on all parties and the original thereof, together with a statement of service, shall be filed with the Administrative Review Board after the hearing, within seven (7) days after service of the moving papers unless it is otherwise directed.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8027, Feb. 5, 2013]

§ 458.83 Waiver of objections.

Any objection not duly urged before an Administrative Law Judge shall be deemed waived.

§ 458.84 Oral argument at the hearing.

Any party shall be entitled, upon request, to a reasonable period prior to

the close of the hearing for oral argument, which shall be included in the official transcript of the hearing.

§ 458.85 Transcript.

An official reporter shall make the only official transcript of such proceedings. Copies of the official transcript will be provided to the parties, in accordance with the provisions of part 70 of this title, or they may be examined in the district office in whose geographic jurisdiction the hearing has been held.

[45 FR 15158, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 63 FR 33780, June 19, 1998]

§ 458.86 Filing of brief.

Any party desiring to submit a brief to the Administrative Law Judge shall file the original within ten (10) days after the close of the hearing: *Provided, however*, That prior to the close of the hearing and for good cause, the Administrative Law Judge may grant a reasonable extension of time. Copies of such brief shall be served on all of the parties to the proceeding. Requests for additional time in which to file a brief under authority of this section made after the hearing shall be made in writing to the Administrative Law Judge and copies thereof served on the other parties. A statement of such service shall be furnished. A request for extension of time shall be received not later than three (3) days before the date such briefs are due. In the absence of the Administrative Law Judge such requests shall be ruled upon by the Chief Administrative Law Judge. No reply brief may be filed except by permission of the Administrative Law Judge.

§ 458.87 Proposed findings and conclusions.

Within fifteen (15) days following the close of the hearing, the parties may submit proposed findings and conclusions to the Administrative Law Judge, together with supporting reasons therefor, which shall become part of the record.

§ 458.88 Submission of the Administrative Law Judge's recommended decision and order to the Administrative Review Board; exceptions.

(a) After the close of the hearing, and the receipt of briefs, or findings and conclusions, if any, the Administrative Law Judge shall prepare his recommended decision and order expeditiously. The recommended decision and order shall contain findings of fact, conclusions, and the reasons or basis therefor including credibility determinations, and recommendations as to the disposition of the case including the remedial action to be taken.

(b) The Administrative Law Judge shall cause his recommended decision and order to be served promptly on all parties to the proceeding. Thereafter, the Administrative Law Judge shall transfer the case to the Administrative Review Board including his recommended decision and order and the record. The record shall include the complaint, the notice of hearing, motions, rulings, orders, official transcript of the hearing, stipulations, objections, depositions, exhibits, documentary evidence and any briefs or other documents submitted by the parties.

(c) Exceptions to the Administrative Law Judge's recommended decision and order may be filed by any party with the Administrative Review Board within fifteen (15) days after service of the recommended decision and order, in accordance with 29 CFR part 26. The Administrative Review Board may for good cause shown extend the time for filing such exceptions. Requests for additional time in which to file exceptions shall be in writing, and copies thereof shall be served on the other parties. Requests for extension of time must be received no later than three (3) days before the date the exceptions are due. Copies of such exceptions and any supporting briefs shall be served on all other parties, and a statement of such service shall be furnished to the Administrative Review Board.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8027, Feb. 5, 2013; 86 FR 1785, Jan. 11, 2021]

§ 458.89 Contents of exceptions to Administrative Law Judge's recommended decision and order.

(a) Exceptions to an Administrative Law Judge's recommended decision and order shall:

(1) Set forth specifically the questions upon which exceptions are taken;

(2) Identify that part of the Administrative Law Judge's recommended decision and order to which objection is made;

(3) Designate by precise citation of page the portions of the record relied on, state the grounds for the exceptions and include the citation of authorities unless set forth in a supporting brief.

(b) Any exception to a ruling, finding, conclusion, or recommendation which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with the foregoing requirements may be disregarded.

§ 458.90 Briefs in support of exceptions.

(a) Any brief in support of exceptions shall be filed in accordance with 29 CFR part 26, contain only matters included within the scope of the exceptions, and contain, in the order indicated, the following:

(1) A concise statement of the case containing all that is material to the consideration of the questions presented;

(2) A specification of the questions involved and to be argued;

(3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the transcript and the legal or other material relied on.

(b) Answering briefs to the exceptions may be filed with the Administrative Review Board within ten (10) days after service of the exceptions.

[45 FR 15158, Mar. 7, 1980; 45 FR 28322, Apr. 29, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8027, Feb. 5, 2013; 86 FR 1785, Jan. 11, 2021]

§ 458.91 Action by the Administrative Review Board.

(a) After consideration of the Administrative Law Judge's recommended decision and order, the record, and any exceptions filed, the Administrative Review Board shall issue its decision affirming or reversing the Administrative Law Judge, in whole, or in part, or making such other disposition of the matter as it deems appropriate: *Provided, however,* That unless exceptions are filed which are timely and in accordance with § 458.89, the Administrative Review Board may, at its discretion, adopt without discussion the recommended decision and order of the Administrative Law Judge, as contained in his recommended decision and order, shall, upon appropriate notice to the parties, automatically become the decision of the Administrative Review Board.

(b) Upon finding a violation of the CSRA, FSA or this part, the Administrative Review Board may order respondent to cease and desist from such violative conduct and may require the respondent to take such affirmative action as it deems appropriate to effectuate the policies of the CSRA or FSA.

(c) Upon finding no violation of the CSRA, FSA or this part, the Administrative Review Board shall dismiss the complaint.

[78 FR 8027, Feb. 5, 2013]

§ 458.92 Compliance with decisions and orders of the Administrative Review Board.

When remedial action is ordered, the respondent shall report to the Director, within a specified period, that the required remedial action has been effected. When the Director finds that the required remedial action has not been effected, he shall refer the matter for appropriate action to the Federal Labor Relations Authority (in the case of labor organizations covered by the CSRA), the Foreign Service Labor Relations Board (in the case of labor organizations covered by the FSA), or the Board of Directors of the Office of Compliance (in the case of labor organizations covered by the Congressional Accountability Act).

[78 FR 8027, Feb. 5, 2013]

§ 458.93 Stay of remedial action.

In cases involving violations of this part, the Administrative Review Board

may direct, subject to such conditions at it deems appropriate, that the remedial action ordered by stayed.

[78 FR 8027, Feb. 5, 2013]

PART 459—MISCELLANEOUS

Sec.
459.1 Computation of time for filing papers.
459.2 Additional time after service by mail.
459.3 Documents in a proceeding.
459.4 Service of pleading and other papers under this subchapter.
459.5 Rules to be construed liberally.

AUTHORITY: 5 U.S.C. 7120, 7134; 22 U.S.C. 4117; 2 U.S.C. 1351(a)(1); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

SOURCE: 45 FR 15165, Mar. 7, 1980, unless otherwise noted. Redesignated at 50 FR 31311, Aug. 1, 1985.

§ 459.1 Computation of time for filing papers.

In computing any period of time prescribed by or allowed by the regulations contained in part 458 of this subchapter, the day of the act, event, or default after which the designated period of time begins to run, shall not be included. The last day of the period so computed is to be included unless it is a Saturday, Sunday or Federal legal holiday in which event the period shall run until the end of the next day which is neither a Saturday, Sunday, or a Federal legal holiday. When the period of time prescribed or allowed is seven (7) days or less, intermediate Saturdays, Sundays, and Federal legal holidays shall be excluded from the computations. When these regulations require the filing of any paper, such document must be received by the Director or the officer or agent designated to receive such matter before the close of business of the last day of the time limit, if any, for such filing or extension of time that may have been granted.

[45 FR 15165, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8027, Feb. 5, 2012]

§ 459.2 Additional time after service by mail.

Whenever a party has the right or is required to do some act pursuant to these regulations within a prescribed period after service of a notice or other paper upon him and the notice or paper is served on him by mail, five (5) days shall be added to the prescribed period: *Provided, however,* That five (5) days shall not be added if any extension of time may have been granted.

§ 459.3 Documents in a proceeding.

(a) *Title.* Documents in any proceeding under part 458 of this subchapter, including correspondence, shall show the title of the proceeding and the case number, if any.

(b) *Signature.* The original of each document required to be filed under these regulations shall be signed by the party or by an attorney or representative of record for the party, or by an officer of the party, and shall contain the address and telephone number of the person signing it.

§ 459.4 Service of pleading and other papers under this subchapter.

(a) *Method of service.* Notices of hearing, decisions, orders and other papers may be served personally or by registered or certified mail or by telegraph. When service is by mail, the date of service shall be the day when the matter served is deposited in the United States mail.

(b) *Upon whom served.* All papers, except as herein otherwise provided, shall be served upon all counsel of record and upon parties not represented by counsel or by their agents designated by them or by law and upon the Director, or his designated officer, or agent or Administrative Law Judge where appropriate. Service upon such counsel or representative shall constitute service upon the party, but a copy also shall be transmitted to the party.

[45 FR 15165, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8027, Feb. 5, 2012]

§ 459.5 Rules to be construed liberally.

(a) The regulations in this subchapter may be construed liberally to effectuate the purposes and provisions of the CSRA or FSA.

(b) When an act is required or allowed to be done at or within a specified time, the Director may at any time order the period altered where it shall be manifest that strict adherence

will work surprise or injustice or interfere with the proper effectuation of the CSRA or FSA.

[45 FR 15165, Mar. 7, 1980. Redesignated at 50 FR 31311, Aug. 1, 1985, as amended at 78 FR 8027, Feb. 5, 2012]

SUBCHAPTER C—EMPLOYEE RIGHTS CONCERNING PAYMENT OF UNION DUES OR FEES

PART 470 [RESERVED]

SUBCHAPTER D—NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

PART 471—OBLIGATIONS OF FEDERAL CONTRACTORS AND SUBCONTRACTORS; NOTIFICATION OF EMPLOYEE RIGHTS UNDER FEDERAL LABOR LAWS

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

Sec.

471.1 What definitions apply to this part?
471.2 What employee notice clause must be included in Government contracts?
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471.4 What employers are not covered under this part?
APPENDIX A TO SUBPART A OF PART 471—TEXT OF EMPLOYEE NOTICE CLAUSE

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

471.10 How will the Department determine whether a contractor is in compliance with Executive Order 13496 and this part?
471.11 What are the procedures for filing and processing a complaint?
471.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?
471.13 Under what circumstances, and how, will enforcement proceedings under Executive Order 13496 be conducted?
471.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?
471.15 Under what circumstances must a contractor be provided the opportunity for a hearing?
471.16 Under what circumstances may a contractor be reinstated?

Subpart C—Ancillary Matters

471.20 What authority under this part or Executive Order 13496 may the Secretary delegate, and under what circumstances?
471.21 Who will make rulings and interpretations under Executive Order 13496 and this part?
471.22 What actions may the Director of OLMS take in the case of intimidation and interference?
471.23 What other provisions apply to this part?

AUTHORITY: 40 U.S.C. 101 *et seq.;* Executive Order 13496, 74 FR 6107, February 4, 2009; Secretary's Order No. 7–2009, 74 FR 58834, November 13, 2009; Secretary's Order No. 01–2020.

SOURCE: 75 FR 28397, May 20, 2010, unless otherwise noted.

Subpart A—Definitions, Requirements for Employee Notice, and Exceptions and Exemptions

§ 471.1 What definitions apply to this part?

Construction means the construction, rehabilitation, alteration, conversion, extension, demolition, weatherization, or repair of buildings, highways, or other changes or improvements to real property, including facilities providing utility services. The term construction also includes the supervision, inspection, and other on-site functions incidental to the actual construction.

Construction work site means the general physical location of any building, highway, or other change or improvement to real property which is undergoing construction, rehabilitation, alteration, conversion, extension, demolition, weatherization or repair, and any temporary location or facility at which a contractor or subcontractor meets a demand or performs a function relating to the contract or subcontract.

Contract means, unless otherwise indicated, any Government contract or subcontract.

Contracting agency means any department, agency, establishment, or instrumentality in the executive branch of the Government, including any wholly owned Government corporation, that enters into contracts.

Contractor means, unless otherwise indicated, a prime contractor or subcontractor.

Department means the U.S. Department of Labor.

Director of OFCCP means the Director of the Office of Federal Contract Compliance Programs in the Department of Labor.

Director of OLMS means the Director of the Office of Labor-Management Standards in the Department of Labor.

Employee notice clause means the contract clause set forth in Appendix A that Government contracting departments and agencies must include in all Government contracts and subcontracts pursuant to Executive Order 13496 and this part.

Government means the Government of the United States of America.

Government contract means any agreement or modification thereof between any contracting agency and any person for the purchase, sale, or use of personal property or non-personal services. The term ''personal property,'' as used in this section, includes supplies, and contracts for the use of real property (such as lease arrangements), unless the contract for the use of real property itself constitutes real property (such as easements). The term ''non-personal services'' as used in this section includes, but is not limited to, the following services: utilities, construction, transportation, research, insurance, and fund depository. The term Government contract does not include:

(1) Agreements in which the parties stand in the relationship of employer and employee; and

(2) Federal financial assistance, as defined in 29 CFR 31.2.

Labor organization means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Modification of a contract means any alteration in the terms and conditions of that contract, including amendments, renegotiations, and renewals.

Order or *Executive Order* means Executive Order 13496 (74 FR 6107, Feb. 4, 2009).

Person means any natural person, corporation, partnership, unincorporated association, State or local government, and any agency, instrumentality, or subdivision of such a government.

Prime contractor means any person holding a contract with a contracting agency, and, for the purposes of subparts B and C of this part, includes any person who has held a contract subject to the Executive Order and this part.

Related rules, regulations, and orders of the Secretary of Labor, as used in § 471.2 of this part, means rules, regulations, and relevant orders issued pursuant to the Executive Order or this part.

Secretary means the Secretary of Labor, U.S. Department of Labor, or his or her designee.

Subcontract means any agreement or arrangement between a contractor and any person (in which the parties do not stand in the relationship of an employer and an employee):

(1) For the purchase, sale or use of personal property or non-personal services that, in whole or in part, is necessary to the performance of any one or more contracts; or

(2) Under which any portion of the contractor's obligation under any one or more contracts is performed, undertaken or assumed.

Subcontractor means any person holding a subcontract and, for the purposes of subparts B and C of this part, any person who has held a subcontract subject to the Executive Order and this part.

Union means a labor organization as defined above.

United States means the several States, the District of Columbia, the Virgin Islands, the Commonwealth of Puerto Rico, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, and Wake Island.

§ 471.2 What employee notice clause must be included in Government contracts?

(a) *Government contracts.* With respect to all contracts covered by this part, Government contracting departments and agencies must, to the extent consistent with law, include the language set forth in appendix A to subpart A of part 471 in every Government contract, other than those contracts to which exceptions are applicable as stated in § 471.3.

(b) *Inclusion by reference.* The employee notice clause need not be quoted verbatim in a contract, subcontract, or purchase order. The clause may be made part of the contract, subcontract, or purchase order by citation to 29 CFR part 471, appendix A to subpart A.

(c) *Adaptation of language.* The Director of OLMS may find that an Act of Congress, clarification of existing law by the courts or the National Labor Relations Board, or other circumstances make modification of the contractual provisions necessary to achieve the purposes of the Executive Order and this part. In such circumstances, the Director of OLMS will promptly issue rules, regulations, or orders as are needed to ensure that all future government contracts contain appropriate provisions to achieve the purposes of the Executive Order and this part.

(d) *Physical posting of employee notice.* A contractor or subcontractor that posts notices to employees physically must also post the required notice physically. Where a significant portion of a contractor's workforce is not proficient in English, the contractor must provide the notice in the language employees speak. The employee notice must be placed:

(1) In conspicuous places in and about the contractor's plants and offices so that the notice is prominent and readily *See*n by employees. Such conspicuous placement includes, but is not limited to, areas in which the contractor posts notices to employees about the employees' terms and conditions of employment; and

(2) Where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract. An employee shall be considered to be so engaged if:

(i) The duties of the employee's position include work that fulfills a contractual obligation, or work that is necessary to, or that facilitates, performance of the contract or a provision of the contract; or

(ii) The cost or a portion of the cost of the employee's position is allowable as a cost of the contract under the principles set forth in the Federal Acquisition Regulation at 48 CFR Ch. 1, part 31: Provided, That a position shall not be considered covered by this part by virtue of this provision if the cost of the position was not allocable in whole or in part as a direct cost to any Government contract, and only a de minimis (less than 2%) portion of the cost of the position was allocable as an indirect cost to Government contracts, considered as a group.

(e) *Obtaining a poster with the employee notice.* A poster with the required employee notice, including a poster with the employee notice translated into languages other than English, will be printed by the Department, and will be provided by the Federal contracting agency or may be obtained from the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5609, Washington, DC 20210, or from any field office of the Department's Office of Labor-Management Standards or Office of Federal Contract Compliance Programs. A copy of the poster in English and in languages other than English may also be downloaded from the Office of Labor-Management Standards Web site at *http://www.olms.dol.gov*. Additionally, contractors may reproduce and use exact duplicate copies of the Department's official poster.

(f) *Electronic postings of employee notice.* A contractor or subcontractor that customarily posts notices to employees electronically must also post the required notice electronically. Such contractors or subcontractors satisfy the electronic posting requirement by displaying prominently on any Web site that is maintained by the contractor or subcontractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor's Web site that contains the full text of the poster. The link to the Department's Web site must read, ''Important Notice about Employee Rights to Organize and Bargain Collectively with Their Employers.'' Where a significant portion of a contractor's workforce is not proficient in English, the contractor must provide the notice required in this subsection in the language the employees speak. This requirement will

be satisfied by displaying prominently on any Web site that is maintained by the contractor or subcontractor, whether external or internal, and customarily used for notices to employees about terms and conditions of employment, a link to the Department of Labor's Web site that contains the full text of the poster in the language the employees speak. In such cases, the Office of Labor-Management Standards will provide translations of the link to the Department's Web site that must be displayed on the contractor's or subcontractor's Web site.

§ 471.3 What exceptions apply and what exemptions are available?

(a) *Exceptions for specific types of contracts.* The requirements of this part do not apply to any of the following:

(1) Collective bargaining agreements as defined in the Federal Service Labor-Management Relations Statute, entered into by an agency and the exclusive representative of employees in an appropriate unit to set terms and conditions of employment of those employees.

(2) Government contracts that involve purchases below the simplified acquisition threshold set by Congress under the Office of Federal Procurement Policy Act. Therefore, the employee notice clause need not be included in government contracts for purchases below that threshold, provided that

(i) No agency or contractor is permitted to procure supplies or services in a manner designed to avoid the applicability of the Order and this part; and

(ii) The employee notice clause must be included in government contracts for indefinite quantities, unless the contracting agency or contractor has reason to believe that the amount to be ordered in any year under such a contract will be less than the simplified acquisition threshold set in the Office of Federal Procurement Policy Act.

(3) Government contracts resulting from solicitations issued before the effective date of this rule.

(4) Subcontracts of $10,000 or less in value, except that contractors and subcontractors are not permitted to procure supplies or services in a manner designed to avoid the applicability of the Order and this part.

(5) Contracts and subcontracts for work performed exclusively outside the territorial United States.

(b) *Exemptions for certain contracts.* The Director of OLMS may exempt a contracting department or agency or groups of departments or agencies from the requirements of this part with respect to a particular contract or subcontract or any class of contracts or subcontracts when the Director finds that either:

(1) The application of any of the requirements of this part would not serve its purposes or would impair the ability of the Government to procure goods or services on an economical and efficient basis; or

(2) Special circumstances require an exemption in order to serve the national interest.

(c) *Procedures for requesting an exemption and withdrawals of exemptions.* Requests for exemptions under this subsection from a contracting department or agency must be in writing, and must be directed to the Director of OLMS, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N–5603, Washington, DC, 20210. The Director of OLMS may withdraw an exemption granted when, in the Director's judgment, such action is necessary or appropriate to achieve the purposes of this part.

§ 471.4 What employers are not covered under this part?

(a) The following employers are excluded from the definition of ''employer'' in the National Labor Relations Act (NLRA), and are not covered by the requirements of this part:

(1) The United States or any wholly owned Government corporation;

(2) Any Federal Reserve Bank;

(3) Any State or political subdivision thereof;

(4) Any person subject to the Railway Labor Act;

(5) Any labor organization (other than when acting as an employer); or

(6) Anyone acting in the capacity of officer or agent of such labor organization.

(b) Additionally, employers exclusively employing workers who are excluded from the definition of ''employee'' under the NLRA are not covered by the requirements of this part. Those excluded employees are employed:

(1) As agricultural laborers;

(2) In the domestic service of any family or person at his home;

(3) By his or her parent or spouse;

(4) As an independent contractor;

(5) As a supervisor as defined under the NLRA;

(6) By an employer subject to the Railway Labor Act; or

(7) By any other person who is not an employer as defined in the NLRA

APPENDIX A TO SUBPART A OF PART 471—TEXT OF EMPLOYEE NOTICE CLAUSE

''1. During the term of this contract, the contractor agrees to post a notice, of such size and in such form, and containing such content as the Secretary of Labor shall prescribe, in conspicuous places in and about its plants and offices where employees covered by the National Labor Relations Act engage in activities relating to the performance of the contract, including all places where notices to employees are customarily posted both physically and electronically. The ''Secretary's notice'' shall consist of the following:

''EMPLOYEE RIGHTS UNDER THE NATIONAL LABOR RELATIONS ACT''

''The NLRA guarantees the right of employees to organize and bargain collectively with their employers, and to engage in other protected concerted activity. Employees covered by the NLRA* are protected from certain types of employer and union misconduct. This Notice gives you general information about your rights, and about the obligations of employers and unions under the NLRA. Contact the National Labor Relations Board, the Federal agency that investigates and resolves complaints under the NLRA, using the contact information supplied below, if you have any questions about specific rights that may apply in your particular workplace.

''Under the NLRA, you have the right to:

• Organize a union to negotiate with your employer concerning your wages, hours, and other terms and conditions of employment.

• Form, join or assist a union.

• Bargain collectively through representatives of employees' own choosing for a contract with your employer setting your wages, benefits, hours, and other working conditions.

• Discuss your terms and conditions of employment or union organizing with your coworkers or a union.

• Take action with one or more co-workers to improve your working conditions by, among other means, raising work-related complaints directly with your employer or with a government agency, and *seeking* help from a union.

• Strike and picket, depending on the purpose or means of the strike or the picketing.

• Choose not to do any of these activities, including joining or remaining a member of a union.

''Under the NLRA, it is illegal for your employer to:

• Prohibit you from soliciting for a union during non-work time, such as before or after work or during break times; or from distributing union literature during non-work time, in non-work areas, such as parking lots or break rooms.

• Question you about your union support or activities in a manner that discourages you from engaging in that activity.

• Fire, demote, or transfer you, or reduce your hours or change your shift, or otherwise take adverse action against you, or threaten to take any of these actions, because you join or support a union, or because you engage in concerted activity for mutual aid and protection, or because you choose not to engage in any such activity.

• Threaten to close your workplace if workers choose a union to represent them.

• Promise or grant promotions, pay raises, or other benefits to discourage or encourage union support.

• Prohibit you from wearing union hats, buttons, t-shirts, and pins in the workplace except under special circumstances.

• Spy on or videotape peaceful union activities and gatherings or pretend to do so.

''Under the NLRA, it is illegal for a union or for the union that represents you in bargaining with your employer to:

• Threaten you that you will lose your job unless you support the union.

• Refuse to process a grievance because you have criticized union officials or because you are not a member of the union.

• Use or maintain discriminatory standards or procedures in making job referrals from a hiring hall.

• Cause or attempt to cause an employer to discriminate against you because of your union-related activity.

• Take other adverse action against you based on whether you have joined or support the union.

''If you and your coworkers select a union to act as your collective bargaining representative, your employer and the union are required to bargain in good faith in a genuine effort to reach a written, binding agreement setting your terms and conditions of employment. The union is required to fairly

represent you in bargaining and enforcing the agreement.

''Illegal conduct will not be permitted. If you believe your rights or the rights of others have been violated, you should contact the NLRB promptly to protect your rights, generally within six months of the unlawful activity. You may inquire about possible violations without your employer or anyone else being informed of the inquiry. Charges may be filed by any person and need not be filed by the employee directly affected by the violation. The NLRB may order an employer to rehire a worker fired in violation of the law and to pay lost wages and benefits, and may order an employer or union to cease violating the law. Employees should *seek* assistance from the nearest regional NLRB office, which can be found on the Agency's Web site: *http://www.nlrb.gov*. ''Click on the NLRB's page titled ''About Us,'' which contains a link, ''Locating Our Offices.'' You can also contact the NLRB by calling toll-free: 1–866–667–NLRB (6572) or (TTY) 1–866–315–NLRB (6572) for hearing impaired.

''*The National Labor Relations Act covers most private-sector employers. Excluded from coverage under the NLRA are public-sector employees, agricultural and domestic workers, independent contractors, workers employed by a parent or spouse, employees of air and rail carriers covered by the Railway Labor Act, and supervisors (although supervisors that have been discriminated against for refusing to violate the NLRA may be covered).

''This is an official Government Notice and must not be defaced by anyone.

''2. The contractor will comply with all provisions of the Secretary's notice, and related rules, regulations, and orders of the Secretary of Labor.

''3. In the event that the contractor does not comply with any of the requirements set forth in paragraphs (1) or (2) above, this contract may be cancelled, terminated, or suspended in whole or in part, and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in or adopted pursuant to Executive Order 13496 of January 30, 2009. Such other sanctions or remedies may be imposed as are provided in Executive Order 13496 of January 30, 2009, or by rule, regulation, or order of the Secretary of Labor, or as are otherwise provided by law.

''4. The contractor will include the provisions of paragraphs (1) through (4) herein in every subcontract or purchase order entered into in connection with this contract (unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 3 of Executive Order 13496 of January 30, 2009), so that such provisions will be binding upon each subcontractor. The contractor will take such action with respect to any such subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions, including the imposition of sanctions for non-compliance: Provided, however, if the contractor becomes involved in litigation with a subcontractor, or is threatened with such involvement, as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States.''

Subpart B—General Enforcement; Compliance Review and Complaint Procedures

§ 471.10 How will the Department determine whether a contractor is in compliance with Executive Order 13496 and this part?

(a) The Director of OFCCP may conduct a compliance evaluation to determine whether a contractor holding a covered contract is in compliance with the requirements of this part. Such an evaluation may be limited to compliance with this part or may be included in a compliance evaluation conducted under other laws, Executive Orders, and/or regulations enforced by the Department.

(b) During such an evaluation, a determination will be made whether:

(1) The employee notice required by § 471.2(a) is posted in conformity with the applicable physical and electronic posting requirements contained in § 471.2(d) and (f); and

(2) The provisions of the employee notice clause are included in government contracts, subcontracts or purchase orders entered into on or after June 21, 2010, or that the government contracts, subcontracts or purchase orders have been exempted under § 471.3(b).

(c) The results of the evaluation will be documented in the evaluation record, which will include findings regarding the contractor's compliance with the requirements of the Executive Order and this part and, as applicable, conciliation efforts made, corrective action taken and/or enforcement recommended under § 471.13.

§ 471.11 What are the procedures for filing and processing a complaint?

(a) *Filing complaints.* An employee of a covered contractor may file a complaint alleging that the contractor has

failed to post the employee notice as required by the Executive Order and this part; and/or has failed to include the employee notice clause in subcontracts or purchase orders. Complaints may be filed with the Office of Labor-Management Standards (OLMS) or the Office of Federal Contract Compliance Programs (OFCCP) at 200 Constitution Avenue, NW., Washington, DC 20210, or with any OLMS or OFCCP field office.

(b) *Contents of complaints.* The complaint must be in writing and must include:

(1) The employee's name, address, and telephone number;

(2) The name and address of the contractor alleged to have violated the Executive Order and this part;

(3) An identification of the alleged violation and the establishment or construction work site where it is alleged to have occurred;

(4) Any other pertinent information that will assist in the investigation and resolution of the complaint; and

(5) The signature of the employee filing the complaint.

(c) *Complaint investigations.* In investigating complaints filed with the Department under this section, the Director of OFCCP will evaluate the allegations of the complaint and develop a case record. The record will include findings regarding the contractor's compliance with the requirements of the Executive Order and this part, and, as applicable, a description of conciliation efforts made, corrective action taken, and/or enforcement recommended.

§ 471.12 What are the procedures to be followed when a violation is found during a complaint investigation or compliance evaluation?

(a) If any complaint investigation or compliance evaluation indicates a violation of the Executive Order or this part, the Director of OFCCP will make reasonable efforts to secure compliance through conciliation.

(b) Before the contractor may be found to be in compliance with the Executive Order or this part, the contractor must correct the violation found by the Department (for example, by posting the required employee notice, and/or by amending its subcontracts or purchase orders with subcontractors to include the employee notice clause), and must commit, in writing, not to repeat the violation.

(c) If a violation cannot be resolved through conciliation efforts, the Director of OFCCP will refer the matter to the Director of OLMS, who may take action under § 471.13.

(d) For reasonable cause shown, the Director of OLMS may reconsider, or cause to be reconsidered, any matter on his or her own motion or in response to a request.

§ 471.13 Under what circumstances, and how, will enforcement proceedings under Executive Order 13496 be conducted?

(a) *General.* (1) Violations of the Executive Order or this part may result in administrative enforcement proceedings. The bases for a finding of a violation may include, but are not limited to:

(i) The results of a compliance evaluation;

(ii) The results of a complaint investigation;

(iii) A contractor's refusal to allow a compliance evaluation or complaint investigation to be conducted; or

(iv) A contractor's refusal to cooperate with the compliance evaluation or complaint investigation, including failure to provide information sought during those procedures.

(v) A contractor's refusal to take such action with respect to a subcontract as directed by the Director of OFCCP or the Director of OLMS as a means of enforcing compliance with the provisions of this part.

(vi) A subcontractor's refusal to adhere to requirements of this part regarding employee notice or inclusion of the contract clause in its subcontracts.

(2) If a determination is made by the Director of OFCCP that the Executive Order or the regulations in this part have been violated, and the violation has not been corrected through conciliation, he or she will refer the matter to the Director of OLMS for enforcement consideration. The Director of OLMS may refer the matter to the Solicitor of Labor to begin administrative enforcement proceedings.

(b) *Administrative enforcement proceedings.* (1) Administrative enforcement proceedings will be conducted under the control and supervision of the Solicitor of Labor, under the hearing procedures in 29 CFR part 18, Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges.

(2) The administrative law judge will certify his or her recommended decision issued under 29 CFR 18.57 to the Administrative Review Board. The decision will be served on all parties and amicus curiae.

(3) Within 25 days (10 days if the proceeding is expedited) after receipt of the administrative law judge's recommended decision, either party may file exceptions to the decision. Exceptions may be responded to by the other parties within 25 days (7 days if the proceeding is expedited) after receipt. All exceptions and responses must be filed with the Administrative Review Board.

(4) After the expiration of time for filing exceptions, the Administrative Review Board may issue an administrative order, or may otherwise appropriately dispose of the matter. In an expedited proceeding, unless the Administrative Review Board issues an administrative order within 30 days after the expiration of time for filing exceptions, the Administrative Law Judge's recommended decision will become the final administrative order. If the Administrative Review Board determines that the contractor has violated the Executive Order or the regulations in this part, the administrative order will order the contractor to cease and desist from the violations, require the contractor to provide appropriate remedies, or, subject to the procedures in § 471.14, impose appropriate sanctions and penalties, or any combination thereof.

[75 FR 28397, May 20, 2010, as amended at 85 FR 13034, Mar. 6, 2020; 85 FR 30619, May 20, 2020; 85 FR 30619, June 19, 2020]

§ 471.14 What sanctions and penalties may be imposed for noncompliance, and what procedures will the Department follow in imposing such sanctions and penalties?

(a) After a final decision on the merits has issued and before imposing the sanctions and penalties described in paragraph (d) of this section, the Director of OLMS will consult with the affected contracting agencies, and provide the heads of those agencies the opportunity to respond and provide written objections.

(b) If the contracting agency provides written objections, those objections must include a complete statement of reasons for the objections, which must include a finding that, as applicable, the completion of the contract, or further contracts or extensions or modifications of existing contracts, is essential to the agency's mission.

(c) The sanctions and penalties described in this section will not be imposed if:

(1) The head of the contracting agency, or his or her designee, continues to object to the imposition of such sanctions and penalties, or

(2) The contractor has not been given an opportunity for a hearing.

(d) In enforcing the Executive Order and this part, the Director of OLMS may take any of the following actions:

(1) Direct a contracting agency to cancel, terminate, suspend, or cause to be canceled, terminated or suspended, any contract or any portions thereof, for failure to comply with its contractual provisions required by Section 7(a) of the Executive Order and the regulations in this part. Contracts may be canceled, terminated, or suspended absolutely, or continuance of contracts may be conditioned upon compliance.

(2) Issue an order of debarment under Section 7(b) of the Executive Order providing that one or more contracting agencies must refrain from entering into further contracts, or extensions or other modification of existing contracts, with any non-complying contractor.

(3) Issue an order of debarment under Section 7(b) of the Executive Order providing that no contracting agency may enter into a contract with any non-complying subcontractor.

(e) Whenever the Director of OLMS exercises the authority in this section, the contracting agency must report the actions it has taken to the Director of OLMS within such time as the Director of OLMS will specify.

(f) Periodically, the Director of OLMS will publish and distribute to all executive agencies a list of the names of contractors and subcontractors that have, in the judgment of the Director of OLMS, failed to comply with the provisions of the Executive Order and this part, or of related rules, regulations, and orders of the Secretary of Labor, and as a result have been declared ineligible for future contracts under the Executive Order and the regulations in this part.

§ 471.15 Under what circumstances must a contractor be provided the opportunity for a hearing?

Before the Director of OLMS takes either of the following actions, a contractor or subcontractor must be given the opportunity for a hearing:

(a) Issues an order for cancellation, termination, or suspension of any contract or debarment of any contractor from further Government contracts under Sections 7(a) or (b) of the Executive Order and § 471.14(d)(1) or (2) of this part; or

(b) Includes the contractor on a published list of non-complying contractors under Section 7(c) of the Executive Order and § 471.14(f) of this part.

§ 471.16 Under what circumstances may a contractor be reinstated?

Any contractor or subcontractor debarred from or declared ineligible for further contracts under the Executive Order and this part may request reinstatement in a letter to the Director of OLMS. In connection with a request for reinstatement, debarred contractors and subcontractors shall be required to show that they have established and will carry out policies and practices in compliance with the Executive Order and implementing regulations. Before reaching a decision, the Director of OLMS may request that a compliance evaluation of the contractor or subcontractor be conducted, and may require the contractor or subcontractor to supply additional information regarding the request for reinstatement. If the Director of OLMS finds that the contractor or subcontractor has come into compliance with the Executive Order and this part and has shown that it will carry out the Executive Order and this part, the contractor or subcontractor may be reinstated. The Director of OLMS shall issue a written decision on the request.

Subpart C—Ancillary Matters

§ 471.20 What authority under this part or Executive Order 13496 may the Secretary delegate, and under what circumstances?

Section 11 of the Executive Order grants the Secretary the right to delegate any functions or duties under the Order to any officer in the Department of Labor or to any other officer in the executive branch of the Government, with the consent of the head of the department or agency in which that officer serves.

§ 471.21 Who will make rulings and interpretations under Executive Order 13496 and this part?

The Director of OLMS and the Director of OFCCP will make rulings under or interpretations of the Executive Order or the regulations contained in this part in accordance with their respective responsibilities under the regulations. Requests for a ruling or interpretation must be submitted to the Director of OLMS, who will consult with the Director of OFCCP to the extent necessary and appropriate to issue such ruling or interpretation.

§ 471.22 What actions may the Director of OLMS take in the case of intimidation and interference?

The Director of OLMS may impose the sanctions and penalties contained in § 471.14 of this part against any contractor or subcontractor who does not take all necessary steps to ensure that no person intimidates, threatens, or coerces any individual for the purpose of interfering with the filing of a complaint, furnishing information, or assisting or participating in any manner in a compliance evaluation, complaint investigation, hearing, or any other activity related to the administration or

enforcement of the Executive Order or this part.

§ 471.23 What other provisions apply to this part?

(a) The regulations in this part implement only the Executive Order, and do not modify or affect the interpretation of any other Department of Labor regulations or policy.

(b) Each contracting department and agency must cooperate with the Director of OLMS and the Director of the OFCCP, and must provide any information and assistance that they may require, in the performance of their functions under the Executive Order and the regulations in this part.

(c)(1) This subpart does not impair or otherwise affect:

(i) Authority granted by law to a department, agency, or the head thereof; or

(ii) Functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(2) This subpart must be implemented consistent with applicable law and subject to the availability of appropriations.

(d) Neither the Executive Order nor this part creates any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

PARTS 472–499 [RESERVED]

FINDING AIDS

A list of CFR titles, subtitles, chapters, subchapters and parts and an alphabetical list of agencies publishing in the CFR are included in the CFR Index and Finding Aids volume to the Code of Federal Regulations which is published separately and revised annually.

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For changes to this volume of the CFR prior to this listing, consult the annual edition of the monthly List of CFR Sections Affected (LSA). The LSA is available at *www.govinfo.gov*. For changes to this volume of the CFR prior to 2001, see the ''List of CFR Sections Affected, 1949–1963, 1964–1972, 1973–1985, and 1986–2000'' published in 11 separate volumes. The ''List of CFR Sections Affected 1986–2000'' is available at *www.govinfo.gov*.

2016

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100.401 Revised 19487
102.119 (o) and (p) added 83136
Chapter IV
403.4 (a)(1) corrected 33389
405.5 Amended 16020
Regulation at 81 FR 16020 confirmed 20245
405.7 Amended 16020
Regulation at 81 FR 16020 confirmed 20245
406.2 (a) amended 16021
Regulation at 81 FR 16021 confirmed 20245
458.65 (b) and (c) correctly revised 33389
458.70 Corrected 33389

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102.2—102.8 (Subpart B) Revised 11751
102.9—102.59 (Subpart C) Added 11754
102.21 Amended 43697
102.30 (a), (c), (d), and (e) revised; (g) added 43696
(c) amended 43697

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102.32 Revised 43696
102.35 (c) added 43696
102.46 Heading revised; (i) added 43696
102.60—102.72 (Subpart C) Redesignated as Subpart D 11754
102.60—102.72 (Subpart D) Redesignated from Subpart C 11754
102.65 (a) amended 43697
102.66 (f) revised 43697
102.67 (c) and (i)(1) amended 43698
102.69 (a) and (d)(1)(ii) revised 43698
102.71 (c) amended 43698
102.72 Heading, (a) introductory text, (1), and (c) revised 43698
102.73—102.82 (Subpart D) Redesignated as Subpart E 11754
102.73—102.82 (Subpart E) Redesignated from Subpart D 11754
102.73 Added 11764
102.74 Added 11764
102.75 Added 11764
102.76 Added 11764
102.77 Heading and (b) revised 11765
102.80 (b) revised 43699
102.81 (a) and (c) amended 43699
102.83—102.88 (Subpart E) Redesignated as Subpart F 11754
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102.98—102.110 (Subpart H) Redesignated as Subpart I 11754
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102.115—102.116 (Subpart J) Revised 11768
102.117—102.119 (Subpart K) Revised 11768
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102.120 (Subpart L) Revised 11768
102.121—102.123 (Subpart M) Revised 11768
102.122—102.123 (Subpart N) Removed 11778
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102.126 Revised 11778
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102.173 (a) revised 11785
102.174 (a), (b) introductory text, (2) and (d) revised 11785
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405.5 Amended 33842
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406.2 (a) amended 33842

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102.1 (i) added 69588
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102.119 Correction: (o) and (p) added 70425

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