Comments to the National Labor Relations Board on Behalf of the Retail Industry Leaders Association ("RILA") Regarding the Board's Proposed New Election Rules April 7, 2014

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The Retail Industry Leaders Association ("RILA"), on behalf of itself and its member companies, submits the following comments in response to the NLRB's proposed amendments to its rules governing employee representation elections. *See* Representation-Case Procedures, 79 Fed. Reg. 7318 (proposed Feb. 6, 2014) (to be codified at 29 CFR Parts 101, 102, 103). RILA also incorporates by reference the comments it submitted in response to the Board's nearly-identical proposal made in 2011, some of which are repeated and expanded on in the following paragraphs. In addition, RILA joins into the comments filed this date by the Coalition for a Democratic Workplace.

RILA is the trade association of the world's largest and most innovative retail companies. RILA members include more than 200 retailers, product manufacturers, and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs, and more than 100,000 stores, manufacturing facilities, and distribution centers domestically and abroad.

RILA strongly objects to the NLRB's proposal. Specifically, RILA submits that: 1) the Board's proposed "twenty percent rule" would create unnecessary post-election uncertainty and undermine collective bargaining, 2) the Board's proposed amendments are at odds with its recent decision in *Specialty Healthcare*, and 3) the Board's proposal that employers provide voting unit employee contact information, other than a home mailing address, unnecessarily violates employee privacy.

I. The Board's Proposed "Twenty Percent Rule" Would Create Unnecessary Post-Election Uncertainty and Undermine Collective Bargaining

The NLRB's proposed "twenty percent rule" is a solution in search of a problem. Specifically, the rule would require regional directors to defer for post-election resolution all questions affecting less than 20 percent of a proposed unit. Such unit placement issues could include supervisory status, managerial status, independent contractor status, confidential employee status, and student vs. employee status. Further, single employer and joint employer issues associated with unit placement questions may also be subject to deferral under the 20 percent rule. The Board has demonstrated no need for such a bright line requirement; in fact, its own statistics show that, under existing practices over the last decade, the median time between the filing of a petition and an election is between 37 and 39 days. 79 Fed. Reg. at 7320. Moreover, implementation of the proposed "twenty percent rule" would impede an employer's pre- and post-election communications with employees, while increasing the risk that the election may ultimately be declared invalid.

The twenty percent rule is particularly objectionable to RILA members. A question that frequently arises in the retail setting is whether individual store managers are supervisors or employees under the National Labor Relations Act. Because store managers generally comprise less than 20 percent of a store's staff, however, the Board's proposed amendments would in all likelihood defer this determination until after an election.

This deferral has significant real world consequences. For example, an employer who acquiesces in a union's proposed unit definition may violate the Act by allowing a store manager to discuss unionization with her coworkers, only to discover later that she should properly have been classified as a supervisor.

Similarly, under the *Harborside Healthcare* line of cases, 343 N.L.R.B. 906, 906-07 (2004), an election may be overturned if, for example, the union utilized an individual who was initially misclassified as a non-supervisor employee to hand out union authorization cards or otherwise engage in certain pro-union conduct.

Most significantly for retailers, store managers are often a retail employer's sole on-site operational representatives. Failure to determine their supervisory status before an election may thus undermine a retailer's most effective means of communication. If a manager is even arguably within the unit, the employer cannot rely upon him to communicate with employees regarding questions concerning unionization without running the risk of engaging in election misconduct and also, perhaps, committing an unfair labor practice.

As explained in detail in RILA's 2011 comments, limiting an employer's ability to communicate during an organizing campaign—either by postponing determinations of supervisory status or by shortening the time period between petition and election—could result in employees being critically uninformed. For example, one RILA member describes an incident in which employees voted for a union solely on the basis of the union's propaganda; the employer had voluntarily entered into a neutrality agreement preventing it from countering any of the union's claims. The employees then entered into bargaining with the expectation that they would receive every benefit the union had promised. This expectation was not met. Because the union was then required to spend months coaching its new members on the realities of collective bargaining and to build realistic expectations, it took the parties more than a year and a half of contentious negotiations to reach a contract. This painful process set a tone of animosity between labor and management—an outcome clearly at odds with the purpose of the Act.

The Board's proposed twenty percent rule has the potential to paralyze post-election bargaining in additional ways. In particular, if challenged ballots would be determinative to the outcome of the election, bargaining may not begin until such unresolved issues are litigated and decided. In other words, the proposed amendments merely delay, rather than avoid, the time and cost of litigation. An election may take place sooner, but reaching a first contract will take longer if the proposed rules are implemented.

By contrast, challenged ballots that are not determinative may never be decided in the course of election proceedings. The Board's proposed solution to this problem is to defer the

issue to negotiations and attempt to resolve it there. As we know, first contract negotiations may, and often do, take a year or 18 months to complete. If the issue cannot be resolved during negotiations, the rule suggests that an employer timely file a unit clarification petition shortly after a contract is reached, and go through yet another, even lengthier, evidentiary hearing to determine the scope of the represented unit. *See* 79 Fed. Reg. at 7331. Bargaining would be counterproductive for employers who decide to engage in this process—neither side can effectively analyze or agree to proposals while the scope of the bargaining unit is unclear. Even if the other terms of a contract are agreed, putting off the determination until a unit clarification hearing is held and a decision rendered places the employer at risk. Employers would act at their own peril in making any unilateral changes that affect employees it believes are supervisors, managers, or independent contractors. Thus, for example, where the Regional Director has put off determining the supervisory status of a store manager, a retailer risks committing an unfair labor practice by giving her a raise or asking her to work a modified schedule. It is untenable to have the status of a group of employees, such as store managers, be unresolved for that length of time.

In sum, implementation of the Board's twenty percent rule would do nothing more than delay litigation, at the expense of election integrity and meaningful and efficient collective bargaining.

II. The Board's Proposed Amendments Are At Odds With Its Recent Decision In *Specialty Healthcare*

The Board's proposed amendments are at odds with the fact-intensive standard for unit appropriateness set out in *Specialty Healthcare*, 357 NLRB No. 83 (2011). This 2011 case overruled decades of prior law requiring the party petitioning for an election to demonstrate that the interests of employees in its proposed unit were "sufficiently distinct" to warrant separate treatment. Now, union organizers can successfully seek certification of multiple subsets of employees, including groupings of workers on a job classification or fragmented basis, by showing only that they share some minimal community of interest.

The burden then shifts to employers to show that employees in the petitioned-for unit share an "overwhelming community of interest" with excluded employees. This "overwhelming community of interest" standard is highly fact-specific and burdensome for employers to meet. Indeed, the standard was extracted from a line of cases holding that employees should be accreted to existing bargaining units rather than given the chance to participate in a representation election. Because these cases involved the substitution of the Board's judgment for employee free choice, the standard understandably developed as a demanding one.

In the context of representation petitions, the application of such a burdensome standard has led to the establishment of fragmented units—particularly in the retail industry. In *Macy's, Inc.*, Case No. 01-RC-091163, for example, a regional director certified a bargaining unit made up of only the cosmetics and fragrances department of a single retail store. Similarly, a regional director in *Bergdorf Goodman*, Case. No. 2-RC-076954, approved a bargaining unit of just 46 women's shoe sales associates working on two floors of a Manhattan department store. The Board has yet to rule on these pending decisions.

RILA and the Retail Litigation Center have submitted amicus briefs in the *Macy's* and *Bergdorf Goodman* cases, which are presently pending before the Board, arguing that these decisions represent an irrational departure from years of Board decisions that recognize the appropriateness of store-wide units in retail. Regardless of how these cases are ultimately decided, however, it is undisputed that employers now face significant uncertainty regarding whether and how employees may form separate units for collective bargaining purposes. This uncertainty was recognized last December by the Board's General Counsel, who admitted that application of *Specialty Healthcare* has "caused a lot of confusion" and requires clarification.[1]

The expedited pre-election procedures articulated in the Board's proposed amendments would serve to impair further the development of coherent standards under *Specialty Healthcare*. In addition, in light of the heavily fact-based standard that the Board has created, its proposal to significantly curtail evidentiary hearings denies employers the right to fully present their positions regarding unit appropriateness, in violation of basic principles of due process. Specifically, the proposed amendments require an employer to state its position a mere seven days after the filing of an election petition. Any issues the employer does not include in this statement may be permanently waived. The amendments further vest a hearing officer with very wide and undefined discretion to limit an employer's right to introduce any evidence that he or she determines is not "relevant to any genuine dispute as to any material fact." 79 Fed. Reg. at 7329. In practice, this discretion could be applied to preclude an employer from developing a complete record that would assist the regional director—and, perhaps, the Board—in making the highly fact-specific determination of whether an overwhelming community of interest exists among employees. Development of a record would be further limited by a prohibition on filing post-hearing briefs without "special permission" of the hearing officer, who can dictate what subjects may and may not be addressed. Finally, improperly imposed limitations on the scope of a record at a representation hearing could also significantly hinder a party's ability to present a case in the courts.

Current confusion over *Specialty Healthcare* will be further exacerbated by the elimination of an appeal as of right to the Board. Indeed, if the proposed amendments are finalized, the Board would have complete discretion to decline review of cases such as *Macy's* or *Bergdorf Goodman*. Instead, as touted by the Notice of Proposed Rulemaking, it would be free to leave "final decisions . . . with the Board's regional directors who are members of the career civil service." 79 Fed. Reg. at 7323. Such discretionary review would slow development of binding and authoritative Board precedent. In addition, the outcome of representation proceedings may increasingly be determined by exacerbated regional splits like those that now characterize our federal courts.

The Board's attempt to expedite pre-election proceedings fails to account for the burdensome, fact-specific "overwhelming community of interest" standard that it has imposed on employers. Implementation of the proposed amendments would thus increase confusion surrounding bargaining unit determinations, resulting in more disputes between employers and unions and, ultimately, the fracturing of cohesive workforces.

[1] Ben James, "NLRB To Issue Guidance On Specialty Healthcare, GC Says," *Law360* (Dec. 13, 2013).

III. The Board's Proposal That Employers Provide Voting Unit Employee Contact Information In Addition To Home Mailing Addresses Unnecessarily Violates Employee Privacy

Finally, the Board's proposed requirement that employers provide their employees' telephone numbers and, where available, e-mail addresses to union organizers constitutes an unreasonable invasion of privacy. Ironically, even the Board's solicitation of comments recognizes the sensitive nature of this type of information; it cautions against including "personal information such as . . . telephone numbers, and email addresses" in submitted comments. 79 Fed. Reg. at 7318. Yet the Board now appears to take the position that an employee who provides his personal e-mail or cell phone number to his employer—for example, as a means of emergency contact—thereby consents to have this information shared with strangers in the event of organizing.

As an initial matter, the Board misplaces its reliance on advances in communications technology as a justification for this required disclosure of electronic contact information. *See* 79 Fed. Reg. at 7326-27. This false rationalization ignores the numerous avenues of electronic communication now available to a union, which were not even imagined when the *Excelsior* list was first prescribed nearly fifty years ago. Far from needing an employee's cell phone number or e-mail address to engage in electronic media, a union can build a website, post to message boards, create a Facebook page, or host a Twitter or Instagram account. Given these numerous communication options, the invasion of employee privacy envisioned by the Board is simply not justified.

The Board's proposed amendments are especially troubling given the numerous examples of harassment arising under the current practice of providing organizers only with employees' home addresses. One RILA member reported that its employees have complained about home visits from five or more organizers, who insisted on speaking with them at 11:00 at night. Other cases have involved more egregious abuses, such as shipping pornography to the home address of a union opponent.

To the extent the Board contemplates requiring employers to provide employees' personal phone numbers and e-mail addresses, if it maintains such information, the increased potential for abuse is staggering. Given recent data breaches at major retailers, RILA members are particularly sensitive to the importance of protecting such personal information. For example, an e-mail address could be used by a hacker to introduce a computer virus, either for purposes of harassment or identify theft. Moreover, personal e-mail addresses are often employed as user names for the purpose of accessing a multitude of secure websites, such as personal banking, credit card and shopping websites, including the websites of many of our members.

Given these risks, the Board cannot justify requiring the disclosure of employees' personal contact information, other than a home mailing address. At a minimum, the union should be required to request and receive employees' written consent before gaining access to their phone numbers and e-mail addresses, and sanctions should be imposed upon if the union uses the information improperly.

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For the above reasons, RILA strongly opposes the NLRB's proposed amendments. Far from streamlining representation proceedings, the changes would merely postpone litigation of key issues. Kicking the can down the road in this fashion would increase confusion and delay during bargaining, making it harder for unions and employers to accomplish the ultimate goal of organizing: reaching a mutually acceptable collective bargaining agreement as soon as possible.