



VIA ELECTRONIC SUBMISSION

April 7, 2014

The Honorable Mark Gaston Pearce  
Chairman  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570

Mr. Gary Shinnars  
Executive Secretary  
National Labor Relations Board  
1099 14th Street, NW  
Washington, DC 20570

**Re: Docket ID NLRB-2011-0002, Representation-Case Procedures; RIN 3142-AA08**

Dear Chairman Pearce and Mr. Shinnars:

Associated Builders and Contractors, Inc. (ABC) hereby submits the following comments to the National Labor Relations Board (NLRB or the Board) in response to the above-referenced notice of proposed rulemaking (NPRM), published in the *Federal Register* on February 6, 2014, at 79 Fed. Reg. 7318.

**About Associated Builders and Contractors, Inc.**

ABC is a national construction industry trade association representing nearly 21,000 chapter members. ABC and its 70 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which they work. ABC member contractors employ workers whose training and experience span all of the 20-plus skilled trades that comprise the construction industry. Moreover, the vast majority of our contractor members are classified as small businesses. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value. This process assures taxpayers and consumers receive the most for their construction dollar.

## **Procedural Background**

ABC previously filed comments in opposition to the Board's June 22, 2011, proposed rule.<sup>1</sup> According to the new Notice, the Board has considered those comments and incorporated them into the current administrative record, and there are no substantive differences between the current proposal and the June 2011 proposal.<sup>2</sup> The Board has further indicated "it is not necessary for any person or organization to resubmit any comment or repeat any argument that has already been made."<sup>3</sup>

At the same time, the Board has made reference in its current NPRM to the Final Rule issued on December 22, 2011<sup>4</sup> (hereafter the "2011 Final Rule"). The 2011 Final Rule adopted only some elements of the original proposed rule but not others, noting that "further Board deliberation concerning those proposals is necessary at this time."<sup>5</sup> The 2011 Final Rule also contained a lengthy preamble that purported to respond to some of the comments filed by opponents of the proposed rule, including some of ABC's comments. The Board subsequently withdrew the 2011 Final Rule, and only the Board Chairman remains from the panel that issued that Rule and its preamble. However, some of the earlier Board panel's commentary has reappeared in the current NPRM, in response to the dissents of Members Johnson and Miscimarra.<sup>6</sup>

In these comments, ABC will respond as appropriate to both the 2011 Final Rule and the current NPRM. ABC was (and remains) strongly opposed to the eight significant rule changes that appeared in the 2011 Final Rule and is even more strongly opposed to the 20 significant rule changes that appear in the current NPRM. As explained below, both the 2011 Final Rule and the current NPRM violate the plain language and Congressional intent expressed in the amended statutes under which the NLRB operates. The board has not adequately justified any of the proposed changes, and its proposed solutions to nonexistent problems in the election case handling process will create new problems, uncertainty, and increased litigation for employers, employees and unions.

As in its 2011 comments, ABC will give particular attention to the issues that appear to have the greatest impact on construction industry workplaces. The Board has long recognized that construction industry employers are "different" in their labor relations from most other industries.<sup>7</sup> ABC is also a member of the Coalition for a Democratic Workplace (CDW) and hereby incorporates by reference CDW's written comments in opposition to the proposed rule, particularly issues that affect employers generally without regard to unique construction industry issues.

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<sup>1</sup> See ABC's comments dated August 22, 2011.

<sup>2</sup> 76 Fed. Reg., at 80140 and 79 Fed. Reg., at 7318.

<sup>3</sup> 79 Fed. Reg., at 7319.

<sup>4</sup> 76 Fed. Reg., at 80138.

<sup>5</sup> 76 Fed. Reg., at 80140.

<sup>6</sup> 79 Fed. Reg., at 7335-7337.

<sup>7</sup> *Steiny & Co., Inc.*, 308 NLRB 1323, 1326 (1992).

## **ABC's Substantive Comments in Response to the NLRB's Proposed Rule**

### **1. The Proposed Rule Changes Are Needlessly Radical and Defy Congressional Intent**

In our 2011 comments, ABC severely criticized the Board's proposed changes (which are identical to the current NPRM) as seeking "radical amendments to longstanding election rules without any principled justification."<sup>8</sup> In the preamble to the 2011 Final Rule, the Board panel responded to these comments by claiming that the rule changes that it chose to adopt at that time were "incremental" and not a "radical departure from Board practice as asserted by [ABC]."<sup>9</sup> ABC disagrees with the Board's assessment even as to the eight significant changes to election case procedures set forth in the December 2011 Final Rule; but certainly by its return to the originally proposed rule, containing no less than 20 significant changes to the Board's longstanding procedures, the Board has again proposed a radical departure from Board practice. It is utterly disingenuous for the Board to attempt to deny the sweeping and "radical" nature of these proposals. Indeed, the Board's own historical discussion of previous changes to representation case procedures confirms that nothing comparable to the current proposed rule changes has been adopted in decades.<sup>10</sup>

ABC's 2011 comments challenged two false premises underlying the Board's proposal: first, that faster elections are necessarily fairer elections; and second, that employers' rights to due process and free speech during union election campaigns somehow are subordinate to the rights of unions to organize the employers' workplaces. ABC strongly agrees with the dissent's assertions in the current NPRM that the primary purpose of the proposed rule is to "shorten the timeframe applicable to all elections" either to "limit unlawful restraint and coercion" or to "diminish freedom of speech."<sup>11</sup>

In response, the Board majority declares in the NPRM that the proposed rule only "attempts to focus on identifying and minimizing unnecessary barriers to the fair and expeditious resolution of questions concerning representation," in the form of "costly and unnecessary litigation." But the majority's claim rings hollow due to its failure to establish that there are any existing barriers at all to the "fair and expeditious resolution of questions concerning representation."<sup>12</sup> Certainly none of the 20 longstanding election case handling procedures that the Board has targeted for elimination or significant change in the current NPRM have been shown to prevent questions concerning representation from being resolved, both fairly and expeditiously. Indeed, the General Counsel's Office recently declared the Regional Directors' processing of union election

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<sup>8</sup> See ABC's 2011 Comments, page 3.

<sup>9</sup> 76 Fed. Reg., at 80148.

<sup>10</sup> 79 Fed. Reg., at 7320-7321. According to the Board's own recitation of the history of its election procedures in the NPRM, the current proposal entails more comprehensive and disruptive changes to longstanding election case procedures than any previous rule changes. Thus, the current proposed rule changes are much more sweeping than those adopted by the Board in 1977 (authorizing elections to proceed while requests for review are pending) or 1959 (delegating decision-making authority to regional directors pursuant to statutory directive to make that change). *Id.* at 7320. As further pointed out in the dissent, the broad-ranging nature and complexity of the current NPRM "contrasts sharply with the Board's 1989 rule governing hospital bargaining unit determinations, which was "much more limited in scope." *Id.* at 7338.

<sup>11</sup> 79 Fed. Reg., at 7336.

<sup>12</sup> 79 Fed. Reg., at 7336.

petitions to be “outstanding,”<sup>13</sup> and the Board has offered no credible evidence to the contrary to justify its sweeping proposals.<sup>14</sup>

The Board majority does not deny the dissent’s observation that the median number of days from petition to election is 38, a length of time that has not been shown to be either unfair or untimely. In response, the Board majority seeks to redirect attention to the median days from petition to election in the small percentage of cases in which pre-election hearings are currently held. This is an arbitrary ground on which to engage in such sweeping rulemaking as has been proposed. Instead, the Board should be taking into account and encouraging parties to enter into stipulated election agreements as often as possible, which is exactly what litigants have been doing in more than 90 percent of petitions under the current rules. ABC agrees with the dissenters that the radical changes proposed by the Board majority, because they are “so numerous and implicate so many disparate aspects of the Board’s procedures,” are inherently likely to destabilize the entire election case handling process, leading to more litigation and fewer stipulations.<sup>15</sup>

Specifically with regard to the construction industry, and contrary to the Board majority’s premise, there has been no showing that construction union elections have been subject to inordinate delays or that unions are unable to win their fair share of elections under the current and longstanding Board procedures. Unions in the construction industry have won a substantial majority of their NLRB elections during the past decade in a median time frame of a little over a month.<sup>16</sup> As others have noted, it is not the job of the Board to guarantee electoral success to unions, nor to manipulate the electoral process so only unions have a full opportunity to communicate with eligible voters. Although the Board majority has acknowledged its statutory duty of neutrality, the current proposals on their face serve no purpose other than the illegitimate objective of ensuring higher and faster rates of union organizing success.

ABC’s 2011 comments challenged the statutory authority for the proposed rule, pointing out that the law does not permit the Board to adopt electoral procedures to promote union success at the expense of the right of employees to hear opposing views from their employers.<sup>17</sup> Instead, the courts have held with regard to construction employers (as with businesses generally) that the Board’s primary responsibility is to protect the rights of employees to the free flow of all information necessary to make an informed decision, whether that decision is to support or *refrain* from supporting union representation.<sup>18</sup> The Supreme Court also has made it clear that

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<sup>13</sup> Gen Counsel Mem. 11-03 (Jan. 10, 2011).

<sup>14</sup> ABC and many other commenters in 2011 criticized the Board majority’s reliance on biased, non-credible studies purporting to show some relationship between election duration and unlawful employer interference with election outcomes. See U.S. Chamber of Commerce, *Responding to Union Rhetoric: The Reality of The American Workplace – Union Studies on Employer Coercion Lack Credibility and Integrity* (U.S. Chamber White Paper 2009). In the construction industry, employers are much more likely to be the victims of corporate campaigns that interfere with neutral customers and damage the reputation of the employers and their nonunion employees, who show no interest in union representation. See Baskin & Northrup, *The Impact of BE&K Construction Co. v. NLRB on Employer Responses to Union Corporate Campaigns and Related Tactics*, 19 Lab. Law 215 (2003-2004).

<sup>15</sup> 79 Fed. Reg., at 7339.

<sup>16</sup> <http://www.nlr.gov/reports-guidance/reports/election-reports>; see also NLRB General Counsel Memorandum GC 14-02, *Report on the Midwinter ABA PP Committee*, p. 13, March 26, 2014.

<sup>17</sup> *Chamber of Commerce v. Brown*, 554 U.S. 60, 67 (2008).

<sup>18</sup> *Id.* at 67-68 (2008); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969).

employers have rights of their own under the National Labor Relations Act, specifically the right to free speech under Section 8(c) of the Act and the right to due process.<sup>19</sup>

## **2. The Board’s Proposed Limits On Employers’ Hearing Rights Violate Due Process and Statutory Authority**

ABC is greatly concerned that the Board’s proposals improperly seek to truncate the statutory right of employers to a pre-election hearing. Both the 2011 Final Rule and the current NPRM improperly construe Section 9(c) of the Act to mean that the statutory purpose of a pre-election hearing is solely to determine if a “question of representation” exists.<sup>20</sup> This reading not only departs from decades of interpretation by the Board,<sup>21</sup> but it also ignores the plain language of the Act itself, which requires that “an appropriate hearing” be held and nowhere restricts such hearings to the question of representation. The Board majority also appears to be adopting an unduly narrow definition of exactly what sorts of issues raise “questions of representation.” ABC strongly agrees with the NPRM dissent’s scholarly discussion of the Act’s language and legislative history, including Congress’s repeated rejection of efforts to narrow the pre-election hearing process. The response of the Board majority is unconvincing and appears to wish away the numerous amendments to the Act since 1935.<sup>22</sup>

From this faulty starting point, the NPRM proposes to force employers to participate in pre-election hearings within seven days of the petition, except in undefined “special” circumstances; and to require employers to define in writing during this truncated time period the issues justifying any hearing. ABC’s 2011 comments pointed out that the Board’s efforts to shorten the pre-election hearing process will have a particularly adverse impact on the construction industry. The Board did not address these comments in the 2011 Final Rule or in the current NPRM.<sup>23</sup> As noted above, the Board has previously found that construction employers confront “different” (and more complicated) labor relations issues than most other industries. Construction contractors that receive notice of a union petition must obtain advice regarding a series of daunting unit questions that often dramatically affect election outcomes, or may even determine whether an election can be appropriately held at all. It is unreasonable, if not impossible, for construction contractors—most of which are small businesses—to become sufficiently conversant with these complicated legal questions within a seven-day time period, and to then

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<sup>19</sup> It is significant that the Board’s NPRM still relies (as it did in 2011) on Supreme Court decisions that predate the Taft-Hartley Act for the proposition that elections should be held “speedily.” 79 Fed. Reg. 7319, *citing NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330 (1946); and *AFL v. NLRB*, 308 U.S. 401, 409 (1940). Neither of these cases dealt with the current timetables for conducting elections, under which elections are being conducted much more expeditiously today than in any previous decade. It is telling that the Board cites no case authority for the proposition that the current median time for conducting elections is too long, and certainly there is no such case authority criticizing the length of construction industry elections.

<sup>20</sup> See proposed amendment to Section 102.64; 79 Fed. Reg., 7356.

<sup>21</sup> See, e.g., *Barre-National, Inc.*, 316 NLRB 877 (1995); *Angelica Healthcare Services Group*, 315 NLRB 1320 (1995).

<sup>22</sup> 79 Fed. Reg., at 7336.

<sup>23</sup> The Board majority relies on the decision in *Croft Metals, Inc.*, 337 NLRB 688 (2002) for the proposition that five working days is sufficient notice of a hearing. 79 Fed. Reg., at 7328. But the proposed rule improperly converts the *Croft Metals* notice mandate from a minimum requirement into a maximum, except in undefined “special” circumstances.

make binding, pre-hearing statements of position that may result in an unknowing waiver of legitimate hearing issues.<sup>24</sup>

The legal and factual issues that construction contractors will be given so little time to analyze under the proposed rule include issues pertaining to the unique statutory basis for bargaining under the “*Deklewa*” principle, which distinguishes between Section 8(f) agreements and Section 9(a) agreements in the construction industry.<sup>25</sup> Other cases present questions arising under the Board’s “disappearing unit” and “expanding unit” doctrines.<sup>26</sup> Employers also must consider whether to contest a petitioned-for unit under the various tests established by the Board in the construction industry for single-craft versus multi-craft units,<sup>27</sup> single-site versus multi-site units<sup>28</sup> and joint-employer versus single-employer units,<sup>29</sup> to name only a few of the questions that commonly must be addressed prior to a construction industry election.

Contrary to the NPRM, these complicated hearing issues will be exacerbated by the Board’s decision in *Specialty Healthcare*,<sup>30</sup> issued subsequent to the 2011 NPRM. Under that ruling, employers that believe a petitioned-for unit is inappropriately fragmented will be required to demonstrate an “overwhelming community of interest” among excluded employees. The Board majority contends that *Specialty Healthcare* does not affect election case procedures,<sup>31</sup> but that myopic view ignores the increased complexity of making *Specialty Healthcare*-type unit determinations, and the reduced amount of time that employers and their lawyers will have to make judgments about what hearing issues should be raised.

ABC also objects to the arbitrary new 20 percent rule, which would allow the Board to evade the statutory requirement of a pre-election hearing altogether by deferring litigation over disputed employees whose numbers do not exceed the Board’s proposed 20 percent threshold. This arbitrary limit on employers’ hearing rights will further deprive employers of their due process rights in connection with the hearing, again in defiance of the Congressional mandate of Section 9. The new 20 percent rule also will have an impact on *Specialty Healthcare*-type unit determinations, which may hinge on whether small groups of employees share an overwhelming community of interest with employees in the petitioned-for unit.

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<sup>24</sup> As in 2011, the current NPRM states that the proposed Statement of Position (SOP) requirement is “modeled” on the mandatory disclosures described in Fed. R. Civ. P. 26(a)(1), 79 Fed. Reg. at 7328. It is surprising that the Board persists in making this claim when ABC and other commenters previously demonstrated that NPRM’s analogy is entirely false. Unlike the proposed rule, the federal rules call for initial disclosures only after an answer is filed to a complaint, which could be as many as 60 days after the complaint is filed, not seven days as mandated by the NPRM. Also, initial disclosures in federal court litigation are subject to amendment, again unlike the Board’s proposed SOP, and the federal disclosures do not stop any party from litigating additional matters at trial, contrary to the Board’s proposed rule. See Wright & Miller, *Federal Practice and Procedure* (2010 ed.).

<sup>25</sup> *John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1380 (1987), *enf’d sub nom.*, *Iron Workers Local 3 v. NLRB*, 843 F. 2d 770 (3d Cir. 1988).

<sup>26</sup> *Davey McKee Corp.*, 308 NLRB 839 (1992); *Fish Engineering*, 308 NLRB No. 113 (1992).

<sup>27</sup> *Brown & Root, Inc.*, 314 NLRB 19 (1994).

<sup>28</sup> *Longcrier Co.*, 277 NLRB No. 62 (1995).

<sup>29</sup> *William N. Taylor, Inc.*, 288 NLRB 1049 (1988).

<sup>30</sup> *Specialty Healthcare*, 357 NLRB 83 (2011).

<sup>31</sup> 79 Fed. Reg., at 7335.

Of particular significance to the construction industry, union petitions often present thorny problems in determining the supervisory or non-supervisory status of contested individuals because of the heavy employment of “working foremen” on construction jobsites.<sup>32</sup> There is no standardized degree of authority exercised by construction foremen, as the Board has recognized, and very few employers are conversant with the Board’s lengthy multi-factor test for determining supervisory status. Yet the Board’s proposed amendments would defer resolution of supervisory issues until after the election, unless the number of disputed foremen exceeds 20 percent of the workforce. This would result in great uncertainty regarding the treatment of foremen by both sides during the election campaign, leading to the greater possibility of unfair labor practices or objectionable conduct.<sup>33</sup>

ABC’s 2011 comments also challenged the proposal to require employers to disclose voter eligibility lists to petitioning unions within two days after a direction of election. ABC noted at that time that the two-day requirement will place a particularly heavy burden on construction industry employers bound by unique voter eligibility rules that allow laid off employees meeting criteria specified by the Board to vote in NLRB elections.<sup>34</sup> It will be difficult, if not impossible, for many construction employers to compile the newly detailed eligibility lists, including contact information for all eligible laid off employees, within the newly shortened two-day time frame contained in the proposed rule. The Board did not respond to this comment in its 2011 Final Rule because the Board wisely dropped the two-day eligibility list requirement. Yet the Board reinstated the same provision in the new NPRM, apparently without giving any consideration to the unique logistical problems faced by construction industry employers in the election context.

The expanded disclosure requirements for such voter eligibility lists under the proposed rule also impose new and unnecessary invasions of privacy and related burdens on both construction employers and employees. In particular, the new requirement that employers disclose employee email addresses and phone numbers ignores recent email “hack attacks” that have become part of union corporate campaigns in the construction industry. A recent example is described in the case of *Pulte Homes, Inc. v. LIUNA Construction*,<sup>35</sup> where the Laborers’ Union deliberately flooded a homebuilder with emails intended to disrupt the employer’s computer system. This kind of attack will become even more common if employers are forced to provide union access to employee email addresses.<sup>36</sup> Again, the Board dropped this expanded disclosure requirement in its 2011 Final Rule and should certainly not adopt it now.

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<sup>32</sup> *Brown & Root, Inc.*, 314 NLRB 19 (1994).

<sup>33</sup> As noted above, the NPRM incorrectly states the law regarding Section 9’s requirement of a pre-election hearing. 79 Fed. Reg., at 7322. Under the Board’s holdings in *Angelica Healthcare Services*, 315 NLRB 1320 (1995), *Barre National, Inc.*, 316 NLRB 877 (1995), and *North Manchester Foundry, Inc.*, 328 NLRB 372 (1999), Section 9 of the Act requires the Board to permit employers to present evidence at a pre-election hearing.

<sup>34</sup> See *Steiny & Co., Inc.*, 308 NLRB 1323, 1326 (1992), reaffirming and modifying the eligibility formula set forth in *Daniel Const. Co.*, 133 NLRB 264 (1961).

<sup>35</sup> 648 F. 3d 295 (6<sup>th</sup> Cir. Aug. 2, 2011).

<sup>36</sup> Equally pernicious is the likely invasion of employee privacy and identity theft that will result from the disclosure to unions of employees’ personal email addresses and phone numbers.

### **3. The Board Must Preserve a Longer Minimum Informational Period Between Any Decision and Direction of Election and the Election Itself**

One of ABC's most serious concerns, raised by both the 2011 Final Rule and the current NPRM, is the proposed elimination of the longstanding 25-day minimum period between the Regional Directors' Decision and Direction of Election and the election itself. This minimum time period serves two purposes under the current rules: to allow time for requests for review to be fully considered in the first instance by the Board as required by the statute; and to allow a minimum time period for employees to receive information about the issues on which they are being asked to vote. The 2011 Final Rule and the current NPRM both would eliminate the previous 25-day minimum and significantly curtail the right of employers to request review.

In 2011, ABC and many other commenters criticized this curtailment of the minimum informational period, and the improper narrowing of the right to request review generally. ABC reiterates now that the current NPRM deprives both employers and their employees of their statutory rights to communicate and receive information. As pointed out in the dissent, Congress has repeatedly expressed the view that employees should not be rushed into a vote on such an important workplace issue without time for robust debate and reflection.<sup>37</sup>

In response, the Board panel expressed "doubt" in the 2011 Final Rule that "many if not most" employers are unaware of an organizing drive prior to the filing of a petition.<sup>38</sup> Yet even the biased studies cited by the Board found no evidence of employer knowledge of union activity prior to as many as half of the elections surveyed.<sup>39</sup> Also contrary to the views of the 2011 Board panel, there is a significant difference between knowing that some inchoate level of union organizing is taking place, that may or may not be worthy of a response, and knowing that an election will be held on specific issues relating to a defined bargaining unit. ABC's experience indicates strongly that many employers in the construction industry wait until they are confronted with an actual union petition before communicating with their employees in a meaningful and coordinated way about the many issues surrounding union representation.

Employers in the construction industry typically are reluctant to communicate with their employees about the subject of unionization because, contrary to another statement of the Board panel in 2011, employers are NOT "able to communicate their message to employees quickly and effectively" on the subject of unionization.<sup>40</sup> Indeed, many construction employers have difficulty communicating with their employees at all due to language barriers among their workers, and the issues surrounding unionization in the industry are complicated and often not fully known to the employers themselves. In this regard, it is disingenuous for the Board panel to have stated in the 2011 Final Rule that "most of the rules governing campaign conduct are matters of common sense that are intuitively understood by employers and employees."<sup>41</sup> To the

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<sup>37</sup> As pointed out in the dissent, even strong proponents of labor such as John F. Kennedy stated that at least 30 days were required between the petition's filing and the election to "safeguard against rushing employees into an election where they are unfamiliar with the issues." 79 Fed. Reg., at 7342.

<sup>38</sup> 76 Fed. Reg., at 80152-80153.

<sup>39</sup> See Bronfenbrenner & Warren, *supra* at 2, statistics cited in the 2011 Final Rule at 76 Fed. Reg., 80153.

<sup>40</sup> 76 Fed. Reg., at 80154.

<sup>41</sup> 76 Fed. Reg., at 80155-80156.

contrary, the rules governing campaign conduct are often *counterintuitive* and are daunting for even experienced labor practitioners to understand and explain to employers, particularly in the construction industry.<sup>42</sup>

## Conclusion

If implemented as written, the NPRM will significantly impede the ability of construction industry employers to protect their rights in the pre-election hearing process. The NPRM also will impede the ability of construction employers to make facts and information regarding union representation available to employees. Finally, the NPRM will impose numerous burdens on the small, merit shop businesses and their employees that constitute the majority of the construction industry without any reasoned justification for imposing such burdens. For the reasons outlined above and in the more detailed, non-industry-specific comments from CDW, ABC strongly opposes the Board's proposed amendments, and requests that the amendments be withdrawn in their entirety for significant further study.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "G. Burr", with a long horizontal flourish extending to the right.

Geoffrey Burr  
Vice President, Government Affairs

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<sup>42</sup> To consider only the two examples of “common sense” campaign conduct referred to in the 2011 Final Rule (76 Fed. Reg., at 80155), there have been thousands of Board decisions issuing counterintuitive and conflicting rulings as to the definitions of “threats and bribes.” 76 Fed. Reg., at 80155.