Statement of Charles I. Cohen
Senior Counsel, Morgan, Lewis & Bockius LLP

before the

Committee on Health, Education, Labor & Pensions
United States Senate

Hearing Title – *Ambushed: How the NLRB's New Election Rule Harms Employers & Employees*

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Chairman Alexander, Ranking Member Murray, and Members of the Committee, thank you for your invitation to participate in this hearing. I am honored to appear before you today.

By way of introduction, I am Senior Counsel in the law firm of Morgan, Lewis & Bockius LLP, where I represent employers in many industries under the National Labor Relations Act (NLRA). From 1994 to 1996, I had the privilege of serving as a Member of the National Labor Relations Board (NLRB or Board), and was appointed by President Clinton and confirmed by the U.S. Senate.[1]

My entire professional career, spanning more than 40 years, has been spent working under the NLRA. For the first eight of those years, I worked at the NLRB, both in Washington and in two regional offices. During that time, I personally conducted NLRB elections, served as a hearing officer, litigated in the Courts of Appeal, and performed the myriad other functions of a Board agent, supervisor, and deputy regional attorney. Apart from my time with the NLRB, the remainder of my professional activity has been representing employers in traditional labor matters.

On December 15, 2014, the NLRB published an extensive Final Rule, which revises on a wholesale basis, the regulations regarding union elections (Final Rule).[2] The Final Rule will, among many things, dramatically shorten the period of time between a union filing an election petition with the Board and the actual holding of the election. It also will undermine an employer's ability to mount a lawful, effective information dialogue with its employees on whether or not to select union representation. The Final Rule, described by the two dissenting NLRB members as the "Mount Everest" of regulations,[3] took 733 pages to print when issued and occupied 200 pages in the Federal Register.

The Final Rule is a transparent attempt to circumvent Congress on the issue of how, if at all, to reform the nation's labor laws after the failure of the prior 111th Congress to pass the

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[1] I am not speaking on behalf of Morgan, Lewis & Bockius LLP or any other specific organization, and my testimony should not be attributed to any organization. There is pending litigation challenging the implementation of the Final Rule in which I, and the firm, are involved. *Chamber of Commerce of the United States, et al. v. National Labor Relations Board*, Case No. 1:15-cv-00009-ABJ (D.D.C.). However, this testimony reflects my own personal views, although I wish to thank David R. Broderdorf for his efforts in helping me prepare this testimony.

[2] 79 Fed. Reg. 74,308-74,490 (Dec. 15, 2014).

[3] 79 Fed. Reg. at 74,430 (dissent).

Employee Free Choice Act (EFCA), legislation supported by the labor movement that would have all but ended secret ballot elections at the NLRB in favor of "card check" recognition.

I appreciate the difficulty and inherent tensions in working under the NLRA. The statute guarantees the right to engage in union activities. It also ensures the right to refrain from such activities. These tensions, since the early years of my career, have played out in ways that have become much more political, engrained, and contentious. In those beginning years, there tended to be slightly different emphases in NLRA interpretation based upon the prism through which the appointees at the Board viewed the Act. Over four of the last five Presidential Administrations, the proverbial envelope has been pushed. Appointees, supported by Republicans and Democrats alike, bear some measure of responsibility for the increased polarization. But, the changes that have brought us here today are of a different magnitude. They represent no less than an attempt by the NLRB to put its thumb on the scale in favor of union representation.

In virtually every controversial NLRB initiative that I have witnessed in the past, the emphasis has been on enforcing the law while plugging opportunities for parties to violate the law or game the system. Unlike any of these other initiatives, however, this one transparently seeks to deprive law-abiding and nongames-playing employers of their right to communicate their views under Section 8(c) of the Act. The entire employer community is presumed to be on the wrong side standing ready to trample the rights of employees. The Final Rule also deprives employees of their right to receive key information from all sides in order to be fully informed on how and whether to exercise their Section 7 rights.

Some key facts are relevant to the Final Rule's background, and our discussion today:

- Union density in the private sector has been on a decline and is currently below 7 percent of the private sector workforce. Whatever the cause, the scope of which is beyond this debate, it is deeply distressing to organized labor.
- Over the past 20 years, unions have been seeking alternatives to winning secret ballot elections, typically through neutrality and card check procedures, often obtained through the pressure of corporate campaigns.
- As mentioned, unions have unsuccessfully sought legislation, through the Employee Free Choice Act, that would have functionally eliminated secret ballot elections conducted by the Board.
- As virtually every NLRB agent knows, the longer the period of time between the filing of an election petition and an election, the less likely it is that the employees will select a union. This is so whether or not unlawful or objectionable conduct has occurred.
- Over the decades, there have been legislative calls from organized labor to dramatically shorten the period of time from petition to election, and the possibility of shortened election periods was widely discussed during the policy debates surrounding the Employee Free Choice Act. No legislative change has occurred.

At the time I served as a Member of the Board during the Clinton Administration, there were similar calls for more rapid elections and to change the Board's procedures following the

Dunlop Commission's Report.[4] However, after considering these issues, the Board concluded that the requirement of a fulsome pre-election hearing prevented the Board from having an unfettered right to accelerate the election process. *Angelica Healthcare Services*, 315 N.L.R.B. 1320 (1995); *Barre National, Inc*., 316 N.L.R.B. 877 (1995). The simple point was that the statute guaranteed an appropriate pre-election hearing.

So what has the Board now come up with in the Final Rule? It has proffered the gimmick of a hurried and emasculated hearing, a binding statement of position under the threat of waiver, offers of proof instead of actual testimony, preclusive rules to limit issues, and frenetic time deadlines that disregard other obligations of employers and their counsel, all in an attempt to get to the election as soon as humanly possible and without giving the employer time to communicate with its employees. On top of these problems, the Final Rule will lead to far fewer elections where the parties obtain decisions on voter eligibility and supervisory status issues before employees vote, thus throwing many more election campaigns into chaos and confusion.

Open and free non-coercive speech and an opportunity to so communicate is the law in place. As the Supreme Court stated recently, Congress's overarching "policy judgment . . . favor[s] uninhibited, robust, and wide-open debate in labor disputes," including the "freewheeling use of the written and spoken word."[5]

In the Final Rule, the Board majority acknowledged the perception of why these rules are being promulgated. As the Board said, "[m]any comments additionally charge that the Board's motivation for issuing the rule are improper in that the Board seeks to act as an advocate for unions (rather than as a neutral overseer of the process), to drive up the rates of union representation, and to 'stack the deck' against employers in union organizing campaigns."[6] The Board went on to disclaim any such desire. Regardless of the Board's true motivations, this is the result of the Final Rule. The dissenting Board members aptly described the outcome: "[T]he inescapable impression created by the Final Rule's overriding emphasis on speed is to require employees to vote as quickly as possible – at the time determined exclusively by the petitioning union – at the expense of employees and employers who predictably will have insufficient time to understand and address relevant issues."[7] Employees will, in practice, be asked to "vote now, understand later."[8]

In light of all available objective data regarding the Board's election-related performance, the Final Rule is at best characterized as a "solution in search of a problem."[9] Most glaringly, the Board did not find the "problem"—significant delays, characterized as more than 56 days from petition to election—in more than a fraction of all cases. To the contrary, the evidence shows that significant delays occur in less than 6 percent of elections.[10] The Final Rule is not even targeted to those 6 percent of elections, but rather rewrites the procedures governing all elections. As the dissenting Board members put it, "[t]hese relatively few cases do not provide a

[4] Dunlop Commission on the Future of Worker-Management Relations, Final Report at 41 (Dec. 1, 1994).

[5] Chamber of Commerce v. Brown, 554 U.S. 60, 67-68 (2008).

[6] 79 Fed. Reg. at 74,326 n.83.

[7] 79 Fed. Reg. at 74,460 (dissent)

[8] Id. at 74,430 (dissent).

[9] Id. at 74,449 (dissent).

[10] Id. at 74,434 (dissent).

rational basis for rewriting the procedures governing *all* elections."[11] Nor can the Board claim that the current process results in unions losing far too many elections, as in the past four years alone unions have won over 60% of elections held.[12]

This objective data confirms that prior initiatives, although not always welcomed by all, have been extremely effective in implementing the policies and purposes of the Act. The Final Rule, unfortunately, will add further fuel to a perception that the Board is casting its own vote in favor of union representation rather than safeguarding the process by which employees can make this choice for themselves after having a reasonable opportunity to get information from all sides.

Importantly, the Final Rule takes another inappropriate step by mandating that employers turn over employee personal telephone and email addresses to unions. Even worse, while acknowledging that "the privacy, identity theft, and other risks may be greater than the Board has estimated," the Board nonetheless asserted that those "risks are worth taking."[13] They are not worth taking.

I wish it did not have to be the case, but my time spent with the Act informs me that no public good will come from the Final Rule. There will undoubtedly be proposed budget cuts, Congressional backlash and increased oversight, such as this very hearing, and more politicization of the NLRB. This is neither good nor fair for the NLRB as an institution, its staff, or indeed the country. As President Obama observed on June 29, 2011: "We can't afford to have labor and management fighting all the time, at a time when we're competing against Germany and China and other countries that want to sell goods all around the world." This Final Rule by the Board will result not only in increased fights between labor and management; it will embroil the United States government in a most unfortunate way.

This concludes my prepared testimony. Thank you again for the invitation to appear today. I would be happy to answer any questions that Members of the Committee may have.

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

[11] Id. at 74,456 (dissent).

[12] NLRB, Election Reports, http://www.nlrb.gov/reports-guidance/reports/election-reports (last visited Feb. 4, 2015).

[13] 79 Fed. Reg. at 74,341-42.