Agricultural Council of California • California Association of Nurseries and Garden Centers
California Association of Winegrape Growers • California Chamber of Commerce
California Citrus Mutual • California Farm Bureau Federation
California Grain and Feed Association • California Grape and Tree Fruit League
California Pear Growers Association • California Seed Association
California Women for Agriculture • Family Winemakers of California
Grower-Shipper Association of Central California
Grower-Shipper Association of Santa Barbara and San Luis Obispo Counties
Imperial Valley Vegetable Growers Association • National Federation of Independent Business
Nisei Farmers League • Pacific Egg and Poultry Association
Ventura County Agricultural Association • Western Growers Association
Western United Dairymen • Wine Institute

January 20, 2012

Agricultural Labor Relations Board
Attn: Mr. J. Antonio Barbosa, Executive Secretary
915 Capitol Mall, Third Floor
Sacramento, CA 95814-4801

Re: Proposed Regulatory Action to Amend Title 8, Cal. Code of Regulations Sections 20363, 20365, 20393, 20400 and 20402

Dear Chairwoman Shiroma and Members Rivera-Hernandez and Mason:

The 21 above-named organizations representing agricultural employers respectfully submit these comments on the proposed regulatory action referenced above.

§20363. Post-Election Determination of Challenges

The proposed amendments would add to section 20363(a) a requirement that the regional director (RD) serve "on all parties" "all challenged ballot declarations and all other evidence" possessed by the RD "relevant to the eligibility of the challenged voters."

This is a significant and welcome change from current practice under which the RD gives the parties—employers and labor organizations—only summaries of challenged voters' declarations. The parties have never received a satisfactory reason as to why the declarations themselves are not given to them at the outset of the RD's investigation.

The usual rationale for withholding declarations from the parties is to protect employees' identities until such time as they may testify. That rationale, however, does not apply to ballot challenges, as the RD lists and thus makes known to the parties the names of challenged voters after the initial tally of ballots.

While section 20363(d) would specifically grant the *parties* "the option of serving [on other parties] a detailed statement of facts in lieu of the declarations," appropriate steps should be taken to ensure each RD understands that an RD does not have that option. While the current regulation does not authorize the RD to give only declaration summaries to them, the parties now in fact receive only summaries and not the declarations themselves. This unauthorized and detrimental practice must cease.

§20365. Post-Election Objections Procedure

Several provisions of Senate Bill 126 were intended in large part to shorten the time needed to resolve post-election issues, including challenged ballots and objections. To this end, the proposed amendments include revisions to section 20365 to remove a level of review of objections filed by parties to an election.

By virtue of SB 126, Labor Code section 1156.3, subdivision (f), newly mandates the Board to issue a remedial certification order if it sets aside an election due to employer misconduct that, in addition to affecting the election's results, "would render slight the chances of a new election reflecting the free and fair choice of the employees." This provision should not be implemented in a way that would undermine the Legislature's intent to hasten the election-review process. Such detrimental implementation—resulting in needless *lengthening* of many objections hearings—would ironically occur if parties were led to conclude that they need to introduce evidence and present argument on the bargaining order issue before the Board has determined whether the election should even be set aside.

Proposed new section 20365(g) indicates the Board understands the importance of bifurcating objections proceedings so that the certification order issue will be considered—if at all—only after the Board has set aside the election. Such bifurcation will avoid the incurrence of needless cost in time and money that would otherwise result if every objections hearing were to entail presentations supporting and opposing the extreme remedy of the issuance of such a certification order.

In addition, it would be incongruous for the Board to assume sole responsibility for certain determinations, such as those involved in resolving challenged ballots or setting election objections for hearing, while allowing the delegation of responsibility for determining—albeit in the form of a recommendation—the most extreme remedy the Board may now impose: the certification order instituted under SB 126. Consideration of the imposition of this extreme remedy should never be assigned to an Investigative Hearing Officer, but should remain in the exclusive domain of the Board itself.

Lastly, consistent with the terminology *shall be **certified*** in Labor Code section 1156.3, subdivision (f), as amended by SB 126, proposed new section 20365(g) should refer to a *certification* order rather than a *bargaining* order.

To implement these three points, the above-named organizations recommend that the proposed amendments to section 20365 be revised to read as follows:

*(~~f~~g) Where the objections satisfy the requirements of subsections (a), (b), and (c) and there are material factual issues in dispute, t~~T~~he Board ~~executive secretary~~ shall direct an investigatory hearing pursuant to section 20370 ~~if it appears that there are substantial and material factual issues in dispute~~. The hearing shall be strictly limited to the **~~issues set forth in the executive secretary's notice of hearing~~ issue of whether the election should be set aside based upon the objections set for hearing, if proven to be true**. Hearings of....*

*(g) Prior to the Board certifying a labor organization as the exclusive bargaining representative by issuance of a **~~bargaining~~ certification** order as authorized by Labor Code section 1156.3, subdivision (f), **~~or an Investigative Hearing Officer (IHE) recommending such action,~~** the parties to the election shall be afforded the opportunity to submit written argument addressing whether a **~~bargaining~~ certification** order is warranted....*

§20400. Filing of Declaration Requesting Mandatory Mediation and Conciliation

Proposed new section 20400(c) refers to a *bargaining* order in the context of a labor organization's certification under Labor Code section 1156.3, subdivision (f). As discussed above, the regulation's terminology should conform to the terminology used in Labor Code section 1156.3, subdivision (f). Thus, *certification order* should be substituted for *bargaining order*.

Further, the preamble of new section 20400(c) should cite to Labor Code section 1156.3, subdivision (f), to clarify that its scope is limited to situations covered by that statute.

Similarly, that preamble should cite to Labor Code section 1164, subdivision (a)(4), to clarify that the regulation's scope is limited to situations involving the dismissal of a decertification petition under that statute.

Accordingly, the above-named organizations recommend that proposed new section 20400(c) be revised to read as follows:

(c) Where the request for mandatory mediation and conciliation is based on a ~~***bargaining***~~ ***certification*** *order* ***authorized under Labor Code section 1156.3, subdivision (f)*** *or the dismissal of a decertification petition* ***pursuant to Labor Code section 1164, subdivision (a)(4)****:*
A declaration pursuant to Labor Code section 1164, subdivision (a)(3) or (a)(4) may be filed with the Board by the agricultural employer or the certified labor organization at any time at least 60 days after the date the ~~***bargaining***~~ ***certification*** *order was issued or the decertification petition was dismissed, as appropriate....*

The above-named organizations appreciate this opportunity to comment in this matter and the Board's consideration of their comments and recommendations.