Office of the Executive Secretary
1325 J Street, Suite 1900-B
Sacramento, CA 95814

ALRB
AGRICULTURAL LABOR RELATIONS BOARD

GAVIN NEWSOM
GOVERNOR

DATE: October 25, 2024

TO: Agricultural Labor Relations Board

CC: Santiago Avila-Gomez, Executive Secretary

FROM: Ralph Lightstone, Board Member
Barry Broad, Board Member

RE: Subcommittee Report Regarding Public Comments and *Further* Proposed Modifications to Proposed Rulemaking (AB 113): Majority Support Petitions and Appeal Bonds (OAL Notice File No. Z2024-0226-02)

The above-referenced regulatory action formally commenced on March 8, 2024, when notice of this proposed rulemaking was published in the California Regulatory Notice Register (Cal. Reg. Notice Register (Mar. 8, 2024) No. 10-Z, p. 249) and separately was issued and publicized by the Agricultural Labor Relations Board (ALRB or Board).[1] Although not requested by any member of the public, the Board on its own motion held a public meeting concerning the proposed rulemaking on April 17, 2024. The initial public comment period closed April 22. Following the consideration of public comments received during the initial comment period, on June 21 the ALRB issued formal notice of modifications to the text of the proposed regulatory action and of the addition of documents to the rulemaking file and provided a 31-day comment period. The written comment period closed July 22. At the September 18, 2024 public Board meeting, the subcommittee presented its report (dated September 11) to the Board which outlined proposed changes based on public comments received by July 22. The Board approved the proposed modifications. On October 2, the ALRB issued a second formal notice of modifications to the text of the proposed regulatory action and of the addition of documents to the rulemaking file and provided a 15-day comment period. The written comment period closed October 17. Written comments were received from:[2]

- ALRB Region II Director Yesenia De Luna (ALRB RD), September 30;
- United Farm Workers of America (UFW), October 16;
- Barsamian & Moody (B&M), October 17;
- California Farm Bureau (CFB), October 17;
- Western Growers Association (WGA), October 17.

---

[1] Information regarding this proposed rulemaking is available on the ALRB's web site at < https://www.alrb.ca.gov/rulemaking/ab-113-implementing-regulations/ >.

[2] Copies of the written comments received are available on the ALRB's web site at the above address.

Having reviewed and considered the comments received, as well as based on the subcommittee's own further review of the proposed regulatory action, the subcommittee hereby presents to the Board its responses to the received comments, and two further proposed modifications to the regulatory text.

Contents of Compliance Specification Involving Monetary Remedies or Notice of Hearing without Specification (Prop. Reg. 20292)

Compliance Specification, Joint and Derivative Liability (B&M)

B&M opposes allowing joint or derivative liability issues to be determined for the first time during compliance proceedings regardless of whether a person or entity named by the Regional Director as jointly or derivatively liable has had notice and opportunity to contest the allegations in the underlying liability proceedings. B&M asks the Board to modify prop. reg. 20292, subd. (e) to permit the Regional Director to assert joint or derivative liability during compliance proceedings only where the Regional Director can (a) demonstrate that the potentially jointly/derivatively liable person or entity has been provided with notice and opportunity to participate in the underlying liability proceedings, or (b) plead in any specification its reasonable justification for the delay in naming the person or entity in the underlying proceedings and the grounds for naming the person or entity at the later stage.

The subcommittee notes this comment pertains to regulatory language proposed in the initial rulemaking notice materials, and is thus outside the scope of current comment period. Moreover, proposed regulation 20292, subd. (e) is not a new provision, rather it previously existed as regulation 20291, subd, (f). As the Board explained in its Notice of Proposed Rulemaking, as part of the Board's restructuring of its compliance proceedings, the Board is proposing to repeal section 20291, subd, (f), but to re-adopt virtually identical language in proposed new section 20292, subdivision (e).

Majority Support Petitions (Lab. Code, §1156.37; Prop. Reg. 20391)

Electronic Filing of Petition and Proof of Support (UFW)

The UFW states that it remains concerned that the Board is not planning to permit electronic filing of majority support petitions and accompanying authorization cards, and repeats the request made in its July 15 written comments that the Board adopt regulations allowing majority support petitions and authorization cards or petitions to be filed via email, with the filing of originals within 48 hours.

In its report to the Board at the September 18 Board meeting, the subcommittee recommended that the Board decline the UFW's proposals and retain the current regulatory language. The subcommittee continues to believe the submission of original authorization cards or petitions will benefit regional staff and facilitate the investigation of majority support petitions, and allowing the electronic submission of cards or petitions followed by original submissions may contribute to delays and result in the duplication of work by regional staff investigating the cards or petitions.

Accordingly, the subcommittee recommends the Board decline these proposals and retain the current proposed regulatory language. The subcommittee again proposes the Board defer action on the issue of electronic proof of support to a future rulemaking where the subject may be more fully considered.

Proof of Service of Majority Support Petition on Employer (UFW; B&M)

In its July 15 written comments, the UFW proposed adding language to proposed regulation 20391 specifying the manner of service of a majority support petition on an agricultural employer. Accordingly, the Board accepted the UFW's suggestion and added language specifying the manner by which to effect service on an employer with modifications to reflect the statutory requirement of personal service.

The UFW comments on new proposed regulation 20391, subd. (a)(1) which requires that a notice to the owner, officer or director of the employer be provided when service of the majority support petition is made on anyone other than the owner, officer or director of the employer. The UFW comments that requiring the notice be provided by email and by an overnight courier is excessive. The UFW proposes that service can be accomplished by either sending a follow up email when an owner, officer or director is not served, or by overnight courier, but not both.

The subcommittee agrees with this proposal and recommends modifying the regulatory language accordingly by changing the word "and" to the word "or." (See new prop. reg. 20391, subd. (a)(1).)

B&M urges the Board to strike the provision allowing the petition to be personally served upon a supervisor of employees covered by the petition when service upon any owner, officer, or director of the employer is not possible. B&M argues that this will invite disputes over whether the employer was adequately served based on arguments that the individual served lacked the authority to be deemed a supervisor, or due to delays in the agricultural employer receiving notice.

The subcommittee believes that the requirement that the labor organization immediately notify the employer of the name and location of the person served and provide a copy of the petition by email, if available, or by overnight delivery adequately ensures that the agricultural employer will receive notice of the petition. The subcommittee does not believe this proposal is necessary and recommends the Board not adopt it.

Submission of "Originals" (UFW)

The UFW's comment regarding the requirement in proposed regulation 20391, subd. (a)(2) requiring the filing of "originals" of authorization cards or petitions relates to its comment above urging the Board to allow majority support petitions and authorization cards or petitions to be filed via email, with the filing of originals within 48 hours.

As stated above, the subcommittee continues to believe the submission of original authorization cards or petitions will benefit regional staff and facilitate the investigation of majority support petitions. Accordingly, the subcommittee recommends the Board decline these proposals and retain the current proposed regulatory language.

Format of Authorization Cards or Petitions (UFW; B&M; WG)

The UFW notes that the proposed regulations appear to require that authorization cards include a worker's email address. The UFW raises the concern that a substantial number of farmworkers do not have email addresses, and the omission of an email address could result in rejection of otherwise valid cards. The UFW requests that the Board add language to 20391, subds. (a)(2)(A) and(B) making it clear that Board shall have discretion to accept the support as valid even if not all the information in the format is provided, so long as the support can reasonably be understood to be an authorization for union representation by the worker.

The proposed regulation's prescribed authorization card format includes fields for an email address and other contact information, but there is no requirement that that a field be filled in if the information is not available. The Regional Director will investigate the petition based on the information provided. The subcommittee does not believe this proposal is necessary and recommends the Board not adopt it.

With respect to the format for authorization cards prescribed in 20391, subd. (a)(2)(A), B&M comments that the language in bold at the bottom of the card advising that signing the card is "is a vote" for the union and that a signature cannot be revoked for one year should be moved so it appears before the signature line. Otherwise, it is largely meaningless because employees are not advised that their signature is a vote until after they have signed.

The subcommittee believes that the large bold font of the notice at the bottom of the authorization card makes it adequately visible to potential signers. The subcommittee does not believe this proposal is necessary and recommends the Board not adopt it.

B&M opposes the provisions in 20391, subds. (a)(2)(A) and(B) that allow the Regional Director to accept authorization cards/petitions that have been "signed and dated before the effective date of this regulation… if the card is in substantial compliance with the requirements of this subdivision." B&M believes that the "substantial compliance" standard is vague and unclear and will invite challenges from employers. Similarly, WG states that allowing for the acceptance of pre-regulation authorization cards or petitions that are in "substantial compliance" raises significant concerns, and undermines transparency and informed consent.

The subcommittee notes that determining what constitutes "substantial compliance" is a fact-based inquiry, and does not believe it is necessary to further define this term in the proposed regulations.

B&M also opposes allowing pre-regulation cards naming one employer to be used to support a majority support petition involving a completely different employer, and urges the Board to modify the proposed regulations to specify that if an authorization card bears the name of an employer that is different than the name of the employer named in the majority support petition, then it shall be deemed invalid.

WG comments that labor organizations should be required to secure updated petitions or cards from the same employees, ensuring they are equipped with the same information as employees who sign post-regulation cards.
At the May 29 and June 12 Board meetings, the Board considered comments asserting that the Board should adopt requirements that authorization cards be deemed valid only if signed by an employee while the employee is working for the employer subject to the majority support organizing campaign. The Board declined to adopt such requirements.

The language in proposed regulation 20391, subds. (a)(2)(A) and (B) is based on existing regulatory language in Board regulation 20300, subdivision (i)(1). Agriculture is a seasonal industry, and workers often work for multiple agricultural employers over the course of a calendar year depending on the season and harvests. Requiring a worker's authorization and support for a labor organization be given effect only if signed by the worker while employed with the subject agricultural employer would impose an unnecessary burden on employee free choice and a labor union's organizing efforts.

Labor Code section 1156.37, subdivision (c) and the proposed regulation (20391, subd. (a)(2)) require that employee support be given effect only as to those employees working for the agricultural employer at the time the petition is filed. This requirement, coupled with the requirement that the authorization cards also identify the name of the agricultural employer to whom the organizing campaign pertains, is sufficient to ensure only current employees of the employer are included for purposes of determining whether majority support is established while also protecting and enabling employee free choice.

Accordingly, the subcommittee recommends the Board decline these proposals and retain the current proposed regulatory language.

Assistance Completing Authorization Cards/Petitions (UFW)

In its July 15 written comments, the UFW proposed that language be adopted specifically allowing that assistance may be provided to a worker in filling out an authorization card. The UFW repeats this proposal in its October 16 comments. The Board previously rejected the UFW's proposal as unnecessary.

As we stated in the September 11 subcommittee report, we recognize such assistance may be necessary in light of language and literacy challenges that exist amongst the farmworker population. Barring evidence of fraud or other misconduct, nothing in our Act prohibits employees or union organizers from assisting workers in completing authorization cards. The subcommittee recommends that the Board decline to adopt the UFW's proposal for the same reasons previously stated.

Regional Director Noticing to Workers of Filing of Majority Support Petition (ALRB RD; UFW)

At the September 18 Board meeting, the Board reconsidered the notice requirements set forth in the modified regulatory language (prop. reg. 20391, subd. (a)(3). The Board retained the notice-posting requirement, but removed the reading and question and answer aspects out of a concern with the possibility of these readings being subjected

to abuse or manipulation by parties, as well as the logistical requirements involved in diverting staff and resources to conducting readings across a workforce. The Board concluded that notices posted at the employer's worksite can communicate to workers relevant and necessary information regarding the petition and their rights under the Act.

The ALRB Regional Director made a public comment at the September 18 Board meeting disagreeing with the elimination of verbal noticing to workers and instead relying on the posting of a written notice alone. She memorialized her comments in writing to the Board on September 30. The ALRB Regional Director states that written noticing alone (without any verbal component) is insufficient to inform farmworkers of their rights during a majority support petition given acknowledged language and literacy challenges in the population. She urges the Board to retain verbal noticing, but in order to minimize concerns with abuse or manipulation of the readings by the parties, the Regional Director recommends that verbal noticing take place without a question-and-answer period.

The subcommittee continues to be concerned that an in person noticing could be subjected to abuse or manipulation by parties. The subcommittee believes that the posting of a written notice is adequate, and recommends the Board decline this proposal and retain the current proposed regulatory language.

The UFW requests that in addition to issuing to the employer the notice to employees regarding the filing of the majority support petition, that the Regional Director provide a copy of the notice to the labor organization, and requests that the Board add language to 20391, subd. (a)(4) requiring a copy of the notice be provided to the labor organization.

The subcommittee agrees with this proposal and recommends modifying the regulatory language accordingly. (See new prop. reg. 20391, subd. (a)(4).)

48-Hour Employer Response; Timing (Prop. reg. 20391, subd. (b)) *(UFW; B&M; WG)*

In response to comments received during the initial notice and comment period in this rulemaking action, the Board adopted modifications to the proposed regulatory text extending the time for an employer to respond to a majority support petition, and produce its employee list, when the deadline for doing so falls on a Saturday, Sunday, or legal holiday. The Board adopted these modifications after considering the subcommittee's earlier reports (dated May 20 and June 7) and recommendations based on comments then received, which were presented to the Board and considered at public meetings on May 29 and June 12. No objections to these modifications were received at that time.

The UFW raised its objection to this modification in its July 15 written comments, and repeats it opposition in its October 16 written comments, stating that expanding the response period to beyond 48 hours will negatively impact union organizing efforts and is in direct conflict with the statute. The Board previously considered the comments received objecting to extending the 48-hour employer response deadline, and rejected them based on the recommendations of the subcommittee in its September 11 report. As that report stated, the 48-hour deadline automatically is extended by operation of

law pursuant to Code of Civil Procedure section 12a, which expressly provides for the extension of legal deadlines that fall on a Saturday, Sunday, or legal holiday. Section 12a applies to deadlines across California Codes, including the Labor Code. The UFW asks the Board to reconsider this provision.

B&M comments that "[t]his is a necessary provision." WG also expresses support for the provision and comments that the amendment "reflects the operational realities faced by agricultural employers and will help ensure compliance without undue hardship."

For the reasons set forth in the September 11 subcommittee report, the subcommittee recommends the Board not reconsider proposed regulation 20391, subd. (b) and retain the current proposed regulatory language.

48-Hour Employer Response; Employee List (Prop. reg. 20391, subd. (b)(2)) (B&M)

B&M opposes the requirement in proposed reg. 20391, subd. (b)(2) that employers must provide their employee's landline and cellular telephone numbers and their email addresses. They state that it is rare for employers to obtain any information beyond a current phone number. B&M request that the regulation be modified so an email address is not required.

Proposed regulation 20391, subd. (b)(2) which describes the required contents of the employee list provided by the employer tracks the language of existing regulation section 20310, subd. (a)(2) which describes the required contents of an employer's response to a representation petition and also requires employers to provide email addresses. Accordingly, the subcommittee recommends the Board decline this proposal and retain the current proposed regulatory language.

Regional Director Initial Determination; Timing (UFW; B&M)

In its July 15 written comments, the UFW objected to the provision extending the time for the Regional Director to make an initial determination regarding the investigation of a majority support petition and proof of support. The Board rejected the objections to the timeframes set forth in proposed regulation 20391, subdivision (c), based on the subcommittee's recommendation in its September 11 report. In its October 16 comments, the UFW states that it continues to object to the proposed language "because the statute requires a determination within 5 days of the filing of the MSP, and if an employer delays its response by any time period, this would cause the Regional Director to issue a determination beyond the 5 days required in the statute." The UFW also repeats its concern that an employer may thwart the majority support process by failing to produce an employer list, thereby preventing the Regional Director from conducting an investigation.

As the subcommittee stated in the September 11 report, restricting the time and scope of the Regional Director's investigation may work both to the detriment of the labor organization and to the arbitrary disenfranchisement of workers. Also, as previously stated, the subcommittee believes the UFW's concern that an employer may thwart the majority support process by failing to produce an employer list is not warranted. The proposed regulation already expressly would allow the regional director to proceed with its investigation notwithstanding an employer's refusal to participate or cooperate,

including drawing adverse inferences or presumptions as may be necessary to do so. (See prop. reg. 20391, subd. (d)(1)(B).) Accordingly, the subcommittee recommends the Board decline this proposal and retain the current proposed regulatory language.

B&M comments that "[s]ubdivision (c) would require the Regional Director to issue its decision "within three days after receipt of the employer's response." This is potentially in conflict with the statute, which allows the parties to be notified within five days of the filing of the MSP petition. In the event an employer responded within the first 24 hours, the Regional Director's response would be due one day earlier than it would be due under the regulations."

The subcommittee does not believe that the proposed regulation is in conflict with the statute. Accordingly, the subcommittee recommends the Board decline this proposal and retain the current proposed regulatory language.

B&M also comments that proposed regulation 20391, subdivision (c)(2) requires the Regional Director to return the majority support petition to the labor organization that it finds invalid, and urges the Board to add the requirement that the Regional Director make a copy of the originally submitted evidence as it "should be considered in the Regional Director's later review of the validity of any evidence submitted during the 'cure period.' If signatures or information are suddenly different, then the Regional Director should be required to investigate."

The subcommittee believes that this proposal is unnecessary, as the subcommittee believes the Regional Director will conduct the investigation appropriately, and recommends the Board decline this proposal.

B&M additionally comments that proposed regulation 20391, subdivision (c)(2) would give the Regional Director just two days to finalize the review after the cure period closes. At the very least, this should be two business days.

The subcommittee believes that this proposal is unnecessary. As the Board stated in its Initial Statement of Reasons, the two-day period is necessary to ensure the expedient processing of a majority support petition and is consistent with other rapid deadlines set forth in the statute regarding the processing of majority support petitions. Therefore. the subcommittee recommends the Board decline this proposal and retain the current proposed regulatory language.

Eligibility Disputes (Prop. Reg. 20391, subd. (c)(4)(A-B) (B&M, CFB, WG)

The proposed regulation sets out a process that has the employer litigate its eligibility issues through the objections process set out in the statute and provides a separate administrative appeal process for the union to use in cases where the eligibility determinations cause the union to fall below majority support. Under proposed regulation 20391, subd. (c)(4)(A), either the Regional Director or labor organization may assert challenges to individuals included on the eligibility list produced by the employer. The Regional Director will then inform the employer of such challenges and determine whether the parties are able to resolve the challenges informally.

For individuals allegedly omitted from the employer's list, proposed subparagraph (c)(4)(A) requires the Regional Director not to disclose to the employer the individuals' names pending her investigation. At the September 18 Board meeting, the Board agreed with the subcommittee's recommendation that this is necessary to protect the confidentiality of the employees who have submitted support in favor of the labor organization. However, once the Regional Director has completed her investigation, subparagraph (c)(4)(D)(ii) provides that when the number of eligibility disputes is sufficient to affect the determination of whether majority support has been achieved, the Regional Director must notify the parties of the disposition of each eligibility dispute, including the identification of all individuals found to have been omitted from the employer's list, as well as evidence in the region's possession regarding the eligibility of the individuals. This disclosure requirement informs the employer of individuals added to the eligibility list in order to provide the employer an opportunity to object to such individuals in post-certification objections under Labor Code section 1156.37, subdivision (f), if the employer so chooses.

Subparagraph (c)(4)(E) reflects and effectuates the employer's right to object to eligibility determinations made by the regional director in post-certification objections pursuant to subdivision (f) of Labor Code section 1156.37. If any eligibility objections are set for hearing, this paragraph restricts the scope of the hearing to the eligibility of the individuals in dispute. The Board agreed with the subcommittee's recommendation that this restriction is necessary to protect employees from unwanted examination and harassment or retaliation based on their support for the labor organization.

If the Regional Director finds the labor organization has not established majority support following her resolution of eligibility disputes, the labor organization may administratively appeal any adversely decided eligibility disputes pursuant to Labor Code section 1142, subdivision (b). Following the resolution of any such appeal, or if none is filed, then an appropriate certification of the results may be issued by the Executive Secretary. If the labor organization is certified after the resolution of eligibility disputes by the Regional Director, the employer may contest the Regional Director's eligibility determinations in post-certification objections pursuant to Labor Code section 1156.37, subdivision (f).

B&M argues that "there is no legal or logical reason for excluding employers from the challenge process" described in proposed reg. 20391, subd. (c)(4)(A). B&M also states that the Regional Director should be required to notify the employer of the names and other identifying information of the workers allegedly left off the list as not disclosing this information a denial of due process to the employer.

WG also expresses concern that proposed reg. 20391, subd. (c)(4)(A) does not allow employers to challenge names submitted by the labor organization. To maintain fairness and ensure the integrity of the process, the regulation should be revised to explicitly provide employers the right to challenge the labor organization's list of alleged supporters.

Similarly, CFB argues that the process subdivision (c)(4)(B)(ii) allows the Regional Director to determine eligibility disputes without providing the employer with any notice of the identities of the allegedly omitted individuals or, perforce, any opportunity to provide the regional director with evidence on the matter or to otherwise challenge the eligibility of those individuals. The lack of such notice and opportunity violates the

employer's due process rights. Thus, this proposed subdivision must be further amended to provide the employer with such notice and a reasonable opportunity to provide such evidence and challenge such eligibility.

Proposed Regulation 20391, subd. (c)(4)(D)(ii) provides that if the number of challenged or allegedly omitted individuals is sufficient to affect the determination whether majority support is established, the Regional Director's notice will identify all individuals found to have been omitted from the employer's list. The subcommittee believes that this adequately informs the employer of the identities of individuals added to the eligibility list in order to provide the employer an opportunity to object to such individuals in post-certification objections under Labor Code section 1156.37, subdivision (f). We believe the proposal as written strikes a balance between protecting the confidentiality of the employees who have submitted support in favor of the labor organization while the pre-certification investigation is pending and allowing the employer to adequately prepare its post-certification objections. Accordingly, the subcommittee recommends the Board decline this proposal and retain the current proposed regulatory language.

Eligibility Disputes, Evidence Relating to Eligibility Determinations (Prop. Reg. 20391, subd. (c)(4)(D)(ii) (UFW)

The UFW states that it continues to be concerned with the disclosure of declarations prior to the time that an employee testifies at a hearing. The UFW requests that the Board amend the proposed language to prohibit the disclosure of any declarations from any non-supervisory agricultural employees, including those of the employees that are the subject of eligibility disputes. The UFW argues that the current proposed language this would be inconsistent with current Board regulations 20236, 20237, 20274 and *Giumarra Vineyards Corp*. (1977) 3 ALRB No. 21. The UFW contends that if the Regional Director provides reasons for including a disputed employee in a unit, that is enough information to allow an employer or union to contest the evidence relied on by the Regional Director.

The UFW raised the same concerns in its July 15 written comments with respect to formerly proposed regulation 20391, subd. (c)(4)(B)(v). The Board declined to adopt the UFW's proposal at the September 18 Board meeting based on the subcommittee's recommendation that any declarations or statements by workers in this context would be strictly limited to the eligibility of the subject individual, i.e., is the individual an agricultural employee and did they work during the eligibility period? In this context, a declaration by the challenged worker is comparable to the challenged ballot declarations regional staff obtain from challenged voters in an election context. (Board reg. 20363, subd. (a); see *Wonderful Nurseries, LLC* (May 24, 2024) ALRB Admin. Order No. 2024-16, p. 12.)

As stated in the September 11 report, under the proposed regulatory language, and consistent with existing regulation 20363, subdivision (a), the names of agricultural employees whose eligibility is in dispute are disclosed but measures are set forth to protect the confidentiality of the names of agricultural employee witnesses who provided statements or evidence concerning the eligibility of another worker. (See also Board regs. 20236, 20274.) Accordingly, the subcommittee recommends the Board decline to amend proposed regulation 20391, subd. (c)(4)(D)(ii).

Limitation of Scope of Employer Challenge of Eligibility Disputes in Objections Prop. reg. 20391, subd. (c)(4)(E).

B&M comments that this provision lacks clarity and asks "Does this mean that an employer would not be permitted to challenge the validity of the underlying vote and whether it was obtained unlawfully?

The subcommittee notes that proposed regulation 20391, subd (c)(4)(E) would not affect the other grounds for objections set forth in Labor Code section 1156.37, subdivision (f)(1)(A-D).

Presumptions Based on Employer Non-Compliance Prop. Reg. 20391, subd. (d)(1)

B&M comments that the "substantially inadequate" standard set forth in subdivision (d)(1)(B) that would trigger the presumption is vague, and asks what if the reason the employer doesn't provide an accurate employee list is because employees refuse to provide accurate information? B&M therefore comments that subdivision (d)(3) should expressly state that the "failure of an employer to provide a complete or accurate employee list shall be excused by the fact that the employer based its information on information supplied to it by its employees" regardless of whether they are direct hire of farm labor contractor employees.

In the subcommittee's May 20 report, the subcommittee indicated that it in drafting proposed regulation 20391, subd. (d), it considered existing Board regulation 20310, subdivision (f) regarding prescribed consequences for when an employer fails to comply with response requirements in the context of a petition for certification. The Board agreed that incorporation of similar provisions under the proposed regulation was appropriate. The subcommittee notes this comment is outside the scope of current comment period; however, the subcommittee considered this comment and notes that determining whether the employee list is "substantially inadequate" is a fact-based inquiry, and under 20391, subd. (d)(2), the Regional Director must provide the employer with written reasons the list was found to be incomplete or in accurate. Thus, the subcommittee does not believe it is necessary to further define this term in the proposed regulations.

Board Review of Certification (UFW, B&M)

Proposed regulation 20391, subdivision (e)(1)(A) allows for labor organizations to file applications for review of a certification "where it is alleged an employer engaged in misconduct that would render slight the chances of a new majority support campaign reflecting the free and fair choice of employees."

The UFW requests that the Board also permit labor organizations to file applications for Board review, not just when employer misconduct is alleged to have affected the majority support campaign, but also in situations where it is alleged that "the board improperly determined the geographical scope of the bargaining unit," "the majority support election was conducted improperly," or "improper conduct (by an employer or the Board) affected the results of the majority support election." The UFW states that this would track the language of Labor Code section 1156.37, subd. (f)(1).

The subcommittee believes proposed regulation 20391, subdivision (e)(1)(A) is consistent with the statute. The bases for objections as set forth in Labor Code section 1156.37, subd. (f)(1) appear to be available only to employers. Accordingly, the subcommittee recommends the Board decline this proposal and retain the current proposed regulatory language.

Finally, B&M asks the Board to clarify whether proposed regulation 20391, subd. (e)(1) provides labor organizations with an opportunity to challenge certification.

At the September 18 Board meeting, the Board determined it was appropriate to modify the proposed regulatory language in proposed regulation 20391, subdivision (e) to codify a labor organization's ability to object to the results of a majority support proceeding based on employer misconduct as described in Labor Code section 1156.37, subdivision (j). In light of other statutory language describing the objections as challenging the certification of a labor organization, the Board agreed that the bases for objections as set forth in subdivision (f)(1) appear to be available only to employers. Therefore, the Board agreed it was appropriate to clarify that a labor organization could file an application for review of a dismissal of a majority support petition within five days after service of a certification limited to the bases in 1156.37, subdivision (j).