
September 28, 2020

*Submitted electronically via regulations.gov.*

Roxanne L. Rothschild
Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, DC 20570

**Re: RIN 3142-AA13; Doc. # NLRB-2020-15596; Representation-Case Procedures: Voter List Contact Information**

Dear Ms. Rothschild:

The Independent Bakers Association ("IBA") is a nation-wide industry trade association with more than two hundred member companies. The Association members are family-owned and privately held wholesale bakeries and allied industries, all of which are subject to the jurisdiction of the National Labor Relations Board ("NLRB"). Many of its members have been, and/or will be party to representation case proceedings before the NLRB; and, therefore, have a direct interest in the substance and procedure that attends such cases. Moreover, as largely family-owned businesses, IBA members have a unique and close relationship with their employees whom they all consider as their most valuable resource. The member companies, on behalf of their employees, are rightfully concerned that the NLRB's current *Excelsior* policy represents an entirely unwarranted and unacceptable invasion of employee privacy rights.

IBA applauds the present action of the NLRB in considering meaningful reforms to that policy in order to safeguard the personal privacy of working men and women. In support of that initiative, the Association respectfully submits the following Comment.

## INTRODUCTION

Occasionally, NLRB policy finds itself more out of step with prevailing jurisprudence than a draftee on his first day of boot camp.[1] In no respect is this phenomenon more evident than with the Obama Board "modifications" to the Board's Representation Procedures.[2] For example, while virtually all policy-based jurisprudence relating to the Board's electoral processes has consistently emphasized the importance of "robust debate" and discussion

[1] For example, the Agency had long been at odds with most federal courts of appeal regarding the "clear and convincing waiver" versus "contract coverage" theories in the context of assessing an employer's mid-term bargaining obligation. The Board had likewise been out of synch with the prevailing appellate view regarding the prerequisites for converting an 8(f) agreement into a 9(a) relationship in the construction industry. Fortunately, these decidedly outlier positions have been modified to conform with mainstream jurisprudence.

[2] See, Representation Case Final Rule, 79 CFR 74308, 12/15/14, effective date, 4/15/15

in the organizing context[3], the procedural modifications enacted in 2015 aimed at, and produced, precisely the opposite result.

Minimizing the opportunity for meaningful debate and discussion was not, however, the only contrarian policy embodied in those procedural changes. They also dramatically expanded the already anachronistic *Excelsior*[4] rule; and, rather than seeking to square it with the growing body of law and public concern over employee privacy rights, the new procedural requirements tracked in the diametrically opposite direction. Thus, at a time when the public has shown increasing concern for individual privacy; and, where courts and legislatures have been actively engaged in creating more safeguards for employee privacy, the 2015 rule changes took the already questionable requirement that employers provide unions with employee names and addresses and added to it even more sensitive personal information, like home telephone numbers, cellphone numbers and e-mail addresses. In mandating these additional new requirements, the Board was not only swimming against a strong policy tide, it was apparently blithely ignoring the very existence of that tide. Moreover, it was doing so in the total absence of any empirical evidence that the disclosure of such private, personal information was at all necessary or justified.[5]

## SOCIETAL PRIVACY CONCERNS

More than a century ago, Justice Louis Brandeis heralded the "right to privacy" in a Harvard Law Review publication[6]. Brandeis not only posited the existence of such a right; but, defined it simply as "the right to be left alone". While the notion took time to develop, by the 1960's, it had become a firmly entrenched constitutional principle[7]. Beyond its legal viability the notion of personal privacy continued, and continues, to gain ever greater societal recognition and attachment.

Personal privacy, or the right to be left alone, is a genuine and growing concern for the vast majority of people. In a recent survey, nearly 80% of the responders expressed significant concern about the possession and use of their personal data by private actors.[8] In the same survey, more than 80% of the participants expressed the view that any potential benefit from the dissemination of their personal information was far outweighed by the risk.[9] A view unquestionably well-founded, since more than three in ten survey respondents also reported that they had been the victim of a data breach in the preceding twelve months.[10]

---

[3] See, *United States Chamber of Commerce v. Brown,* 554 US 60 (US Sup Ct, 2008); *Letter Carriers v. Austin,* 418 US 264, 272-273 (US Sup Ct, 1974)

[4] 156 NLRB 1236 (1966). *Excelsior* required the disclosure of employee names and home addresses. Arguably, requiring this limited disclosure might have been defensible in the 1960's - a bygone era in which there were no personal computers, email, cellphones, social media or text messaging, and where more than 20% of US households did not have a telephone. *Statistica Research Department, Telecommunications* (2010). The options for interpersonal communication in the current era, however, are so broad that any claim that a union cannot identify or communicate with employees is frankly untenable. Indeed, it was likely untrue in the 1960's as well since the *Excelsior* Board never cited any empirical evidence to justify its imposition of the original requirement. It is certainly untenable today.

[5] As noted below, the right to privacy is now a well-enshrined constitutional principle, and any government policy that infringes on such a right must pass constitutional muster. Before the federal government can properly mandate the involuntary disclosure of sensitive, private, personal information, it is incumbent on the government to clearly articulate the necessity of such a requirement. Beyond mere lip service, the Board did not do so when it initially imposed the limited *Excelsior* requirement. It most certainly did not do so when it radically expanded that requirement and its attendant privacy infringement.

[6] See, Harvard L. Rev., Brandeis, L., "The Right to Privacy". Vol. IV, No. 5, December 1890.

[7] See, e.g. *Griswold v. Connecticut*, 381 US 479 (SU Sup Ct, 1965); *Stanley v. Georgia*, 394 US 557 (US Sup Ct, 1969)

[8] See, "Americans and Privacy", Pew Research Center, November 15, 2019.

[9] Pew Research, ibid

[10] Pew Research, ibid

The Pew Survey is by no means an outlier. Indeed, its data may err, if at all, on the conservative side. For example, a different United Press/Zogby poll found that the privacy of personally identifiable information was a matter of significant importance to more than 85% of the survey responders.[11] Even more significantly for present purposes, two separate Harris polls found that 90% of respondents found it "extremely" or "somewhat" important to them not to be disturbed at home.[12]

Surveys, however, are not the only indicator of how citizens view the importance of personal privacy and the right to be left alone. In 2003 Congress passed and the President signed "The Do Not Call Implementation Act of 2003".[13] The law, administered by the Federal Trade Commission ("FTC"), allows US residents to enroll their telephone numbers in a registry maintained by the Agency. Once registered, most third parties are prohibited from using the registered number for purposes of telephone solicitation. According to the most recent data available from the FTC, US citizens in fiscal year 2019 had registered more than 239 million phone numbers on the Do Not Call List; and, the FTC received nearly 5.5 million complaints regarding phone call solicitations. [14] It is quite simply impossible to overstate the level of public concern over the dissemination of personal information, and the desire of individuals to maintain their privacy, including the most fundamental of those privacy rights – the right to be left alone.

## GROWING LEGISLATIVE RESPONSE

With the singular exception of the NLRB virtually every other instrumentality of government, foreign and domestic, has responded to the public's near universal concerns regarding personal privacy by making personally identifiable information more difficult for third parties to acquire and use. In Europe, for example, the European Union ("EU") has enacted a comprehensive regulatory scheme to address data privacy concerns. The EU's *General Data Protection Regulation* ["GDPR"] contains strict prohibitions on the dissemination of all "personally identifiable information"; and specifically includes personal e-mail addresses among a host of other items that comprise such identifiable information.[15] Under the GDPR an individual's e-mail address is "confidential" and must be used and secured under strict privacy and security guidelines. Those guidelines provide that personal e-mail addresses can only be collected, disseminated or used in those instances where the individual has *explicitly opted in* to allow such actions. [16]

In the US, and apart from the "Do Not Call Act", *supra*, data privacy has largely been a matter of state regulation. However, the impetus for a more comprehensive federal regulatory scheme is growing exponentially; and, the federal government has already taken preliminary steps toward establishing national standards. For example, The National Institute of Standards and Technology ["NIST"], an adjunct of the US Department of Commerce, has already acted to broadly define "personally identifiable information", and has included within that definition a person's individual e-mail address. [17]

Some form of data privacy law is now on the books in all fifty states. Most notably, in 2018 the State of California enacted the California Consumer Privacy Act.[18] The California legislation contains a very broad definition of what constitutes "personal information", and clearly encompasses such routine data as individual e-mail

[11] UPI/Zogby poll on individual privacy attitudes, April 3, 2007
[12] Harris Polls conducted August 2001, and March 18, 2003, respectively
[13] See, 15 USC, Sec. 6011, et seq
[14] "FTC National Do Not Call Registry Data Book for FY 2019", at p. 1.
[15] See, Article 4 GDPR at (1).
[16] See, GDPR, supra, at Articles 7 and 14.
[17] See, e.g. NIST ITL Bulletin – Guide to Protecting Personally Identifiable Information, at pp 1,3 (April. 2010) https://www.nist.gov/publications/guide
[18] Title 1.81.5, Pt. 2, Div 3, Cal Civ Code (June 2018)

addresses. Also, the law prohibits the sharing of personally identifiable information in the absence of explicit consent by the affected individual.[19] The inclusion of that prohibition is not surprising given the overwhelming public support for such requirements. Indeed, both a recent Harris poll and a Pew Research study found that over 85% of responders favored specific opt-in requirements before allowing any third party to even collect, let alone share, their home addresses and phone numbers.[20]

## PERTINENT LEGAL DEVELOPMENTS

Just as technology has advanced and has required societal readjustment and adaptation, so too has the law. Thus, since the Board's 1966 *Excelsior* decision the Supreme Court's jurisprudence with regard to employee privacy and union information entitlement has evolved; and, its evolution ought to compel the Board to revisit and reassess its policy position as embodied in the current *Excelsior* requirement.

In *United States Department of Defense v. FLRA*[21] the US Supreme Court held that federal government agencies were not, and could not, be required to disclose the home addresses of their employees to a public sector union. The decision in *Defense Department* involves the interpretation and application of both the federal Privacy Act of 1974[22] and the Freedom of Information Act[23] Both statutes apply to public sector employees, and neither apply to private sector employees. Thus, the decision is concededly not directly controlling. However, its findings and analysis should compel a serious reconsideration of the current *Excelsior* rule.[24] Thus, although involving different statutes, the decision in *Defense Department* ultimately turns on the Court's finding that the home addresses of federal employees constitute private, personal information, and that the compelled disclosure of such information to a labor organization would constitute a "clearly unwarranted invasion of [the employees'] personal privacy". Beyond finding employee names and addresses, let alone home and cell phone numbers and email addresses, constitute private information deserving of legal protection against disclosure, the Court in *Defense Department*, reiterated its view expressed earlier in *United States Department of Justice v. Reporters Committee for Freedom of the Press*[25] that in assessing whether the government should be allowed to compel an employer to disclose private, personally identifiable information regarding its employees to a third party, such clear invasion of privacy must be weighed against the policy militating in favor of disclosure. The IBA respectfully submits that the Board has never meaningfully engaged in a similar balancing test with respect to the *Excelsior* requirement. Moreover, if it were to do so, as it unquestionably should, it is clear, that save for limited instances, the alleged "need" for *Excelsior* information simply does not outweigh the substantial impingement on individual privacy rights.

## THE CURRENT *EXCELSIOR* REQUIREMENT FAILS ANY CONCEIVABLE BALANCING TEST

The NLRB is no stranger to the task of balancing competing rights, particularly in the union organizing context. Thus, for example, the history of the Act reflects the debate over striking a balance between the ability of a union to communicate with potential supporters, and an employer's private property rights. That debate culminates in the Supreme Court's decision in *NLRB v. Babcock & Wilcox, Inc.*, 351 U.S. 105 (1956) and provides useful lessons in the *Excelsior* context as well.

---

[19] CA Privacy Act, *supra*; See, also, *"California Dreamin' of Privacy Regulation",* Cong Rev Ser, LSB 10213 (Nov. 1, 2018)
[20] See, Harris and Pew polls, *supra.*
[21] 510 US 487 (1994)
[22] See, 5 U.S.C., Sec. 552 a, 552 a (b)(2)
[23] See, 5 U.S.C., Sec. 552
[24] See, E.g., Greenhaus, David; "Should the NLRB Revisit Excelsior", Hofstra Labor and Employment Law Journal, Vol. 16, Issue 1, Article 8 (1998)
[25] 489 US 749 (US Sup Ct 1989)

First, where a party's legal rights are in tension with another party's competing legal rights, the controlling principle has been that the Board must strike a balance in which the accommodation of one right is accomplished with as little infringement on the other as is possible. The Board has never meaningfully engaged in this analysis with respect to either the original or the current *Excelsior* requirement. Rather, it has contented itself with merely claiming that in the organizing context, the possession of such private and personal information will better enable the union to communicate with unit employees. As noted below in detail, such a stated justification misses the mark on a host of grounds.

Second, and to the extent a balancing test is actually required at all, such a test must clearly articulate the *compelling* reasons why a party's rights must be infringed upon in order to secure a different right. Moreover, the articulation of those reasons must be more than mere platitudes. The breach of a party's rights must, in the first instance, be predicated on actual evidence of need. This is a requisite element of any analysis that involves the infringement on a party's rights. However, it is one which the Board has never undertaken. Again, as noted below in detail, the actual evidence in this regard is at best speculative, and at worst, non-existent.

Turning first to the issue of balancing it must be noted that that the analogy to the NLRA's private property jurisprudence is, by no means, a perfect one. Thus, in the context of *employee* access to employer property, there are two legal rights that are in tension – the employees' Section 7 rights, and the employer's property rights. In the *Excelsior* context there are not two sets of rights in issue, only one. Employees have a clear privacy right in their personal information; however, a labor union has no direct statutory right at all. Neither Section 7, which expressly applies only to "employees", nor any other provision of the NLRA accords labor unions in the organizing context a statutory right to employee information. At best, like in cases of *union* access to private property, unions possess an extremely limited, and circumscribed derivative "right" to such information only when they can demonstrate a compelling need. The *Excelsior* rule turns this entire analysis on its head; and, subordinates employees' constitutional right to privacy to a non-existent union right to information, all without any empirical showing of need, let alone compelling necessity.

The private property analogy is also distinguishable since, in the instance of property, the right "belongs" to the employer/property owner. In the instance of personal information that is not the case. The employer merely possesses or maintains the information, but it is the employee that has the privacy right in that information. The present *Excelsior* requirement affords the employee whose privacy right is at stake absolutely no role in objecting to, or allowing the infringement upon, his or her personal right. The possessor of the right should have a meaningful role in the process; or, failing that, there must be both a compelling necessity for the disclosure, and an insurmountable obstacle to employee input. In the case of the *Excelsior* requirement there are neither.

The preceding observations notwithstanding, and, assuming a balancing test is required, the analysis should next turn to an assessment of a union's actual need for private employee information in the organizing context. Beyond mere surmise, the Board has never articulated any empirical or experiential data regarding employee contact information beyond the self-evident proposition that the more contact information an individual has, the *easier* it is to make contact. However, no valid balancing test involving the infringement of rights can be justified because it makes things "easier" or "better". Such infringement can only be justified by compelling need. Since the Board has never meaningfully undertaken this effort it is impossible to assess the viability of its rationale. That said, a few observations are pertinent here.

First, the *Excelsior* rule requires an employer to provide private employee information only after a petition has been filed. Common experience dictates that, by that juncture, a union that is remotely skilled at organizing *already* knows the identity of the employees in the bargaining unit, and either has or can easily obtain the necessary contact information as well. Thus, there is simply no necessity for the government to compel the

disclosure of entrusted information. Second, were experience and common sense alone not sufficient to reach this conclusion it is worth additionally bearing in mind that the average number of employees within a bargaining unit in 1966 was only sixty-four[26]. By 1993 the average number of eligible voters in Board elections had dropped to fifty-six, and for the past two decades, the average number of eligible voters has consistently been under thirty.[27] Since a petition requires at least a 30% showing of interest that means that in an average organizing campaign a union would only need to learn the identities of a handful of eligible voters – a task easily and readily accomplished by merely making inquiry of their co-workers that supported the petition. While this may be a somewhat longer prospect in a larger unit, the methodology remains precisely the same. Indeed, it is precisely this methodology of building on internal employee support that unions already utilize in all their organizing efforts. The claim that a union is unable to determine the identity of all the eligible voters in virtually every bargaining unit simply defies logic and experience. It is equally as easy for a union to determine how to contact a person once they have identified them.

Unquestionably some would argue that if a union can so easily discover *Excelsior* information on its own, what is the impediment with an employer providing it? The argument, of course, completely misses the point. Such independent discovery of information does not involve the federal government compelling the disclosure of private information entrusted to an employer. Independent discovery, unlike the *Excelsior* rule does not involve governmental compulsion, does not require an employer to breach its duty to safeguard employee information, and does not contravene employees' implied or explicit expectation of privacy.

## UNAVAILING DEFENSES

Proponents of the original *Excelsior* rule, and proponents of its expansion, have sought to defend the policy on two grounds. First, they argue that the state and federal laws, and consumer concerns previously noted are all inapposite since they are relevant only in the context of the commercial use of personally identifiable information. Second, they claim that the provision of *Excelsior* information is justified by analogy to public elections where voter lists with addresses are available for public inspection, or corporate proxy elections where management must provide the names and addresses of stockholder/voters, or internal union elections where candidates for office have access to member contact information. Indeed, these were the precise analogies relied on by the Board in its *Excelsior* decision. See, *Excelsior*, at 1242. Neither argument withstands scrutiny.

The first argument, even upon cursory review, is plainly specious. First, contact from union in the context of an organizing campaign is every bit as "commercial" and as intrusive, as contact from any other "seller". Indeed, probably more so, since the typical commercial seller usually confines himself to a mail or telephone solicitation, however, rarely makes a "home visit". Further, both a sales call and a union organizing call are commercial in the sense that they contemplate the prospect of an eventual economic transfer. Moreover, an organizing call, or visit, like a similar selling activity all entail "solicitation" which the Board has defined as any effort to encourage employees to vote or support [a union]. See, *Wynn Las Vegas,* 369 NLRB No. 91. Further still, from an invasion of privacy perspective, it is totally immaterial if one characterizes the call or visit as a "sales call" or an "organizing call". How one chooses to characterize the purpose of the contact is essentially meaningless. From a privacy perspective what the contactor wants out of the contact is not the issue. From a privacy perspective it is the disturbance itself that is the issue. Put in simple terms, it does not matter *why* someone calls your cellphone, or rings your doorbell, or floods your email in-box – it is the fact that you are not "being left alone" by virtue of these acts that constitutes the invasion of privacy. Thus, the claimed "difference" between a commercial sales call and an organizing call is, at best, a distinction, without a substantive difference.

[26] See, Thirty-First Annual NLRB Report at page 20.
[27] See, Fifty-Eighth Annual NLRB Report at page 15; and, Testimony of Former NLRB G.C. Fred Feinstein before the House Committee of Education and the Workforce Re HR 2347, p. 6 (2013).

In a similar vein, the notion that voter, stockholder, or union member information that is publicly available justifies the *Excelsior* rule does not bear up under examination. First, when an individual either registers to vote, or signs forms associated with the purchase of stock or union membership it is generally self-evident that these are "public" documents. In all of these instances, the individual has no expectation of privacy with respect to the information that they provide. Indeed, most have exactly the opposite expectation. By contrast when employees provide personal information their employer there is an expectation of privacy. Employees do not expect that their employer will, or even could, legally sell or otherwise share their personally identifiable information with any third party. Most employees are, if not specifically at least intuitively, well aware of the host of state-based legal protections that surround their personnel files and personnel information. There is, in the instance of employment maintained personal information, a clear expectation of privacy on the part of employees – an expectation that does not extend to the allegedly analogous examples cited by *Excelsior* proponents.

Second, even beyond the question of expectation, the analogy fails on the grounds of voluntariness. Thus, to one degree or another, a voter, stockholder, or union member either explicitly or impliedly consents to the relinquishment of a certain amount of privacy by virtue of the action he or she chooses to take. That is not the case in the employment context. By the mere act of accepting employment, there is nothing, express or inherent, in the act that remotely signifies the individual's consent to have his or her employer share personal information with a private third party.

## ASSOCIATION POSITION

While the Board's request for Comments technically addresses only the propriety of those requirements added to the traditional *Excelsior* rule by the Obama Board, IBA respectfully suggests that this might be an appropriate opportunity to re-visit the continuing viability of the rule in its totality. Thus, many of the observations made herein with respect to an individual's phone numbers and email addresses apply as well to their identity and home address. Moreover, at no time since the establishment of the *Excelsior* requirement has the Board ever undertaken any empirical or data-based study to determine the necessity of employer provision of the information, or a petitioner's inability to obtain the information in question on its own. Given the privacy concerns that attend all such information it is simply no answer to say that the mandated provision of such information is "easier"; or makes the prospect of communication "better". Those are not appropriate criteria. Many things would certainly be easier, or more effective, or better, if one were to ignore the personal privacy of others. That does not, however, mean the government should simply adopt them.

The *Excelsior* list does, however, serve the indispensable function of creating a roll of eligible voters. This function could be fully preserved by simply making the *Excelsior* list available to the Board, however precluding its pre-election distribution to the petitioner.

While the elimination of the *Excelsior* requirement in its entirety may constitute a revision beyond that which the Board is currently prepared to take, the Board should consider and take the following actions:

### Rescind the Current Rule

At a bare minimum, the Board should eliminate any requirement that employers be required to provide its employees' cell phone and home phone numbers and e-mail addresses. On any privacy "continuum" this information is significantly more sensitive and presents a far greater opportunity for intrusion than names and physical addresses. As noted herein, this level of detailed contact information is neither necessary, nor warranted. A petitioning labor organization has no right, statutory or otherwise, to such private information.

Employees, by contrast, have a clear privacy right in such information. Employers have an obligation to facilitate the preservation of their employees' privacy rights, and the government has no compelling interest in intruding upon those same rights.

Provide Employees with an Option

Given the increasing emphasis on individual choice in data security laws and proposals, the Board, regardless of what specific information it may require in its eventual rule, must include some form of opt in/opt out provision. The Board could effectuate such a system easily. Thus, in the event of a petition, a Region could include information forms, an explanatory letter, and pre-addressed return envelopes along with the other election materials it already provides to employers. Employers would then distribute the materials to eligible voters who could decide whether or not they wished to send their contact information to the Board for eventual distribution to the union. All of this could readily be explained to employees in the cover letter, and the employer would have no knowledge as to which employees opted in or opted out. Thus, employees that wished to voluntarily cede their privacy right in order to receive union information and/or contact could readily do so; and, neither the employer, nor the government would be placed in the untenable position of invading employee privacy without consent or cause.

A slight variation of this procedure was rejected by the *Excelsior* Board in *British Auto Parts*, 160 NLRB 239 (1966). However, the Board in *Auto Parts* offered not a single reason for its rejection, nor any explanation as to why such a procedure would not satisfy the underlying goals of the *Excelsior* policy. It merely held it did not comply with *Excelsior* – a decision itself, as already noted, devoid of empirically demonstrated necessity, completely unconcerned with fundamental privacy rights, and equally devoid of any meaningful analysis of potential alternative procedures. The Board should take this opportunity to provide employees themselves with a meaningful role in determining how their personal information is to be used and/or shared.

Eliminate the Automatic Re-run Penalty

As the Board itself often notes, its election results should never be set aside lightly. Doing so requires substantial evidence that any complained-of misconduct *had an effect on the outcome of the election.* However, an *automatic* rule requiring that an election be set aside for non-compliance with the *Excelsior* requirements is simply inconsistent with the Board's general, and correct, treatment of post-election Objections. Regardless of what *Excelsior* requirements the Board eventually adopts, it should align its analysis of Objections based on *Excelsior* with its analysis in other Objection cases. Thus, for example, a late filed *Excelsior* list should not be automatic grounds for setting aside an election in which the Petitioner fails to secure a majority vote. Rather, it should be incumbent on the Petitioner to provide sufficient evidence that the late filing had an effect on the election results. Such a conclusion should not simply be *presumed,* it must be demonstrated.

Provide A Reasonable and Flexible Period for Production

Few changes have been less necessary and proven more disruptive than the current requirement that employers provide *Excelsior* information within two days of the election agreement or Direction of Election. Compiling an accurate list has repeatedly proven not to be as simple a task as the Obama Board blithely assumed. The current rule not only mandates a compliance window that is untenably short for any employer, it affords no latitude at all.

The Association would propose that the Board return to the prior seven-day compliance window. In addition, the rule should note that of paramount concern is the accuracy of the list for *voter eligibility purposes.* Accordingly, the seven-day window should be the minimum amount of time allowed for compiling and submitting the list. In cases involving large numbers of voters, unresolved scope and/or eligibility issues, Regional Directors should be given the discretion to designate a longer period for compliance, and should be

advised to do so whenever it is shown that a longer period would enhance the accuracy of the information for *voter eligibility confirmation purposes.*

Issue Sanctions for Misuse

To the extent the final rule requires the provision of personally identifiable information to a labor organization, its use must be limited, its distribution and/or sale strictly and explicitly prohibited, and any violation of such conditions be subject to sanction. The type of personal information contained in the *Excelsior* requirement is of great interest to commercial sellers, political parties, and interest groups of all kinds. If the government mandates the provision of such information for one purpose, it is incumbent upon the government to insure that it is limited to that purpose only. Further, since it is employee information, employees should be informed of the reasons, restrictions and sanctions that attend the provision of such information.

Accordingly, IBA proposes that whenever the Board orders the provision of any employee information, such order contain language to the following effect: "The National Labor Relations Board is ordering your employer to provide your _____ to _____, the petitioning labor union. Your employer must comply with this order. However, by requiring the provision of this information neither the NLRB, nor the federal government in general, in any way endorses or favors the notion of unionization in general or this petitioner in particular. The NLRB and the federal government are entirely neutral in this matter. The sole purpose of providing your personal information is to enable communication on the subject of the immediate election. The union can use your information only for such purpose. It is prohibited from selling or sharing your personal information with any third party, including commercial sellers, political organizations and parties, and any interest group. Any labor organization that violates these usage restrictions may be subject to temporary or permanent debarment from NLRB Representation case matters; and, subject to any other sanctions under state or federal law with respect to the misuse of personally identifiable information."

CONCLUSION

For the foregoing reasons, IBA respectfully submits that the Board should eliminate or modify its *Excelsior* requirements in the manner noted herein.

Respectfully submitted,

Andrea W. Hart, General Counsel
Independent Bakers Association
316 F Street NE, Ste 206
Washington, DC 20002
(202) 333-8190

Brian E. Hayes
Ogletree, Deakins, Nash, Smoak & Stewart
1909 K Street, NE, Ste 1000
Washington, DC 20006
(202) 887-0855

Mark M. Stubley
Ogletree, Deakins, Nash, Smoak & Stewart
300 North Main Street
Greenville, SC 29601
(864) 271-1300