

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 15-08

September 1, 2015

**TO: All Regional Directors, Officers-in-Charge,
and Resident Officers**

FROM: Richard F. Griffin, Jr., General Counsel

**SUBJECT: Guidance Memorandum on Electronic Signatures to Support a Showing of
Interest**

On December 15, 2014, the Board adopted a final rule¹ that became effective on April 14, 2015 and modified in certain respects the procedures applicable to the processing of representation cases. As part of this rulemaking, the Board solicited comments on the question of whether the proposed regulations should expressly permit or proscribe the use of electronic signatures to support a showing of interest. The Board determined that its regulations as currently written are sufficient to permit the use of electronic signatures in this context. 79 Fed. Reg at 74331. The Board further concluded that Congress had manifested its intention “that Federal agencies, including the Board, accept and use electronic forms and signatures, when practicable—*i.e.*, when there is a cost-effective way of ensuring the authenticity of the electronic form and electronic signature given the sensitivity of the activity at issue, here the showing of interest.” *Id.* at 74330. The Board charged me with the responsibility to “determine whether, when, and how electronic signatures can practicably be accepted” and to “issue guidance on the matter.” *Id.* at 74331.

As is reflected in the guidelines which follow, I have determined that the evidentiary standards that the Board has traditionally applied to handwritten signatures apply equally to electronic signatures² and that it is practicable to accept electronic signatures in support of a showing of interest if the Board’s traditional evidentiary standards are satisfied.

I. CURRENT BOARD REGULATION OF THE SHOWING OF INTEREST

The Final Rule does not alter the legal principles that the Board has long followed in administering its showing of interest requirements. Rather, the Board charged the General Counsel with determining whether the established internal administrative processes to deal with allegations of forgery and fraud in the submission of handwritten authorization cards or petitions set forth in its Representational Casehandling Manual (CHM) §11028-11029 would similarly apply in connection with electronic signatures. 79 Fed. Reg. at 74331. I conclude that these established principles and processes constitute an appropriate framework for evaluating whether

¹ 79 Fed. Reg. at 74308.

² For the purpose of this memorandum, a “signature” can include various forms of electronic identification, including email exchanges or internet/intranet sign-up methods.

the Board's traditional requirements can be adapted to accommodate Congress' strong policy preference for the use and acceptance of electronic signatures whenever practicable.

A. Purpose of the Showing of Interest

The Board's showing of interest requirement constitutes an important safeguard against the potential for misuse of election procedures and waste of Agency resources. A petitioning party must provide evidence showing that the petition has the support of at least 30 percent of the bargaining unit before an election will be held. *Id. at 74421; see also id. at 74470.* CHM §11020 explains that the purpose of the demonstration of an adequate showing of interest on the part of labor organizations and individual petitioners that initiate or seek to participate in an Representation case is to determine whether the conduct of an election serves a useful purpose under the statute, i.e., whether there is sufficient employee interest to warrant the expenditure of the Agency's time, effort, and resources in conducting an election. CHM §11021 notes that this inquiry is purely an administrative matter, which prevents parties with little or no stake in a bargaining unit from abusing the Agency's machinery and interfering with the normal administration of the Act.

B. Current Requirements for a Showing of Interest

CHM §11022 provides that the showing of interest can take a number of forms. In RC, RD, and RM cases, the union can submit authorization cards or a list of signatures designating the union as the signers' agent for collective-bargaining purposes or evidence from its records as to the individuals who are members of the union. A petitioner in an RD case may submit cards or a signature list indicating that the employees signing the showing no longer wish to be represented by the union or authorize the petitioner to file a decertification petition. Similarly, CHM §11506.5 permits for signature lists to support showings of interest in a UD petition. The employer's showing of interest in an RM case can consist of proof of a demand for recognition made by one or more labor organizations or evidence of objective considerations relating to an incumbent labor organization's continued majority status.

The current requirements do *not* mandate that the cards or lists contain employee job classifications or contact information such as home address, email address, phone number, and job titles. However, authorization cards usually contain such information, along with the name of the employer. Signature lists, in addition to a statement about representation, often contain only the printed name, which is sometimes difficult to read, a signature, and a date.

The date on which the showing of interest signatures was obtained must be established. If a card or signature list is undated, the party submitting the showing may establish the date by affidavit. CHM §11027.3. If the signing date cannot be established, the card will not be counted for showing of interest percentage purposes.

C. Current Procedures For Determining The Authenticity Of Handwritten Signatures In Support Of A Showing Of Interest

The Board, with court approval, has long held that the showing of interest is a matter for administrative determination and is not litigable by the parties. See, e.g., *O. D. Jennings & Co.*, 68 NLRB 516; 518 (1946); *Super Valu, Inc.*, 181 NLRB 698, 698-699 (1970). Accord *NLRB v.*

Metro-Truck Body, Inc., 613 F.2d 746, 750 (9th Cir. 1979) (collecting cases). Among other things, this policy enables the Board expeditiously to determine whether representation proceedings are warranted and to do so in a manner that, to the maximum extent possible, preserves the secrecy of individual employees' views with respect to union representation. *Kearney & Trecker Corp. v. NLRB*, 209 F.2d 782, 787-88 (7th Cir. 1953). Nevertheless, within these limitations, the Board's procedures provide recourse for parties to submit evidence impugning the validity of the showing of interest and, by this means, to secure dismissal of the petition if the Board, after its administrative investigation, concludes that the showing of interest is of questionable authenticity. See, e.g., *Columbia Broad. Sys., Inc. (Bridgeport, Conn.)*, 125 NLRB 1161 (1959).

The handwritten signatures submitted by parties in support of a showing of interest are presumed to be valid unless called into question by the presence of objective evidence. CHM § 11027.1. Long experience has shown that authentication disputes rarely arise. See *Perdue Farms, Inc.*, 328 NLRB 909 (1999) and *Globe Iron Foundry*, 112 NLRB 1200 (1955) (Board dismissed petitions in light of forged showing of interest). Under CHM §§ 11028.1 and 11029.1, if a party timely presents credible supporting evidence that the showing of interest may have been invalidated by forgery or fraud, the Regional Director will first conduct an initial investigation of those allegations. Should supporting evidence give reasonable cause to believe that the showing of interest may be invalid, Board policy calls for the Regional Director to conduct a further administrative investigation using a variety of tools. As explained in CHM § 11029.1, "[t]he investigation may include, but need not be limited to, attempts to obtain affidavits from the person or persons responsible for securing and submitting the showing, signature comparisons, preferably against the employer's records, and the questioning of persons purported to have been signatories."

The Agency takes allegations of forged or altered documents seriously. That concern goes beyond the question of whether a particular representation petition should be dismissed on the grounds that the showing of interest is of questionable authenticity. Rather, where the Region has found merit to an allegation of forgery, CHM § 11029.3 provides that the Region should report the results of its investigation to the Division of Operations-Management, which, if it agrees as to the merits, should report the matter to the Office of the United States Attorney, which has jurisdiction to prosecute. See 18 U.S.C. § 1621; 18 U.S.C. § 1001; *Brogan v. United States*, 522 U.S. 398 (1998) (union official prosecuted under 18 U.S.C. § 1001 for falsely testifying to a federal agent). See also *Multimatic Products, Inc.*, 288 N.L.R.B. 1279, 1279 n.2, 1337 & n.77 (1988) (allegation of union's fraudulent back dating of authorization cards referred for prosecution by the Board).

II. APPLICATION OF THE BOARD'S TRADITIONAL SHOWING OF INTEREST STANDARDS TO ELECTRONIC SIGNATURES IS A PRACTICABLE AND COST-EFFECTIVE MEANS OF ENSURING THE AUTHENTICITY OF THE ELECTRONIC FORM

Based on the foregoing, under the Board's existing evidentiary standards, handwritten signatures submitted in support of a showing of interest are presumed to be valid; however, if plausible contrary evidence is uncovered, the matter is administratively investigated. Disputes about the validity of handwritten signatures turn on the Board's evaluation of (1) documentary

evidence purporting to express the views of an employee with respect to representation, (2) testimony and other evidence from the petitioner attesting to the fact that the documentary evidence was secured from the purported signatory and accurately transmitted to the Board, and (3) testimony from the purported signatory confirming the authenticity of the document.

These existing standards are the touchstone for determining whether a showing of interest can be supported through the use of electronic signatures, along with traditional handwritten signatures. As the Board recognized in the Final Rule, Congress has encouraged agencies to make electronic signature options available to the public. As set forth above, the Office of Management and Budget has suggested that a decision to reject the electronic signature option is justifiable only where “there is no reasonably cost-effective combination of technologies and management controls that can be used to operate the transaction and sufficiently minimize the risk of significant harm.” 79 Fed. Reg. at 74330 (quoting *OMB Guidance*, 65 FR at 25512). The existing evidentiary standards that the Board has traditionally used in resolving authentication disputes are a proven and cost-effective means of minimizing the risk of fraud in submitting a showing of interest. Plainly, methods of filing electronic signatures that satisfy those same evidentiary standards are practicable and ought to be available to the public.

For these reasons, I have concluded that Regional Directors should accept electronic signatures as a means to support a showing of interest where, as with handwritten signatures, the electronic signature method chosen by the party provides the Regional Director with prima facie evidence (1) that an employee has electronically signed a document purporting to state the employee’s views regarding union representation and (2) that the petitioner has accurately transmitted that document to the Region. As is the law now with respect to handwritten signatures, the documents submitted by the parties are presumed to be valid.

If plausible evidence is submitted in a timely fashion that gives the Regional Director reasonable cause to conclude that the showing of interest may be of questionable authenticity, then the Regional Director should conduct a further administrative investigation. As with investigations of handwritten signatures, that investigation may include taking affidavits both from the petitioner and from individual employees regarding the authenticity of their electronic signatures.

I have concluded that the manner of submitting electronic signatures that we describe below, as verified, if necessary, by the Agency’s long-standing procedures to investigate allegations of fraud or forgery, allow for a cost-effective means of utilizing and verifying electronic signatures. The Board’s traditional procedures have met the test of time and applying them to electronic signatures will not pose either significant costs or risks to the public or to the Agency. And as Congress anticipated in encouraging agencies to embrace this new technology wherever feasible, making this technology available will benefit the public. The potential benefits of implementation include that: (1) the showing of interest is easier to read and confirms the identity of the signer; (2) the methodology is convenient and consistent with how many members of the public operate today in various aspects of their lives -- electronic signature pads for credit or debit purchases, on-line banking, on-line purchases, and electronic filing of taxes; and (3) employees who desire to sign an authorization card or signature list may do so in a private setting.

III. GUIDANCE ON IMPLEMENTATION

A. Requirements for Acceptance of Electronic Signatures

I have determined that an acceptable submission supported by electronic signature in support of a showing of interest must have the following elements to establish its authenticity and provide a mechanism for the Agency to investigate allegations of forgery or fraud where appropriate.

1. Submissions supported by electronic signature must contain the following:
 - a. the signer's name;
 - b. the signer's email address or other known contact information (e.g., social media account);
 - c. the signer's telephone number;
 - d. the language to which the signer has agreed (e.g., that the signer wishes to be represented by ABC Union for purposes of collective bargaining or no longer wishes to be represented by ABC Union for purposes of collective bargaining);
 - e. the date the electronic signature was submitted; and,
 - f. the name of the employer of the employee.
2. A party submitting electronic digital signatures must submit a declaration (1) identifying what electronic signature technology was used and explaining how its controls ensure: (i) that the electronic signature is that of the signatory employee, and (ii) that the employee herself signed the document; and (2) that the electronically transmitted information regarding what and when the employees signed is the same information seen and signed by the employees.³
3. When the electronic signature technology being used does not support digital signatures that lend itself to verification as described in paragraph 2, above, the submitting party must submit evidence that, after the electronic signature was obtained, the submitting party promptly transmitted a communication stating and

³ For example: "The electronic signature identifies the signing individual because it is signed with their private key. The Union issued each employee of the bargaining unit with a digital certificate that can be verified through TechCorp. They were assigned this certificate during a Union meeting held on MMDDYYYY. When they get their certificate, they create their private key, and the showing of interest we submitted is digitally signed by those individual private keys. You can verify the chain at _____. For good measure, we're also submitting the hashes and the public keys."

confirming all the information listed in 1a through 1f above (the “Confirmation Transmission”).⁴

- a. The Confirmation Transmission must be sent to an individual account (i.e., email address, text message via mobile phone, social media account, etc.) provided by the signer.
 - b. If any responses to the Confirmation Transmission are received by the time of submission to the NLRB of the showing of interest to support a petition, those responses must also be provided to the NLRB.
4. Submissions supported by electronic signature may include other information such as work location, classification, home address, and additional telephone numbers, but may **not** contain dates of birth, social security numbers, or other sensitive personal identifiers. Submissions with sensitive personal identifiers will not be accepted and will be returned to the petitioner. They will not be accepted until personal identifiers are redacted.

I recognize that the requirements set forth above are more stringent than what is currently required for non-electronic signatures. Presently, signature lists are not required to contain any personal contact information. However, the contact information (email address, phone number or other social media account) is easy to obtain electronically from the signer and will enable the NLRB to promptly investigate forgery or fraud, where appropriate.⁵ Moreover, the Confirmation Transmission will allow an employee, who receives the notification but did not actually intend to sign the document, with the means to alert the Agency, the employer, a union, or others that he or she did not, in fact, electronically sign a showing of interest.

I believe that these additional requirements for electronic signatures should reassure those who expressed reservations about acceptance of electronic signatures, that the Agency takes seriously their concerns and is committed to ensuring the integrity of the process. I further stress that parties will *not* be required to submit electronic signatures in support of their showing of interest and can continue to submit written signatures on paper for all or part of their showing of interest. However, when parties choose to submit electronic signatures, it is important that the

⁴ For example: “Each individual went to the website we set up. They filled out their names, email addresses, phone numbers and employer name on the form with language indicating that they wished to be represented for collective-bargaining purposes by the Union and clicked on “I agree”. The electronic signature we’re providing identifies the signing employee, because that’s what they typed into the form. We’re logging the date and time of each session along with the IP address; we’re submitting the summary of the logs to you as Exhibit A. We also sent a confirmation transmission to the address provided (as required by the GC memo).”

⁵ As is now the case with handwritten signatures, an electronic signature submitted in support of a showing of interest that meets the requirements set forth herein will be presumed to be valid absent sufficient probative evidence warranting an investigation of possible fraud. Mere speculation or assertions of fraud are not now, and will not in the future, be sufficient to cause the Agency to investigate.

public, employees, and other parties have confidence in the process and in the NLRB's ability to investigate potential forgery or fraud, when appropriate.

B. Effective Date

Effective immediately, parties may submit electronic signatures in support of a showing of interest. However, the signatures will only be accepted and used to calculate percentages related to sufficiency of a showing of interest if the requirements set forth above are met.

C. How to Submit the Electronic Signature to the NLRB

If you wish to submit an electronic signature in support of a showing of interest, your submission must provide the information required in Section III A, above.

The information you have establishing electronic signatures could be in different forms. For example, it could be an email sent soliciting information and support to which the signer replied or it could be a copy of a webpage soliciting information along with a spreadsheet showing data received after the electronic signer clicked a "Submit" button. Like other showing of interest submissions, these documents may be E-Filed. However, since these documents do not have actual signatures, such that there are no "original cards," further documents do not have to be submitted unless the NLRB requests them.

If you have any questions regarding this memorandum, please contact Assistant General Counsel Aaron Karsh at (202) 273-3828 or Deputy Assistant to the General Counsel Dolores Boda at (202) 273-2887, both in the Division of Operations-Management.

A handwritten signature in black ink, consisting of stylized initials 'R.F.G.' with a vertical line through the 'F'. Below the initials, the letters 'R.F.G.' are printed in a small, sans-serif font.

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