burden of persuasion is on the person requesting the hearing, to prove by a preponderance of the evidence that the Department improperly revoked the passport or denied the passport application, or cancelled the Consular Report of Birth Abroad, based on the facts and law in effect at the time such action was taken.

§ 51.72 Transcript and record of the hearing.

A qualified reporter, provided by the Department, will make a complete verbatim transcript of the hearing. The person requesting the hearing or his or her attorney may review and purchase a copy of the transcript directly from the reporter. The hearing transcript and all the information and documents received by the hearing officer, whether or not deemed relevant, will constitute the record of the hearing. The hearing officer’s preliminary findings and recommendations are deliberative, and shall not be considered part of the record unless adopted by the Deputy Assistant Secretary for Passport Services, or his or her designee.

§ 51.73 Privacy of hearing.

Only the person requesting the hearing, his or her attorney, an interpreter, the hearing officer, the reporter transcribing the hearing, and employees of the Department concerned with the presentation of the case may be present at the hearing. Witnesses may be present only while actually giving testimony or as otherwise directed by the hearing officer.

§ 51.74 Final decision.

After reviewing the record of the hearing and the preliminary findings of fact and recommendations of the hearing officer, and considering legal and policy considerations he or she deems relevant, the Deputy Assistant Secretary for Passport Services, or his or her designee, will decide whether to uphold the denial or revocation of the passport or cancellation of the Consular Report of Birth Abroad. The Department will promptly notify the person requesting the hearing of the decision in writing. If the decision is to uphold the denial, revocation, or cancellation, the notice will contain the reason(s) for the decision. The decision is final and is not subject to further administrative review.

Carl C. Risch,
Assistant Secretary of State for Consular Affairs, Department of State.

[FR Doc. 2017–26751 Filed 12–13–17; 8:45 am]
BILLING CODE 4710–13–P

NATIONAL LABOR RELATIONS BOARD

29 CFR Parts 101 and 102
RIN 3142–AA12

Representation-Case Procedures

AGENCY: National Labor Relations Board.

ACTION: Request for information.

SUMMARY: The National Labor Relations Board (the Board) is seeking information from the public regarding its representation election regulations (the Election Regulations), with a specific focus on amendments to the Board’s representation case procedures adopted by the Board’s final rule published on December 15, 2014 (the Election Rule or Rule). As part of its ongoing efforts to more effectively administer the National Labor Relations Act (the Act or the NLRA) and to further the purposes of the Act, the Board has an interest in reviewing the Election Rule to evaluate whether the Rule should be: Retained without change, retained with modifications, or rescinded, possibly while making changes to the prior Election Regulations that were in place before the Rule’s adoption. Regarding these questions, the Board believes it will be helpful to solicit and consider public responses to this request for information.

DATES: Responses to this request for information must be received by the Board on or before February 12, 2018. No late responses will be accepted. Responses are limited to 25 pages.

ADDRESSES: You may submit responses by the following methods: Internet—Electronic responses may be submitted by going to www.nlrb.gov and following the link to submit responses to this request for information. The Board encourages electronic filing. Delivery—If you do not have the ability to submit your response electronically, responses may be submitted by mail to: Roxanne Rothschild, Deputy Executive Secretary, National Labor Relations Board, 1015 Half Street SE, Washington, DC 20570. (202) 273–2917 (this is not a toll-free number), 1–866–315–6572 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Background

On December 15, 2014, the Board published the Election Rule, which amended the Board’s prior Election Regulations. 79 FR 74308 (December 15, 2014). The Election Rule was adopted after public comment periods in which tens of thousands of public comments were received. The Rule was approved by a three-member Board majority, with two Board members expressing dissenting views. Thereafter, the Rule was submitted for review by Congress pursuant to the Congressional Review Act. In March 2015, majorities in both houses of Congress voted in favor of a joint resolution disapproving the Board’s rule and declaring that it should have no force or effect. President Obama vetoed this resolution on March 31, 2015. The amendments adopted by the final rule became effective on April 14, 2015, and have been applicable to all representation cases filed on or after that date. Multiple parties initiated lawsuits challenging the facial validity of the Election Rule, and those challenges were rejected. See Associated Builders & Contractors of Texas, Inc. v.
representation-election procedures. Nonetheless, two dissenting colleagues objected to the request for information regarding the Election Rule because, among other things, they believe that (i) the Election Rule has worked effectively (or even, in Member Pearce’s estimation, essentially flawlessly), (ii) any request for information reveals a predetermination on our part to revise or rescind the Election Rule, and (iv) future changes will be based on “alternative facts” and “manufactured” rationales.

It is the Board’s duty to periodically conduct an objective and critical review of the effectiveness and appropriateness of our rules. In any event, our dissenting colleagues would answer the above Question 1 in the affirmative: They believe the Election Rule should be retained without change. That is their opinion. However, the Board is seeking the opinions of others: Unions, employers, associations, labor-law practitioners, academics, members of Congress, and anyone from the general public who wishes to provide information relating to the questions posed above. In addition, we welcome the views of the General Counsel and also the Regional Directors, whose experience working with the 2014 Election Rule makes them a valuable resource.

One thing is clear: Issuing the above request for information is unlike the process followed by the Board majority that adopted the 2014 Election Rule. The rulemaking process that culminated in the 2014 Election Rule (like the process followed prior to issuance of the election rule adopted by Members Pearce and Becker in 2011) started with a lengthy proposed rule that outlined dozens of changes in the Board’s election procedures, without any prior request for information from the public regarding the Board’s election procedures. By contrast, the above request does not suggest even a single specific change in current representation-election procedures. Again, the Board merely poses three questions, two of which contemplate the possible retention of the 2014 Election Rule.1

1. Should the 2014 Election Rule be retained without change?
2. Should the 2014 Election Rule be retained with modifications? If so, what should be modified?
3. Should the 2014 Election Rule be rescinded? If so, should the Board revert to the Election Regulations that were in effect prior to the 2014 Election Rule’s adoption, or should the Board make changes to the prior Election Regulations? If the Board should make changes to the prior Election Regulations, what should be changed?

IV. Response to the Dissents

It is surprising that the Board lacks unanimity about merely posing three questions about the 2014 Election Rule, when none of the questions suggests a single change in the Board’s

V. Dissenting Views of Member Mark Gaston Pearce and Member Lauren McFerran

Member Pearce, dissenting.

I dissent from the Notice and Request for Information, which should more aptly be titled a “Notice and Quest for Alternative Facts.” It ignores the Final Rule’s success in improving the Board’s representation-case procedures and judicial rejection of dissenting Members Miscimarra and Johnson’s legal pronouncements about the Final Rule. Some two and a half years ago, the National Labor Relations Board concluded lengthy rulemaking pursuant to the Administrative Procedure Act to reexamine our representation-case procedures. We had proposed a number of targeted solutions to discrete problems identified with the Board’s methods of processing petitions for elections with a goal of removing unnecessary barriers to the fair and expeditious resolution of representation cases. The rulemaking sought to simplify representation-case procedures, codify best practices, increase transparency and uniformity across regions, eliminate duplicative and unnecessary litigation, and modernize rules concerning documents and communication in light of changing technology. After a painstaking three and a half year process, involving the consideration of tens of thousands of comments generated over two separate comment periods totaling 141 days, and 4 days of hearings with live questioning by the Board Members, we issued a final rule that became effective on April 14, 2015. Representation-Case Procedures, 79 FR 74308 (Dec. 15, 2014).

The Final Rule was careful and comprehensive—spanning over 100 pages of the Federal Register’s triple-column format in explaining the 25 changes ultimately made to the Board’s rules and regulations. For each change, the Final Rule identified the problem to be ameliorated, catalogued every type of substantive response from the public, and set forth the Board’s analysis as to why the proposed amendment was either being adopted, discarded or modified.2

2 See Associated Builders and Contractors of Texas, Inc. v. NLRB, 826 F.3d 215, 229 (5th Cir. 2016) (noting that the Board “conducted an exhaustive and lengthy review of the issues, evidence, and testimony, responded to contrary arguments, and offered factual and legal support for its final conclusions”); Chamber of Commerce of the United States of America v. NLRB, 118 F. Supp. 3d 171, 229 (D.D.C. 2015) ("[T]he Board engaged in a comprehensive analysis of a multitude of issues relating to the need for and the propriety of the Final Rule, and it directly addressed the commenters’ many concerns.").
Complying with the rulemaking process, and dealing with the deluge of public comments generated, was not an easy task for our Agency. Thousands of staff hours were expended; research and training was required into statutes and procedures with which we were unfamiliar; expensive licensing was purchased for software to sort, and websites to house, the tens of thousands of comments received; and contributions were made from all corners of the Agency. Through this extensive process, the fundamental questions were asked and answered. The amended procedures have now been in place for some two and a half years, and my colleagues show no serious justification for calling them into question.

Indeed, it is with some irony that I am reminded of the sentiment expressed in dissent to the Final Rule in 2014 that “the countless number of hours spent by Board personnel in rulemaking” would be better spent expeditiously processing Board procedures in rulemaking’’ would ‘‘the countless number of hours spent by employees’ Section 7 rights are afforded more equal treatment, the timing of hearings is more predictable, and litigation is more efficient and uniform. • Parties are more often spared the expense of litigating, and the Board is more often spared the burden of deciding, issues that are not necessary to determine whether a question of representation exists, and which may be mooted by election results. • The Board enjoys the benefit of a regional director decision in all representation cases. • Board practice more closely adheres to the statutory directive that requests for review not stay any action of the regional director unless specifically ordered by the Board. • Non-employer parties are able to communicate about election issues with voters using modern means of communication such as email, texts and cell phones, and are less likely to challenge voters out of ignorance. • Notices of Election are more informative, and more often electronically disseminated. • Employees voting subject to challenge are more easily identified, and the chances are lessened of their ballots being comngled. And all of this has been accomplished while processing representation cases more expeditiously from petition, to election, to closure. So why would the majority suggest rescinding all of these benefits to the Agency, employees, employers, and unions? In evaluating that question, it is worthwhile to remind ourselves of a basic tenet of administrative law: while an agency rule, once adopted, is not frozen in place, the agency must offer valid reasons for changing it and must fairly account for the benefits lost as a result of the change. Citizens Awareness Network, Inc. v. U.S., 391 F.3d 338, 351–352 (1st Cir. 2004). None of the reasons offered by today’s majority constitutes a persuasive justification for requesting information from the public, let alone for rescinding or modifying the Final Rule. The majority also cites congressional efforts to overturn the Final Rule, they did not succeed, and cannot be used to demonstrate that the Final Rule contravenes our governing statute. As the courts have recognized, “It is well-established that ‘the view of a later Congress cannot control the interpretation of an earlier enacted statute.’” Huffman v. OPM, 263 F.3d 1341, 1354 (Fed. Cir. 2001) (quoting O’Gilvie v. United States, 519 U.S. 79, 90 (1996)). Finally, as the majority is forced to concede, every legal challenge to the Final Rule has been struck down by the courts.

In evaluating the appropriateness of the Notice and Request for Information, it is also worth journeying back in time to consider the pronouncements and dire predictions voiced by then-Members Miscimarra and Johnson about the Final Rule when it issued. In considering these matters, the reader need not take my word, for the dissent appears in the Federal Register.

Suffice it to say that the Final Rule’s dissenters were so wrong about so much. They did not simply disagree with the Board’s judgments, but instead claimed that the Final Rule violated the NLRA, the APA, and the U.S. Constitution.

The Final Rule dissents pronounced that the Rule’s amendments contradicted our statute and were otherwise impermissibly arbitrary. 79 FR at 74431. It was wrong on both counts. See Associated Builders and Contractors of Texas, Inc. v. NLRB, 826 F.3d 215, 218 (5th Cir. 2016) (The ‘‘rule, on its face, does not violate the National Labor Relations Act or the Administrative Procedure Act[,]’’); Chamber of Commerce of the United States of America v. NLRB, 118 F. Supp. 3d 171, 220 (D.D.C. 2015) (rejecting
claims that the Final Rule contravenes either the NLRA or the Constitution or is arbitrary and capricious or an abuse of the Board’s discretion).

The Final Rule dissent pronounced that the Rule’s primary purpose and effect was to shorten the time from the filing of petition to the conduct of the election, and that this violated the NLRA and was otherwise arbitrary or capricious. 79 FR at 74430, 74433–74435. It was wrong on all three counts. See ABC of Texas, 826 F.3d at 227–228 (noting that the Board properly considered delay in scheduling elections and that the Board also reasoned that the final rule was necessary to further “a variety of additional permissible goals and interests”); Chamber of Commerce, 118 F. Supp. 3d at 218–219 (rejecting claim that the Rule promotes speed in holding elections at the expense of all other statutory goals and requirements, and noting that many of the Rule’s provisions do not relate to the length of the election cycle).

The Final Rule dissent pronounced that the Rule’s granting regional directors discretion to defer litigation of individual eligibility issues at the pre-election hearing was contrary to the statute and was arbitrary and capricious in violation of the APA. 79 FR at 74430, 74436–74438, 74444–74446. The courts rejected those arguments. See Chamber of Commerce, 118 F. Supp. 3d at 181, 195–203 (“Granting regional directors the discretion to decline to hear evidence on individual voter eligibility and inclusion issues does not violate the NLRA [and is not arbitrary and capricious].”); ABC of Texas, 826 F.3d at 220–223. See also Associated Builders and Contractors of Texas, Inc. v. NLRB, 2015 WL 3609116 *2, *5–*7 (aff’d, 826 F.3d at 220, 222–223 (“the rule changes to the pre-election hearing did not exceed the boundaries of the Board’s statutory authority”).

The Final Rule dissent pronounced that the Rule’s provision making Board review of regional director post-election determinations discretionary contravened the Board’s duty to oversee the election process and was arbitrary and capricious. 79 FR at 74431, 74449–74451. Wrong again. See Chamber of Commerce, 118 F. Supp. 3d at 215–218 (rejecting claims that “the Final Rule’s ‘elimination of mandatory Board review of post-election disputes . . . contravenes the Board’s statutory obligation to oversee the election process’” and is arbitrary and capricious).

The Final Rule dissent pronounced that the Rule’s voter list provisions were not rationally justified or consistent with the Act, did not adequately address privacy concerns, and imposed unreasonable compliance burdens on employers. 79 FR at 74452, 74455. Wrong on all counts. See Chamber of Commerce, 118 F. Supp. 3d at 209–215 (“The Employee Information Disclosure Requirement [in the Rule’s voter list provisions] does not violate the NLRA,” and “is not arbitrary and capricious;” the Board did not act arbitrarily in concluding that “the requirement ensures fair and free employee choice” and “facilitates the public interest;” and “the Board engaged in a lengthy and thorough analysis of the privacy risks and other concerns raised by the Board’s dissenters made a number of erroneous predictions regarding how the Final Rule would work in practice. But as far-fetched as I found these speculations in 2014, one can now see that these predictions are refuted by the Board’s actual experience administering the Final Rule. A quick review of several published agency statistics shows some of their most notable speculations of dysfunction to be completely unfounded.

The Final Rule dissenters speculated that the changes made by the Rule would drive down the Board’s historically high rate of elections conducted by agreement of the parties either because the Final Rule does not provide enough time to reach agreement, 79 FR 74442, or because parties can no longer stipulate to mandatory Board review of post-election disputes, 79 FR 74450. They argued, “[e]ven if the percentage of election agreements decreases by a few points, the resulting increase in pre- and post-election litigation will likely negate any reduction of purported delay due to the Final Rule’s implementation.” 79 FR at 74450. But they were wrong. Following the Final Rule’s implementation, the Board’s election agreement rate has actually increased.5

Additionally, the Final Rule dissenters claimed that the Rule would do little to address those few representation cases that in their view involved too much delay, namely those cases that take more than 56 days to process from petition to election. 79 FR at 74456–57. But, in fact, the
percentage of elections that were conducted more than 56 days from petition has decreased since the Final Rule was adopted.\(^5\) Moreover, for contested cases—the category which consistently failed to meet the 56-day target—the Final Rule has reduced the median time from petition to election by more than three weeks.\(^6\)

The Final Rule dissent further hypothesized that whatever time-savings might be achieved in processing cases from petition to election, there was a likelihood that “the overall time needed to resolve post-election issues will increase.” 79 FR at 74435. Here again, the dissent was wrong. The Agency’s 100-day closure rate—which by definition takes into account a representation case’s overall processing time—is better than ever. In FY 2017, the second fiscal year following the Final Rule’s implementation, the Agency achieved a historic high of closing 89.9% of its representation cases within 100 days of a petition’s filing. And in FY 2016, the first fiscal year following the Final Rule’s implementation, the Agency’s representation case closure rate of 87.6% outpaced all but one of the six years preceding the Final Rule.\(^7\)

All of the foregoing raises the question: If the Final Rule dissent’s claims of statutory infirmity have been roundly rejected by the courts, and the predictions that the Final Rule would cause procedural dysfunction have been undercut by agency experience, why is comment being solicited as to whether the Final Rule should be further amended or rescinded? The answer would appear to be all too clear. When the actual facts do not support the current majority’s preferred outcome, the new Members join Chairman Miscimarra to look for “alternative facts” to justify rolling back the Agency’s progress in the representation-case arena.

It is indeed unfortunate that when historians examine how our Agency functioned during this tumultuous time, they will have no choice but to conclude that the Board abandoned its role as an independent agency and chose to cast aside reasoned deliberation in pursuit of an arbitrary exercise of power.

Accordingly, I dissent. \(\text{Member McFerran, dissenting.}\) On April 14, 2015—after thousands of public comments submitted over two periods spanning 141 days, four days of public hearings, and over a hundred, dense Federal Register pages of analysis—a comprehensive update of NLRB election rules and procedures took effect. The Election Rule was designed to simplify and modernize the Board’s representation process, to establish greater transparency and consistency in administration, and to better provide for the fair and expeditious resolution of representation cases.

As stated in the Rule’s Federal Register preamble:

While retaining the essentials of existing representation case procedures, these amendments remove unnecessary barriers to the fair and expeditious resolution of representation cases. They simplify representation-case procedures, codify best practices, and make them more transparent and uniform across regions. Duplicative and unnecessary litigation is eliminated. Unnecessary delay is reduced. Procedures for Board review are simplified. Rules about documents and communications are modernized in light of changing technology.


During the short, two-and-a-half years since the Rule’s implementation, there has been nothing to suggest that the Rule is either failing to accomplish these objectives or that it is causing any of the harms predicted by its critics. As Member Pearce catalogs in his dissent, by every available metric the Rule appears to have met the Board’s expectations, refuting predictions about the Rule’s supposedly harmful consequences. The majority makes no effort to rebut Member Pearce’s comprehensive analysis. The preliminary available data thus indicates that the rule is achieving its intended goals—without altering the “playing field” for unions or employers in the election process.\(^1\) The validity of the Rule, moreover, has been upheld in every court where it has been challenged.\(^2\) In short, the Rule appears to be a success so far.

Nonetheless, today a new Board majority issues a Request for Information (RFI) seeking public opinion about whether to retain, repeal, or modify the Rule—and signaling its own desire to reopen the Rule. Of course, administrative agencies ought to evaluate the effectiveness of their actions, whether in the context of rulemaking or adjudication, and public input can serve an important role in conducting such evaluations.\(^3\) But the nature and timing of this RFI, along with its faulty justifications, suggests that the majority’s interest lies not in acquiring objective data upon which to gauge the early effectiveness of the Rule, but instead in manufacturing a rationale for a subsequent rollback of the Rule in light of the change in the composition of the Board. Because it seems as if the RFI is a mere fig leaf to provide cover for an unjustified attack on a years-long, comprehensive effort to make the Board’s election processes more efficient and effective, I cannot support it. I would remain open, however, to a genuine effort to gather useful information about the Rule’s effectiveness to this point.

I. The RFI is premature, poorly crafted, and unlikely to solicit meaningful feedback.

Initially, it seems premature to seek public comment on the Rule a mere two-and-a-half years after the Rule’s

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1 See NLRB, Annual Review of Revised R-Case Rules, available at https://www.nlrb.gov/news-outreach/news-story/annual-review-revised-r-case-rules (showing, in comparison between pre- and post-Rule representation cases, modest decrease in time elapsed from petition to election, no substantial change in party win-rates, and largely stable number of elections agreed to by stipulation); NLRB, Graphs and Data, Petitions and Elections, available at https://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections (showing similar outcomes, based on fiscal-year data on representation cases).


3 I have no objection at all to seeking public participation in the Board’s policymaking, as reflected in the Board’s standard practice of inviting amicus briefs in major cases, including those where the Board is reconsidering precedent. Ironically, the new majority has now broken with that practice for no good reason in reversing recent precedent. See, e.g., UPMC, 365 NLRB No. 153 (2017) (Member McFerran, dissenting). I hope this unfortunate omission does not signal a permanent change to the Board’s approach in seeking public input in major cases.
implementation. The Rule has been in place for less than the point at which the rulemaking process took off from the beginning to end. Moreover, as noted, since the Rule appears to be achieving its stated ends without producing the dire consequences some purported to fear. In short, there does not appear to be any present basis or need for this Rule.

Nevertheless, as stated, I am not opposed to genuine efforts to meaningfully evaluate the Rule’s performance to date. But I believe that any useful request for information would have to seek comprehensive information on the specific changes made by the Rule. In any event, although I was not a participant in the Board’s original notice of proposed rulemaking, I was carefully-crafted policy proposals. In short, the Board’s periodic review should reflect the exercise of reasonable judgment. In this case, the majority has

failed to identify any reasonable basis for seeking public input on the Election Rule at this time. Nor has the majority made any effort to obtain or analyze easily available data that conceivably could support issuing an RFI. See, e.g., Dept. of Labor, Employee Benefits Security Admin., Request for Information Regarding Exemptions, 82 FR 36692, Aug 7, 2017 (enumerating legal questions); Dept. of Labor, Employee Benefits Security Admin., Request for Information Regarding the Fiduciary Rule and Prohibited Transaction Exemptions, 82 FR 31278, July 6, 2017 (same).

The majority states that it is the Board’s duty to periodically review its rules. Without a doubt, the Board must monitor its rules to be sure that they are meeting their goals and to help the Board better effectuate the statute. But choosing to reopen the Election Rule now is highly dubious. The Board has many longstanding rules—addressing issues from industry-wide health care bargaining units—which have never been reviewed after promulgation. Yet the majority chooses the newly-minted Election Rule, among all others, for attention—without its choice. Given the resources required of both the agency and interested parties when the Board revisits a rule, the Board’s periodic review should reflect the exercise of reasoned judgment. In this case, the majority has

specific rather than generalized feedback, an agency’s typical request for information. Agencies benefit most from receiving warranted. In fact, precisely because the resulting data were to suggest that, after such a short time on the books, the Rule is in need of refinement, or that additional public input could enhance the Board’s understanding of the Rule’s functioning, the Board might then craft

tailored questions designed to elicit meaningful, constructive feedback. Unfortunately, in addition to framing a vague, unfounded inquiry that is unlikely to solicit useful information, the majority’s request also establishes an unnecessarily rushed comment process that is likely to frustrate those interested parties who might actually hope to provide meaningful input. To the extent members of the public wish to provide informed feedback on the Rule, they will need information. In the absence of a comprehensive analysis from the General Counsel, outside parties are likely to seek relevant data on the Rule’s functioning through a Freedom of Information Act (FOIA) request. The public’s acquisition and analysis of such data through the FOIA process will involve the assembly and submission of FOIA requests, which in turn may require the agency to survey and compile extensive data for each such request. Therefore parties will have to wait for some data acquired through FOIA before being in a position to give informed feedback. This process could take far more than the 60 days provided for comment by the RFI. Indeed, during the 2014 rulemaking process leading up to the Election Rule, the Chamber of Commerce, well into the 60-day comment period, sought an extension to give it more time to both request and analyze FOIA data. While it was ultimately determined that the comment period should not be extended under the circumstances at the time, the Chamber’s effort highlights the relevance of FOIA data and the time-intensiveness of parties’ analysis of such data. My colleagues’ failure to allot time to account for the parties’ information-gathering process only confirms that the RFI is not designed to solicit and yield well-informed responses that might genuinely assist the Board’s evaluation of the Rule.

II. The RFI is a transparent effort to manufacture a justification for revising the Rule. As emphasized, I fully support the notion that the Board should take care to ensure that its rules and regulations are serving their intended purposes. I would welcome a genuine opportunity to receive and review meaningful information on the Rule’s performance at an appropriate time. But this hurried effort to solicit a “show of hands” of public opinion without the benefit of meaningful data (or even thoughtfully framed points of inquiry) bears none of the hallmarks of a genuine effort at regulatory review.10 Gathering useful
information is demonstrably not the purpose of this RFI. Instead, this RFI is transparent to manufacture a justification for reopening the Rule. No legitimate justification exists.

The Supreme Court has made clear that, when an agency is considering modifying or rescinding a valid existing rule, it must treat the governing rule as the status quo and must provide "good reasons" to justify a departure from it. See Federal Communications Commission v. Fox Television, 556 U.S. 502, 515 (2009). Obviously, determining whether there are "good reasons" for departing from an existing policy requires an agency to have a reasonable understanding of the policy and how it is functioning. Only with such an understanding can the agency recognize whether there is a good basis for taking a new approach and explain why. Id. at 515–516. Indeed, even when an agency is only beginning to explore possible revisions to an existing rule, the principles of reasoned decision-making demand a deliberative approach, informed by the agency's own experience administering the existing rule.11

"opinion," and that they are merely soliciting a wider range of opinions from the public to better assess the Rule. But the fact that public opinion on the Rule may vary as it was doing at the time of rulemaking—i.e., is not a reason for the Board to revisit the Rule. Canvassing public opinion might make sense if it were done in a manner that first gathered and considered evidence on the Rule's functioning, framed any questions in a way that actually requested useful substantive feedback on the agency's own analysis.

But the operation we have here, without the benefit of data or analysis, is not a productive way to enlist public opinion. As the dissenters to the Election Rule observed, including Chairman Miike, the rulemaking was of "immense scope and highly technical nature," and it generated "an unprecedented number of comments, encompassing widely divergent views." 79 FR 74430, 74459. It is inaccurate to say that the Rule is both comprehensive and technical, and that the public holds polarized views thereon. Yet now the majority broadly seeks public opinion on the fate of the Rule without offering any data or analysis of its own to provide a foundation for the public's assessment. Ultimately, they provide no persuasive explanation of how soliciting public input in the absence of any agency analysis or proposals—input that, as noted, is tantamount to a "thumbs up or thumbs down" movie review—will provide a foundation for the rulemaking process.12

13 Similarly, the unfounded criticism of the Rule as it was adopted, both among its legal challengers and the Board members who dissented from the Rule, is not a sound basis for this RFI. As the United States District Court for the District of Columbia made clear in rejecting a challenge to the Rule: "[The Rule's challengers'] dramatic pronouncements are predicated on mischaracterizations of what the Final Rule actually provides and the disregard of distinctions that contradict plaintiffs' narrative. And the claims that the regulation contravenes the NLRA are largely based on its statutory language or legislative history that has been excerpted or paraphrased in a misleading fashion. Ultimately, the statutory and constitutional challenges do not withstand close inspection." Chamber of Commerce v. NLRB, supra, 118 F. Supp. 3d at 177.
circumstances described above. Perhaps it is explained by the common-sense notion that the Agency’s and the public’s limited experience with the Rule would make such a petition glaringly premature. See 5 U.S.C. 553(e).

The only remaining asserted justification for considering revisiting the Rule at this early stage is the majority’s express reliance on the change in the composition of the Board. This certainly is not a “good reason” for revisiting a past administrative action, particularly in the context of rulemaking. See generally Motor Vehicles Manufacturers v. State Farm, 463 U.S. 29 (1983). Yet, I fear this is the origin of the RFI, and regrettably so. The Board has long and consistently rejected motions to reconsider its decisions based on a change in the composition of the Board. See, e.g., Brown & Root Power & Mfg., 2014 WL 4302554 (Aug. 29, 2014); Visiting Nurse Health System, Inc., 338 NLRB 1074 (2003); Wagner Iron Works, 108 NLRB 1236 (1954). We should continue to exercise such restraint with respect to the Rule, unless and until a day comes when we discover or are presented with a legitimate basis for taking action. Today, however, is manifestly not that day.

As a result, it should come as no surprise to the majority if a court called upon to review any changes ultimately made to the Rule looks back skeptically at the origins of the rulemaking effort. The RFI is easily viewed as simply a scrum through which the majority is attempting to project a distorted view of the Rule’s current functioning and thereby justify a partisan effort to roll it back. Cf. United Steelworkers v. Pendergrass, 819 F.2d 1263, 1268 (3d Cir. 1987) (“Some of the questions [in an ANPRM] could hardly have been posed with the serious intention of obtaining meaningful information, since the answers are self-evident.”). Such opportunism is wholly inconsistent with the principles of reasoned Agency decision-making. It is equally inconsistent with our shared commitment to administer the Act in a manner designed to fairly and faithfully serve Congressional policy and to protect the legitimate interests of the employees, unions, and employers covered by the Act. Whatever one thinks of the Rule, the Agency, its staff, and the public deserve better.

VI. Conclusion

The Board invites interested parties to submit responses during the public response period and welcomes pertinent information regarding the above questions.

Roxanne Rothschild,
Deputy Executive Secretary, National Labor Relations Board.

[FR Doc. 2017–26904 Filed 12–12–17; 4:15 pm]

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52


Air Plan Approval; Florida; Stationary Sources Emissions Monitoring; Reopening of Comment Period

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; reopening of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is reopening the comment period for a proposed rulemaking notice published in the Federal Register on October 13, 2017, which accompanied a direct final rulemaking published on the same date. The direct final rulemaking has been withdrawn due to the receipt of an adverse comment. In the October 13, 2017, proposed rulemaking, EPA proposed to approve a portion of a State Implementation Plan (SIP) revision submitted by the State of Florida, through the Florida Department of Environmental Protection (FDEP) on February 1, 2017, for the purpose of revising Florida’s requirements and procedures for emissions monitoring at stationary sources. Additionally, the October 13, 2017, document included a proposed correction to remove a Florida Administrative Code (F.A.C.) rule that was previously approved for removal from the SIP in a separate action but was never removed. It was brought to EPA’s attention that the February 1, 2017, state submittals and related materials were not accessible to the public through the electronic docket. The materials are now accessible in the electronic docket. EPA is reopening the comment period for an additional 30 days.

DATES: The comment period for the proposed rule published October 13, 2017 (82 FR 47662), reopened. Comments must be received on or before January 16, 2018. In a future final action based on the proposed rule, EPA will address all public comments received, including the adverse comment received on the direct final rule.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–R04–OAR–2017–0500 at http://www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit http://www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT: Andres Febres, Air Regulatory Management Section, Air Planning and Implementation Branch, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region 4, 61 Forsyth Street SW, Atlanta, Georgia 30303–8960. Mr. Febres can be reached via telephone at (404) 562–8966 or via electronic mail at febres-martinez.andres@epa.gov.

SUPPLEMENTARY INFORMATION: EPA published a proposed rulemaking on October 13, 2017 (82 FR 47662), which accompanied a direct final rulemaking published on the same date (82 FR 47636). The proposed revision includes amendments to three F.A.C. rule sections, as well as the removal of one F.A.C. rule section from the Florida SIP, in order to eliminate redundant language and make updates to the requirements for emissions monitoring.