Authority: 15 U.S.C. 80b–5; 80b–6a; 80b–11

Title: Definition of "specified period" over which the asset value of the company or fund under management is averaged
Citation: 17 CFR 275.205–2
Authority: 15 U.S.C. 80b–5; 80b–6a; 80b–11

Title: Exemption of investment advisers registered as broker-dealer in connection with the provision of certain investment advisory services
Citation: 17 CFR 275.206(3)–1
Authority: 15 U.S.C. 80b–6a; 80b–11(a)

Title: Agency cross transactions for advisory clients
Citation: 17 CFR 275.206(3)–2
Authority: 15 U.S.C. 80b–11(a)

Title: Advertisements by investment advisers
Citation: 17 CFR 275.206(4)–1
Authority: 15 U.S.C. 80b–6

Title: Custody or possession of funds or securities of clients
Citation: 17 CFR 275.206(4)–2
Authority: 15 U.S.C. 80b–6

Title: Cash payments for client solicitations
Citation: 17 CFR 275.206(4)–3
Authority: 15 U.S.C. 80b–4; 80b–6; 80b–11(a)

Title: Form N–8A (notification of registration)
Citation: 17 CFR 274.10
Authority: 15 U.S.C. 80a–1 *et seq.*

Title: Form N–2 (registration statement of closed end management investment companies)
Citation: 17 CFR 274.11a–1; 17 CFR 239.14
Authority: 15 U.S.C. 80a–1 *et seq.*; 77a *et seq.*

Title: Form N–8B–2 (registration statement of unit investment trusts which are currently issuing securities)
Citation: 17 CFR 274.12
Authority: 15 U.S.C. 80a–1 *et seq.*

Title: Form N–8B–3 (registration statement of unincorporated management investment companies currently issuing periodic payment plan certificates)
Citation: 17 CFR 274.13
Authority: 15 U.S.C. 80a–1 *et seq.*

Title: Form N–8B–4 (registration statements of face-amount certificate companies)
Citation: 17 CFR 274.14
Authority: 15 U.S.C. 80a–1 *et seq.*

Title: Form N–5 (registration statement of small business investment company under the Securities Act of 1933 and the Investment Company Act of 1940)
Citation: 17 CFR 274.5; 17 CFR 239.24
Authority: 15 U.S.C. 77a *et seq.*; 15 U.S.C. 80a–1 *et seq.*

Contact person: Carolyn A. Miller, Senior Financial Analyst, Securities and Exchange Commission, Division of Investment Management, 450 Fifth Street, NW., Washington, DC 20549, (202) 272–2762.

Rules Administered by the Division of Market Regulation

Title: Recordkeeping rule for national securities exchanges, national securities associations, registered clearing agencies and the Municipal Securities Rulemaking Board
Citation: 17 CFR 240.17a–1
Authority: 15 U.S.C. 78q(a)(1)

Title: Records to be made by certain exchange members, brokers, and dealers
Citation: 17 CFR 240.17a–3; .17a–4
Authority: 15 U.S.C. 78q(a)(1)

Title: Right of national securities exchange, national securities association, registered clearing agency or the Municipal Securities Rulemaking Board to destroy or dispose of documents
Citation: 17 CFR 240.17a–6
Authority: 15 U.S.C. 78q(a)(1)

Title: Reports of Municipal Securities Rulemaking Board
Citation: 17 CFR 240.17a–21
Authority: 15 U.S.C. 78q(a)(1)

Title: Form MSD (application for registration as a municipal securities dealer pursuant to Rule 15Ba2–1)
Citation: 17 CFR 249.1100
Authority: 15 U.S.C. 78o–4(a)(2)

Title: Form MSDW (notice of withdrawal from registration as a municipal securities dealer)
Citation: 17 CFR 249.1110
Authority: 15 U.S.C. 78o–4(a)(2)

Title: Forms X–15Aa–1, X–15Aj–1, and X–15Aj–2
Citation: 17 CFR 240.15A1–1; .15Aj–1
Authority: 15 U.S.C. 78o–3(a)

Contact person: Dirk Peterson, Attorney, Division of Market Regulation, Securities and Exchange Commission, Washington, DC 20549, (202) 504–2418.

* * * * *

Rules Administered by the Office of the Chief Accountant

Title: Article 3A of Regulation S–X (presentation of consolidated and combined financial statements in filings with the Commission)
Citation: 17 CFR 210.3A
Authority: 15 U.S.C. 77f; 77g; 77s(a); 77aa(25) to (26); 78l; 78m; 78o(d); 78w(a); 79e(b); 79n; 79t(a); 80a–8; 80a–29

Title: Article 7 of Regulation S–X (form and content of financial statements filed with the Commission by insurance companies)
Citation: 17 CFR 210.7
Authority: 15 U.S.C. 77f; 77g; 77h; 77j; 77s(a); 77aa(25) to (26); 78l; 78m; 78o(d); 78w(a); 79e(b); 79n; 79t(a); 80a-8; 80a-29

Title: Article 9 of Regulation S–X (concerning the form and content of financial statements filed by banks and consolidated financial statements filed by bank holding companies with the Commission)
Citation: 17 CFR 210.9
Authority: 15 U.S.C. 77f; 77g; 77h; 77j; 77s(a); 77aa(25) to (26); 78l; 78m; 78o(d); 78w(a); 79e(b); 79n; 79t(a); 80a–8; 80a–29

Contact person: Robert Burns, Chief Counsel, Office of the Chief Accountant, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, (202) 272–2130.

* * * * *

The Commission invites public comment regarding the regulatory flexibility analysis of the rules scheduled for review.

By the Commission.

Dated: September 16, 1992.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 92–22929 Filed 9–21–92; 8:45 am]

BILLING CODE 8010–01–M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 166

[Docket No. 82P–0186]

Margarine; Amendment of the Standard of Identity; Correction

AGENCY: Food and Drug Administration, HHS.

ACTION: Tentative final rule; correction.

SUMMARY: The Food and Drug Administration (FDA) is correcting a tentative final rule to amend the standard of identity for margarine that appeared in the **Federal Register** of July 31, 1992 (57 FR 33916). The document was published with an inadvertent typographical error. Also, the telephone number of the contact person has been changed since the publication of the tentative final rule. This document corrects the typographical error and updates the telephone number.

DATES: Written comments by August 31, 1992. The agency proposes that any final rule that may be issued based upon this tentative final rule shall become effective 60 days after date of publication in the **Federal Register**.

ADDRESSES: Submit written comments to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Shellee A. Davis, Center for Food Safety and Applied Nutrition (HFF–414), 200 C St. SW., Washington, DC 20204, 202–205–5112.

In FR Doc. 92–18109, appearing on page 33916, in the **Federal Register** of Friday, July 31, 1992, the following corrections are made:

1. On page 33916, in the 3d column, under the heading "**FOR FURTHER INFORMATION CONTACT:**", in the 4th line, the telephone number "202–485–0112" is corrected to read "202–205–5112".

2. On page 33917, in the 3d column, in the 5th full paragraph, in the 4th line, the word "now" is corrected to read "no".

Dated: September 11, 1992.

Douglas L. Archer,

Acting Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 92–22951 Filed 9–21–92; 8:45 am]

BILLING CODE 4160–01–F

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

Union Dues Regulations

AGENCY: National Labor Relations Board.

ACTION: Notice of proposed rulemaking and notice of oral argument.

SUMMARY: this first Notice of Proposed Rulemaking provides rules and procedures for the implementation of the United States Supreme Court decision in *Communications Workers* v. *Beck*, 487 U.S. 735 (1988). The supreme Court there held that Section 8(a)(3), like its statutory equivalent, Section 2, Eleventh of the Railway Labor Act (45 U.S.C. 152, Eleventh), does not authorize a union, over the objection of dues-paying nonmember employees, to expend funds collected under a union-security agreement on activities unrelated to collective bargaining, contract administration, or grievance adjustment. The Board has determined that the articulation of certain of labor organizations' statutory duties under the *Beck* decision may best be achieved through the use of Section 553 ("informal") rulemaking under the Administrative Procedure Act (APA).

We emphasize, however, that in our effort to address by rule what is legally required of a union to fulfill its duty of fair representation, the rules proposed are offered to invite debate and generate discussion of the practical impact of the rules on the workplace. indeed, we are not ourselves unanimous on several issues. The Board hopes to have a full range of opinion on all aspects of the proposed rules before we make a determination on what provisions to include in the final rules.

DATES: Comments must be received on or before [October 22, 1992.] The Board plans to hold oral argument on November 5, 1992, to consider certain legal issues that are likely to be addressed in the public comments. Further details will be announced at a later date.

ADDRESSES: Comments should be submitted in eight copies to: Office of the Executive Secretary, 1717 Pennsylvania Avenue, NW., room 701, Washington, DC 20570, Telephone: (202) 254–9430.

Persons wishing to be heard at the oral argument should notify the Office of the Executive Secretary, 1717 Pennsylvania Avenue, NW., Washington, DC 20570, Telephone: (202) 254–9430.

FOR FURTHER INFORMATION CONTACT: John C. Truesdale, Executive Secretary, Telephone: (202) 254–9430.

SUPPLEMENTARY INFORMATION: The following is an outline of the contents of this Notice:

I. Background

In its Advance Notice of Proposed Rulemaking at 57 FR 7897 dated February 27, 1992, the Board announced a desire to receive public comment on questions involving rulemaking to articulate certain of labor organizations' duties under the Beck decision. The comment period ended on April 30, 1992, and the Board received twelve comments representing a diversity of viewpoints.

On May 4, 1992, the Board held a public meeting at which it was briefed on and considered these comments. Following the briefing, the Board elected to pursue the rulemaking initiative and directed its staff to produce a preliminary draft of a set of rules and associated comment. The Board decided that during the rulemaking process the Agency should continue adjudicating *Beck*-related cases. The Board additionally determined that it would, at a future time, hold oral argument on the proposed rules.

In crafting the proposed rule, the Board took note of the recommendations in several of the comments. Comment No. 3 (Management Association of Illinois), Comment No. 9 (Citizens for a Sound Economy Foundation) and Comment No. 10 (National Right to Work Foundation) suggested that a good beginning point would be the General Counsel's Guideline Memorandum 88–14, which was issued approximately five months after the Supreme Court's decision in Beck. That Memorandum was designed as a guide for the NLRB's Regional, sub-Regional and Resident Offices in the handling of Beck-related issues. Since its issuance, many cases have been investigated and complaints issued in some cases pursuant to its directives.

The Board recognizes that this Memorandum has, over the last three and one-half years, been an important element in this Agency's handling of Beck-type cases. Accordingly, while the proposed rules are not to be understood as adopting the provisions of the Memorandum in any legal sense, it has provided an initial frame of reference for identifying the relevant issues and the pertinent legal interests.

II. Validity and Desirability of Rulemaking; Impact upon Pending Cases

Section 6 of the National Labor Relations Act expressly grants the Board authority to engage in rulemaking:

> The Board shall have authority from time to time, to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

In *American Hospital Association* v. *NLRB*, _____, U.S. _____ 111 S. Ct. 1239 (1991), the Supreme Court upheld the Board's authority to make and promulgate substantive rules. Further, in its comments approving the Board's first use of substantive rulemaking in the area of health care bargaining units and encouraging the Board to remain open to rulemaking in other appropriate areas, the Administrative Conference of the United States (ACUS) stated that rulemaking offers "broader opportunity for public participation and more meaningful notice to affected parties of potential changes in regulatory standards." The Board finds that ACUS's characterization of the advantages of rulemaking is especially apt in the circumstances here. The Supreme Court's decision in Beck affects thousands of bargaining units and collective-bargaining agreements, and labor organizations already have begun to set up procedures to deal with the Court's new interpretation of the duty of fair representation articulated in Beck. Because of the variety of issues and questions that arise under the application of Beck, the Board finds that engaging in rulemaking and continuing to decide the cases coming before it at the same time serves the dual purposes of increasing access to the process of changing regulatory standards while preventing unnecessary delay in processing cases.

Further, the Board has examined the changes in the law brought about by the Beck decision in light of ACUS's suggested factors for identifying appropriate areas for future rulemaking and finds that each of those factors is present here. Thus, the Board finds that its efforts to arrive at rules of law that best embody Congressional intent in section 8(a)(3) and 8(b)(1)(A), as interpreted by the Supreme Court in Beck, would be aided by: (i) submissions and information, including empirical data, beyond that normally available through adjudication; (ii) participation by affected persons beyond the parties; (iii) the desirability of establishing new policies promptly in this area; (iv) the desirability of stabilizing the law quickly; (v) the possibility of lessening the cost in all future litigation and enforcement actions through readily applicable rules; and (v) the achievement of control over policy review and development. See ACUS, 305.91-5, "Facilitating the Use of Rulemaking by the National Labor Relations Board" (Recommendation No. 91-5), I CFR Ch. 3 (1/1/92 edition).

Comments received by the Board in answer to its February 27, 1992, Advance Notice of Proposed Rulemaking was generally favorable to the rulemaking concept with certain exceptions and caveats. Ken Harrison and Peter C. McConarty, Sr., writing as individuals, (Comments 1 and 2) pronounced themselves pleased at the prospect of rulemaking. Mr. Harrison (Comment 1) recommended that the procedure be kept "simple." The Management Association of Illinois (Comment 3) and Associated General Contractors of America (Comment 5) favored rulemaking and presented numerous suggestions for the specific content of the rules. The ranking minority members of the Senate Committee on Labor and Human Resources and the House Committee on Education and Labor—Senator Orrin G. Hatch (R-Utah) and Congressman William F. Goodling (R-Pennsylvania)—both favored rulemaking (Comment 6) as did the Labor Policy Association (Comment 7). The AFL-CIO, through its counsel Lawrence Gold (Comment 8), stated that "there is no clearly right choice between proceeding through rulemaking or proceeding through litigation." The National Right to Work Foundation (Comment 10) and Associated Builders and Contractors, Inc. (Comment 12) opposed rulemaking. Nothing that several Beck cases were pending before the Board, the Right to Work Foundation concluded that "[I]t seems to us that employees' Beck rights can be more promptly and completely protected through the Board's expeditious decisions in these cases, and that rulemaking is, at best, unnecessary." The Right to Work Foundation also noted that cases soon to come before the Board would "present the full range of Beck issues." Associated Builders and Contractors, Inc. stated that it was "most concerned that the present rulemaking proposal not delay resolution of numerous Beck-related issues which are already in the process of adjudication. If not abandoned altogether, this rulemaking proceeding must be expedited so as to avoid the appearance of unwarranted delay."

At the May 4 public meeting, the Board took note of the concern expressed by the foregoing public comments that a rulemaking proceeding would unduly delay the disposition of the cases proceeding through the adjudicatory pipeline. The Board thus concluded that, to the extent feasible, case processing should continue despite the pendency of rulemaking. Ten cases now have been brought before the Board on exceptions from decisions of the Agency's administrative law judges, and deliberations on those cases are presently underway. In the event that the Board does promulgate final administrative rules and applies them to pending cases (an issue on which the Board has proposed alternatives), it is obvious that the administrative rules will probably have a bearing on the outcome of some of those cases. Accordingly, the Board is weighing whether to give notice to the parties in those cases pending before the Board, suggesting that they consider submitting comments for the rulemaking record.

III. Purpose

Section 103.40(a) sets forth statements of purpose and intent, in order to provide, first, an explanation of the legal foundation of the proposed rules and, secondly, a guideline for interpreting the proposed rules in the broader context of the Board's jurisprudence.

The statutory predicate giving rise to the Beck decision is section 8(a)(3), which authorizes an employer and a labor organization to enter into a union-security agreement, thus imposing the legal duty upon a unit employee to provide a degree of financial support for the union's activities. However, the statute does not by its express terms either define such significant terms as "membership" or lay out in detail the limitations that Congress intended to be imposed on a labor organization's right to exact monetary support from unit employees. The Court in Beck construed the statute as providing that employees enjoying the benefits of union representation should contribute a fair financial share to the cost of the services provided by the bargaining agent, but that the statute authorized collection of only those fees and dues necessary to support collective-bargaining activities. The expenditure of dues and fees on activities outside the union's role as a collective-bargaining representative, the Court held, violated the union's duty of fair representation to employees who objected to such expenditures.

The Supreme Court has defined the component parts of the duty of fair representation to include (1) serving the interests of all members without hostility or discrimination toward any, (2) exercising its discretion with complete good faith and honesty, and (3) avoiding arbitrary conduct. *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967). It is a doctrine which originated not as a Board rule but as a judicially-fashioned one of specific focus—to combat racial discrimination by unions against African-American workers. *Steele* v. *Louisville & N.R.R.*, 323 U.S. 1192 (1942). However, the duty of fair representation has not been static. Over the last half-century, the doctrine has exhibited an evolving character, the principles of which have been applied in ever-widening contexts, including contract negotiations (*Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953)), the grievance/arbitration process (*Vaca* v. *Sipes, supra*), and the administration of the hiring halls (*Breininger* v. *Sheet Metal Workers*, 493 U.S. 67 (1989)). Significantly, the duty of fair representation found new application in the Beck decision, which focused on the responsibilities which a union owes to its employees on the matter of compulsory union dues and fees.

Just as the doctrine has been applied to various aspects of the relationship between unions and the bargaining unit employees, it also has undergone refinement as a legal concept. For purposes of supporting the proposed rule, it is especially noteworthy that the Supreme Court has recently described the duty as "akin to the duty owed by other fiduciaries to their beneficiaries * * * [such as] the duty a trustee owes to trust beneficiaries." *Air Line Pilots Association* v. *O'Neill*, 113 L.Ed.2d 51, 62 (1991), citing *Teamsters* v. *Terry*, 108 L.Ed.2d 519 (1990). In relying upon the trustee analogy, the Court has equated a union's duty to act in good faith with a trustee's duty to act in the best interests of the beneficiaries. *Teamsters* v. *Terry, supra*. With respect to the handling of grievances, the Court in Terry noted the similarities between the authority of a union as exclusive representative and the authority of a trustee, citing various sections of the Restatement (Second) of Trusts.

The fiduciary analogy in the judicial doctrine of fair representation is not a surprising or aberrant development, but in a sense was foreshadowed in Board law. Although the Board did not recognize the duty of fair representation as an enforceable obligation under the Act until 1962 in Miranda Fuel Co., 140 NLRB 181, enforcement denied, 326 F.2d 172 (2d Cir. 1963), several circuits have described the duty in fiduciary terms. *NLRB* v. *Teamsters Local 282*, 740 F.2d 141 (2d Cir. 1984); *NLRB* v. *Teamsters Local 182*, 401 F.2d 509 (2d Cir. 1968; *NLRB* v. *Hotel, Motel & Club Employees' Union, Local 586*, 320 F.2d 254 (3d Cir. 1963).

Applying the "trustee" analogy found useful by the courts in defining the judicial doctrine of the duty of fair representation to financial obligations under union-security agreements,[1] the Board believes that it is appropriate to define the duty of fair representation under section 8(b)(1)(A) as entailing an obligation to provide unit employees with pertinent information regarding their relationship with the union under such agreements, including the right of employees to decline to become full union members, the right to object to the use of dues for nonrepresentational purposes, and the right, once an appropriate objection has been made, to be charged only for activities germane to the labor organization's function as a bargaining representative. The Board finds that such a duty is appropriate on a practical level, so that employees covered by such agreements will possess the information necessary to exercise their rights, and that such a duty also properly flows from a union's status as the exclusive bargaining representative and the concomitant obligation to accord fair representation to all unit employees. Moreover, the Board's imposition of a duty to inform employees of their rights in this area is not incompatible with the Supreme Court's observation in *Machinists* v. *Street*, 367 U.S. 740, 774 (1960), that dissent is not presumed. Under the rules proposed here employees will retain the burden of making their objections known to the bargaining representative; however, employees will now generally be provided with the knowledge necessary to choose whether to object or not.

In addition, a duty to disclose is directly linked to the protection of the section 7 rights of employees to refrain from concerted activities. The failure to inform employees of their rights under *NLRB* v. *General Motors Corp.* 373 U.S. 734 (1963) and Beck, and, where warranted, of certain financial information regarding a labor organization's expenditure of fees and dues can result in employees' unwitting financial support of activities from which they have a statutory right to refrain. Thus, under the prescriptions of Section 8(b)(1)(A), a breach of this duty of disclosure constitutes a restraint on the employees' section 7 rights. See *NLRB* v. *Teamsters Local 282, supra*, 740 F.2d at 145–46.

In addition, the Board has held that a union violates its duty of fair representation if it seeks to enforce a union-security clause without giving the affected employee full information as to the amount owed and a reasonable opportunity to pay it. See *CWA Local 11509 (Pacific Bell)*, 283 NLRB 1143 (1987); *Teamsters Local 291 (Kaiser Industries)*, 263 NLRB 1100 (1978).

The requirements associated with explicit, open notice are also consistent with the position which the Board recently took in favor of candid language in *IBEW Local No. 2088, AFL–CIO (Lockhead Space Operations Co.)*, 302 NLRB No. 49 (May 29, 1991) (In dues checkoff situation explicit language within checkoff authorization clearly setting forth an obligation to pay dues even in absence of union membership will be required to establish that the employee bound himself or herself to pay the dues even after resignation of membership.) In another context—the exclusive hiring hall—the Board has stated that unions are obligated to inform employees and applicants who use a hiring hall of procedures and changes in procedures used in the operation of the hiring hall. This obligation has been described as "statutory." Electrical Workers IBEW Local 11 (Los Angeles NECA), 270 NLRB 424, 426 (1984), enfd. 772 F.2d 571 (9th Cir. 1985).

Finally, a requirement to notify employees of *Beck* rights is consistent with decisions of the United States Supreme Court in the public sector and the Railway Labor Act (RLA). Thus, in *Chicago Teachers Union Local 1* v. *Hudson*, 475 U.S. 292, 306 (1986), the Court stated:

> Basic considerations of fairness, as well as concern for the First Amendment rights at stake, also dictate that the potential objectors be given sufficient information to gauge the propriety of the Union's fee. Leaving the nonunion employee in the dark about the source of the figure for the agency fee—and requiring [him] to object in order to receive information—does not adequately protect the careful distinctions drawn in Abood.

In addition to providing doctrinal support for the proposed rules, these decisions are relevant from a practical standpoint. A number of unions must operate not only under the National Labor Relations Act but also under one or the order statutory/constitutional framework. It is appropriate as a matter of administrative efficiency that the Board tailor the requirements under the Act so as to lessen the burdens and expenses which a union might incur by virtue of inconsistencies in the overlapping regulatory schemes.

It is true that the Board over three decades ago attempted to exercise its Section 10(c) remedial powers to require certain prophylactic safeguards in hiring hall agreements to protect against discrimination. These included the posting of notices to employees and job applicants of all the provisions relating to the functioning of the hiring hall arrangement. The Supreme Court

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[1] Cf. *Restatement(Second) of Trusts* section 173, Duty to Furnish Information, & Comment C ("* * * the beneficiary is always entitled to such information as is reasonably necessary to enable him to enforce his rights under the trust or to prevent or redress a breach of trust.")

Our discussion here is not intended to announce any change in the Board's analysis of a labor organization's duty of fair representation under section 8(b)(1)(A) with respect to allegations of unfair labor practices unrelated to the arbitrary union conduct discussed in Beck.

refused enforcement of the Board's order in *Local 357, Teamsters* v. *NLRB*, 365 U.S. 667 (1961). Noting that Congress had not outlawed the hiring hall, the Court determined that there was no warrant for inferring as a general manner that unions would operate hiring halls in an unlawfully discriminatory manner. "Where * * * Congress has aimed its sanctions only at specific discriminatory practices, the Board cannot go farther and establish a broader, more pervasive regulatory scheme." Local 357, Teamsters, supra at p. 676. *Breininger* v. *Sheet Metal Workers Local 6*, 493 U.S. 67, 89 n.12 (1989) affirmed that reading of Local 357, Teamsters, stating "that the Board's approach * * * exceeded the mandate of the NLRA."

The Board's rulemaking with respect to the Supreme Court's interpretation of a union's duty of fair representation in Beck, however, stands on a fundamentally different footing than its judicial prescriptions in Local 357, Teamsters. In the first place, Local 357 was not a duty of fair representation case. Indeed, the Board rule under review in that case had its origins in the 1958 opinion in Mountain Pacific Chapter, 119 NLRB 883, 893, which antedated the incorporation of the fair representation duty into the Board's unfair labor practice jurisprudence in Miranda Fuel by four years. Given the evolutionary nature in the courts of the duty of fair representation, whose hallmark features are "flexibility and adaptability," Breininger, *supra*, 493 U.S. at 86, the Board is not prepared to say that Local 357 forecloses adoption of the rules proposed in this Notice. Since, after Beck, a union violates section 8(b)(1)(A) and its duty of fair representation by expending dues collected from objectors for nonrepresentational purposes, a consideration of what other obligations are essential to a union's fulfillment of that duty is appropriate. Secondly, in the hiring hall context such as that in Local 357, employees were not required to initiate any communication with the union to perfect their statutory rights to be free from unlawfully discriminatory treatment by the union. In contrast, employees who desire to opt for "proportionate share payer" status are required to affirmatively communicate their objections to the union, as well as any challenges which they wish to make as to the expense allocations. Likewise, as a matter of practical experience employees who wish to hold only "financial core" status in the union, as opposed to full membership, must so inform the union. In either case, employees will have to be knowledgeable enough as to their rights in order to make an informed decision over the extent to which they wish to engage in, or refrain from, concerted activity.

IV. Definitions

A definitional section is included in the proposed rules. The purpose of this section is to make clear distinctions among employees who have variously opted for different forms of relationship with a union that is party to a contract containing a traditional union-security clause. Three such relationships are identified: (1) Full members of the union; (2) "financial core employees" who are not full members but pay the equivalent of initiation fees and uniform periodic dues within the meaning of General Motors Corporation, 373 U.S. 734 (1963); and (3) the Beck category of employee who is designated as a "proportionate share payer." This latter employee is neither a full member of the union nor a General Motors-type "financial core employee" in that such an employee has elected to pay only that part of union periodic dues and fees which pay for those union activities germane to the performance of the duties of an exclusive bargaining representative. The definition of "labor organization" draws on section 2(5) of the National Labor Relations Act and that of "full member" of such an organization from section 3(o) of the Labor-Management Reporting & Disclosure Act. 29 U.S.C. 402(o).

While we have included in the definitional section the terms "representational activities" and "nonrepresentational activities," the actual definitions are, for purposes of convenience, set forth in §§ 103.41(a) and 103.41(b) of the rules. These latter deal with the question of which expenditures a union may or may not charge to "financial core employees" who have made an appropriate objection to them under § 103.40(d)(2).

V. Coverage; Obligations of a Labor Organization Regarding Membership, and Dues and Initiation Fees

Section 103.40 (c) and (d) simply track the established legal requirements of the Supreme Court's decisions in Beck and General Motors with respect to a labor organization's statutory obligations under a union-security agreement entered into pursuant to the proviso to section 8(a)(3) and section 8(f). The rule prohibits a labor organization from requiring any employee to become a full member of the union as a condition of employment. However, consistent with the Supreme Court's recognition in Beck of the union's status as exclusive representative of all bargaining unit employees regardless of membership, and the union's duty of fair representation to all bargaining unit employees, the rule permits a labor organization to require financial core employees to pay the equivalent of initiation fees and uniform periodic dues charged to members, unless the financial core employee objects to the use of his dues for nonrepresentational purposes. In the event a financial core employee lodges an appropriate objection, the rule permits a labor organization to charge the objecting employee only the percentage of fees and dues which reflects the percentage spent for appropriate representational activities.

VI. Notice Requirements

Sections 103.40 (e) and (f) of the proposed rule impose notice and disclosure obligations upon labor organizations.

The purpose of these notice and disclosure requirements is to ensure that all unit employees are advised of their options with respect to the financial obligations arising out of applicable union-security agreements. The legal justification for these requirements is spelled out in part III, *supra*. In addition, it is noted that some comments received following publication of the Advance Notice of Proposed Rulemaking favored notice requirements of the type set forth in our proposed rule. Comment No. 9, filed by Citizens for a Sound Economy Foundation, at p. 3, followed General Counsel Memorandum 88–14 in calling for a notice requirement. Comment No. 10 from the National Right to Work Foundation also called for a notice requirement.

In particular, the rule requires that the labor organization inform all employees of their Beck rights, the right to join or refrain from joining a union, and the financial obligations incident to each status. In addition, consistent with the guidelines set forth in GC Memorandum 88–14, the rule requires that a labor organization notify all financial core employees of their right to object to expenditures for activities unrelated to representational activities, and the procedure to register such objections.

As provided under subsection (e), the notice of legal rights must be given annually to all employees. New employees, however, must be provided the notice within 30 days of notice to the labor organization of hire or transfer into the unit.

The proposed rule provides alternatives with respect to the method of providing the required notice to employees. Alternative A of

§ 103.40(e)(2) and Alternative A of § 103.40(f)(2) provide that notice to all unit employees and to financial core employees shall be given by mail. Alternative B of § 103.40(e)(2) and Alternative B of § 103.40(f)(2) provide for posting of the requisite notices to all unit members and to all financial core employees in an accessible place customarily used for such purposes or for publication in a union publication received by all bargaining unit employees. With respect to the information that labor organizations are required to provide only to objecting financial core employees, the Rules require that notice shall be by mail to the last known address.

As provided in subsection (f), notices of a more detailed nature, including both information of a legal nature and financial information, must be given to "financial core employees" and to "proportionate share payers." The subsection also provides that once an employee lodges an objection and becomes a proportionate share payer, a labor organization must begin charging the proportionate share payer only the percentage of dues and fees corresponding to the percentage of monies expended for representational activities.

The time periods prescribed in the Notice, Objection and Challenge provisions of § 103.40 (e) and (f) were chosen for apparent reasonableness and a perceived need for expedition in handling Beck-type disputes. The 90-day period following the end of the labor organization's fiscal year, prescribed in § 103.40(f)(4), was selected to match the similar 90-day period for the filing of LM–2 and LM–3 forms with the Department of Labor.

The proposed rule sets forth alternative rules under § 103.40(f)(4). Alternative A calls for an independent audit of the financial information a labor organization is required to supply to objecting financial core employees. See § 103.40(f)(4)(ii). The reported cases indicate that the issue of an independent audit usually entails two questions: (1) Should an auditor, if employed, verify the nature of a particular expenditure as being representational or nonrepresentational? and (2) should the auditor, if employed, verify only that a particular expenditure was made? The proposed rule at § 103.40(f)(4)(ii) provides that the accountant will not verify the representational or nonrepresentational nature of expenditures. The Board is not persuaded that it is proper for an accountant to be called upon to deliver what is, in essence, a legal opinion.

Courts of appeal which have considered the issue appear to agree. See, e.g., *Andrews* v. *Education Association of Cheshire*, 829 F.2d 335, 340 (2d Cir. 1987) and *Dashiell* v. *Montgomery County*, 925 F.2d 750, 754–57 (4th Cir. 1991). Under the proposed rule, then, a union will be required to show only that the auditor has verified the actual financial information.

There is, of course, the underlying question of whether any type of independent audit should be required. The Supreme Court's comment in *Chicago Teachers Union Local 1* v. *Hudson*, 575 U.S. 292, 306 n.18 (1986), is persuasive authority that such a requirement should be included in the proposed rule:

> The Union need not provide nonmembers with an exhaustive and detailed list of all its expenditures, but adequate disclosure surely would include the major categories of expenses, *as well as verification by an independent auditor* (emphasis supplied).

Yet, the AFL–CIO in Comment No. 8 suggests that there are limits beyond which cases such as Hudson, arising in the public sector and relying upon constitutional considerations, should not apply to the Act. It is with this uncertainty in mind, and the Board's concern over the pragmatic consequences, in terms of expense and time, of imposing a requirement for an independent audit of unions' financial statements, that the Board proposes Alternative B. Under this alternative, the Department of Labor forms LM–2 and LM–3, which do not require independent audit, may be submitted to objecting financial care employees in satisfaction of notice required in § 103.40(f)(4).

VII. Challenge Procedures, Including Board and Arbitral Procedures

Subsection (g) addresses what is to occur in the event a proportionate share payer decides to challenge the allocation which the labor organization has made between representational and nonrepresentational activities. A step-by-step procedure is prescribed, with time limits included.

Section 103.40(g)(4) of the proposed rules permit a union to institute arbitral procedures to handle disputes arising out of Beck questions. Section 103.40(g)(3) permits an employee who disagrees with a union's reply to a challenge regarding expenditures to file a charge with the National Labor Relations Board. An employee may pursue both these courses of action. The arbitral procedures under these proposed rules accord with the Supreme Court's holding in *Chicago Teachers Union Local 1* v. *Hudson*, supra, that a union has the responsibility, in the public employment sector, to provide procedures that enable employees to exercise statutory (and First Amendment) rights.

To obviate the possibility that a person challenging the allocation may be forced to make what is tantamount to an involuntary loan during the pendency of the challenge, Section 103.40(g)(6) provides that amounts in dispute be placed in an escrow account and paid, with interest, should the employee prevail in the dispute. A similar procedure was approved in *Price* v. *Automobile Workers*, 927 F.2d 88 (2d Cir. 1991).

Section 103.40(g)(5) provides that where an employee's Board charge concerns only the accuracy of supplied financial data, the Board's General Counsel may defer processing of such charge pending the outcome of an arbitral procedure. Following the decision in the arbitral process, the decision will be reviewed under the standards set forth in Olin Corp., 268 NLRB 573 (1984). No deferral is permitted if the employee's charge concerns matters other than the accuracy of financial data, e.g. whether a given expenditure is representational or nonrepresentational.

Consideration was given to the possibility of a broader form of deferral to arbitration, i.e., one which might have deferred to arbitral awards involving the nature of particular expenditures. We have decided, in these proposed rules, not to propose this broader deferral policy. Such questions, in the current state of Beck litigation, are better left to this Board in its capacity as maker of national labor policy. There are currently no extant Board decisions on the whole range of Beck issues. While deferral to arbitration has played an important role in board law at least since the decision in Spielberg Manufacturing Company, 112 NLRB 1080 (1955), some 37 years ago, we would not feel it prudent to provide for deferral on a whole range of issues which the Board itself has not as yet considered. Such deferral would leave both the labor-management community and arbitrators without guidance in a situation in which the Board is designed to give such guidance.

VIII. Chargeable and Nonchargeable Expenditures

Section 103.41 of the proposed rules lists certain types of union activities and classifies them as either representational or nonrepresentational. The types of activities listed in the proposed rule substantially track those listed in General Counsel's Memorandum 88–14. The Board has not attempted to set forth an exhaustive list of such activities. There are three reasons for its reluctance to do so. First, it would seem almost impossible to conjure up every activity, representational and nonrepresentational, that a labor organization might conceivably undertake. Second, even if the Board could compile an exhaustive list of activities, the law has not developed to the point where we could authoritatively categorize all, or even most, of the activities on such a list. Third, most of the law that does exist at this juncture pertains to the public sector and the railway labor sector. In the Board's view, it remains an open question whether a classification of activities in either the public or the railway labor areas necessarily applies to activities by labor organizations under the NLRA.

The Board anticipates that categorization of other labor organization activities as "representational" or "nonrepresentational" will be accomplished through adjudication, further rulemaking, or both.

The Board recognizes that certain categorizations of chargeable and nonchargeable expenses are controversial and unsettled by case law. In the interest of speedy promulgation of the rule, therefore, the Board has offered three alternatives to § 103.41.

The Board notes that while it has presented, *infra*, three Alternative Rules outlining the chargeability or nonchargeability of a limited number of expense categories, there exists case law which impacts on this issue. The Board notes initially that the Supreme Court in *Ellis* v. *Railway Clerks*, 466 U.S. 435 (1984) decided that, under an analogous provision in the Railway Labor Act, [2] "organizing expenses [spent] on employees outside the collective bargaining unit already represented" afford only the most attenuated benefits to collective bargaining on behalf of the dues payers, and thus, such expenses are not chargeable to objecting employees. The Board has also taken note, however, of the Supreme Court's recent statement in *Lehnert* v. *Ferris Faculty Association*, 111 S. Ct. 1950 (1991). Lehnert is silent with respect to the chargeability of organizing expenses to objecting employees in the public sector. The Court nevertheless prescribed a case-by-case analysis following guidelines set forth in *Machinists* v. *Street*, 367 U.S. 740 (1961) and *Chicago Teachers Union Local No. 1* v. *Hudson*, 475 U.S. 292 (1986). Alternative Rule B provides for organizing expenses in the same industry to be chargeable.

We have provided an Alternative Rule relating to whether a labor organization may charge objecting employees for activities, viz. litigation, not undertaken directly on behalf of an objecting employee's bargaining unit. In doing so, the Board is mindful of Supreme Court's decision in Lehnert, supra, declining to require such a direct relationship. In that case the Court stated:

> "[w]hile we consistently have looked to whether non-ideological expenses are germane to collective bargaining . . . we have never interpreted that test to require a direct relationship between the expense at issue and some tangible benefit to the dissenters' bargaining unit.
>
> * * * * *
>
> We therefore conclude that a local bargaining representative may charge objecting employees for their pro rata share of the costs associated with otherwise chargeable activities of its state and national affiliates, even if those activities were not performed for the direct benefit of the objecting employee's bargaining unit. (emphasis supplied)

Lehnert, 137 LRRM at 2327. See *Crawford* v. *Air Line Pilots Ass'n Intern.*, 870 F.2d 155 (4th Cir. 1989), rehg. en banc granted; *Cumero* v. *Public Employment Relations Board*, 49 Cal. 3d 575, 778 P.2d 174 (1989).

Similarly, we have provided Alternative Rules categorizing activities undertaken on behalf of employees in units other than the one in which union security payments are being exacted. Again, there is Supreme Court precedent impacting on this question. See *Lehnert* v. *Ferris Faculty Association*, supra.

The Board invites comment on all three of the Alternative Rules and on whether these enumerated activities should be treated as representational or nonrepresentational.

IX. Union-Security Clauses and Beck

Several comments received by us in answer to the Advance Notice of Proposed Rulemaking proposed that the Board modify the model union-security clause set forth in *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880 (1958). Comment No. 3 (Management Association of Illinois) and Comment No. 10 (National Right to Work Foundation) both proposed that Keystone be modified to explicate the differences between (1) employees who choose full membership in a labor organization, (2) those who choose financial core status under *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963) and (3) those who elect to pay only that portion of dues and fees used to pay expenses germane to collective bargaining.

The model clause in Keystone, adopted before either General Motors or Beck, spoke only in terms of "membership in good standing." It did not define the phrase and it did not describe the various ways in which employees can satisfy their obligations under the clause.

Consistent with the comments that we have received, and in harmony with the other provisions of these rules, we have proposed a model union-security clause which sets forth the obligations of each of the three groups named above. Since the union-security clause is the source of employee obligations, it would seem appropriate that the clause clearly state the obligations of each of the three groups. In addition, such a clause, together with the notices proposed in these rules, will clearly apprise employees of the choices available to them and the obligations attendant to each choice.

However, we have not overruled *Paragon Products Corp.*, 134 NLRB 662 (1961). Thus, the mere fact that a union-security clause does not conform to the model clause would not remove the contract as a bar to a representation petition. Rather, we shall continue to apply the following holding of Paragon:

> [W]e now hold that only those contracts containing a union-security provision which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by section 8(a)(3) of the Act, and is therefore incapable of a lawful interpretation.

The model clause will function as a "safe harbor" for negotiators but other, differently-worded clauses would not be found illegal unless they violate the Paragon standard.

Finally, Comment No. 3 (Management Association of Illinois) suggests combining checkoff provisions with the model clause. We have not done so in our proposed rule. Checkoff is a method for employees to make their payments under a union-security clause. Thus, the principles concerning checkoff do not deal with the extent of the obligation; they deal only with the payment mechanism for satisfying the obligation. See generally IBEW Local 2088 (Lockheed Space Operations Co.), 302 NLRB No. 49 (March 29, 1991). In short, the subject of checkoff is beyond the

[2] Section 2, Eleventh.

purview of these rules. In addition, any effort to handle the innumerable combination of pay intervals, timing of payroll deductions and provisions for forwarding deductions to the union could easily lead to confusion and attendant litigation. Accordingly, the Board declines to be drawn into this unrelated subject.

X. Effective Date

Generally, rules promulgated pursuant to Section 553 ("informal") rulemaking under the Administrative Procedure Act (APA) are applied prospectively. 5 U.S.C. 551 (4). However, the Board may not be foreclosed from applying proposed rules retroactively to pending cases. Compare *SEC* v. *Chenery Corp.*, 332 U.S. 194 (1947); *Laidlaw Corp.* v. *NLRB*, 414 F. 2d 99 (7th Cir. 1969), with *Retail, Wholesale & Dept. Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir 1972). As a general matter, in other contexts, where retroactive effect would not be "manifestly unjust" (see e.g., *Greene* v. *U.S.*, 376 U.S. 149, 160 (1964); *Coe* v. *Secretary of HEW*, 502 F.2d 1337, 1339 (4th Cir. 1974)) or where a balance of factors favors it (see e.g., *Maxcell Telecom Plus, Inc.* v. *FCC*, 815 F.2d 1551, 1554–55 (D.C. Cir. 1987), retroactive application has been approved. Recent cases also suggest that a retroactive effective date of a rule may be invalid if precluded by statue (*Bowen* v. *Georgetown University Hospital*, 448 U.S. 204 (1988)) or if it "unreasonably impacts" on past activities (*Chemical Waste Management, Inc.* v. *EPA*, 869 F. 2d 1526, 1535–37 (D.C. Cir. 1989).

The fact that cases are beginning to come before the Board for review which present many of the issues being addressed in the proposed rules suggests the appropriateness of applying the administrative rules to the pending cases. However, the Board desires to develop an administrative record on which to make a final determination, and thus, the Board seeks comment on whether to give retroactive effect to the proposed rule. Section 103.43, therefore, is presented as an alternative form. Alternative A provides for retroactive application of the rule to pending cases; Alternative B provides that the rule shall apply prospectively.

XI. Docket

The docket is an organized and complete file of all the information submitted to or otherwise considered by the NLRB in the development of this proposed rulemaking. The principal purposes of the docket are: (1) To allow interested parties to identify and locate documents so they can participate effectively in the rulemaking process; and (2) to serve as the record in case of judicial review. The docket, including a verbatim transcript of any hearings, the exhibits, the written statements, and all comments submitted to the Board, is available for public inspection during normal working hours at the Office of the Executive Secretary in Washington, DC.

XII. Regulatory Flexibility Act

As required by the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., the Board certifies that the proposed rule will not have significant economic impact on small entities. Prior to this rule, parties were compelled to litigate before the Board questions of fair representation and a union's fiduciary responsibilities in the collection of initiation fees and dues under union-security contract clauses. The proposed rule resolves many of these questions and thus the necessity for litigation will be correspondingly reduced. Although the rule requires labor organizations to send notices to employees concerning their rights under *General Motors* and *Beck*, this requirement is consistent with the fundamental Congressional aim of insuring employees a free and informed choice in the exercise of their statutory rights.

XIII. Regulatory Text

List of Subjects in 29 CFR Part 103

Administrative practice and procedure, Labor-management relations.

For the reasons set forth in the prior pages, it is proposed to amend 29 CFR part 103 as follows:

PART 103—OTHER RULES

Subpart D, consisting of §§ 103.40, 103.41, 103.42, and 103.43 is added to read as follows:

Subpart D—Union Dues Regulations

Subpart D—Union Dues Regulations

§ 103.40 Labor organization dues and fees regulations.

(a) *Purpose.* (1) The purpose of this regulation is to articulate certain obligations that a labor organization must fulfill in connection with the negotiation and administration of union-security agreements authorized under section 8(a)(3) and 8(f) of the National Labor Relations Act (the Act). Those obligations are grounded in the duty of fair representation, which a labor organization owes to employees as their exclusive bargaining representative. The duty of fair representation imposes an obligation on a labor organization to represent each employee fairly and in good faith, without arbitrary or discriminatory treatment. *Vaca* v. *Sipes*, 375 U.S. 335 (1964); Miranda Fuels, 140 NLRB 181 (1962), enf. denied 326 F.2d 172 (2d Cir. 1963). Further, the Supreme Court, in *Chicago Teachers Union Local No. 1* v. *Hudson*, 475 U.S. 292 (1986), found that *"[b]asic considerations of fairness* * * * dictate that the potential objectors be given sufficient information to gauge the propriety of the Union's fee." 475 U.S. 292, 306 (emphasis added). The Board finds that the "basic considerations of fairness" the Court found operative in the context of public sector employment also underlie a union's duty of fair representation. Further, it believes that it best effectuates the policies of the National Labor Relations Act if all employees covered by contractual union-security clauses, whether union members or nonmembers, are informed of their rights under *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), *CWA* v. *Beck*, 487 U.S. 735 (1988), and related cases. Thus, the Board will find that a labor organization seeking the discharge of an employee for failure to tender dues and fees has violated section 8(b)(1)(A) and 8(b)(2) if the labor organization has failed to notify employees of their rights, as described herein, or to reduce the dues and fees charged if such is warranted under these rules. The Board also will find that a labor organization has failed to notify employees of their rights, as described herein, or to reduce the dues and fees charged if such is warranted under these rules. The Board also will find that a labor organization has violated section 8(b)(1)(A) of the Act if it fails to abide by any of the provisions of these rules.

(2) It is not intended that this regulation be a comprehensive or exclusive statement of the obligations on this subject. Rather, the intention is to state requirements that have not been announced previously by the Board and to address other requirements which have been announced previously through adjudication. The Board contemplates that it may in the future refine the details of the obligations set out here and define additional obligations either through case-by-case adjudication on complaints issued by the General Counsel or through further administrative rulemaking, or both.

(b) *Definitions.* For purposes of this section, § 103.41, and § 103.42—

(1) The term *employee* means an employee as defined in section 2(3) of the Act who is included in a bargaining unit for which a labor organization is the exclusive bargaining representative.

(2) The term *full member* means an employee who has fulfilled the requirements for membership in a labor organization has voluntarily joined the labor organization, and who neither has voluntarily resigned from membership nor has been expelled or suspended from membership.

(3) The term *fees and dues* means the periodic dues and initiation fees uniformly required by a labor organization as a condition of acquiring or retaining membership.

(4) The term *financial core employee* means an employee who is not a full member of the Union, but who is required to pay the equivalent of fees and dues to retain his employment under a contractual union security provision.

(5) The term *proportionate share payer* means a financial core employee who has elected to pay only that part of the union fees and dues charged for activities germane to the Union's performance of the duties of an exclusive bargaining representative of employees in dealing with labor-management issues.

(6) The term *proportionate share payment* means that percentage of fees and dues which reflects the percentage spent by the labor organization for representational activities.

(7) The term *labor organization* means a labor organization as defined in section 2(5) of the Act which acts as the exclusive bargaining representative of employees covered under the Act.

(8) The term *representational activities* means the activities of an exclusive bargaining representative as set forth in § 103.41(a).

(9) The term *nonrepresentational activities* means the activities of an exclusive bargaining representative as set forth in § 103.41(b).

(c) *Coverage.* The rules set forth in this Section and §§ 103.41 and 103.42 apply in circumstances where a labor organization is party to a union-security agreement entered into pursuant to the proviso of section 8(a)(3) of the National Labor Relations Act (the Act) or section 8(f) of the Act.

(d) *Obligations of a labor organization regarding membership and dues and initiation fees.* (1) A labor organization may not require, as a condition of employment, that an employee become or remain a full member. A labor organization may require, as a condition of employment, that an employee become a financial core employee or, upon appropriate employee objection, a proportionate share payment.

(e) *Obligations of a labor organization to provide certain information to all employees.* (1) Each year, a labor organization must inform all bargaining unit employees, both members and nonmembers, of the following rights:

(i) All employees have a right to become or remain full members of the Union;

(ii) All employees have a right to refuse to become or remain full members of the union. All employees have a right to become or remain financial core employees (thereby obligated to pay the equivalent of fees and dues to retain their employment under a contractual union security provision);

(iii) All financial core employees, upon appropriate objection, have a right to become or remain proportionate share payers (thereby obligated to pay only that part of the union fees and dues charged for activities germane to the Union's performance of the duties of an exclusive bargaining representative of employees in dealing with labor-management issues).

[Alternative A

(2) A labor organization shall give the employee the notification specified above by mailing it to each employee at his/her last known address.]

[Alternative B

(2) A labor organization will be deemed to have fulfilled its obligation to notify employees who are full members of these rights by posting a notice containing the above information in an accessible place where such notices are customarily posted or by publishing it in a union publication received by all members. A labor organization will be deemed to have fulfilled its obligation to notify employees who are financial core employees and proportionate share payers if it posts a notice on a bulletin board or other agreed-upon place in the workplace where such notices are customarily posted or if it publishes the information in a newsletter or other publication that it mailed to all unit employees, full members, financial core employees, and proportionate share payers alike.]

(3) A labor organization shall provide the notice specified in paragraph (e)(1) of this section, within 30 days after notice of their entry into the unit, to all employees hired or transferred into the unit.

(f) *Obligations of a labor organization to provide certain information to financial core employees and proportionate share payers.* (1) Each year, a labor organization must provide a notice to all financial core employees giving them the following information:

(i) They have a right to object to labor organization expenditures for activities unrelated to representational activities.

(ii) If they exercise their right to object, they will be charged only that percentage of dues and fees which reflects the percentage spent by the labor organization for representational activities. The notice shall set forth the percentages spent for representational and nonrepresentational activities during the most recent fiscal year.

(iii) A financial core employee who has filed an objection shall be deemed to remain a proportionate share payer until the employee informs the labor organization that the employee wishes to change status.

[Alternative A

(2) The notice set forth in paragraph (f)(1) of this section shall be mailed to each financial core employee at his/her last known address and must be sent no later than 60 calendar days after the end of the labor organization's fiscal year. A labor organization may require that an objection be filed within a specified period after receipt of the notice described in paragraph (f)(1) and (2) of this section but in no event shall that period be less than 15 days from receipt of the notice.]

[Alternative B

(2) The notice set forth in paragraph (f)(1) of this section shall be provided no later than 90 calendar days after the end of the labor organization's fiscal year. A labor organization will be deemed to have fulfilled this requirement by posting or publication as set forth in paragraph (e)(2) of this section. A labor organization may require than an objection be filed within a specified period after receipt of the notice described in paragraph f(1) and (2) of this section but in no event shall that period be less than 15 calendar days from receipt of notice.]

(3) After receiving an objection, the labor organization will immediately begin to charge only the percentage amount set forth in paragraph (f)(1)(ii) of this section.

(4) As soon as practicable after the end of the labor organization's fiscal year, but in no event more than 90 days after the end of such year, the labor organization must supply certain financial information to those financial core employees who have filed appropriate objections as referred to in paragraph (f)(1) of this section. Notice of

such information shall be mailed to each financial core employee at his/her last known address. The information shall be provided as follows.

(i) It will include:

(A) The percentage figure set forth in paragraph (f)(1)(ii) of this section;

(B) A description of the activities deemed representational and those deemed nonrepresentational, and the amount of money spent on each;

[Alternative A

Provided: If the labor organization is the local of a national or international labor organization and the national or international labor organization receives a portion of the amounts derived from dues and fees under the union-security agreement, the financial report must include relevant information regarding both the local and the national or international organizations.]

[Alternative B

Provided: If the labor organization is the local of a national or international labor organization and the national or international labor organization receives a portion of the amounts derived from dues and fees under the union-security agreement, the financial report must include relevant information regarding both the local and the national or international organizations.

Provided further that, if part of the dues collected under union-security agreements by a local labor organization is forwarded to a national or international labor organization with which the local is affiliated, the allocation between chargeable and nonchargeable expenses for the national or international labor organization may be considered equivalent to the allocation for the local union.]

[Alternative A

(ii) This information must be audited and verified by an independent accountant. The accountant need not verify the representational or nonrepresentational nature of a given expenditure but only that the particular expenditure was made.]

[Alternative B

(ii) The labor organization may satisfy the obligations specified above by mailing Department of Labor forms LM–2 and LM–3, as revised, to those financial core employees who have filed appropriate objections, provided that those forms contain the information required in this paragraph (f) of this section.]

(5) With respect to the computation and exaction of proportionate share payments, a labor organization may deem the "dues year" to commence when notice of the amount to be charged is sent to employees, provided that date is no more than 90 days after the close of the labor organization's fiscal year and the labor organization charges that amount for the following twelve months.

(6) The information described in paragraph (f)(4) of this section may be sent together with the notice described in paragraph (f)(1) of this section.

(g) *Obligations of a labor organization to proportionate share payers who challenge the calculation of the proportionate share payment; right to resort to remedies of the Act.* (1) The labor organization shall permit employees who are proportionate share payers to challenge the data supplied by it. The labor organization may require that the challenge be made in writing within a specified period but in no event shall that period be less than 15 calendar days after receipt of the information set forth in paragraph (f)(3) of this section. The labor organization also may require that the challenge specifically set forth the disagreement with the labor organization's data. If the last day of any prescribed period falls on Sunday or legal holiday, the deadline shall be the next business day. Deposit in the United States mail shall suffice to meet this deadline.

(2) If the labor organization disagrees with the employee's challenge, it shall notify the employee in writing. If the labor organization does not respond within 30 days (deposit in the mails to suffice to meet this deadline), it shall be deemed to have agreed to the employee's challenge.

(3) An employee aggrieved by a labor organization's disagreement with his challenge may file a charge with the General Counsel of the National Labor Relations Board at any Regional, sub-Regional or Resident Office or at the Board's office in Washington, DC.

(4) A labor organization may establish arbitral procedures for the handling of disputes arising from the employee challenge. Such an arbitral procedure shall not grant sole discretion to the labor organization in the selection of an arbitrator. In any given case, arbitration may be invoked only upon agreement of both the labor organization and the challenging employee. The arbitrator shall be paid by the labor organization: Provided, that the labor organization may require that each party bear its own costs of arbitration, including travel costs and attorney fees.

(5) If the employee's charge before the Board concerns only the accuracy of the financial data, and if the employee has resorted to an appropriate arbitral mechanism established under paragraph (g)(4) of this section, the General Counsel of the NLRB may defer processing of the charge, pending the outcome of that procedure. After the rendering of an arbitral award, such award shall be reviewed under the standards of *Olin Corp.*, 268 NLRB 573 (1984). If the employee's charge concerns other matters (e.g., the classification of an expenditure as representational), the charge shall not be deferrable.

(6) Pending resolution of the employee's challenge, the labor organization may charge the employee the percentage amount reflected by the labor organization's data. However, the difference between this amount and the amount asserted by the employee shall be placed into an escrow account and paid, with interest, to the employee if he or she prevails. Such interest shall be computed at the rate and in the manner provided for in unfair labor practice cases before the Board.

[Alternative A

§ 103.41 Categorization of representational and nonrepresentational activities.

(a) The term *representational activities* means those activities germane to the Union's performance of the duties of an exclusive bargaining representative of employees in dealing with labor-management issues. Examples of such activities include:

(1) Collective bargaining, contract administration, and grievance-arbitration

(2) National conventions

(3) Social events open to full members, financial core members, and proportionate share payers and business meetings.

(4) Labor organization publications to the extent that they report on the representational activities of the labor organization

(5) Benefit programs that are available on an equal basis to full members, financial core employees, and proportionate share payers

(6) Litigation activities incident to negotiating a collective bargaining agreement, settling grievances and disputes, fulfilling the duty of fair representation, handling jurisdictional disputes with other labor organizations, and conducting other litigation before administrative agencies or courts.

(7) Organizing activities.

(b) The term *nonrepresentational activities* means those activities not germane to the Union's performance of the duties of an exclusive bargaining representative of employees in dealing with labor-management issues.

Examples of such nonrepresentational activities include:

(1) Labor organization publications to the extent that they report on activities other than representational activities.

(2) Benefit programs that are not available on an equal basis to full members, financial core employees, and proportionate share payers

(3) A labor organization building fund

(4) Lobbying activities

(5) Activities to promote or defeat legislation

(6) Political campaign activities

(7) Advertising unrelated to representational activities.

(c) The examples enumerated in paragraphs (a) and (b) of this section are not intended to be exhaustive. It is intended that activities not falling within specified examples shall be evaluated in accordance with the standards stated in such paragraphs and shall be subject to further articulation or clarification in accordance with paragraph (a) of § 103.40.]

[Alternative B

§ 103.41 Categorization of representational and nonrepresentational activities.

(a) *Representational activities* means those activities germane to the Union's performance of the duties of an exclusive bargaining representative of employees in dealing with labor-management issues. Examples of such activities include:

(1) Collective bargaining, contract administration, and grievance-arbitration concerning employees in the bargaining unit

(2) National conventions

(3) Social events open to full members, financial core members, and proportionate share payers and business meetings related to the bargaining unit

(4) Labor organization publications to the extent that they report on the representational activities or organizing activities in the same industry of the labor organization

(5) Benefit programs that are available on an equal basis to full members, financial core employees, and proportionate share payers in the bargaining unit

(6) Litigation activities incident to negotiating a collective bargaining agreement or settling grievances and disputes concerning employees in the bargaining unit, fulfilling the duty of fair representation to the unit, handling jurisdictional disputes with other labor organizations concerning bargaining unit work, and conducting litigation before administrative agencies or courts concerning bargaining unit employees

(7) Union organizing activity confined to the industry of the bargaining unit.

(b) *Nonrepresentational activities* means those activities not germane to the Union's performance of the duties of an exclusive bargaining representative of employees in dealing with labor-management issues. Examples of such nonrepresentational activities include:

(1) Labor organization publications to the extent that they report on activities other than representational activities or organizing activities outside the same industry

(2) Benefit programs that are not available on an equal basis to all bargaining unit employees

(3) A labor organization building fund

(4) Lobbying activities

(5) Activities to promote or defeat legislation

(6) Political campaign activities

(7) Advertising unrelated to representational activities

(8) Union organizing activities beyond the industry of the bargaining unit

(c) The examples enumerated in paragraphs (a) and (b) of this section are not intended to be exhaustive lists. It is intended that activities not falling within specified examples shall be evaluated in accordance with the standards stated in such subsection and shall be subject to further articulation or clarification in accordance with paragraph (a) of § 103.40.]

[Alternative C

§ 103.41 Categorization of representational and nonrepresentational activities.

(a) The term *representational activities* means those activities, within the particular bargaining unit, which relate to the union's performance of its duties as the exclusive bargaining representative of that unit. Examples of such activities include:

(1) Collective bargaining, contract administration and grievance-arbitration

(2) National conventions

(3) Union business meetings and social activities open to member and nonmember unit employees

(4) Labor organization publications to the extent they report on the labor organization's representational activities

(5) Costs of benefits available to all bargaining unit employees alike

(6) Litigation expenses incident to negotiating and administering the contract, settling grievances and disputes, fulfilling the duty of fair representation, handling jurisdictional disputes with other labor organizations and conducting other litigation before administrative agencies or courts.

(b) The term *nonrepresentational activities* means those activities which do not relate to the union's performance of its duties as the exclusive bargaining representative of the particular bargaining unit. Examples of such activities include:

(1) Labor organization publications to the extent they report on nonrepresentational activities

(2) Costs of benefits not available to all bargaining unit employees

(3) Costs of labor organization building fund

(4) Lobbying activities

(5) Promotion or defeat of legislation

(6) Political campaigns

(7) Advertising related to nonchargeable matters

(8) Organizing activities]

§ 103.42 Model union security clause.

Purpose. The Board determines, in accordance with § 103.40(a), that the promulgation of a model union security clause would facilitate the ability of a labor organization to fulfill its duty of fair representation to employees by clarifying for such employees the requirements of the Act as interpreted by the Supreme Court in *NLRB* v. *General Motors Corp.*, 373 U.S. 734 (1963), *CWA* v. *Beck*, 487 U.S. 735 (1988), and related cases. The model union security clause set forth in the Appendix to this section supersedes all previous such model clauses announced by the Board, including that promulgated in Keystone Coat, Apron, and Towel Supply Co., 121 NLRB 880 (1958). This announcement does not affect Paragon Products Corp., 134 NLRB 662 (1961).

Appendix to § 103.42

Model Union Security Clause

Union security and financial obligations of employees to the bargaining representative.

[EMPLOYER] and [UNION] herein exercise their right, under Section 8(a)(3) [or 8(f)] of the National Labor Relations Act and the laws of [STATE], to agree to the following union security provision:

(1) Every employee covered by this Agreement must, for the life of this Agreement after the grace period described in Section 2 below, satisfy an obligation to the Union as the unit's exclusive bargaining representative. Under this Agreement, employees must choose one of the three ways of satisfying this obligation, as described below. Every employee has the right to make this choice free of interference, restraint or coercion:

(a) Full union membership: The employee chooses to join the Union as a full member, is subject to all rights and duties accorded members, and, as a condition of employment, must pay the full initiation fee (if applicable) and uniform periodic dues charged by the Union;

(b) Financial core employee: The employee does not become a member of the Union; thus, he/she is not entitled to the full range of rights and duties of membership. This employee does not object to the Union's spending part of the dues and fees collected under this Agreement for activities not germane to its role as the unit's exclusive bargaining representative. This employee must pay, as a condition of employment, the full initiation fee (if applicable) and the uniform periodic dues charged by the Union. The Union must provide this employee with information to enable him/her to decide whether to object to the use of his/her dues for nonrepresentation expenditures.

(c) Proportionate share payer: The employee does not become a full member of the Union, and thus is not entitled to the full range of rights and duties of union membership; further, the employee informs the Union that he/she objects to the Union's spending part of the dues and fees collected under this Agreement for activities not germane to its role as the exclusive bargaining representative; this employee must, as a condition of continued employment, pay the percentage of fees and uniform, periodic dues used for activities germane to the Union's status as the unit's exclusive bargaining representative. The Union must provide this employee with information about its expenditures and this employee may challenge the Union's information.

(2) Each employee covered by this Agreement who is not a full member of the Union on the effective date of this Agreement (or hire date, if applicable), has the right to a "grace period" of twenty-nine [or seven, if 8(f)] days in which to choose his/her status. Thus:

(a) For all employees who are in the unit and are not full Union members on the effective date of this Agreement [or the Agreement's date of execution, whichever is later], their chosen status, and their obligation to pay dues and fees, shall begin on the thirtieth [eighth, if 8(f)] day after the effective date of this Agreement [or the Agreement's date of execution, whichever is later].

(b) For all new employees who are hired into the unit during this Agreement's life and are not full Union members on the date of hire, their chosen status, and their obligation to pay dues and fees, shall also begin on the thirtieth day [eighth, if 8(f)] after their date of hire [or the Agreement's date of execution, whichever is later].

(3) Employees in the unit who are full Union members on this Agreement's effective date or, if hired during this agreement's life, on their date of hire, do not receive the grace period. For these full Union members, their obligation to the Union is continuous and is not affected by this Agreement, although they are free to change their status.

(4) Employees may elect to change their chosen status upon appropriate written notice to the Union.

[Alternative A

§ 103.43 Effective Date.

Sections 103.40, 103.41, and 103.42 shall apply to all pending cases in whatever stage.]

[Alternative B

§ 103.43 Effective Date.

Sections 103.40, 103.41, and 103.42 shall have prospective effect only.]

Dated, Washington, DC, September 17, 1992.

By direction of the Board.

National Labor Relations Board.

John C. Truesdale,

Executive Secretary.

[FR Doc. 92-22919 Filed 9-21-92; 8:45 am]

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DEPARTMENT OF DEFENSE

Office of the Secretary

32 CFR Part 202

Eligibility Criteria for News Media Membership in the DoD National Media Pool

AGENCY: Department of Defense.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: This notice is issued to inform the news media and the public of a contemplated Department of Defense (DoD) rule to cover National Media Pool operations. While the Department of Defense is not of the view that this possible rule must be published, the Department believes that this advance notice should be useful in obtaining public comments, which will enhance the deliberative process.

The rule would establish uniform criteria by which to determine media organizations' eligibility for membership in the DoD National Media Pool.

In situations where pool coverage provides the only feasible means of media access to United States military operations, DoD will activate the National Media Pool to deploy a representative group of journalists to cover the operation, unless national security considerations require otherwise. By participating in the pool, each media organization must agree to observe basic ground rules designed to allow pool representatives the greatest permissible freedom and access in battlefield coverage while protecting operational security. However, because the operational requirements of any particular mission are difficult to predict, the ground rules are subject to change based on situational factors such as space limitations, remote locations, or the need to maintain operational security and to protect the safety of U.S. troops during the nearly phases of an operation.

By participating in the pool, member organizations also agree to provide personnel and equipment on standby to be deployed anywhere in the world on four hours notice to cover a particular operation. The pool members rotate this obligation every three months among themselves. The composition of any pool to be deployed will be tailored to meet the operational requirements and limitations of the DoD activity to be covered.

DATES: Written comments must be received by November 12, 1992.

ADDRESSES: Comments should be addressed to Pete Williams, Assistant Secretary of Defense (Public Affairs), The Pentagon, room 2E800, Washington, DC 20301-1400.

FOR FURTHER INFORMATION CONTACT: Robert Taylor, Principal Deputy Assistant Secretary of Defense (Public Affairs), telephone (703) 697-0713.

SUPPLEMENTARY INFORMATION: The DoD National Media Pool was established in 1985 to provide a means to allow journalists to accompany U.S. forces and report on military operations while still maintaining operational security and troop safety. There have been twelve media pool deployments since the pool was created, including the earliest stages of Operation Desert Shield in August, 1990. Currently, more than forty Washington-based media organizations are members of the DoD National Media Pool.

The Assistant Secretary of Defense for Public Affairs held discussions with a representative group of news media organizations on ways to improve combat coverage. On May 21, 1992, the Department of Defense officially adopted and incorporated the principles for news media coverage of DoD operations into DoD Directive 5122.5, Assistant Secretary of Defense (Public Affairs), on May 21, 1992.

Administrative Notices

A. Executive Order 12291

This rule, as proposed, does not meet the criteria for a "major rule" requiring a regulatory impact analysis under Executive Order 12291. The regulations are not likely to result in (1) an annual effect on the economy of $100 million or more, (2) a major increase in costs or prices for consumers, individual industries, federal, state or local government agencies, or geographic regions or (3) a significant adverse effect