

exchange contracts (e.g., forwards, interest rate swaps, and options). Under the Call Report instructions in effect through December 31, 1996, the netting of other assets and liabilities is not permitted unless specifically required by the instructions.

The OTS practice has been to follow GAAP as it relates to offsetting in the balance sheet.

### C.5. Push Down Accounting

Push down accounting is the establishment of a new accounting basis for a depository institution in its separate financial statements as a result of a substantive change in control. Under push down accounting, when a depository institution is acquired, yet retains its separate corporate existence, the assets and liabilities of the acquired institution are restated to their fair values as of the acquisition date. These values, including any goodwill, are reflected in the separate financial statements of the acquired institution as well as in any consolidated financial statements of the institution's parent.

The banking agencies require push down accounting when there is at least a 95 percent change in ownership. This approach is generally consistent with accounting interpretations issued by the staff of the Securities and Exchange Commission.

The OTS requires push down accounting when there is at least a 90 percent change in ownership.

### C.6. Negative Goodwill

Under Accounting Principles Board Opinion No. 16, "Business Combinations," negative goodwill arises when the fair value of the net assets acquired in a purchase business combination exceeds the cost of the acquisition and a portion of this excess remains after the values otherwise assignable to the acquired noncurrent assets have been reduced to a zero value.

The banking agencies require negative goodwill to be reported as a liability on the balance sheet and do not permit it to be netted against goodwill that is included as an asset. This ensures that all goodwill assets are deducted in regulatory capital calculations consistent with the internationally agreed-upon Basle Accord.

The OTS permits negative goodwill to offset goodwill assets on the balance sheet.

### C.7. In-Substance Defeasance of Debt

In-substance defeasance involves a debtor irrevocably placing risk-free monetary assets in a trust established solely for satisfying the debt. According

to FASB Statement No. 76, the liability is considered extinguished for financial reporting purposes if the possibility that the debtor would be required to make further payments on the debt, beyond the funds placed in the trust, is remote. With defeasance, the debt is netted against the assets placed in the trust, a gain or loss results in the current period, and both the assets placed in the trust and the liability are removed from the balance sheet.

For Call Report purposes through December 31, 1996, the banking agencies did not permit banks to report the defeasance of their liabilities in accordance with Statement No. 76. Instead, banks were to continue reporting any defeased debt as a liability and the securities contributed to the trust as assets. No netting was permitted, nor was any recognition of gains or losses on the transaction allowed. The banking agencies did not adopt Statement No. 76 because of uncertainty regarding the irrevocability of trusts established for defeasance purposes. Furthermore, defeasance would not relieve the bank of its contractual obligation to pay depositors or other creditors. In June 1996, the FASB issued a new accounting standard (FASB Statement No. 125) that supersedes Statement No. 76 for defeasance transactions occurring after 1996, thereby bringing GAAP in line with the Call Report treatment for these transactions.

The OTS practice has been to follow GAAP for defeasance transactions.

Dated at Washington, D.C., this 17th day of November, 1997.

Federal Deposit Insurance Corporation.

**Robert E. Feldman,**

*Executive Secretary.*

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## FEDERAL LABOR RELATIONS AUTHORITY

### Notice of Opportunity to Submit Amicus Curiae Briefs in an Unfair Labor Practice Proceeding Pending Before the Federal Labor Relations Authority; FLRA Case No. WA-CA-40743

**AGENCY:** Federal Labor Relations Authority.

**ACTION:** Notice of the opportunity to file amicus curiae briefs in a case pending before the Federal Labor Relations Authority. In the subject case, the Authority is determining whether section 2(d) of Executive Order 12871 constitutes an agency election to bargain

on matters set forth in section 7106(b)(1) of the Federal Service Labor-Management Relations Statute (5 U.S.C. 7106(b)(1)), and whether such an election can be enforced in Authority unfair labor practice and subsequent court review proceedings.

**SUMMARY:** The Federal Labor Relations Authority provides an opportunity for all interested persons to file briefs as amici curiae on a significant issue arising in a case pending before the Authority. The issue is common to a number of other cases also pending before the Authority. The Authority is considering the cases pursuant to its responsibilities under the Federal Service Labor-Management Relations Statute, 5 U.S.C. 7101-7135 (1994 & Supp. II 1996) (Statute). The issue concerns an agency's obligation to negotiate on subjects set forth in section 7106(b)(1) of the Statute in light of the provisions of sections 2(d) and 3 of Executive Order 12871. Section 2(d) of Executive Order 12871 provides in relevant part that agency heads subject to Chapter 71 of title 5, United States Code shall "negotiate over the subjects set forth in 5 U.S.C. 7106(b)(1), and instruct subordinate officials to do the same[.]" Section 3 of Executive Order 12871 provides in relevant part that it "is not intended to, and does not, create any right to administrative or judicial review, or any other right, substantive or procedural, enforceable by a party against the United States, [or] its agencies \* \* \*."

**DATES:** Briefs submitted in response to this notice will be considered if received by mail or personal delivery in the Authority's Case Control Office by 5 p.m. on Thursday, December 18, 1997. Placing submissions in the mail by this deadline will not be sufficient. Extensions of time to submit briefs will not be granted.

**ADDRESSES:** Mail or deliver briefs to Peter Constantine, Director, Case Control Office, Federal Labor Relations Authority, 607 14th Street, NW., Room 415, Washington, D.C. 20424-0001.

**FOR FURTHER INFORMATION CONTACT:** Peter Constantine, Director, Case Control Office, Federal Labor Relations Authority, (202) 482-6540.

**SUPPLEMENTARY INFORMATION:** The case presenting the issue on which amicus briefs are being solicited is before the Authority on exceptions to a recommended decision and order of an Administrative Law Judge (Judge) resolving unfair labor practice allegations. The following summary is offered.

In its partial decision in *U.S. Department of Commerce, Patent and Trademark Office*, Case No. WA-CA-40743 (PTO), the Authority concluded, in agreement with the Judge, that the agency violated sections 7116(a)(1) and (5) of the Statute by failing to bargain with the union over the impact and implementation of its decision to use term appointments to fill certain bargaining unit positions. The Authority also determined that the agency's decision to use term appointments concerns a matter encompassed by section 7106(b)(1) of the Statute. However, the Authority did not rule on the General Counsel's allegation that the agency violated the Statute by failing to bargain over the substance of its decision to use the term appointments. The Authority in PTO decided that resolving this remaining allegation requires examining provisions of the Statute and Executive Order 12871, as well as relevant precedent.

The Authority determined that the record before it in PTO did not adequately address issues critical to completing the analysis required to decide this remaining allegation. In particular, the Authority stated that the parties in PTO, as well as parties in other pending cases in which the General Counsel had similarly alleged that agencies had violated the Statute by refusing to bargain over matters encompassed by section 7106(b)(1), have not fully addressed long-established precedent regarding bargaining obligations under section 7106(b)(1).

Accordingly, with respect to the remaining allegation concerning the agency's obligation under section 7106(b)(1) to bargain over its decision to use term appointments, the Authority described in Section IV.C. through E. of its partial decision in PTO, applicable precedent and questions that arise from the parties' arguments. The Authority directed the parties in PTO and the other listed cases to submit briefs on the questions developed in its partial decision. The questions are set forth below.

Additionally, parties in the other listed cases were directed to address whether there are facts or issues in their cases that are distinguishable from those in PTO on the particular allegation that the respondent was obligated to bargain under section 7106(b)(1).

Finally, the Authority provided the parties to the various cases the opportunity to request oral argument before the Authority. However, the Authority determined that participation in any oral argument would be confined

to the parties to the various pending cases, in the absence of a demonstration that the interests of a person desiring to participate in the oral argument will not adequately be represented by these parties.

In addition to PTO, the other pending cases are:

1. *Department of the Air Force, 647th Air Base Group, Hanscom Air Force Base, Massachusetts (and National Association of Government Employees, SEIU, AFL-CIO, Local R1-8)*, Case No. BN-CA-41011;

2. *U.S. Department of Justice, Immigration and Naturalization Service (and American Federation of Government Employees, National Border Patrol Council, AFL-CIO)*, Case No. WA-CA-50048;

3. *Social Security Administration, Santa Rosa District Office, Santa Rosa, California (and American Federation of Government Employees, Council 147, AFL-CIO)*, Case No. SF-CA-50155; and

4. *U.S. Department of Veterans Affairs Medical Center, Lexington, Kentucky (and National Association of Government Employees)*, Case No. CH-CA-50399.

Although the questions set forth below were asked of the parties in PTO and the other cases listed above, the matters addressed in the questions posed are likely to be of concern to the Federal sector labor-management relations community in general. Therefore, the Authority finds it appropriate to provide for the filing of amicus curiae briefs responding to the following questions, and addressing any other matters deemed relevant to resolving the questions raised in this and the other cases listed above concerning the respondent's obligation to bargain under section 7106(b)(1) of the Statute. Responses should address, at a minimum, the Statute, legislative history, Executive Order 12871, Authority and judicial precedent, as discussed in the Authority's partial decision in PTO. If it is contended that this precedent is distinguishable or was wrongly decided, the responses should provide the basis for this contention.

1. Under what circumstances, if any, does an election to bargain under section 7106(b)(1) of the Statute create rights and obligations that are enforceable through unfair labor practice proceedings?

2. If there are circumstances when an election to bargain is enforceable under the Statute, are those circumstances present in PTO, or in any of the other cases listed above? For example, if an "irrevocable" election can be made, has such an election been made by PTO?

3. Does section 2(d) of Executive Order 12871 constitute an agency election, within the meaning of section 7106(b)(1) of the Statute, to bargain on proposals on matters set out in section 7106(b)(1)?

4. If an election to bargain creates rights and obligations that are enforceable under any circumstances, what is the extent of the bargaining required to satisfy the obligations? For example, does the obligation to bargain extend to impasse, or is it satisfied by some other "amount" of bargaining?

5. In view of the fact that the President's issuance of Executive Order 12871 is the only basis asserted for finding that an election to bargain has been made that is binding on the agency, is enforcing the election barred by Section 3 of the Executive Order?

6. If the Authority were to find that there are circumstances when an election to bargain is enforceable under the Statute, and that such circumstances are present in PTO or in any of the other cases listed above, should a violation be found in PTO or in any of those other cases? If so, what is the appropriate remedy to enforce the election?

All briefs shall be captioned "U.S. Department of Commerce, Patent and Trademark Office, Case No. WA-CA-40743, *Amicus Brief*" and shall contain separate, numbered headings for each issue discussed. Briefs must include a signed and dated statement of service that complies with the Authority's regulations (5 CFR 2429.27(a) and (c)) showing service of one copy of the brief on all counsel of record or other designated representatives in PTO and the other cases listed above. Copies of the Authority's partial decision in PTO, dated November 17, 1997, and a list of the designated representatives for that and the other cases may be obtained in the Authority's Case Control Office at the address set forth above. Copies of these materials will be forwarded (by mail or by facsimile) to any person who so requests by contacting Peter Constantine at the same address. An original and four (4) copies of each amicus brief must be submitted, with any enclosures, on 8½×11 inch paper.

(Authority: 5 U.S.C. 7105(a)(2)(G) & (I))

Dated: November 17, 1997.

For the Authority.

**Peter Constantine,**

*Director, Case Control Office, Federal Labor Relations Authority.*

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