

Congress of the United States
Washington, DC 20510

September 24, 2020

The Honorable John F. Ring
Board Member
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

Dear Chairman Ring:

We are writing to seek confirmation that you will uphold your commitment as a public official to abide by our nation's ethics laws, and take steps to ensure that the American public can have faith in the integrity of the National Labor Relations Board (NLRB).

In November 2019, the NLRB released a report and new guidance on procedure regarding instances when a Member ignores the advice of a Designated Agency Ethics Official (DAEO) to recuse themselves from a case due to a conflict of interest.¹ We believe the answer to this question is straightforward – Members should follow the DAEO's guidance, consistent with decades of practice across agencies and federal ethics laws. And we have provided a lengthy response to the NLRB's report outlining how the report is based on a twisted legal analysis that ignores basic tenets of ethics law.²

The NLRB initiated the report after the NLRB Inspector General (IG) and DAEO found that Member William Emanuel violated his ethics pledge in the case *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*³ Rather than undertaking a good-faith effort to restore public confidence in the Board's integrity, the NLRB's ethics report is a thinly veiled effort to post-hoc validate Member Emanuel's insistence he should have been permitted to participate in the *Hy-Brand* decision, contrary to the NLRB DAEO's determination. The report states, "Member Emanuel contends that he strongly disagreed with the substance of the recusal

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² Letter from Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee to NLRB Chairman John Ring, March 11, 2020, <https://www.warren.senate.gov/imo/media/doc/2020.03.11%20Letter%20from%20Senator%20Warren,%20Reps%20DeLauro,%20Pocan,%20Lee%20to%20NLRB%20on%20Ethics%20Recusal%20Report.pdf>.

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determination but was unable to seek review of it.”⁴ The NLRB’s new guidance changes the rules to appease Member Emanuel’s objections, creating a legally dubious roadmap for Members to ignore a recusal determination, rather than reinforcing NLRB Members’ requirement to comply with ethics officials’ determinations.

This represents a chilling continuation of ongoing concerns about the public integrity of the NLRB. Senators wrote to Member Emanuel in November 2017, shortly after his confirmation as a new member of the NLRB, expressing concern that his “long history of representing employers wishing to make it harder for workers to bargain collectively” would present “a number of conflicts.”⁵ The senators requested that Member Emanuel “publicly disclose all potential conflicts created by [his] former clients and those of [his] firm” so that the public could “evaluate [his] ability to impartially apply the law.”⁶ He responded on November 21, 2017 with a list of 162 former clients.⁷ He also stated:

As I pledged under Executive Order 13770, for two years following my appointment to the NLRB, I will recuse myself in all Board cases in which my “former employer,” Littler Mendelson, or my own “former clients,” are a party or represent a party.⁸

In a response to Questions for the Record from Senator Patty Murray, Member Emanuel also listed *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery and FPR-II, LLC, d (BFI)* as one of the cases pending before the NLRB in which his former employer, Littler Mendelson, represented a party.⁹

Members of Congress wrote to Member Emanuel again on February 6, 2018, warning that his participation in “directing the General Counsel to ask the Court to remand [the case *BFI*] back to the Board for reconsideration consistent with precedent set out in the *Hy-Brand* decision and more favorable to [his former employer’s] client ... appears to be in direct contravention of

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⁹ Response from William Emanuel to Questions for the Record submitted by Senator Patty Murray for July 13, 2017 hearing on William Emanuel’s Nomination for Member of the NLRB, <https://www.help.senate.gov/imo/media/doc/Emanuel%20BFI%20Remand%20-%20Attachment%20A.PDF>.

[his] commitments to the Office of Government Ethics, to the requirements of the Ethics Pledge, and to the requirements of federal regulations.”¹⁰

The IG released a report several days later on February 9, 2018, finding that “the *Hy-Brand* and *Browning-Ferris* matters are the same ‘particular matter involving specific parties,’” and concluding, as a result, that “Member Emanuel’s participation in the *Hy-Brand/Browning-Ferris* matter when he otherwise should have been recused exposes a serious and flagrant problem and/or deficiency in the Board’s administration of its deliberative processes and the National Labor Relations Act.”¹¹ The IG further wrote that Member Emanuel’s participation in the decision “calls into question the validity of that decision and the confidence that the Board is performing its statutory duties.”¹²

Senators Elizabeth Warren and Patty Murray wrote to Member Emanuel on February 26, 2018, noting that the IG report “make[s] clear that [his] actions created a serious flaw in the *Hy-Brand* decision-making process, tainted the outcome of that process, and undermined the ability of the public to trust in the integrity of the Board’s decision-making processes.”¹³

On March 23, 2018, Senator Warren called on Member Emanuel to resign, noting, “Mr. Emanuel violated his ethics agreement and participated in a case where he had a clear conflict of interest ... Mr. Emanuel’s job is to give workers a fair shake—and he no longer has the credibility to do so.”¹⁴

Member Emanuel did not resign, and the NLRB then undertook a lengthy process¹⁵ to double down on his insistence that Members should have the authority to circumvent our nation’s ethics laws and standards if they so choose.

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In our March 11, 2020 letter to the NLRB, we explained that the agency’s new report and guidance suggest “that it is not only permissible, but preferable for a potentially-conflicted board member, rather than a third party, to make the final determination of whether they should recuse [which] belies common sense and decades of relevant legal precedent.”¹⁶ We also noted that the new guidance suggests a Member can simply “[reach] his or her own decision” on recusal, putting NLRB members and staff at risk of discipline for violating ethics rules or criminal ethics laws,¹⁷ including the nation’s criminal conflicts of interest statute, 18 U.S. Code, Section 208.¹⁸

In a letter we sent to Chairman Ring today, we raised concerns that the NLRB has provided incomplete and incorrect information about the new guidance to the public and to Congress. The Office of Government Ethics (OGE) sent the NLRB a letter on December 19, 2019 raising concerns that “portions of the [NLRB ethics] report characterize ethics requirements and processes in ways that could be misconstrued.”¹⁹ In particular, OGE requested that the NLRB “clarify various portions of the Report that could be misconstrued to suggest that [OGE] will adjudicate disagreements between Board members and the NLRB Designated Agency Ethics Official.”²⁰

The NLRB responded to OGE with edits to passages identified by OGE as “characteriz[ing] ethics requirements and processes in ways that could be misconstrued.”²¹ It is our understanding that OGE has told the NLRB those edits to the report address their concerns, and that the NLRB is treating those edits as operative language for the purposes of implementing the November guidance.²² However, there is no publicly available final report incorporating those edits, or explanation that the currently posted ethics report and guidance reflect incorrect information. In fact, the NLRB sent unedited, incorrect report language to our offices, which is posted publicly online, and has not bothered to provide a correction to us or to the public.²³

Between the legally tenuous guidance, obfuscated internal process, and misrepresentations to Congress and the public, there is little clarity about the ethics and integrity rules that govern the NLRB and its members, and what process the NLRB is actually implementing regarding recusal decisions and other components of the agency’s ethics program.

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As the head of your agency, you are responsible for “establishing and maintaining an effective agency ethics program and fostering an ethical culture in the agency.”²⁴ The Standards of Ethical Conduct for Employees of the Executive Branch state that “public service is a public trust.”²⁵ The public belief in the integrity of the government is a critical regulatory goal, which is codified in requirements for government employees to “avoid any actions creating the appearance that they are violating the law or the ethical standards set forth” in federal ethics regulations.²⁶ That means that even the appearance of a conflict of interest must be avoided in order to ensure that “every citizen can have complete confidence in the integrity of the Federal Government.”²⁷

In order to provide clarity to the public and to Congress on the key issue of concern with the new ethics guidance, we request that you provide us with an answer to the following question no later than October 8, 2020.

Will you commit to follow the guidance of the NLRB Designated Agency Ethics Official if you are advised to recuse yourself from a case or other official matters?

Sincerely,

Elizabeth Warren
United States Senator

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Chair
Subcommittee on Labor, Health, and Human
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House Committee on Appropriations

Mark Pocan
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²⁴ 5 CFR § 2638.107.

²⁵ 5 CFR § 2635.101.

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In November 2019, the NLRB released a report and new guidance on procedure regarding instances when a Member ignores the advice of a Designated Agency Ethics Official (DAEO) to recuse themselves from a case due to a conflict of interest.¹ We believe the answer to this question is straightforward – Members should follow the DAEO's guidance, consistent with decades of practice across agencies and federal ethics laws. And we have provided a lengthy response to the NLRB's report outlining how the report is based on a twisted legal analysis that ignores basic tenets of ethics law.²

The NLRB initiated the report after the NLRB Inspector General (IG) and DAEO found that you violated your ethics pledge in the case *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*³ Rather than undertaking a good-faith effort to restore public confidence in the Board's integrity, the NLRB's ethics report is a thinly veiled effort to post-hoc validate your insistence you should have been permitted to participate in the *Hy-Brand* decision, contrary to the NLRB DAEO's determination. The report states, "Member Emanuel contends that he strongly disagreed with the substance of the recusal determination but was unable to seek

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Dear Member Kaplan:

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⁹ Response from William Emanuel to Questions for the Record submitted by Senator Patty Murray for July 13, 2017 hearing on William Emanuel’s Nomination for Member of the NLRB, <https://www.help.senate.gov/imo/media/doc/Emanuel%20BFI%20Remand%20-%20Attachment%20A.PDF>.

[his] commitments to the Office of Government Ethics, to the requirements of the Ethics Pledge, and to the requirements of federal regulations.”¹⁰

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On March 23, 2018, Senator Warren called on Member Emanuel to resign, noting, “Mr. Emanuel violated his ethics agreement and participated in a case where he had a clear conflict of interest ... Mr. Emanuel’s job is to give workers a fair shake—and he no longer has the credibility to do so.”¹⁴

Member Emanuel did not resign, and the NLRB then undertook a lengthy process¹⁵ to double down on his insistence that Members should have the authority to circumvent our nation’s ethics laws and standards if they so choose.

¹⁰ Letter from Senator Patty Murray, Representative Bobby Scott, Senator Elizabeth Warren, et al. to NLRB Member William Emanuel, February 6, 2018, <https://www.help.senate.gov/imo/media/doc/02052018%20NLRB%20Emanuel%20Letter.pdf>.

¹¹ National Labor Relations Board, Office of Inspector General, “Notification of a Serious and Flagrant Problem and/or Deficiency in the Board’s Administration of its Deliberative Process and the National Labor Relations Act with Respect to the Deliberation of a Particular Matter,” memorandum, February 9, 2018, pp. 5, https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1535/OIG%20Report%20Regarding%20Hy_Brand%20Deliberations.pdf.

¹² *Id.*

¹³ Letter from Senators Elizabeth Warren and Patty Murray to NLRB Member William Emanuel, February 26, 2018, https://www.warren.senate.gov/imo/media/doc/2018_02_26_Letter_to_NLRB_Member_Emanuel_on_2_20_IG_report.pdf.

¹⁴ Bloomberg Law, “Warren Wants Labor Board Member Out Over Ethics Questions,” Chris Opfer and Hassan A. Kanu, March 23, 2018, <https://news.bloomberglaw.com/daily-labor-report/warren-wants-labor-board-member-out-over-ethics-questions>.

¹⁵ National Labor Relations Board, “National Labor Relations Board’s Ethics Recusal Report,” November 19, 2019, <https://www.warren.senate.gov/imo/media/doc/NLRB%20Ethics%20Recusal%20Report%20Nov%202019.pdf>.

In our March 11, 2020 letter to the NLRB, we explained that the agency’s new report and guidance suggest “that it is not only permissible, but preferable for a potentially-conflicted board member, rather than a third party, to make the final determination of whether they should recuse [which] belies common sense and decades of relevant legal precedent.”¹⁶ We also noted that the new guidance suggests a Member can simply “[reach] his or her own decision” on recusal, putting NLRB members and staff at risk of discipline for violating ethics rules or criminal ethics laws,¹⁷ including the nation’s criminal conflicts of interest statute, 18 U.S. Code, Section 208.¹⁸

In a letter we sent to Chairman Ring today, we raised concerns that the NLRB has provided incomplete and incorrect information about the new guidance to the public and to Congress. The Office of Government Ethics (OGE) sent the NLRB a letter on December 19, 2019 raising concerns that “portions of the [NLRB ethics] report characterize ethics requirements and processes in ways that could be misconstrued.”¹⁹ In particular, OGE requested that the NLRB “clarify various portions of the Report that could be misconstrued to suggest that [OGE] will adjudicate disagreements between Board members and the NLRB Designated Agency Ethics Official.”²⁰

The NLRB responded to OGE with edits to passages identified by OGE as “characteriz[ing] ethics requirements and processes in ways that could be misconstrued.”²¹ It is our understanding that OGE has told the NLRB those edits to the report address their concerns, and that the NLRB is treating those edits as operative language for the purposes of implementing the November guidance.²² However, there is no publicly available final report incorporating those edits, or explanation that the currently posted ethics report and guidance reflect incorrect information. In fact, the NLRB sent unedited, incorrect report language to our offices, which is posted publicly online, and has not bothered to provide a correction to us or to the public.²³

Between the legally tenuous guidance, obfuscated internal process, and misrepresentations to Congress and the public, there is little clarity about the ethics and integrity rules that govern the NLRB and its members, and what process the NLRB is actually implementing regarding recusal decisions and other components of the agency’s ethics program.

¹⁶ Letter from Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee to NLRB Chairman John Ring, March 11, 2020, <https://www.warren.senate.gov/imo/media/doc/2020.03.11%20Letter%20from%20Senator%20Warren,%20Reps%20DeLauro,%20Pocan,%20Lee%20to%20NLRB%20on%20Ethics%20Recusal%20Report.pdf>.

¹⁷ *Id.*

¹⁸ 18 U.S. Code § 208.

¹⁹ Letter from OGE Director Emory A. Rounds, III to NLRB Chairman John Ring, December 19, 2019, [https://www.oge.gov/web/OGE.nsf/0/43485A2A24C0CCDB852584D60062B3A5/\\$FILE/Letter%20to%20NLRB%20Chair.pdf](https://www.oge.gov/web/OGE.nsf/0/43485A2A24C0CCDB852584D60062B3A5/$FILE/Letter%20to%20NLRB%20Chair.pdf).

²⁰ *Id.*

²¹ *Id.*

²² Call between the Office of Senator Elizabeth Warren and the U.S. Office of Government Ethics, June 18, 2020.

²³ Letter from NLRB Chairman John Ring to Senator Elizabeth Warren and Representatives Rosa DeLauro, Mark Pocan, and Barbara Lee, April 7, 2020, <https://www.nlr.gov/sites/default/files/attachments/pages/node-6353/ring-to-warren-delauro-pocan-lee-final2.pdf>.

The Standards of Ethical Conduct for Employees of the Executive Branch state that “public service is a public trust.”²⁴ The public belief in the integrity of the government is a critical regulatory goal, which is codified in requirements for government employees to “avoid any actions creating the appearance that they are violating the law or the ethical standards set forth” in federal ethics regulations.²⁵ That means that even the appearance of a conflict of interest must be avoided in order to ensure that “every citizen can have complete confidence in the integrity of the Federal Government.”²⁶

In order to provide clarity to the public and to Congress on the key issue of concern with the new ethics guidance, we request that you provide us with an answer to the following question no later than October 8, 2020.

Will you commit to follow the guidance of the NLRB Designated Agency Ethics Official if you are advised to recuse yourself from a case or other official matters?

Sincerely,

Elizabeth Warren
United States Senator

Rosa DeLauro
Chair
Subcommittee on Labor, Health, and Human
Services, Education, and Related Agencies
House Committee on Appropriations

Mark Pocan
Member of Congress

Barbara Lee
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²⁴ 5 CFR § 2635.101.

²⁵ 5 CFR § 2635.101(b)(14).

²⁶ 5 CFR § 2635.101(a).

Congress of the United States
Washington, DC 20510

September 24, 2020

The Honorable Lauren M. McFerran
Board Member
National Labor Relations Board
1015 Half St., S.E.
Washington, D.C. 20570

Dear Member McFerran:

We are writing to seek confirmation that you will uphold your commitment as a public official to abide by our nation's ethics laws, and take steps to ensure that the American public can have faith in the integrity of the National Labor Relations Board (NLRB).

In November 2019, the NLRB released a report and new guidance on procedure regarding instances when a Member ignores the advice of a Designated Agency Ethics Official (DAEO) to recuse themselves from a case due to a conflict of interest.¹ We believe the answer to this question is straightforward – Members should follow the DAEO's guidance, consistent with decades of practice across agencies and federal ethics laws. And we have provided a lengthy response to the NLRB's report outlining how the report is based on a twisted legal analysis that ignores basic tenets of ethics law.²

The NLRB initiated the report after the NLRB Inspector General (IG) and DAEO found that Member William Emanuel violated his ethics pledge in the case *Hy-Brand Industrial Contractors, Ltd. and Brandt Construction Co.*³ Rather than undertaking a good-faith effort to restore public confidence in the Board's integrity, the NLRB's ethics report is a thinly veiled effort to post-hoc validate Member Emanuel's insistence he should have been permitted to participate in the *Hy-Brand* decision, contrary to the NLRB DAEO's determination. The report states, "Member Emanuel contends that he strongly disagreed with the substance of the recusal

¹ National Labor Relations Board, "National Labor Relations Board's Ethics Recusal Report," November 19, 2019, <https://www.warren.senate.gov/imo/media/doc/NLRB%20Ethics%20Recusal%20Report%20Nov%202019.pdf>.

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³ National Labor Relations Board, "National Labor Relations Board's Ethics Recusal Report," November 19, 2019, pp. 2; 40-43, <https://www.warren.senate.gov/imo/media/doc/NLRB%20Ethics%20Recusal%20Report%20Nov%202019.pdf>.

determination but was unable to seek review of it.”⁴ The NLRB’s new guidance changes the rules to appease Member Emanuel’s objections, creating a legally dubious roadmap for Members to ignore a recusal determination, rather than reinforcing NLRB Members’ requirement to comply with ethics officials’ determinations.

This represents a chilling continuation of ongoing concerns about the public integrity of the NLRB. Senators wrote to Member Emanuel in November 2017, shortly after his confirmation as a new member of the NLRB, expressing concern that his “long history of representing employers wishing to make it harder for workers to bargain collectively” would present “a number of conflicts.”⁵ The senators requested that Member Emanuel “publicly disclose all potential conflicts created by [his] former clients and those of [his] firm” so that the public could “evaluate [his] ability to impartially apply the law.”⁶ He responded on November 21, 2017 with a list of 162 former clients.⁷ He also stated:

As I pledged under Executive Order 13770, for two years following my appointment to the NLRB, I will recuse myself in all Board cases in which my “former employer,” Littler Mendelson, or my own “former clients,” are a party or represent a party.⁸

In a response to Questions for the Record from Senator Patty Murray, Member Emanuel also listed *Browning-Ferris Industries of California, Inc., d/b/a BFI Newby Island Recyclery and FPR-II, LLC, d (BFI)* as one of the cases pending before the NLRB in which his former employer, Littler Mendelson, represented a party.⁹

Members of Congress wrote to Member Emanuel again on February 6, 2018, warning that his participation in “directing the General Counsel to ask the Court to remand [the case *BFI*] back to the Board for reconsideration consistent with precedent set out in the *Hy-Brand* decision and more favorable to [his former employer’s] client ... appears to be in direct contravention of

⁴ National Labor Relations Board, “National Labor Relations Board’s Ethics Recusal Report,” November 19, 2019, pp. 45, <https://www.warren.senate.gov/imo/media/doc/NLRB%20Ethics%20Recusal%20Report%20Nov%202019.pdf>.

⁵ Letter from Senators Elizabeth Warren, Patty Murray, Sherrod Brown, et al. to NLRB Member William Emanuel, November 6, 2017, https://www.warren.senate.gov/files/documents/2017_11_7_Emanuel_Ethics_Obligations.pdf.

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¹² *Id.*

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