UNITED STATES DEPARTMENT OF LABOR
OFFICE OF LABOR-MANAGEMENT STANDARDS

LMRDA: Interpretation of	RIN 1215-AB79
the "Advice" Exemption	RIN 1245-AA03

COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

These comments on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and its affiliated unions are submitted in response to the Department of Labor's notice of proposed rulemaking with regard to the "advice" exemption to the reporting requirements stated in § 203 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 433, regarding activities by labor consultants that have the object, "directly or indirectly," of "persuad[ing] employees" with regard to the exercise of their rights to "organize and bargain collectively." 76 Fed. Reg. 36178 (June 21, 2011). The AFL-CIO urges that the proposed rule be adopted.

The proposed rule appropriately modifies the Department's interpretation of § 203 to account for the fact that the modern anti-union campaign places heavy reliance on supervisors as the consultant's trusted intermediaries as well as the use of sophisticated video and web-based communication technology. Labor consultants running such campaigns are engaged in an activity primarily designed to influence or persuade the target group, i.e., the employees, not to provide advice to the employer as a client. The proposed rule therefore correctly requires labor consultants to report such activities.

Section 203 of the Act broadly requires employers and labor relations consultants to report on "any agreement or arrangement . . . pursuant to which [the consultant]

undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively." 29 U.S.C. § 433(a)(4). *See also id*. § 433(b)(1). So, for example, "it is plain that the preparation of written material by a lawyer, consultant, or other independent contractor which he directly delivers or disseminates to employees for the purpose of persuading them with respect to their organizational or bargaining rights is reportable. " *LMRDA Interpretative Manual* § 265.005. At the same time, the Act also states that this broad reporting requirement does "not require any employer or [consultant] to file a report covering the services of [the consultant] by reason of [the consultant] giving or agreeing to give advice to such employer." 29 U.S.C. § 433(c).

Section 203 is "something less than a model of statutory clarity." *Wirtz v. Fowler*, 372 F.2d 315, 325 (5th Cir. 1966) (overruled in part on other grounds). In particular, § 203 is "silent or ambiguous" with respect to whether activity "that can be viewed as both advice and persuasion" is reportable. *See UAW v. Sect'y of Labor*, 869 F.2d 616, 617, 618 n.3 (D.C. Cir. 1989). Accordingly, it is the Department's responsibility to reasonably construe the advice exemption.

The Department has recognized that "[t]he question of application of the 'advice' exemption requires an examination of the intrinsic nature and purpose of the arrangement to ascertain whether it essentially calls exclusively for advice or for other services in whole or part." *LMRDA Interpretative Manual* § 265.005. In this regard, the Department has observed that "[s]uch a test cannot be mechanically or perfunctorily applied" but,

rather, "involves a careful scrutiny of the basic fundamental characteristics of any arrangement to determine whether giving advice or furnishing some other services is the real underlying motivation for it." *Ibid*.

Unfortunately, one aspect of the Department's long-standing interpretation of the "advice" exemption has been "mechanically or perfunctorily applied," *ibid*., in a manner that "permits a consultant to prepare and orchestrate the dissemination of an entire package of persuader material while sidestepping the reporting requirements merely by using the employer's name and letterhead or avoiding direct contact with employees." 76 Fed. Reg. at 36181 quoting William Hobgood, Assistant Secretary of Labor for Labor-Management Relations. That application permits consultants to "easily slide out from under the scrutiny of the Department of Labor" by "deal[ing] directly only with supervisors and management." 76 Fed. Reg. at 36187 quoting Levitt, *Confessions of a Union Buster* 42 (1993).

The problem derives from the Department's position that a consultant's "prepar[ation of] an entire speech or document for the employer . . . can reasonably be regarded as a form of written advice" so long as "the employer is free to accept or reject the written material prepared for him." *Interpretative Manual* 265.005. The Department tempered this position by explaining that the consultant's preparation of material for delivery by the employer "would not *ordinarily* require reporting" so long as it was part of "a bona fide undertaking" and "there is no indication that the [consultant] is operating under a deceptive arrangement with the employer." *Ibid.* (emphasis added). Although this interpretation was clearly intended to address a situation in which a representative of

the employer with sufficient authority "to accept or reject the written material" presents the speech prepared by the consultant to employees, the position has been "mechanically or perfunctorily applied," *ibid*., to allow employers and consultants to escape reporting on consultant persuader activities just so long as they are implemented through the employer's supervisors and managers.

Obviously, the fact that a labor consultant directs an employer's supervisors to hand out anti-union leaflets written by the consultant rather than handing those leaflets to employees himself does not transform the content of those leaflets from persuader activity into advice. The Department has acknowledged that "the preparation of written material" that a consultant "delivers or disseminates to employees" either "directly" or "*through an agent*" "obviously do[es] not call for the giving of advice to an employer." *Interpretative Manual* 265.005 (emphasis added). Yet, the Department's current interpretation of the "advice" exception has allowed consultants to escape reporting on their campaign "activities" through the device of using the employer's supervisors and managers to deliver the consultant's antiunion message, even where the "real underlying motivation," *ibid.*, is clearly "to persuade employees . . . not to exercise . . . the right to organize and bargain collectively," 29 U.S.C. § 433(a)(4). This "deceptive arrangement," *ibid*., has become the routine means by which employers and consultants "easily slide out from under the scrutiny of the Department of Labor," 76 Fed. Reg. at 36187 quoting Levitt, *Confessions of a Union Buster* 42. *See* Joyce, *Union Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees by Management Consultants During Union Representation Election Campaigns*, 135 U. Pa.

L. Rev. 453 (1987).

It has thus become common for "consultants [to] use first-line supervisors to spearhead their anti-union campaigns." Logan, *Consultants, Lawyers, and the "Union Free" Movement in the USA Since the 1970s*, 33 Ind. Rel. J. 197, 201 (2002). "'Union avoidance' consultants typically script supervisors' conversations, train them how to read employees' verbal and non-verbal reactions, and have them ask indirect questions without explicitly asking employees how they will vote." Lafer, Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections, *American Rights at Work Report* 3 (July 2007). Martin Jay Levitt, a prominent labor consultant, explained his modus operandi:

> "The entire campaign . . . will be run through your foremen. I'll be their mentor, their coach. I'll teach them what to say and make sure they say it. But I'll stay in the background." Levitt, *Confessions of a Union Buster* 10.

Any pretense that the consultants are instructing the supervisors on how to comply with the law is conclusively refuted by the empirical evidence showing a strong correlation between the hiring of a consultant and unlawful behavior by the supervisors. Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 NW U.L. Rev. 87, 126 & table 17 (1984). *See* Bronfenbrenner, *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, Statement to the U.S. Trade Deficit Review Commission 46-47 (2000).

As the Department has previously observed, the websites of labor consultants

frequently offer to conduct "full scale counter-union campaigns" on behalf of client-employers. 66 Fed. Reg. 2782, 2786 (Jan. 11, 2001). Typical of the promises that routinely appear on labor consultants' websites are that "*our* Vote No or Say No posters and handouts inform, educate and persuade *your* employees" or that the consultant can "create a custom Nightmare video" that will "wake employees up" to the "disastrous consequences" of the "company becom[ing] unionized." The provision of such materials constitutes an activity aimed at influencing employees rather than labor relations advice for the employer.

The consultants creating such anti-union materials are not, however, required to report under the Department's current interpretation of the "advice" exemption, just so long as they have the employer's supervisors distribute the consultants' materials for them. As a result, most persuader activity by labor consultants goes unreported. For example, a basic search for "antiunion consultants" and other similar terms found nineteen consultants openly advertising their services on the internet, but only six of them had *ever* filed reports with OLMS.

The proposed revision of the Department's interpretation of the "advice" exemption closes this massive loophole by clarifying that the "advice" exemption will not be "mechanically or perfunctorily applied" to allow employers and consultants to escape reporting through the device of having the consultant undertake its persuader activities by directing the employer's supervisors and managers. The proposed forms make clear that reports are required when consultants undertake such persuader "activities" as: "[d]rafting, [substantially] revising, or [otherwise] providing materials for presentation to

employees"; "[p]lanning or conducting . . . employee meetings"; or "[c]oordinating or directing the activities of supervisors" to do the same. The specific communication services listed on the proposed form appropriately include those commonly used to persuade employees of the employer's anti-union position, including "speech[es],' "written materials," "audiovisual or multi-media presentations," and "website content."

The proposed LM-10 and LM-20 Forms will help ward off future evasive maneuvers by providing for more detailed reporting. However, we fully anticipate that some employers and consultants will continue to find other "deceptive arrangements" to "slide out from under the scrutiny of the Department of Labor." We, therefore, urge the Department to support reporting under the new forms by adopting an active program of guidance and enforcement to ensure that reporting takes place within both the spirit and the letter of the law.

Respectfully submitted,

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