Comments of the National Small Business Association on the Proposed Rule Regarding Interpretation of the ''Advice'' Exemption of the Labor-Management Reporting and Disclosure Act

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Dear Mr. Davis:

The National Small Business Association (NSBA) is pleased to provide these comments with respect to the proposed rule (RIN 1215-AB79 and 1245-AA03) regarding interpretation of the "advice" exemption of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)[1] contained in section 203(c) of the Act. This proposed rule would make substantial changes to the existing interpretation of the advice exception. The underlying section 203(a)(4) rule imposing reporting obligations is often referred to as the "persuader" rule or the persuader reporting obligations.

The NSBA was founded in 1937 to advocate for the interests of small businesses in the U.S. It is the oldest small business organization in the U.S. The NSBA represents more than 150,000 small businesses throughout the country in virtually all industries and of widely varying sizes.

Summary

It is our considered view that the proposed rule:

- is contrary to Congressional intent (for at least five reasons);
- upends a half century of settled law, creates uncertainty and replaces a relatively clear bright line rule with one riddled with ambiguity;
- imposes substantially higher costs than the DOL claims;
- will harm employers' right to secure advice;
- violates attorney-client privilege; and
- lacks an adequate evidentiary basis.

We therefore urge the Department to withdraw the proposed rule.

[1] 29 USC 401 *et seq*.

Background

Section 203 of the LMRDA requires employers to report with respect to five different types of matters. Section 203(a)(4) requires that employers report to DOL for public release the details of agreements or arrangements with consultants that undertake persuader activities. The reports are made on DOL-required forms, Form LM-10 and Form LM-20.

Persuader are 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 through representatives of their own choosing, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer."[2]

Section 203(c) of the LMRDA provides an exception from the forgoing reporting requirement. The exception covers agreements or arrangements for "advice" and for representing "such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer." Ever since a 1962 Kennedy Administration interpretation by the DOL known as the Donahue memorandum (and subsequent formal guidance), the section 203(c) advice exception has been interpreted such that employers and consultants need not file reports when the consultants have no direct contact with employees and act only through the employer who has the choice whether or not to accept and use the advice.[3] Engaging in persuader activity for one client can, however, trigger reporting with respect to other "advice only" clients that would not otherwise be reportable.[4] This has also been the DOL position in litigation and the DOL position has prevailed in court.[5] In other words, when the consultant's role was advisory, no reporting was required. Only when the consultant's role was to actually engage in persuasion was reporting required.

In contrast, under the interpretation of section 203(c) contained in the proposed rule, virtually any imaginable activity by almost any consultant or vendor that in any manner, directly or indirectly, relates to a labor dispute or attempted organization of an employer would be reportable. At the very least, speechwriting, public relations advice, strategic advice, and the preparation of campaign materials, letters, videos, web sites, emails or other materials for employer communication to employees must be reported. There is no de minimis rule based on time or fees. Thus, even extremely minor activities must be reported.

Under the proposed rule, "[t]he duty to report can be triggered even without direct contact between a lawyer or other consultant and employees, if persuading employees is an

[2] Section 203(a)(4) of LMRDA; 29 USC 433(a)(4).
[3] See section 265.005 of the LMRDA Interpretative Manual.
[4] *Master Printers Association v. Donovan*, 699 F.2d 370 (7th Cir.1983), cert. denied, 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984)
[5] See, e.g., *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*, 869 F.2d 616 (D.C. Cir. 1989).

object, direct or indirect, of the persons activity …"[6] and "a consultant's revision of the employer's material or communications to enhance the persuasive message also triggers the duty to report …"[7] Even holding multi-employer "seminars, webinars and conferences that have as their "direct or indirect object to persuade employers concerning their representation or collective bargaining rights," would trigger a consultants or employers obligation to file the necessary reports.[8]

Under the proposed rule, the statutory section 203(c) exception would become so narrow as to be unrecognizable and, as discussed below, irrelevant. It would become a dead letter. The advice exception is narrowed by redefining "advice" extraordinarily narrowly. "A lawyer or other consultant, who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law or provides guidance on NLRB practice or precedent is providing 'advice.'"[9] Period.

The Proposed Rule is Contrary to Congressional Intent

Notwithstanding the many unsubstantiated assertions in the proposed rule discussion that the proposed rule is designed to better reflect Congressional intent, there are at least five strong reasons to believe that the current rule reflects Congressional intent better than the proposed rule.

First, the 1959 Conference Committee Report explicitly stated that Congress intended the section 203(c) advice exception to be broad. It is, quite literally, difficult to conceive of a more narrowly drafted definition of advice than that contained in the proposed rule. Second, Congress has had five decades to change the code if it was dissatisfied with the Kennedy Administration interpretation. They have not. In fact, no corporate action of any kind has been taken by Congress. Neither chamber of Congress nor any committee of Congress has taken action to change the rule. This half century of Congressional acquiescence to the current interpretation is strong evidence that the Kennedy Administration DOL got it right (and every subsequent Administration for that matter). Third, the courts have found the current DOL rule to be consistent with Congressional intent. Fourth, basic rules of statutory construction would lead us to a different understanding of Congressional intent than that proffered by the authors of the proposed rule. The plain meaning of the word advice, whether used by a layman or an attorney, is much broader than the definition the authors of the proposed rule have chosen. No objective analyst could conclude that Congress meant so narrow an exception when it used the word advice. Fifth, the proposed rule's construction of the section 203(c) exception would make it quite literally a dead letter because under the proposed rule's exception language nothing would be exempt under section 203(c) that is not already exempt under section 204 (relating to attorney-client communications). It is inconsistent with basic rules of statutory construction to read a section of the statute as surplusage (i.e. unnecessary, unneeded or meaningless words) when an alternative construction gives meaning to the provision.

[6] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 1).
[7] *Ibid*.
[8] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 2).
[9] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 1).

The Congress Intended for the Exception to be Broad

Contrary to the assertion made in section IV (C) of the discussion in the proposed rule, [10] the 1959 Conference Committee report language makes the Congressional intent to grant a **broad** exemption patently clear. The proposed rule's discussion of Congressional intent is simply an attempt to obfuscate the issue.[11] The Conference Committee Report language with respect to the advice exception is set forth below.

> Section 203-reports of employers
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> …
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> Subsection (c) of section 203 of the conference substitute grants a **broad** *(emphasis added)* exemption from the requirements of the section with respect to the giving of advice. This subsection is further discussed in connection with section 204.[12]
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> …
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> Section 204-attorney-client communications exempted
>
> The senate bill provides that an attorney need not include in any report required by the act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.
>
> The conference substitute adopts the provisions of the senate bill, but in connection therewith the conferees included, in section 203(c), a provision taken from the senate bill that provides that an employer or other person is not required to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer or the negotiation of an agreement or any question arising thereunder.

[10] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36184.

[11] Quite literally none of the discussion is section IV(C) is relevant to the scope of the advice exception. The only part of the legislative history on point is reproduced here and makes it abundantly clear that the exception is to be broad rather than as narrow as it could conceivably be. The proposed regulation's authors seem to think that a discussion of the why the overall Act is necessary somehow trumps the only discussion of the advice exception. Again, elementary rules of construction and common sense dictate a more reasonable construction -- the construction that every DOL since the Kennedy Administration has adopted.

[12] Conf. Rep. 86-1147, Conf. Rep. No. 1147, 86TH Cong., 1st Sess. 1959, 1959 U.S.C.C.A.N. 2318, P.L. 86-257, Labor-Management Reporting and Disclosure Act of 1959.

Congress Has Knowingly Acquiesced to the Kennedy DOL Interpretation for Half a Century

The proposed rule seeks to change a rule in effect for half a century under Democratic and Republican Presidents and unchanged by Congress whether controlled by Democrats, Republicans or jointly. The fact that Congress has neither seen fit to change the underlying statute nor sought to invalidate the rule in any way for half a century is very strong evidence that Congress is satisfied with the current rule. In the last five decades, Congress has not passed legislation in either chamber changing this requirement nor has any committee reported out legislation making such a change. Nor, to our knowledge, has Congress even so much as held a hearing regarding the subject matter of the proposed rule (although the rule has been mentioned a few times by witnesses). This acquiescence by Congress belies the argument made in preamble to the proposed rule that the proposed changes are necessary to reflect the intention of Congress. We believe that Congress is satisfied with the current state of the law for the simple reason that there is no real problem with the law as it currently stands.

This argument is not only in accord with common sense but has long been recognized by the courts. See, e.g., *United States v. Midwest Oil Co*., 236 U.S. 459 (1915). See also, *Kaplan v. Corcoran*, 545 F.2d 1073, (7th Cir. 1976).

The Courts Have Confirmed the Existing DOL Interpretation

Courts have upheld the current DOL interpretation of Congressional intent. For example, in the 1989 case, *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole,* [13] the Union appellees argued a position virtually identical to the position taken by the authors of the proposed rule. The D.C. Circuit Court disagreed.

The Circuit Court's discussion is directly on point and a good discussion of the current state of law:

> The Secretary reconciles section 203's coverage and exemption prescriptions differently. If the arrangement is one solely for advice to the employer and his supervisor representatives, then it matters not, according to the Secretary, that the advice has as "an object" employee persuasion. The very purpose of section 203's exemption prescription, the Secretary maintains, is to remove from the section's coverage certain activity that otherwise would have been reportable. In the overlap area, the Secretary thus concludes, the exemption direction, not the coverage provision, generally must control.
>
> Given the tension Congress created, and the deference due the Secretary's reconciliation, we cannot call arbitrary her view that if an activity is properly characterized as "advice," reporting generally is not required. We therefore

[13] 869 F.2d 616 (D.C. Cir. 1989).

> proceed to inquire whether the Secretary has reasonably delineated what constitutes advice within the meaning of section 203(c), 29 U.S.C. Sec. 433(c). The statute itself, always the starting point, nowhere attempts a definition of the term. See Memorandum from Charles Donahue, Solicitor of Labor, to John L. Holcombe, Commissioner, Bureau of Labor-Management Reports, at 1 (Feb. 19, 1962).
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> In a 1962 effort to describe the "advice" exemption, LMRDA Interpretative Manual Entry Sec. 265.005 (Jan. 19, 1962) (Scope of the "Advice" Exemption), the Department contrasted 1) material a consultant delivers directly to employees to persuade them regarding organizational rights, with 2) material the employer drafts, then refers to a consultant for review or revision. The first category falls outside, and the second, inside, the advice exemption. There is no dispute over either of these rankings.
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> The "more difficult" to classify cases, the Department has acknowledged, involve presentations for and to the employer prepared entirely by the consultant, e.g., a fully scripted speech for supervisors to deliver. In such cases, it has been the Department's policy that where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.
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> …
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> Recognizing the Secretary's right to shape her enforcement policy to the realities of limited resources and competing priorities, and comprehending her ruling on advice to involve no *volte face* from longstanding statutory definition and interpretation, we reject the challenge to her ruling.

No court has held that an attorney or consultant that provides only advice and has no contact with employees must file reports.

There is No Reason to Part from the Ordinary Meaning of the Word Advice

There is absolutely no reason to believe that those drafting the Act meant something unusual when they used the word advice in the statute. There is certainly no reason to believe that they meant to exclude most categories of advice when they used the word advice. Had they meant to exclude only lawyers in administrative proceedings or providing the narrowest kind of legal advice, they would have said so.[14] They undoubtedly intended what they said and Congress in enacting the legislation did not assume some oddly narrow definition of the word. That they did not define the word in the statute strongly implies they used the word in its ordinary sense. In accordance with the canons of statutory construction, in the absence of any

[14] And section 203(c) would be unnecessary in light of section 204 (regarding attorney-client privilege), as discussed below.

clear evidence to the contrary and explicit legislative history saying they meant for the advice exception to be broad, the word advice should be construed in accordance with its ordinary meaning. The Supreme Court has held that "statutory words are presumed, unless the contrary appears, to be used in their ordinary sense, with the meaning commonly attributed to them." [15] The proposed rule, if finalized, would constitute an abuse of discretion by the DOL because it construes the word advice in an abusively narrow manner. The proposed rule does not further Congressional intent. Instead, it is in direct contravention of clearly expressed Congressional intent.

The Proposed Rule Effectively Reads Section 203(c) Out of the Law

The proposed rule's construction of the section 203(c) exception would make it quite literally a dead letter because under the proposed rule's exception language nothing would be exempt under the new interpretation of section 203(c) that is not already exempt under section 204 (relating to attorney-client communications). It is inconsistent with basic rules of statutory construction to read a section of the statute as surplusage (i.e. unnecessary, unneeded or meaningless words) when an alternative construction gives meaning to the provision.

The Supreme Court has held that "[i]t is the duty of the Court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed."[16]

Section 204 provides:

> Sec. 204. Nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

The proposed rule would limit the advice exception by defining advice as follows:

> A lawyer or other consultant, who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law or provides guidance on NLRB practice or precedent is providing "advice."[17]

There is no advice that meets the proposed definition of advice that would not also be protected by section 204. Ergo, the proposed rule quite literally reads section 203(c) out of the law and violates the canons of statutory construction laid down by the Supreme Court.

For these reasons the proposed rule should be withdrawn.

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[15] *Caminetti v. United States*, 242 U.S. 470, 471 (1917).
[16] *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883).
[17] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 1).

The Proposed Rule Upends a Half Century of Settled Law, Creates Uncertainty and Replaces a Clear Bright Line Rule with One Riddled with Ambiguity

While it is clear that the authors of the proposed rule want to broaden LMRDA dramatically, it is not clear where they really mean for the line to be drawn. After half of century of practice, guidance and court rulings, the scope of the current rule is well known. Replacing the current rule will create uncertainty, require firms to spend time and money evaluating the new rule and consulting with their attorneys and other advisors. And, notwithstanding all of that effort, it will be years before the final contours of the new rule are known.

These costs are generally underappreciated by government regulators in any event. But at this time of economic difficulty, imposing additional costs and creating additional uncertainty is particularly ill-advised.

A final point. The proposed rule provides that even multiemployer "seminars, webinars and conferences that have as their "direct or indirect object to persuade employers concerning their representation or collective bargaining rights," would trigger an obligation by "the consultant and the employer … to file the necessary reports."[18] A law firm, consulting firm, trade association, professional association or other entity that puts on a seminar, webinar or conference regarding the advice exception or other labor law issues typically has no idea what those hearing the presentation are going to do with the information. Absent mind reading skills, it will be impossible for them to comply with the rule unless they report all attendees to their events and the fees that they paid. This constitutes a grave violation of privacy and a tremendous administrative burden on providers. It will reduce the number of informational programs and will increase their cost. It will lead to a less informed business and inevitably result in less, not more, compliance with the law.

For these reasons the proposed rule should be withdrawn.

The Proposed Rule Imposes Substantially Higher Costs than the DOL claims

The DOL analysis of the cost of the proposed rule does a better job than most of providing the logic and basis of its cost analysis. For this, the agency is to be commended. Nevertheless, we believe that the analysis is substantially flawed and potentially under estimates the cost that the proposed rule would impose by an order of magnitude or, probably, more.

First, the reporting obligations imposed by the new rule are extremely broad. Reporting obligations fall on anyone who may indirectly or direct be involved in persuasion. This goes far beyond the 3,414 Form LM-10 filers and the 2,601 Form LM-20 filers that the Department estimates. If the proposed rule is to be taken seriously (and because of the associated criminal penalties for non-filing, it must be), virtually every lawyer, consultant, advisor, publisher, web page consultant and the like who works for a firm with a labor union that may have a labor dispute will end up having to familiarize themselves with these rules and may well have to file.

Thus instead of 6,000 filers, the DOL may see ten times that many or more.

[18] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36191 (column 2).

Second, the time estimates (60 minutes for an LM-20 and 120 minutes for an LM-10) are dramatically too low.[19] Perhaps, a labor lawyer already familiar with the rule and the underlying law who also had taken an Evelyn Wood speed reading course and had highly efficient support staff could meet these times if only one consultant is involved. Perhaps. But most business people are going to have to spend time familiarizing themselves with the LMRDA, the rules promulgated thereunder and any DOL issued guidance, then go on to familiarize themselves with the forms, then collect the information necessary and then fill out the form. Moreover, given the breadth of the proposed rule, employers are likely to have many, not just one, consultant that is reportable.

Third, given the complexity and ambiguity of the law and the potential criminal penalties involved, any prudent affected employer is going to seek outside advice regarding compliance from an attorney or consultant expert. This will take time and cost a considerable amount of money. Yet the DOL cost estimates do not take into account the cost of outside advice.

We suggest you run the following empirical experiment. Give random persons a copy of the law and the regulations and copies of DOL guidance. Then give them a reasonable fact pattern. Then tell them to figure out whether they need to file and, if so, to prepare the forms correctly. Then tell them they will go to prison if they are wrong. We suggest that they will not be able to complete this task in 60 to 120 minutes. And that they probably would want to consult an expert before filing the forms. Of course, a more realistic experiment would entail them having to find the law, the regulations and the guidance on their own.

The idea that firms are going to be able to comply with this rule for $87 to $175 is simply ludicrous.[20]

For these reasons the proposed rule should be withdrawn.

The Proposed Rule will Harm Employers' Right to Secure Advice

By imposing such a burden on employers securing advice, the proposed rule would act as a substantial deterrent to employers securing advice. This effect is likely to be particularly pronounced on small employers that have limited funds, cannot afford expensive advice and do not have in-house counsel. This is undoubtedly part of the unstated agenda of supporters of the rule. An unintended consequence of the proposed rule is that by dramatically increasing the cost and consequences (potential criminal penalties) of securing advice, fewer firms will seek advice and compliance with important aspects of the National Labor Relations Act will decline.

The Proposed Rule Violates Attorney-Client Privilege

The authors of the proposed rule wrongly assert that "In general, the fact of legal consultation, clients' identities, attorney's fees and the scope and nature of the employment are not deemed privileged."[21]

[19] Federal Register, Vol. 76, No. 119, June 21, 2011 at pages 36198-36204.
[20] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36203.

The American Bar Association Model Rules of Professional Conduct have been adopted, with modifications, in most states. Rule 1.6 of the Model Rules has routinely been interpreted to prohibit attorneys from disclosing, without client consent, the existence of an attorney-client relationship and the fee arrangement. It also, of course, protects attorney client communication. Merely by providing a client with advice beyond the narrow confines of the exception set forth in the Proposed Rule, the Proposed Form LM-10 not only would require the disclosure of an attorney-client relationship, the size of the fee and the full contents of the engagement agreement, part C of the form would also require that the attorneys' activities be disclosed with specificity. The Proposed Rule would, therefore, force attorneys either to violate the disciplinary rules that govern their practice of law and face disbarment or to violate the regulations implementing the LMRDA and face criminal sanctions under that Act. Thus, the Proposed Rule places attorneys in a manifestly absurd position. This situation will engender great uncertainty and adversely affect the trust between attorney and client. It will harm their ability to provide sound advice and the ability of their employer clients to obtain sound advice.

Moreover, section 204 of the LMRDA makes it clear that the proposed rule is blatantly inconsistent with the underlying statute. Section 204 provides:

> Attorney-Client Communications Exempted
>
> Sec. 204. Nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.[22]

The Proposed Rule should be withdrawn both because it is inconsistent with the clear Congressional intent to protect attorney-client privilege expressed by section 204 and because it is inconsistent with the attorney disciplinary rules in most if not all U.S. jurisdictions.

Therefore, the proposed rule should be withdrawn.

The Proposed Rule Lacks an Adequate Evidentiary Basis

It is unclear to the NSBA how dramatically increasing reporting and increasing business compliance costs is going to have a meaningful positive impact on working Americans. Nor does the NSBA membership believe that there is a meaningful problem that this proposed regulation is addressing. Yes, there are consultants that provide advice to employers. Generally, they help firms navigate the thicket of labor laws that a firm must comply with. They also, of course, may assist a firm in achieving a desired result in a labor dispute or prevailing in an NLRB election. We see nothing inherently wrong with that. It is not as if labor unions do not engage consultants.

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[21] Federal Register, Vol. 76, No. 119, June 21, 2011 at page 36192 (column 1).
[22] 29 USC 434.

If consultants or lawyers are engaging in unlawful practices, then the DOL should use the many tools available to it to attack that problem rather than imposing an additional compliance burden on the business community. But radically increasing reporting is not going to materially improve DOL's ability to police unlawful practices since neither employers nor consultants engaging in such practices are going to report doing so.

Conclusion

For the reasons provided above, the NSBA believes that that the proposed rule is contrary to Congressional intent, upends a half century of settled law, creates uncertainty by replacing a relatively clear bright line rule with one riddled with ambiguity, imposes substantially higher costs on businesses than the DOL claims, will harm employers' right to secure advice, violates attorney-client privilege and is not based on substantial evidence that there is a meaningful problem to be addressed.

Therefore, the NSBA respectfully requests that the proposed rule be withdrawn.

Sincerely,

David R. Burton
General Counsel

cc: The Hon. Hilda L. Solis
Secretary of Labor

The Hon. Tom Harkin
Chairman
Health, Education, Labor and Pensions Committee

The Hon. Michael B. Enzi
Ranking Minority Member
Health, Education, Labor and Pensions Committee

The Hon. John Kline
Chairman
House Education and the Workforce Committee

The Hon. George Miller
Ranking Minority Member
House Education and the Workforce Committee

The Hon. Mary L. Landrieu
Chair
Senate Small Business and Entrepreneurship Committee

The Hon. Olympia J. Snowe
Ranking Minority Member
Senate Small Business and Entrepreneurship Committee

The Hon. Sam Graves
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House Small Business Committee

The Hon. Nydia M. Velázquez
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The Hon. Cass R. Sunstein
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