AAA Life Insurance Company

17900 North Laurel Park Dr.
Livonia, Michigan 48152
734-591-6513
Fax 734-805-6282
jkorner@aaalife.com

July 14, 2011

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW., Room N-5609
Washington, DC 20210

Re: RIN 1245-AA03

Dear Mr. Davis:

AAA Life Insurance Company is writing in response to the June 21, 2011 NPRM regarding Section 203(c) of the LMRDA. It is the position of AAA Life Insurance Company that none of the NPRM recommendations be adopted for the reasons stated below.

As you know, section 203(c) creates an exemption to reporting requirements "by reason of [a consultant] giving or agreeing to give advice to such employer." Id. Further, the NPRM correctly defines "advice" as "a recommendation regarding a decision or course of conduct." Merriam-Webster Collegiate Dictionary, Tenth Ed., 18 (2002). The Oxford English Dictionary defines "advice" as an "opinion given or offered as to action[.]" Therefore, "advice" which is not defined in the LMRDA, is to be given its plain and ordinary meaning. Here, the plain and ordinary meaning lends itself to a broad and liberal interpretation.

However, the DOL through its June 21, 2011 NPRM states that it was the intent of Congress to preclude this expansive interpretation and application of the "advice" exemption. However, this conclusion is best left for the legislature to decide and not the DOL. The DOL is inserting its' own judgment in place of Congress. If congressional intent was to limit the scope of the "advice" exemption, it certainly could have done so. To the contrary, Congress passed the LMDRA with a broad and liberal "advice" exemption. Congress could have narrowly defined "advice" or Congress could have certainly adopted all these additional caveats, now being proposed by the NPRM, when the LMRDA was passed. Congress chose not to and the DOL should not replace its discretion for that of the Legislature.

Further, Congress, over the course of many years, could have chosen to amend the NLRA and section 203(c). Congress still has that option currently. However, Congress has affirmatively chosen to not make any such amendments. Therefore, Congress by its

inaction does not feel that any changes to Section 203(c) are necessary and, the DOL should not supplant legislative intent with its own.

In addition, the definition of "advice," if literally construed and applied, would exempt any and all "advice" activities by a consultant. However, to narrow this interpretation and to protect the collective-bargaining process, the current "advice" exemption provides additional limitations or hurdles to the above broad definition. In this regard, an activity is characterized as "advice" if the consultant does not have any direct contact with employees or if "the employer is free to accept or reject the oral or written material submitted." Therefore, if a consultant has direct contact with a company's employees or if the employer does not have a choice to accept or reject the consultant's recommendation, then the activity cannot be characterized as "advice" and must be reported. These additional stipulations limit the broad and ordinary definition of "advice" and provide additional safeguards to employee bargaining.

Regarding the argument that the failure to report somehow adversely affects an employee's ability to make a free and informed choice regarding his/her vote is also unpersuasive. This argument avers that failure to disclose an employer-consultant relationship somehow affects an employee's ability to make a decision about whether to unionize or not. However, this argument fails to consider every person's intrinsic capability to utilize their own discretion regarding decision making.

In this regard, every employee is able to and should "consider the source" when hearing either pro- or anti-union sentiment. It is not too far fetched for an employee to conclude that pro-union dicta or activity is bias in favor of unionization just as anti-union speech or activity is bias against unionization. Much like advertising, a purchaser must "consider the source" when deciding to make a purchase based on an advertisement. Similarly, an employee should also "consider the source" when hearing either pro- or anti-union speech. A reasonable person should conclude that anti-union speech would be in support of the employer just as pro-union speech would be in support of the union. A reasonable person would understand this regardless of whether a consultant was used by an employer. Disclosing a consultant relationship will not affect a reasonable person's inherent ability to "consider the source" and make a decision when hearing either pro- and anti-union information.

Further, an employer using the services of a consultant has no impact or affect on the employee's ability to vote. Regardless of whether a consultant is used or not, an employee still has the choice to vote for, or against, unionization, and the discretion to weigh the evidence before making a decision.

Consultant use is also not "underreported" as current reporting is made in accordance with the advice exemption of the LMDRA. The reporting of consulting arrangements is not "underreported" simply by virtue of compliance with Section 203(c) of the NLRA. Consulting use would be "underreported" if consultants and employers were failing to report consulting agreements that should be reported pursuant to the current interpretation of section 203(c) of the LMDRA.

The NPRM also impermissibly intrudes on protected attorney-client privilege. Section 29 U.S.C. 434 states clearly and unequivocally:

"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."

Black's Law Dictionary, 6th Ed., 1990 defines "[a]ttorney-client privilege" as "[i]n law of evidence, client's privilege to refuse to disclose and to prevent any other person from disclosing confidential communications between him and his attorney. *Such privilege protects communications between attorney and client made for purpose of furnishing or obtaining professional legal advice or assistance*." (Emphasis added).

The above statute is clear and unambiguous and the NPRM is in clear contravention of this authority.

The proposed amendment to LM-20, specifically under section 10 "Terms and conditions," is a disclosure of protected attorney-client communications. In this regard, the NPRM requires disclosure as to the reason for the agreement between employer and client and what the agreement is. This is, of course, protected communications between an attorney and client. Further, if any privileged communication is waived, then arguably *all* of the communications between an attorney and client are waived as well. Fort James Corp v. Solo Cup Co., 412 F.3d 1340 (2005; In re Echostar Communications Corp., 448 F.3d 1294 (2006). If the NPRM are adopted, then conceivably any communications between an employer and its attorney will not be privileged by virtue of filing the LM-20 form. Certainly, this is impermissible and certainly it is not the intent of Congress to waive the attorney-client privilege in labor settings.

For the above reasons, AAA Life Insurance Company respectfully requests that the NPRM regarding section 203(c) of the LMRDA not be adopted.

Sincerely,

Jeff Korner
AAA Life Insurance Company