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VIA FIRST–CLASS MAIL AND ELECTRONIC MAIL

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

Re: Comments on Notice of Proposed Rulemaking on the "Advice" Exemption Applicable to the Reporting of Labor Consultant Persuader Activity under the Labor–Management Reporting and Disclosure Act, 76 Fed. Reg. 36178, Department of Labor, Employment Standards Administration (June 21, 2001), 26 CFR Parts 405 and 406, RIN 1215–AB79, 1245–AA03

Dear Mr. Davis:

These comments are submitted on behalf of the Service Employees International Union (SEIU) in strong support of the Department of Labor's Notice of Proposed Rulemaking (NPRM) concerning the interpretation of the "advice" exemption applicable to the reporting of labor consultant persuader activity required under Section 203 of the Labor–Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. Section 433, published at 76 Fed. Reg. 36178 (June 21, 2011), RIN 1215–AB79, RIN 1245–AA03. With 2.2 million members in the healthcare, public and property services sectors, the SEIU is the fastest growing union in the United States.

The Department of Labor (DOL or the Department) has proposed revising its interpretation of the "advice" exemption applicable to the filing of LM–10 Employer Reports and LM–20 Agreements and Activities Reports, pursuant to Section 203 of the LMRDA, which disclose agreements or arrangements between employers and labor relations consultants calling for the consultants to engage in activities intended to persuade employees concerning their rights to organize and bargain collectively. Under the proposal, the Department would narrow the scope of what constitutes "advice" that is exempt from reporting under Section 203, and thereby expand the circumstances in which employer–consultant persuader agreements must be disclosed. In addition, the DOL has proposed making revisions to Forms LM–10 and LM–20 needed to reflect its revised interpretation of the "advice" exemption.

Under the Department's proposal, "advice" that would be exempt from disclosure under the statute would refer to an oral or written recommendation made by a consultant to an employer regarding a decision or a course of

conduct, such as counseling the employer or employer representatives on what the employer may lawfully say to employees, ensuring the employer's compliance with the law, and providing guidance on NLRB practice or precedents. "Persuader activity" that would trigger reporting under the statute would refer to a consultant providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly of persuading the employer's employees concerning their rights to organize or bargain collectively.

Examples of persuader activities that would trigger reporting under Section 203 include (without limitation) drafting, substantially revising, or providing an employer with a persuader speech, website content, audiovisual or multimedia presentation, or other material or communications of any sort, for presentation, dissemination, or distribution to the employer's employees; planning or conducting individual or group meetings designed to persuade employees; developing or administering employee surveys concerning union awareness or sympathy; coordinating or directing the activities of supervisors or employer representatives to engage in the persuasion of employees; developing employer personnel policies and practices designed to persuade employees; and coordinating the timing and sequencing of persuader tactics and strategies.

The Department would require the disclosure of all agreements or arrangements that, in whole or in part, would call for a consultant to engage in persuader activities, regardless of whether the consultant would also provide advice falling within the exemption under the agreements or arrangements. No disclosure would be required for an agreement or arrangement under which a consultant provided only advice to an employer.

The Department's proposed revised interpretation of the "advice" exemption represents an appropriate and necessary narrowing of its current overbroad interpretation of what kind of activity falls within the exemption. Under the current view, agreements or arrangements between an employer and consultant calling for the consultant to engage in persuader activity involving the employer's employees are exempt from disclosure as long as the consultant avoids direct contact with the employees being persuaded. This means that a consultant can engage in activity clearly intended to persuade an employer's employees about their organizing and collective bargaining rights without having to disclose the activity – as long as the consultant avoids face–to–face contact with the employees. This interpretation creates a huge loophole in the law resulting in the underreporting of consultant persuader activity that falls under Section 203.

As the NPRM addresses in detail, since the enactment of the LMRDA, there has been a tremendous rise in the number of labor consultants specializing in helping employers defeat union organizing campaigns (this is commonly referred to as the "union avoidance" industry), and in employers' use of such consultants to beat back organizing efforts and weaken unions. NPRM at *36185–*36186; Bronfenbrenner, K., "No Holds Barred–The Intensification of Employer Opposition to Organizing," EPI Briefing Paper # 235 (American Rights At Work Education Fund and Economic Policy Institute, May 20, 2009). One researcher estimates that the union avoidance industry grew from 100 management consulting firms in the 1960s to more than ten times that number in the 1980s, and that the industry is worth several hundred million dollars per year. NPRM at *36185–*36186; Logan, J., "The Union Avoidance Industry in the United States," 44 *British Journal of Industrial Relations* 651, 653–54 (December 2006). Although these management consultants engage in reportable activity, the Department's overbroad interpretation of the "advice" exemption permits them to avoid their disclosure obligations.

The DOL's proposed revised interpretation of the "advice" exemption would go a long way toward remedying the underreporting of consultant persuasive activity by adopting a common–sense approach to the meaning of the word "advice." The proposed revisions are appropriate, fully justified, and in fact, required in order to ensure that consultant persuader activity falling under Section 203 of the LMRDA is reported as required by law.

I. The Department's revised interpretation of the "advice" exemption is firmly rooted in the plain text of Section 203 of the LMRDA.

Section 203(a)(4)–(5) of the LMRDA provides that employers must disclose to the Secretary of Labor:

> any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person 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 through representatives of their own choosing, or undertakes to supply such employer with information concerning the activities of employees of a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding

and any payment (including reimbursed expenses) made pursuant to such agreements or arrangements, including in detail the date and amount of such payments, and the name, address, and position (if any) of the person to whom the payment was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made. 29 U.S.C. Section 433(a)(4)–(5) (emphasis added).

Section 203(b) of the LMRDA imposes a corresponding reporting and disclosure obligation on consultants retained by employers to:

> undertake[] activities where an object thereof is, *directly or indirectly* – (1) 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 (2) to supply an employer with information concerning the activities of employees of a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding.

29 U.S.C. Section 433(b) (emphasis added). Consultants retained by employers pursuant to such agreements or arrangements must also provide detailed statements of the terms and conditions of such agreements or arrangements, and receipts and disbursements of any kind resulting from their providing labor relations advice and services pursuant to the arrangements. *Id.*

Section 203(c) creates an exemption from the requirement to report with respect to agreements or arrangements for services of any person by reason of her/his giving or agreeing to

give "advice" to an 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 with respect to wages, hours or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. Section 433(c). "Advice" is not defined in the statute. Section 204 exempts attorneys from including in any report required to be filed "any information which was lawfully communicated to such attorney[s] by any of [their] clients in the course of a legitimate attorney–client relationship." 29 U.S.C. Section 434.

In light of the fact that Sections 203 is expressly intended to cover direct and indirect consultant persuader activity, the Department's current distinction between consultant persuader activity that involves face–to–face contact with employees (which is reportable) and consultant persuader activity that does not involve such contact (which is considered "advice" and, therefore, is not reportable) is illogical. Section 203 plainly covers all activity engaged in by consultants pursuant to an agreement or arrangement with employers for the purpose of persuading employees as to their rights to bargain and organize collectively, regardless of whether they do so "directly or indirectly." The new interpretation proposed by the Department, therefore, represents reasonable and common–sense reading of a statute intended to capture all consultant persuader activity.

II. Academic research and data reviewed by the Department in the NPRM demonstrate the tremendous growth in the "union avoidance" industry since the LMRDA was enacted, and the vast underreporting of consultant persuader activity stemming from the Department's overbroad interpretation of the "advice" exemption.

Citing extensive academic research that has been done concerning the union avoidance industry, the Department acknowledges the tremendous growth in the industry since the 1960s, and that between 71% and 87% of employers facing organizing campaigns retain labor consultants to assist with managing, organizing and running anti–union campaigns. NPRM at *36185–*36186; Bronfenbrenner, K., "No Holds Barred–The Intensification of Employer Opposition to Organizing," EPI Briefing Paper # 235 (American Rights At Work Education Fund and Economic Policy Institute, May 20, 2009); Logan, J., "'Lifting the Veil' on Anti–Union Activities: Employer and Consultant Reporting Under the LMRDA, 1959–2001," 15 *Advances in Industrial and Labor Relations* (Elsevier Ltd. 2007); Logan, J., "The Union Avoidance Industry in the United States," 44 *British Journal of Industrial Relations* (Blackwell Publishing Ltd./London School of Economics 2006); Logan, J., "Consultants, Lawyers, and the 'Union Free' Movement in the USA Since the 1970s," 33 *Industrial Relations Journal* (Blackwell Publishers Ltd. 2002).

In addition, the Department documents the vast underreporting of consultant persuader activity. Looking at the average number of National Mediation Board (NMB) and National Labor Relations Board (NLRB) representation petitions filed from 2005 until 2009, and based upon research demonstrating the prevalence of employer use of labor consultants to fight organizing campaigns, the Department estimates that approximately 2,600 consultant persuader agreements should have been filed pursuant to Section 203 each year from 2005 to 2009. However, the Department determined that an average of only 192 reports disclosing Section 203 agreements or arrangements were filed each year during this time period, representing only 7.4% of the number of reports than the Department would have expected. NPRM at *36186–*36187.

The Department also establishes the nexus between its expansive interpretation of the "advice" exemption and the underreporting of consultant persuader activity, as management

consultants have openly admitted to relying on the Department's broad interpretation to hide their persuasive activities from view. For instance, self–proclaimed union buster Martin Jay Levitt is quoted in the NPRM as saying:

> The law states that management consultants only have to file financial disclosures if they engage in certain kinds of activities, essentially attempting to persuade employees not to join a union or supplying the employer with information regarding the activities of employees or a union in connection with a labor relations matter. Of course, that is precisely what anti–union consultants do, have always done. Yet I never filed with Landrum–Griffin in my life, and few union busters do....As long as [the consultant] deals directly only with supervisors and management, [the consultant] can easily slide out from under the scrutiny of the Department of Labor, which collects the Landrum–Griffin reports.

NPRM at *36187–*36188, *quoting* Martin Jay Levitt (with Terry Conrow), *Confessions of Union Buster* (New York: Crown Publishers, Inc., 1993) at 41–42.

In addition to helping guarantee that employers and consultants comply with their obligations to comply with Section 203, the Department notes that limiting the exemption would help ensure that employees whose employers are fighting organizing campaigns get access to information that they have the right and need to know, namely, that their employers have hired third–parties to help them resist the campaigns and the full cost of this third–party activity. As the Department correctly notes, this information is particularly important for workers to have in light of the fact that employers often characterize unions as third parties who unnecessarily interfere in the relationship between employers and employees. Further, as the Department rightly recognizes, labor organizations covered by the LMRDA are legally required to identify the date, purposes and amount of all expenditures, including but not limited to expenditures related to organizing, through the submission of LM–2, LM–3 and LM–4 annual financial disclosure reports, which are publicly available. In light of the significant burdens imposed on unions to track and disclose all of their activity, it is only a matter of basic fairness for the Department to insist that employers and consultants whose activity falls under Section 203 comply with their own reporting and financial disclosure obligations.

For these reasons, SEIU strongly supports the Department's revised interpretation of the "advice" exemption, and urges the Department to move forward with implementing the proposed changes expeditiously.

Respectfully submitted,

Judith A. Scott
General Counsel