Buchanan Ingersoll & Rooney PC
Attorneys & Government Relations Professionals

One Oxford Centre
301 Grant Street, 20th Floor
Pittsburgh, PA 15219-1410
T 412 562 8800
F 412 562 1041
www.buchananingersoll.com

David J. Laurent
412 562 1857
david.laurent@bipc.com

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

Re: Rosebud Mining Company's Opposition to the Proposed Rules Regarding the Interpretation of the "Advice" Exemption
RIN 1245-AA03

Dear Mr. Davis

I represent Rosebud Mining Company ("Rosebud"), which is a privately held Pennsylvania company that mines and sells bituminous coal in Pennsylvania and Ohio. Rosebud employs approximately 1450 employees. For the reasons set forth below, Rosebud submits that the Office of Labor-Management Standards of the Department of Labor ("DOL") should not adopt the rules it proposed on or about June 22, 2011 titled Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption ("Proposed Rules").

I. The Proposed Rules rest on a faulty premise. DOL reasons that a new, more narrow interpretation of the "advice" exemption found at 29 U.S.C. §433 (c)[1] is needed to implement Congress' intent. The "advice" exemption, however, has been applied in a relatively consistent fashion since the statute was passed in 1959. Had Congress disagreed with that long-standing interpretation, it surely would have amended the statute by now to express its desire for a more narrow interpretation.

[1] 29 U.S.C. §433(c) states as follows: "Nothing in this section shall be construed to require any employer or other person 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 with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder."

II. The Proposed Rules rest on a faulty textual analysis of the word "advice." DOL reasons that the current interpretation of the word "advice," as meaning oral or written information that the employer is free to accept or reject, does not comport with the plain meaning of the word "advice." DOL explains that "advice" is "ordinarily understood to mean a recommendation regarding a decision or a course of conduct" and, therefore, "this common construction of 'advice' does not rely on the advisee's acceptance or rejection of the guidance from the advisor." 76 FR 36184. DOL's rationale is mistaken in two respects.

A. By its very nature, a "recommendation" is something the recipient is free to accept or reject. Therefore, whether one has the ability to accept or reject the information is central to determining whether it is "advice."

B. While the DOL correctly states that whether something is "advice" should not turn on whether it actually is accepted or rejected, that point is irrelevant because the current test does not depend on whether the "advice" is accepted or rejected. Instead, the current test - and the proper inquiry under the statute - is whether the actor is giving "advice," *i.e.*, whether the actor is giving a recommendation that the recipient is free to accept or reject. In short, what the recipient does with the information should not influence the determination of whether the information constitutes "advice."

III. The Proposed Rules wrongly conflate the concepts of persuader activity and "advice" so that both turn on the substance of the information conveyed and the exemption no longer has any meaning or purpose. The statute requires reporting when a person "undertakes activities where an object thereof, directly or indirectly, is to persuade employees," but exempts "giving or agreeing to give advice to such employer." 29 U.S.C. §§433(a)(4) and (c). By definition, an exemption is a limited circumstance in which one can do an otherwise regulated act. *See* Merriam-Webster, which states that, exempt means "to release or deliver from some liability or requirement to which others are subject." Thus, the "advice" exemption necessarily should encompass a form of persuader activity that, in the absence of the exemption, would require reporting.

Nonetheless, under the Proposed Rules, only the transmission of information that is wholly devoid of anything relating to persuading employees will fall within the "advice" exemption; however, if the communication is devoid of anything that that could be considered as intended to persuade employees, then it would not fall within the scope of the statute and there would be no need for an exemption. Therefore, the Proposed Rules violate the well-settled maxim of statutory construction that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley v. U.S.*, 556 U.S. 303 (2009).

IV. DOL's proposed interpretation of the "advice" exemption would create an unreasonable and unworkable standard. DOL acknowledges that the "advice" exemption encompasses a lawyer who tells a client that portions of a letter the client wants to send to its employees would violate the National Labor Relations Act because they constitute illegal threats; however, under the Proposed Rules, the lawyer would cease providing "advice" and begin engaging in persuader activity if the lawyer took the next logical step and revised the letter to eliminate the threats or recast the statements so as to make them lawful. This dichotomy makes no sense.

As a practical matter, there is no material difference between telling a client that it cannot lawfully say X, but adding that the client lawfully could say Y, or revising a draft letter to illustrate those very same recommendations. Indeed, a core part of the practice of law is revising documents for clients to render them compliant with the law and both the oral and written communications would be protected as the advice of counsel under the attorney-client privilege. Therefore, the Proposed Rules would establish a nonsensical standard that ignores the realities of how legal advice is provided.

V. The Proposed Rules will cause law firms to avoid representing employers during organizing campaigns, which will deprive employers of competent counsel and likely result in the commission of avoidable unfair labor practices. If law firms are required to report detailed financial information to DOL for doing as little as revising or drafting documents for clients regarding union representation matters - traditional areas of legal practice that the Proposed Rules will recast as persuader activity - many law firms will choose to forego that line of business entirely, rather than report. Therefore, many employers will have no choice but to wade into organizing campaigns without competent legal advice on what they can and cannot say and do. Without adequate guidance in this complex area, many employers will unknowingly commit unfair labor practices that easily could have been avoided.

For all of these reasons, Rosebud opposes the adoption of the Proposed Rules. If you have any questions, please contact me.

Very truly yours,

David J. Laurent