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September 21, 2011

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

Re: Proposed Rule Labor-Management Reporting and Disclosure Act: Interpretation of the "Advice" Exemption (RIN 1245-AA03)

Dear Mr. Davis:

On June 22, 2011, the Department of Labor (Department) issued a Proposed Rule to revise Form LM-10 *Employer Report* and LM-20 *Agreements and Activities Report,* which are required under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The proposed revisions include reinterpretation of the "advice" exemption of the LMRDA. NPRA, the National Petrochemical & Refiners Association, submits the following comments on behalf of its members.

NPRA is a trade association representing high-tech American manufacturers of virtually the entire U.S. supply of gasoline, diesel, jet fuel, other fuels and home heating oil, as well as the petrochemicals used as building blocks for thousands of vital products in daily life. NPRA members make modern life possible and keep America moving and growing as they meet the needs of our nation and local communities, strengthen economic and national security, and provide jobs directly and indirectly for more than 2 million Americans.

Based on our review, NPRA states that the proposed rule is contrary to the original purpose and spirit of the LMRDA. It is also in conflict with the National Labor Relations Act (NLRA), interferes with attorney-client privilege, is unconstitutional and does not comply with standard requirements of regulatory procedures for rulemaking.

In its review of the proposed rule, NPRA determined a number of areas to highlight:

1. <u>The Proposed Rule will Inhibit Labor and Employee Relations Advice to Employers</u>

The proposed rule would deny employers access to legal advice and counsel. By removing the advice exemption to the reporting requirements, the Department would force disclosure

of confidential agreements between employers and law firms and/or consultants. This would have a grievous effect on attorney-client privilege and employers' right to counsel.

If the rule is enacted in its present form, law firms would be reluctant, or outright refuse, to advise employers, as by doing so, they would violate their ethical obligation to maintain attorney-client privilege.

The proposed rule also does not make a distinction as to when assistance is provided. NPRA questions whether legal advice regarding non-organizing activities would be subject to disclosure under the proposed rule.

2. Trade Associations as Persuaders

NPRA notes that the overly broad definition would pertain to the work of trade associations. Under the proposed rule, a trade association's activities such as proposed positive employee relations webinars or having speakers at a conference discussing response to union organization campaigns, makes the trade association a *de facto* persuader and, thus, mandated to report all labor relations services for all its members.

3. The Proposed Rule is Contrary to Both the LMRDA and the NLRA

The proposed rule is beyond the scope of the LMRDA, as it seeks to totally redefine the "advice" exemption of the LMRDA by mandating that any "advice" from law firms and other organization to be reportable "persuader activity."

When Congress enacted the LMRDA in 1959, it did so with the intent to identify those parties that worked in the background to spy upon and/or disrupt union organizing activities. The words "hidden," "surreptitious," and "masquerading as legitimate labor consultants," appear in the original language of the LMRDA. The spirit of the LMRDA was to ensure that employees and unions could have such third party players unmasked and indentified. The original LMRDA did not state that those parties consisted of attorneys or consultants who were advising employers.

As stated earlier, the reporting requirement in the proposed rule is not confined to advice concerning union organization. The proposed language states that the persuader activity rule would apply to activities that, directly or indirectly, "encourage employees to vote for or against union representation, to take a position with respect to collective bargaining proposals, or refrain from concerted activity (such as a strike) in the workplace." This proposed language is not what Congress had envisioned to regulate when the defined "persuader" activities in the LMRDA in 1959.
With respect to the National Labor Relations Act (NLRA), the proposed rule conflicts with section 8(c) of the NLRA, as well as the section 203(f) of the LMRDA with mandates that the Department uphold the rights of employees under Section 8(c) of the NLRA.[1]

[1] 29 U.S.C. §§158(c). 433(f)

Section 8 (c) of the NLRA states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

4. Implications for Smaller Businesses

Enacting this rule will require many smaller businesses to reevaluate their ongoing relationships with labor counsel. For some of these businesses, the choice will be made to go it alone and hope for the best.

The result of such decisions would be a significant rise in the number of unfair labor practice charges, as well as a related increase in elections delays, re-run elections and bargaining orders. The delays and confusion would affect employer-employee relations and add onto the workload for the staff of both the National Labor Relations Board (NLRB) and the Department.

5. Impact on Employees

The Department needs to realize that an unintended consequence of the proposed rule would be the denial of employee access to information that they would need in order to make an informed decision with regard to union representation. This would be true for certification, collective bargaining, and decertification. The proposed rule will discourage what the Supreme Court has termed the desirable Congressional policy of "favoring uninhibited, robust, and wide-open debate" on matters relating to unionization, so long as that does not include unlawful speech or conduct.[2]

6. There is No Reasonable Justification for the Proposed Rule

The Department's current Interpretive Manual for the LMRDA has not changed since 1962.

NPRA takes this to mean that the current interpretation is well-established, relied upon and accepted. The Department has not identified any credible reason for the proposed changes. The Supreme Court has rejected attempts by federal agencies to change statutes that are generally accepted without those agencies providing credible reason for doing so.

Further, the Department fails to demonstrate any harm as a result of the traditional attorney-client advice which would justify the changes to the LMRDA.

[2] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008)

7. Violation of U.S. Constitution

The proposed rule violates employers' freedom of speech, expression and association rights.

NPRA brings to the attention of the Department the fact that advice in the labor relations area is not only advisable and necessary, it is legally protected.

> It must be emphasized that the rights with which we are concerned are fundamental First and Fourth Amendment rights. That labor relations employers have the right to speak to attorneys regarding their business labor relations, to associate with attorneys for lawful legal advice, and to have private affairs of a lawful nature protected from government intrusion is beyond dispute.

Price v. Wirtz, 412 F.2d 647, 654 (5th Cir. 1969) (Dyer, Circuit Judge, dissenting)

In the proposed rule, it states that the LMRDA provides sanctions, both civil and criminal. NPRA reminds the Department that courts have consistently struck down criminal laws as unconstitutionally vague if they "fail [] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute."[3]

The vagueness of the proposed rule, especially in the wording of the expansion of the definition of persuasion to cover policy revisions, seminars and training, are so unclear that compliance would be almost impossible. If the Department wished to establish penalties under the proposed rule, it would almost certainly be struck down as unconstitutional.

8. Violation of Executive Orders and Regulatory Flexibility Act

The proposed rule violates Executive Order (EO) 13563, issued by President Obama earlier this year. The EO, entitled "Improving Regulation and Regulatory Review" states that all Executive Branch agencies ensure that regulations "allow for public participation and an open exchange of ideas….must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends…must take into account benefits and costs, both quantitative and qualitative.."

The proposed rule also violates EO 12866 entitled "Regulatory Planning and Review" issued by President Clinton in 1993. This EO requires all agencies to assess all costs and benefits of available regulatory alternatives. Such assessment does not appear in the proposed rule.

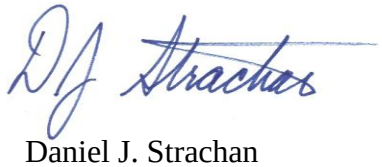
Additionally, the proposed rule violates the Regulatory Flexibility Act of 1960, wish requires agencies to consider the impact of proposed rules on small entities, analyze effective alternatives that minimize small entity impacts, and make initial analyses available for public comment.[4] Such analysis fails to appear in the proposed rule.

[3] *Papechristou v. City of Jacksonville,* 405 U.S. 156, 162 (1972).
[4] 5. U.S.C. at §§ 603, 604.

For the above-named reasons, NPRA objects to the Department's proposed rule and requests that the Department withdraw the proposed rule. Further, NPRA requests that if the proposed rule is withdrawn and reintroduced at a later data, that a fair analysis be completed using the rulemaking standards cited in our comment before it is proposed.

NPRA looks forward to continuing an open, constructive dialogue with the Department of Labor on this and other labor issues. If you have any questions, or if NPRA can be of any assistance, please contact me at (202) 552-8475 or at dstrachan@npra.org

Sincerely,



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