United Mine Workers of America
Comments on the Department of Labor's Proposed Rule:
Labor-Management Reporting and Disclosure Act;
Interpretation of the "Advice" Exemption
RIN 1245-AA03

The United Mine Workers of America (UMWA or Union) is pleased to offer these comments on the above-captioned proposed rule of the Office of Labor-Management Standards of the Department of Labor (DOL or Department).

The UMWA supports the proposed rule and its appropriate narrowing of the Department's interpretation of the "advice" exemption to disclosure required by the Act. The proposed rule would more precisely conform the Department's interpretation of the Act to the intent of Congress, would shed light on the nature and extent of the unethical activities of paid union-busters during organizing campaigns, and would provide employees information necessary to informed decision-making about their protected choice of whether to engage in collective bargaining. The proposed rule would promote the public and employees' prompt receipt of vital information about the unethical activities of union-busting middlemen, which is precisely what Congress intended. While the UMWA fully supports the proposed rule, we respectfully suggest that the Department strengthen it with the addition of a rigorous enforcement mechanism and more stringent limitations on electronic filing hardship exemptions.

I. The Proposed Rule Implements Congressional Intent

According to the preamble of the LMRDA, Congress passed the Act because, "there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct." 29 U.S.C.A. § 401(b). "Labor relations consultants," among others, are identified has having caused these breaches. Id. The legislative history of the Act is even more direct on this point, where members of Congress described the importance of public disclosure of employer expenditures made to "union busting middlemen" by stating

> However the expenditures are made, they are usually surreptitious because of the unethical content of the message itself. The committee believes that this type of activity by or on behalf of employers is reprehensible. These expenditures may or may not be technically permissible under the national labor relations or railway labor acts, or they may fall in a gray area. In any event, where they are engaged in they should be exposed to public view, for if the public has an interest in preserving the rights of employees then it has a concomitant obligation to insure the free exercise of them.

S. Rep. No. 86-187 (1956). Because the interpretation of the Act set forth in the proposed rule appropriately narrows the "advice" exception and exposes to public view

the activities of union busting middlemen, it serves the intended purpose of the Act's disclosure requirement.

The specific changes set forth in the proposed rule would ensure that the Department's interpretation of the Act is in harmony with Congressional intent and common sense. The LMRDA states that employers and consultants are not required to report a relationship that involves no more than "advice." 29 U.S.C. §433(c). The current DOL interpretation of the term "advice" so broadly construes this exemption that it effectively encompasses nearly all activity short of direct contact with employees. LMRDA Interpretive Manual, §265.0005. The present interpretation of "advice" does not match the goals stated in the Act and reflected in its legislative intent, nor does it comport with the generally accepted meaning of the word "advice." The proposed interpretation of advice, to encompass any "recommendation regarding a decision or course of conduct" is more clear and harmonious with the purpose of the reporting requirement as set forth in the Act. Requiring disclosure where, "the agreement or arrangement, in whole or in part, calls for the consultant to engage in persuader activities" better addresses the concerns Congress expressed in the Act and explained in its legislative history.

a. The Proposed Rule Would Expose Consultant Activities to Employees

One of the most frequently used campaign tactics employed by union busting middlemen is to depict the union as an outsider trying to force its way into the employment relationship. The UMWA has first-hand experience with this sort of behavior. For example, during an organizing campaign at Fola Coal, LLC, consultants used this tactic to great effect. *See* NLRB Case No. 09-RC-18255 (2009). Those consultants produced the employer's anti-union campaign literature, drafted the speeches, and coached management on how to hold captive audience meetings. The consultants' campaign repeatedly and consistently accused the union of being an outsider. Because the consultants were not required to disclose their activities, employees had no way to know that a paid third-party concocted and orchestrated dissemination of the anti-union messages that bombarded them in the workplace for months on end.

Despite statistics demonstrating that union workers receive higher pay and better benefits than their non-union counterparts, union busting firms use carefully crafted campaigns to mislead workers into believing that collective bargaining is not in their best interest. *See* Charig Mehta and Nik Theodore, *Undermining the Right to Organize: Employer Behavior during Union Representation Campaigns*, America Rights at Work, at 14 (2005). The current rules encourage consultants to use deception and secrecy to bust unions. By requiring that employers disclose their relationships with union busting middlemen, the proposed rule would allow employees to scrutinize the source of the bogus information they receive about the merits of collective bargaining and let them decide for themselves if they want a union. Moreover, it would allow the employees to decide which party in the organizing campaign is the true outsider: a democratic federation of their fellow workers or paid outside consultants and attorneys.

Supreme Court Justice Louis Brandeis once wrote, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants." Louis Brandeis, What Can Publicity Do? Harper's Weekly Dec. 20, 1913. Wide varieties of individuals and groups have an interest in knowing the activities of anti-union consultants during organizing campaigns. The government, the public, and academics would certainly benefit from prompt access to the information disclosed to the extent Congress intended. However, it is perhaps most critical that such information reaches employees confined in workplaces under assault by the union-busters' propaganda campaigns. Academics and government regulators know or should know of the enormous influence wielded by anti-union consultants during the run-up to the union elections. Many employees and other members of the general public do not. This is the direct result of the Department's failure to implement the will of Congress by allowing the advice exemption to effectively nullify the disclosure requirement as it applies to union-busting middlemen and failing to incorporate modern technology into the reporting and disclosure process.

b. The Revised Form Promotes Meaningful Disclosure

The form presently used for reporting union consulting activity, the LM-20, is of severely limited value to the collection, disclosure and understanding of the activities of union busting middlemen. Despite clear instructions on the current form regarding specificity in responses, union busters rarely, if ever, provide the required information. For example, one filing contained the following description of a union buster's activities, "provide[d] labor relations advice to such matters as wages, benefits, and the collective bargaining process." Filing No. C-655-372490. Vague, and frankly inaccurate, statements such as this allow union busters to obscure their level of involvement in a union busting campaign and the true nature of their reprehensible activities.

The proposed rule would improve not just the quantity of reporting but also the quality. It would revise the LM-20 and require union busters to fill out a simple checklist. The proposed checklist will eliminate the union busters' present ability to deceptively hide their involvement behind unclear or incomplete answers. The new checklist would provide employees and the public with useful information about the nature and extent of the consultant's participation in anti-union campaigns.

c. Electronic Filing Facilitates Prompt Disclosure

The current system for the processing of disclosure reports, when it results in disclosure at all, is far too slow. Consultants fill out paper forms that are sent by regular mail to the Department of Labor. Often, the consultants leave the forms incomplete. If any real information is disclosed at all, it is not disseminated to any audience until Department employees process the forms. This is inevitably too slow to provide employees any meaningful information about union-busting activities in their workplace and their employers' financing of the same. There is no reason for such delay in the information age.

The proposed rule would create a new electronic filing system. The forms would contain error checking and trapping functions to ensure that all the forms are complete before submission. Taken together, these requirements will make it more difficult for union busting middlemen to evade their statutory obligation to provide information about their unethical conduct quickly and accurately. This will allow the public to understand the true nature of the billion dollar union busting industry and permit workers to make an informed decision regarding their choice in an election.

II. Improving the Effectiveness of the Proposed Rule

a. Enforcement

Even if the advice exemption is appropriately narrowed, Congress's intention that union-busting activities be exposed to public view will not be realized absent vigorous enforcement of the disclosure requirement. Several years ago, while attempting to organize miners at Brody Coal Mining, LLC, a union-busting consultant brazenly flouted the reporting requirements of the Act. *See* NLRB Case No. 09-RC-18217 (2009). Despite the fact that the consultant directly addressed employees, engaged in surveillance of union meetings, and videotaped union organizers, he refused to file his LM-20 form. Eventually the UMWA filed a complaint with the DOL. The DOL sided with the union and ordered the consultant to file promptly. However, the DOL did not impose any sanction on the consultant for breaking the law. Furthermore, the consultant did not file the form until October 24, 2008 - nearly a year and a half after the Union signed a contract with the employer. Filing No. C-655-372490. Where there are no real penalties for non-compliance, it cannot be expected that unethical purveyors of deception will voluntarily comply with the process designed to expose their activities.

While the proposed rule contains many laudable new reporting requirements, it does not solve the fundamental problem that the UMWA faced at Brody Coal Mining. The proposed rule would greatly expand the number of consultants who are required to file, but it would not provide any new provisions designed to compel compliance. Without meaningful penalties to ensure compliance, the UMWA does not believe that the important information contained in the reports will reach employees in time for them to make an informed decision.

b. Possible Abuse of Electronic Filing Hardship Exemptions

The proposed rule contains hardship exemptions for e-filing of the consulting forms. It contains a one-time exemption for, "unanticipated technical difficulties" and a continuing hardship exemption if e-filing cannot be achieved without, "undue burden or expense." 76 F.R. 36178, 36193-36194.

While some exemptions may be justifiable, the hardship exemptions in the proposed rule are far too broad. For example, the continuing hardship provision allows a consultant to request a hardship exemption for up to one year. With the near ubiquity of computers with Internet access in the modern workplace and the relative sophistication of

union-busting firms, it is hard to believe that any union-buster could justify an entire year of hardship exemptions. Beyond the length of the exemptions, the proposed rule does not provide sufficient guidance on what is required to demonstrate true hardship. For example, the proposed rule does not explain what sorts of "unanticipated technical difficulties" justify an exemption. It also does not explain what level of burden or expense would justify a continuing hardship. The UMWA suggests that the Department not excuse disclosure absent a compelling demonstration of serious technical difficulty, burden, or expense.