Portland Cement Association

September 21, 2011

VIA Electronic submission to regulations.gov

Re: Comments of Portland Cement Association re RIN 1215-AB79 and RIN 1245-AA03, *Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption*

Dear Sir/Madam:

I am writing to offer the comments of the Portland Cement Association (PCA) in response to the above-referenced Notice of Proposed Rulemaking (NPRM) published in the *Federal Register* on June 21, 2011, at 76 Fed. Reg. 36178.

PCA represents 25 cement companies, operating 97 manufacturing plants in 36 states, with distribution centers in all 50 states. PCA members account for 97.1 percent of domestic cement making capacity. Because of its extreme strength, long-lasting durability, and economical cost (especially when compared with other building materials that could be used alternatively) cement is an indispensible component in constructing and maintaining our Nation's infrastructure. The following is a general breakdown of the importance of cement and the extent of its use throughout construction: commercial and industrial buildings (23 percent); highways, streets and bridges (21 percent); housing (19 percent); public building (9 percent); maintenance and repair (7 percent); water and waste systems (7 percent); other (8 percent). Cement is made from containing calcium, silicon, aluminum, and iron. Portland cement[1] accounts for approximately 93 percent of the cement production in the United States. Masonry and blended cement account for the remaining 7 percent. PCA's members employ more than 13,000 persons in the manufacturer of cement. As employers that would be directly affected by the proposed reinterpretation and the regulatory obligations which it would impose, PCA's members have a significant interest in this rulemaking and its outcome.

According to the NPRM, the Department of Labor's (DOL) Office of Labor-Management Standards (OLMS) is proposing to revise Form LM-10 and Form LM-20 and the related instructions for each form in order "to make them more user-friendly and require more detailed reporting on employer and consultant agreements. 76 Fed. Reg. at 36178. The NPRM further explains that DOL is also proposing to reinterpret its *long-standing* interpretation of the "advice" exemption established by section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 433:

[1] "Portland cement" is not a brand name. It is a generic term used to describe a specific type of cement.

> by limiting the definition of what activities constitute "advice" under the exemption, and thus expanding those circumstances under which reporting is required by employer-consultant persuader agreements.

Id.

The following summarizes the positions and concerns which PCA has regarding the proposed reinterpretation and form revisions DOL is proposing to make:

- DOL has failed to articulate a reasoned and rationale justification for the need to revise its current interpretation of the "advice" exemption.
- The legislative history does not support the proposed narrowing of the advice exemption.
- The advice exemption would effectively be nullified under the proposed reinterpretation.
- The proposed reinterpretation of "advice" would embrace benign activities which Congress did not intend to cover as reportable persuader activities.
- DOL has failed to provide the requisite reasoned analysis to support the proposed reinterpretation.

COMMENTS

A. DOL has failed to articulate a reasoned and rationale justification for the need to revise its current interpretation of the "advice" exemption. DOL' rationale for the need to revise its current interpretation of the "advice" exemption is expressly set forth on page 36182 of the NPRM's *Federal Register* notice, as follows:

> We now believe that the Department's current interpretation of the advice exemption **may** be overbroad, and **could** sweep within it agreements and arrangements between employers and labor consultants that involve certain persuader activity that Congress **intended** to be reported under the LMRDA.

(Emphasis supplied.)

While federal agencies are not proscribed from changing their past policies as a general proposition, they are nonetheless subject to well-established limitations when they do so. As the Court of Appeals for the D.C. Circuit has advised on numerous occasions: "An agency acts arbitrarily and capriciously if it 'reverse[s] its position in the face of a precedent it has not persuasively distinguished.'" *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 347 F.3d 1177, 1181 (D.C. Cir. 2204), quoting *Louisiana Pub. Ser. Comm'n v. FERC*, 184 F.3d 892, 897

(D.C. Cir. 1999). Likewise, "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis. . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.* Co, 463 U.S. 29, 57 (1983).

According to the NPRM's stated "need for a revised interpretation," 76 Fed. Reg. at 36182, DOL does not claim that its current interpretation **is** too broad; only that it **may** be. Likewise, DOL is not claiming that the current interpretation **is sweeping** within the advice exemption activities that Congress intended to be reported; only that there is a possibility that such sweeping **could** occur. Thus, according to the NPRM's reasoning, the only way to prevent the possibility of this from occurring is to contract the current interpretation of advice so that more activities become subject to reporting.

In effect, DOL is implicitly stating that, for the last 49 years, the DOL has **knowingly not enforced** the law as Congress had intended; that during the past 49 years DOL has knowingly permitted countless numbers of activities which should have been reported to go unreported. Aside from the fact that the making of such an admission by DOL (or by any government agency) is in-and-of-itself extraordinary, in this case the record demonstrates that DOL's position is arbitrary, if not irrational.

If, as the NPRM contends, the Secretary's current interpretation has long been inconsistent with statutory intent, it is reasonable to expect that the courts which have had the opportunity to review the current interpretation would long ago have found the Secretary's current interpretation to be unreasonable and directed it to be changed. Obviously, that has not happened.

The NPRM errs by downplaying the significance of the DC Circuit's decision in *International Union, United Automobile Workers v. Dole*, 869 F.2d 616 (DC Cir. 1989). The NPRM suggests that the sole reason the court upheld "the Secretary's long-standing interpretation" was the court's recognition of the Secretary's "right to shape her enforcement policy to the realities of limited resources and competing priorities." 76 Fed. Reg. at 36181. By this assertion, the NPRM thus is effectively claiming that, in *International Union, United Automobile Workers v. Dole, supra,* the DC Circuit concluded that, as a matter of law, it is legally permissible for the realities of an agency's limited resources and competing priorities to take precedence over the agency's fundamental obligation to enforce the law as Congress intended; that, because of the DOL's limited resources and competing priorities, the DC Circuit therefore excused DOL from having to interpret and enforce the advice exemption in the more exacting way that the NPRM is now claiming Congress had long-ago directed.[2] PCA disagrees.

The NPRM inextricably ignores the over-riding fact that, in order for the DC Circuit to have even considered DOL's "limited resources and competing priorities," it was fundamentally necessary for the court to have first considered whether the current interpretation was reasonable and consistent with the statute's intent. Clearly, that is the issue that ultimately controls the

[2] DOL is certainly welcome to make this argument to the DC Circuit. However, it is unlikely that the DC Circuit would embrace the argument and concur that was what it held when it decided *International Union, United Automobile Workers v. Dole.*

validation of DOL's interpretation of the advice exemption. Clearly, too, the DC Circuit understands this and conducted that analysis. Therefore, *International Union, United Automobile Workers v. Dole* stands for a broader, more fundamental, proposition than the NPRM claims at 76 Fed. Reg. 36181. Contrary to what the NPRM implies, the DC Circuit upheld the Secretary's current interpretation because (but only *after*) the court concluded that the current interpretation is reasonable and, as a matter of law, consistent with Congressional intent ("Recognizing the Secretary's right to shape her enforcement policy to the realities of limited resources and competing priorities, *and comprehending her ruling on advice to involve no volte face from longstanding statutory definition and interpretation, we reject the challenge to her ruling*." 869 F.2d, *supra* at 620 (emphasis supplied)).

Additional evidence of the NPRM's failure to articulate a reasoned and rationale justification of a need to revise the current interpretation is provided by DOL's rescission of its 2001 proposal to revise the current interpretation. While the NPRM cites to the proposal and its rescission, 76 Fed. Reg. at 36181, it wisely does not cite to the 2001 proposal in the section of the NPRM discussing the need for the revised interpretation, which begins on 76 Fed. Reg. at 36182, and instead discussed both the 2001 proposed revision and rescission only as part of the NPRM's discussion of the history of DOL's interpretation of the advice exemption. 76 Fed. Reg. 36181.

In spite of the NPRM's effort to downplay the significance of the 2001 proposed reinterpretation and its subsequent rescission, both are extremely relevant to the instant proposal and, indeed, demonstrate not only that a revision is not necessary but also demonstrate that DOL is offering virtually the same deficient justification now as it did in 2001. Indeed, a side-by-side comparison of the 2001 *Federal Register* notice announcing the proposed revised statutory interpretation, 66 Fed. Reg. 2782, with the instant proposal, reveals that the current NPRM is essentially a reprint of the 2001 preamble, including the background and alleged need discussions, which as essentially cut-and-pasted statements taken directly from the 2001 notice.

The NPRM has also failed to demonstrate that anything of substance concerning labor consultant activities has changed since the 2001 rescission. In particular, the NPRM has failed to demonstrate that the activities now being engaged in by labor consultants are substantively different from the 2001 activities that labor consultants were engaging in. Accordingly, the reasons which DOL cited to explain the evidentiary inadequacy of the 2001 proposed reinterpretation are just as relevant and applicable to the current proposal and provide equally compelling reasons why the reinterpretation now being proposed should also be rescinded. As the 2001 notice of rescission stated without qualification:

> Upon review and reconsideration of the revised interpretation, the Department has determined that *the revision is not warranted or justified. The evidence and argument presented in the notice of January 11, 2001 is insufficient to support the conclusion that the interpretation of the term ''advice'' taken since 1962 is inconsistent with the ordinary understanding of that term or that it is inconsistent with the intent of the LMRDA reporting requirements*. See also *International Union, UAW* v. *Dole,* 869

> F.2d 616, 618–620 (D.C. Cir. 1989) (interpretation taken since 1962 is a permissible interpretation of the statute).

66 Fed. Reg. 18864 (emphasis supplied).

While the current NPRM lacks such requisite evidence, it attempts to bypass DOL's previous finding of the insufficiency of its evidentiary support, by citing to "[c]ontemporary research in the industrial relations arena," 76 Fed. Reg. at 36185, which the NPRM claims:

> provides ample support for the conclusion that the consultant industry has mushroomed, and the use of consultants by employers to defeat union organizing efforts has similarly proliferated in recent years.

Id. [3]

Because all of these studies were conducted by advocates of organized labor, serious questions have to be raised concerning the objectivity of these studies as well as the merits and reliability of their conclusions, which the NPRM fails to resolve.[4]

More importantly, PCA has serious questions regarding the relevancy of the conclusions for which the studies have been cited by the NPRM. The fact research shows that employers' use of labor consultants "has mushroomed," and/or that "the use of consultants by employers to defeat union organizing has similarly proliferated," does not, in-and-of-itself, translate into proof that the activities in which those labor consultants have been engaging are, in fact, the activities that Congress intended to be reported. The NPRM has certainly provided no details concerning the specific activities which, based on the research, have mushroomed and resulted in unions loosing elections.

The NPRM's analysis of representation cases and LM-20 reports, discussed on 76 Fed. Reg. 36186, also fails to prove that the current interpretation is not working as Congress had intended, or prove that a significant underreporting problem exists, as the NPRM also claims. *Id.* However, even if the use of labor consultant services has increased, the plain and simple fact is this: if the activities being engaged in by labor consultants do not qualify as reportable activities,

---

[3] "Contemporary" is defined by the Merriam-Webster on-line dictionary, http://www.merriam-webster.com/dictionary, as "happening, existing, living, or coming into being during the same period of time; simultaneous." Of the "contemporary research cited by the NPRM at 76 Fed. Reg. 36185-186, only one study was published as recently as 2009. One was published in 2008, the remaining were published before then, including a number that were published prior to 2000. It would appear that few of these studies which the NPRM cited could appropriately be characterized as "contemporary." At the same time, however, the fact that the current NPRM relies heavily on studies done prior to the 2001 rescission does provide further evidence to undercut DOL's claim that things have changed since its recession decision.

[4] Unfortunately, the "contemporary research" studies cited in the *Federal Register* are among the documents which are not readily available to the public; a fact which PCA explained in a letter PCA sent to OLMS to request OLMS to insert these studies into the docket. OLMS declined our request. A copy of PCA's request and OLMS' response are included with these comments as appendices A and B.

then by law they do not have to be reported and, therefore, an underreporting problem cannot, in fact, exist.

Moreover, even assuming that an underreporting problem does exist, the obvious and more reasoned solution should be for DOL to increase its enforcement of the current interpretation; which is a problem the NPRM concedes DOL has known has existed since at least 1980 but also conceded has yet to be addressed. 76 Fed. Reg. at 36187 fn. 12. Instead, the proposed rule's remedy is simply to revise the interpretation so that the activities which currently – and for more than 49 years – have not been classified as persuader activities would become so and therefore would have to be reported. The NPRM's analysis, justifications, and proposed solution, are neither reasoned nor reasonable.

While federal agencies are not proscribed from changing their past policies as a general proposition, they are nonetheless subject to well-established limitations when they do so. As the Court of Appeals for the D.C. Circuit has advised on numerous occasions: "An agency acts arbitrarily and capriciously if it 'reverse[s] its position in the face of a precedent it has not persuasively distinguished.'" *New York Cross Harbor R.R. v. Surface Transp. Bd.*, 347 F.3d 1177, 1181 (D.C. Cir. 2204), quoting *Louisiana Pub. Ser. Comm'n v. FERC*, 184 F.3d 892, 897 (D.C. Cir. 1999). Likewise, "[a]n agency's view of what is in the public interest may change, either with or without a change in circumstances. But an agency changing its course must supply a reasoned analysis. . . ." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.* Co, 463 U.S. 29, 57 (1983). "A regulation which . . . operates to create a rule out of harmony with the statute is a mere nullity. [Citation omitted.] And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable." *Orion Reserves Ltd. Partnership v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009), quoting *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129 (1936). "If Congress established a presumption from which judicial review should start, that presumption . . . is . . . *against* changes in current policy that are not justified by the rulemaking record." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins.* Co, *supra*, at 42. The NPRM has failed to meet these standards.

B. <u>The legislative history does not support the proposed narrowing of the advice exemption</u>. The NPRM contends that Congress never intended the advice exemption to be as broad as the current interpretation allows and asserts that this conclusion is supported by statute's legislative history. PCA disagrees.

The NPRM points out that the federal district and circuit courts for the District of Columbia have previously had the opportunity to review section 203's advice exemption, including its legislative history. However, the NPRM fails to mention that in the particular instances cited, those courts, relying on the pertinent legislative history, acknowledged that the advice exemption is to be interpreted broadly. As the District Court stated in *International Union v. Secretary of Labor*, 678 F. Supp. 4, 6 (D.D.C. 1988), "Congress intended to grant broad scope to the term "advice," citing H.R. Conf. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959),

reprinted in 1959 U.S. Code Cong. & Admin. News 2503, 2505.[5] The DC Circuit agreed. *International Union, UAW v. Dole*, 869 F.2d 616, 618 (D.C. Cir. 1989).

The NPRM likewise failed to mention the 8th Circuit's decision, *Donovan v. Rose Law Firm,* 768 F.2d 964 (8th Cir. 1985), which also concluded that the Conference Report, and not the Senate report on which the NPRM seeks to rely, provides "the most compelling indication of congressional intent."[6] As the Eight Circuit stated more fully:

> Were we forced to choose in ascertaining congressional intent between a Senate report dealing only with a predecessor of the LMRDA and a conference committee report on the final version of the LMRDA, we believe it would be the better practice to choose the conference committee report. But we have already noted, and we emphasize again, that the Senate report on § 103(b) of the Kennedy-Ives bill dealt with language differing in a significant way from the language we currently interpret. Thus, we believe the statement in Conf. Rep. No. 1147 is the most compelling indication of congressional intent as to the meaning of § 203(c).

Id. at 974.

While the NPRM purports to rely on the statute's legislative history, by failing to make any reference whatsoever to the Conference Report, it is clear that the NPRM has not relied upon the legislative history as it claims. Based on the DC and 8th circuit courts' reading of the relevant legislative history to § 203(c), it is arbitrary for DOL to contend that its proposed reinterpretation of the advice exemption is supported by the legislative history, when the legislative history that the courts have found to be "the most compelling indication of congressional intent as to the meaning of § 203(c)" has been outright ignored. A further demonstration of the legislative history's lack of support for the proposed reinterpretation is discussed in Section D below.

C. <u>The advice exemption would effectively be nullified under the proposed reinterpretation</u>. "Advice," according to the proposed "Instructions for Form LM-10 Employer Report" (Instructions) "means an *oral or written recommendation* regarding a decision or course of conduct." 76 Fed. Reg. at 36224 (emphasis supplied). According to the proposed Instructions:

> a consultant who exclusively counsels employer representatives on what they lawfully say to employees, ensures a client's compliance

[5] To be precise, the Conference Report stated specifically: "Subsection (c) of section 203 of the conference substitute *grants a broad exemption from the requirements of the section with respect to the giving of advice.*" *Id.* (Emphasis supplied.)

[6] DOL can hardly claim that it was unaware of the *Donovan v. Rose Law Firm* decision when it was mentioned in the district court's *International Union* decision, 678 F. Supp., *supra* at 6, that the NPRM cited.

> with the law, or provides guidance on NLRB practice or precedent, is providing "advice."

76 Fed. Reg. at 36225. Thus, according to the proposed Instruction's foregoing statement, an oral or written recommendation that counsels employer representatives on what they may lawfully say to employees would be advice.

However, the proposed Instructions further provide that such an oral or written recommendation would cease to be advice if the particular recommendation would "in whole or in part, have the object of directly or indirectly to persuade employees concerning their rights to organize or bargain collectively," *id.*, and that the form, or manner, of such recommendations would:

> include but are not limited to: drafting, revising, providing a persuader speech, written material, website content, audiovisual or multimedia presentation, or other material or communication of any sort to an employer for presentation, dissemination, or distribution to employees, directly or indirectly . . .;

76 Fed. Reg. 36224-225.

Thus, also according to the proposed Instructions, any oral or written recommendation that counsels employer representatives on what they may lawfully say to employees would be "advice" unless and until that oral or written recommendation counseling employers on what they may lawfully say to employees would "in whole or in part, have the object of directly or indirectly to persuade employees concerning their rights to organize or bargain collectively;" in which case the recommendation would become persuader activity. At a minimum, the NPRM and its proposed implementing Instructions are internally inconsistent and contradictory.

It is a fundamental fact that the NPRM's stated purpose and intent is to reinterpret the advice exemption in order to make virtually every oral or written counsel regarding what an employer can lawfully say to its employees concerning, or in response to, an organizing campaign, "persuader" activity. By classifying as "persuader activity" effectively ***any*** oral or written communication from an attorney or labor consultant to their employer-client which could have ***any*** influence on the content of the employer's communications with its employees, the proposed reinterpretation would effectively prevent labor consultants, and especially attorneys, from advising their employer clients on what they can lawfully say to employees, unless the occurrence of that counsel is reported.

However, it is also because of the criminal penalties which can be imposed for failing to report that the NPRM and its implementing regulations are unconstitutionally ambiguous and vague. The NPRM, and in particular the proposed implementing Instructions, fails to define what DOL means by the phrase "in whole or in part, have the object of directly or indirectly to persuade employees concerning their rights to organize or bargain collectively." Likewise the NPRM, and in particular its proposed implementing Instructions, fails to provide a bright-line distinction that would enable labor consultants and employers to discern when a recommendation will be deemed to provide counsel on what an employer can lawfully say to employees on the

one hand, and a recommendation that counsels an employer on what it can lawfully say but "in whole or in part, ha[s] the object of directly or indirectly to persuade employees concerning their rights to organize or bargain collectively" and thus will be deeded reportable "persuader activity." As such, communications which Congress did not intend to be reported will of necessity be reported, if for no other reason than the desire of consultants and employers to avoid risking criminal sanctions for failing to report their communications. Moreover, the NPRM also fails to provide any evidentiary standard by which the intent of a consultant's recommendation to its employer-client could be proven, *i.e.*, "the object of directly or indirectly to persuade employees concerning their rights to organize or bargain collectively," the proposed reinterpretation would, if anything, impose a strict liability standard. DOL has offered no evidence that Congress enacted, or intended to impose, a strict liability standard; especially when a failure to report would subject the labor consultant to potential criminal sanctions.

DOL's claim that the proposed reinterpretation would continue to permit a labor consultant to counsel employers on what they can lawfully say to employees and not have to report that activity rings hollow. Indeed, such communications between labor consultants and their employer clients will either be reported, or cease to occur, because of the criminal penalties which could be imposed for a failure to report, thereby effectively eroding the statutory advice exemption and Congress' expressed intent to "grant[ ] a broad exemption from the requirements of the section with respect to the giving of advice." Conf. Rep. No. 1147, *supra*, 1959 U.S. Code Cong. & Admin. News at 2505.

Both in substance and/or effect the proposed reinterpretation would therefore eviscerate the advice exemption and render, as a nullity, the broad scope that Congress intended be given to the exemption. "A regulation which . . . operates to create a rule out of harmony with the statute is a mere nullity. [Citation omitted.] And not only must a regulation, in order to be valid, be consistent with the statute, but it must be reasonable." *Orion Reserves Ltd. Partnership v. Salazar*, 553 F.3d 697, 703 (D.C. Cir. 2009), quoting *Manhattan Gen. Equip. Co. v. Comm'r of Internal Revenue*, 297 U.S. 129 (1936).

D. <u>The proposed reinterpretation of "advice" would embrace benign activities which Congress did not intend to cover as reportable persuader activities</u>. The proposed rule's intent to reinterpret advice in order to treat as "persuader activity," virtually any written recommendation from a labor consultant to be reported goes beyond the scope of activities which Congress was intending to be reported. While the NPRM claims that the need for the proposed reinterpretation is supported by the legislative history, it relied solely on S. Rep. 86-187 as the basis for this conclusion. As we noted previously in these comments, the NPRM did not cite to the Conference Report that the courts have held is relevant. Neither did the NPRM cite to Senate Report No. 1684, 85th Cong.., 2d Sess. (1958), which the 4th Circuit Court of Appeals has said is also relevant to understanding the interplay between the reporting required by LMRDA section 203(b), 29 U.S. C. § 433(b), and the exemption from reporting which LMRDA section 203(c), 29 U.S. C. § 433(c) provides for advice. As the 4th Circuit observed in *Douglas v. Wirtz*, 353 F.2d 30, 33, quoting from S. Rep. No. 85-1684:

> Section 103(b) requires a labor-relations consultant to file a financial report upon his labor-relations activities if he undertakes

> to influence or affect employees in the exercise of the rights guaranteed by the National Labor Relations Act or to provide an employer with paid informers or any agency engaged in the business of violating such rights. *Since attorneys at law and other responsible labor-relations advisors do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice,* taking part in collectively bargaining and appearing in court and administrative proceedings nor [sic] would such a consultant be required to report.

Id. at 33 (emphasis supplied).

The foregoing statement is extremely relevant to this rulemaking and undercuts the NPRM's contention that current interpretation has allowed activities which should be reported to avoid being reported. In fact, the above-referenced statement demonstrates that, at the time the LMRDA was enacted, Congress believed that persuader activities were the exception and not the norm for labor consultants. The foregoing statement is not only consistent with the current interpretation; it also explains why the Conference Report subsequently instructed that the advice exemption is to be broadly constructed. A similar sentiment was expressed by the 6th Circuit Court of Appeals in *Humphreys Hutcheson and Moseley v. Donovan*, 755 F. 2d. 1211, 1215-16 (1985). ("The court agrees with the majority of courts that find the purpose of section 203(c) is to clarify what is implicit in section 203(b) – that attorneys engaged in the *usual practice of labor law* are not obligated to report under section 203)(b)." (emphasis supplied).)

PCA submits that drafting a statement for an employer to be given to employees, and/or revising a statement prepared by the employer for the same purposes, has long been part of the "usual practice of labor law"; especially if the objective for drafting or revising a draft is to ensure the client does not say something out of compliance with labor law. Neither Sen. Rep. No. 86-187, nor anything else cited by the NPRM, support a different conclusion. Reinterpreting the advice exemption in order to regulate advice given in the form of a draft statement and/or suggested revisions as DOL has proposed would be the same as requiring defense attorneys to make public the advice they give to a client.

While the statutory language does not define the term "persuader activity," S. Rep. No. 86-187 makes clear that the activities which the McClellan Committee was concerned about and wanted to address through reporting were specific and targeted, but were certainly not the activities which would be considered as the "usual practice of labor law." The report states:

> * * * *
>
> MANAGEMENT REPORTING AND THE PROBLEM OF THE MIDDLEMAN
>
> The committee notes that in almost every instance of corruption in the labor-management field there have been direct or indirect management involvements. The report of the McClellan

> committee describes *management middlemen flitting about the country on behalf of employers to defeat attempts at labor organization. In some cases they work directly on employees or through committees to discourage legitimate organizational drives or set up company-dominated unions. These middlemen have been known to negotiate sweetheart contracts. They have been involved in bribery and corruption as well as unfair labor practices. The middlemen have acted, in fact if not in law, as agents of management.*

1959 U.S. Code Cong. & Admin. News at 2326-2327 (emphasis supplied).

S. Rep. No. 86-187 goes on to explain how the accompanying Senate committee's bill, S. 1555), "attacks these problems on three fronts," 1959 U.S. Code Cong. & Admin. News at 2327, of which the third front is the most relevant to this rulemaking. It states in relevant part:

> * * * *
>
> Third, the committee bill relies upon a system of reporting and disclosure to apply further corrective curbs on improper employer activity. *Under section 103(a) an employer will be required to disclose any payments made by him to persuade employees not to exercise or as to the manner of exercising their right to organize and bargain collectively.*

1959 U.S. Code Cong. & Admin. News at 2327-328. However, the report goes on to say that payments involving regular wage payments or expenditures to improve working conditions or provide employee benefits would not be required to be reported as a "persuader activity":

> Under this section an employer is required to *report any direct expenditures during any fiscal year for the purpose of persuading employees in the exercise of their right to organize and bargain collectively as long as such expenditures do not involve regular wage payments or expenditures to improve working conditions or provide other employee benefits*.

1959 U.S. Code Cong. & Admin. News at 2328 (emphasis supplied).

S. Rep. No. 86-187 also excluded from being reportable persuader activity, "expenditures which an employer makes in his own name to communicate information to his employees including any kind of written or oral statement or advertisement." 1959 U.S. Code Cong. & Admin. News at 2328. Thus, according to S. Rep. No. 86-187, an employer who delivers, in its own name, an oral or written statement to its employees discussing why they should not vote for a union, would not be engaging in reportable persuader activity.

If such conduct when engaged in by an employer would therefore not constitute reportable persuader activity, is hard to understand why, as DOL is now contending, Congress would reverse path and classify the very same conduct as reportable persuader activity just

because the employer's communication is drafted or revised by a labor consultant. In fact, contrary to DOL's contention, the legislative history demonstrates that Congress did not intend to include every statement drafted or revised by a labor consultant as reportable persuader activity, merely because it was drafted or revised by a labor consultant. Congress was clearly contemplating that the labor consultant's conduct would be something more significant. According to S. Rep. No. 86-187, for example, expenditures made by an employer to a "labor relations consultant or other person who undertakes to *interfere* with the right of employees to organize and bargain collectively" would be reportable persuader activity. 1959 U.S. Code Cong. & Admin. News at 2328 (emphasis supplied).

Evidence of the fact that Congress was not intending to regulate the actions of attorneys (and other labor consultants) engaged in the "usual practice of labor law," *Humphreys Hutcheson and Moseley v. Donovan,* 755 F. 2d. *supra,* 1215-16, and was instead focused on a particular form of conduct, is further reinforced by the specific reference to Nathan Shefferman in the Conference Report's explanation of the reporting requirements being imposed upon labor consultants. Indeed, the Report's reference to Shefferman gives the necessary and appropriate meaning, context, and clarity to the McClellan Committee's discussion of what Congress considered to be "union-busting middlemen" and the specific type and targeted nature of the "persuader" activity by such middlemen that Congress was, in fact, intending to address. As the Conference Report stated in relevant part:

> * * * *
>
> Fourth, the substitute requires reports of all agreements with independent contractors, such as Nathan Shefferman, pursuant to which the independent contractor undertakes to persuade employees to exercise or not to exercise, or as to the manner of exercising, their statutory right to organize and bargain . . . .

1959 U.S. Code Cong. & Admin. News at 2504. Had Congress intended to regulate any and all communications between labor consultants and their employer-clients relating to an organizing campaign, or to regulate any and all activities engaged in by a labor consultant, the Conference Report would not have included the reference to Shefferman. The inclusion of the reference to Shefferman demonstrates Congress' intent to place a limit on what activities should be classified as persuader activities.

The arbitrariness of the NPRM is likewise demonstrated by its own reference to Shefferman, which notes not only that his "firm indulged in the *worst types of deceptive consultant activity,*" 76 Fed. Reg. 36184, but also that "Shefferman can be credited with developing many of the strategies that continue to dominate the field." *Id.* However, the NPRM can only justify the proposed reinterpretation by citing to Shefferman's "deceptive" activities involving "organizing 'vote no' committees during union campaigns, designing psychometric employee tests designed to weed out pro-union workers, and negotiating improper 'sweetheart' contracts with union officials." *Id.* Such examples of "deceptive consultant activities" which the NPRM cites, however, are clearly not the kind of activities that constitute the "usual practice of labor law" which the proposed reinterpretation is now also seeking to regulate; usual and customary practices such as drafting or revising an employer's statement to its employees to

ensure the employer only says what is lawful. Moreover, the NPRM never explains why, or how, the mere drafting, or revision of a statement which the employer will personally give to its employees would rise to the level of being deceptive to those employees when, under the proposed reinterpretation, the employer could continue to draft such statements by itself without need to report.[7]

In short, the discussion of the persuader activities that Congress was intending to address through section 203 set forth in the statute's legislative history, including S. Rep. No. 86-187, provides meaningful insight into the character of the particular activities which Congress sought to regulate. The examples of the conduct which the legislative history cited demonstrates that Congress was focused on a specific type of conduct. That Congress did not direct, or intend, that the mere recommendations provided by a labor consultant, regardless of the medium through which they are provided to the employer-client, concerning the employer's direct communications with its employees relating to an organizing campaign would (or should) constitute a reportable persuader activity. Nowhere in the legislative history is it suggested that a labor consultant's counsel to its employer-client, in the form of a written draft or a revision of the employer's draft regarding what is or is not appropriate content of a communication from the employer to its employees (*i.e.*, what the employer can lawfully say), is reportable persuader activity *per se,* as it would become by virtue of the proposed reinterpretation.

Perhaps the arbitrariness, if not absurdity, of the proposed reinterpretation is best demonstrated by the following: DOL's reinterpretation would allow a labor consultant to suggest orally to an employer what the employer should consider saying to its employees without need to report.[8] However, the proposed reinterpretation would require the employer and labor consultant to report if the same suggested language is provided to the employer in writing.[9] DOL's proposed reinterpretation is patently arbitrary.[10]

---

[7] The fact that, according to the NLRB, unions prevailed in 67.6 percent of elections held in calendar year 2010 and in 68.7 percent of elections held in calendar year 2009, 76 Fed. Reg. 36382, provides sufficient proof that the crafting of employers' statements by labor consultants are not having much influence on the outcomes of the majority of elections and hardly rise to the level of "persuader activity" which was the focus of Congress when it enacted section 203.

[8] "A consultant who exclusively counsels employer representatives on what they lawfully say to employees, ensures a client's compliance with the law, or provides guidance on NLRB practice or precedent, is providing "advice." 76 Fed. Reg. at 36225.

[9] "Specific examples of persuader activities that, either alone or in combination, would trigger the reporting requirements include but are not limited to: drafting, revising, or providing a persuader speech, written material, website content, . . ." *et cetera.* 76 Fed. Reg. at 36224-225.

[10] It is especially important to point out that the rendering of "advice" by attorneys, including the drafting and/or revisions for clients of statement, contracts, *et cetera,* long-predates the enactment of section 203. The current interpretation merely recognized and codified what was already occurring. The current interpretation appropriately recognized that and codified as "advice" what was already properly occurring, while at the same time addressed the more specific deceptive practices which Congress signaled it did intend to regulate.

CONCLUSION

For the foregoing reasons, the proposed reinterpretation of the advice exemption is unwarranted and should be withdrawn by DOL.

Respectfully submitted,

Robert A. Hirsch
Director, Regulatory Affairs

500 New Jersey Avenue, N.W., 7th Floor
Washington, DC 20001
202.408.9494 Fax 202.408.0877

www.cement.org