CONSTANGY
BROOKS & SMITH, LLP

SUITE 520
4100 MONUMENT CORNER DRIVE
FAIRFAX, VIRGINIA 22030-8609
TELEPHONE (571) 522-6100 • FACSIMILE (571) 522-6101
www.constangy.com

September 21, 2011

FILED ELECTRONICALLY
Andrew C. Davis, Chief
Division of Interpretation and Standards
Office of Labor-Management Standards
United States Department of Labor
200 Constitution Avenue, N.W., Room N-5609
Washington, D.C. 20210

Re: Comments Regarding Labor-Management Reporting and Disclosure Act: Interpretation of the Advice Exemption; RIN 1245-AA03 (former RIN 1215-AB79)

Dear Mr. Davis:

The law firm of Constangy, Brooks & Smith, LLP, submits the following comments regarding the proposed change to the current interpretation of the "advice exemption" under the "persuader" provisions of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. §§ 401 et. seq.

I. ABOUT THE COMMENTATOR

Constangy, Brooks & Smith, LLP (hereinafter "Constangy" or "the Firm") is a national labor and employment law firm based in Atlanta, Georgia. Since 1946, Constangy has represented employers ranging in size from Fortune 500 corporations to smaller companies with fewer than 50 employees. With more than 130 attorneys in 23 offices throughout the United States, the Firm provides clients a variety of legal services including, but not limited to, state and federal court Title VII litigation, OSHA, ERISA, Wage and Hour, Immigration, Workers' Compensation and traditional Labor Relations representation and advice. Constangy's Labor Relations practice group is composed of attorneys who have come to the firm from positions with the National Labor Relations Board and the United States Department of Labor, or who have extensive experience as private practitioners. The Labor Relations team represents employers in a wide variety of industries, including health care, manufacturing, textile and apparel, food and restaurants, hotels, construction, retail, and utilities. As such, our attorneys possess a broad knowledge of labor law, and both the firm

and the clients we represent maintain a significant interest in the manner in which the LMRDA is interpreted and enforced by the DOL.

The correct interpretation and application of the LMRDA as defined by the Department of Labor ("DOL"), as well as compliance with the law, are of vital importance to the Firm and our clients. In light of the foregoing, the Firm respectfully submits the following comments to assist the Department of Labor in reaching proper and reasonable conclusions with respect to the proposed rulemaking.

II. THE POSITION OF THE COMMENTER

As described below, Constangy respectfully submits that the proposed rulemaking is inconsistent with the LMRDA, unnecessary, and would infringe upon the attorney-client privilege. The DOL has failed to establish the need for such broad changes, as there is no indication that the current interpretation of the LMRDA results in an under-reporting of information intended to be reported under the law as written and reasonably interpreted. Moreover, while the proposed amendments purport to encourage transparency, the likely effect of the proposed rule changes would be burdensome on both employers and third-party organizations providing the types of services that would be subject to the proposed changes, and the contemplated reporting obligations would conflict with the attorney-client privilege and interfere with the provision of legal advice. Further, the reporting obligations would be unjustifiably costly on all parties involved, including the DOL.

III. THE LMRDA'S PERSUADER REPORTING PROVISIONS AND THE STATUTORY EXEMPTIONS

Section 203(a) of the LMRDA, 29 U.S.C. §§ 401 et. seq., requires among other things, that an employer must annually report with the DOL (on a Form LM-10), every agreement or arrangement with a "labor relations consultant or other independent contractor or organization," pursuant to which such a third party (1) engages in activities where an object thereof is to persuade employees to exercise or not to exercise, or as to the manner of exercising their rights to organize, **or** (2) to supply the employer information about activities of employees or a labor organization in connection with a labor dispute with the employer. 29 U.S.C. § 433(a)(4). Likewise, Section 203(b) requires third-party consultants, contractors or organizations who enter into such agreements or arrangements with the employer to file a Form LM-20 within 30 days of making the agreement or arrangement covered by Section 203(a). 29 U.S.C. § 433(b).

These LMRDA reporting requirements do not stand in isolation however. Statutory **exemptions** to the reporting requirements exist as follows:

1. Section 203(c) exempts agreements or arrangements by third-party consultants to provide "**advice**" and/or representation in legal proceedings (judicial, administrative or arbitral) and/or in collective bargaining negotiations. 29 U.S.C. § 433(c).

2. Section 203(e) exempts activities of an employer's "regular" employees where the compensation to them is for "service as a regular officer, supervisor, or employee." Id. § 433(e).

3. Section 204 exempts client-to-attorney communications where information is lawfully communicated **to** the attorney **by** the client in the course of a legitimate attorney-client relationship. 29 U.S.C. § 434 (emphasis added).[1]

The "advice" exemption is not limited by the statute to certain types of advice, or specifically to "advice" where there was a no object to "persuade." The "advice" exemption is just that -- an "**exemption**" to remove from Section 203 coverage and reporting obligations persuader activity that is "advice" and that otherwise would be subject to an obligation to report.

To be considered within the advice exemption, the activity need only be construed as "advice." Since the term "advice" is not defined in the LMRDA, the DOL should resort to a common and accepted definition of what in fact constitutes "advice." The proposed rulemaking cites the following three sources and the definitions therein:

(i) The Merriam-Webster Collegiate Dictionary, 10th ed. 18 (2002) - defines "advice" as "a recommendation regarding a decision or course of action."

(ii) Black's Law Dictionary (online) - defines advice as "guidance offered by one person, esp. a lawyer, to another." (8th ed. 2004).

(iii) The Oxford English Dictionary - defines advice as "opinion offered as to action." (2d ed. 1989).

In all of the recognized sources above, the term "advice" contemplates and connotes (1) a consideration and (2) a "decision" or "action" (through an explicit or implicit acceptance or rejection) by the advisee, and that the "advice" is not the final determinative "decision" or "action" itself.

For nearly 50 years the DOL has interpreted "advice," as used in the exemption, in a manner consistent with the definitions cited above. It has long been recognized that "advice" is not a final determinative act (equating to "persuader activity"), but instead is the conveyance of guidance, a recommendation, or an opinion of a preliminary nature that goes

---

[1] The LMRDA's explicit client-attorney communication language covers a one-direction flow of information from the client to the attorney. Information flowing from the attorney to the client is already covered by the "advice exemption" and coverage of that information flow by special language is unnecessary. It is clear that the provisions of Section 203 (c) and Section 204 dovetail efficiently to preserve the attorney-client privilege to its full extent – a flow of any information between a client and the attorney intended to facilitate the provision of advice by the attorney.

to and through the employer before the final element of communicating information to employees. Previously the DOL has looked for the presence of employer freedom to accept or reject such "advice," as an indication of whether the activity of the consultant constitutes a recommendation, an opinion, or mere guidance to the employer. In every case where a consultant has not communicated directly or indirectly with employees (i.e., as a "middleman"), and instead deals only through the employer (via management), the third-party consultant's role is advisory and the activity of the consultant is "advice" whether it has a persuasive object or not. See DOL LMRDA Interpretive Manual §265.005 (interpretation generally applicable since 1962).

After nearly 50 years of consistent interpretation by the Department of Labor, Congress could have narrowed the "advice" exemption but elected not to do so. Courts construing the "advice" exemption have uniformly cited a Congressional intent to grant "broad scope" to the exemption. See, e.g., International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole, 869 F.2d 616, 618 (D.C. Cir. 1989). All "advice" is statutorily within the exemption's "broad scope." No regulatory re-interpretation of the exemption should eliminate the exempt status of "advice" that is within the scope of the broad language of the statute.

IV. THE PROPOSED RULEMAKING'S NARROWING OF THE "ADVICE" EXEMPTION UNDER THE GUISE OF REINTERPRETATION CONFLICTS WITH THE STATUTE

The DOL's rulemaking attempts to narrow the advice exemption to a mere "shadow of its statutory self" by proposing to make many "advice" activities subject to LMRDA reporting. The rulemaking achieves this result by having the LMRDA reporting provisions override the advice exemption when the advice has a persuader object. Under the proposed interpretation, materials and any activities generating them are to be considered "persuasive" if they would have the object of "influenc[ing] the decisions of employees with respect to forming, joining or assisting a union, collective bargaining, or any protected concerted activity (such as a strike) in the workplace." See, e.g., Proposed Rule Form LM-10 Instructions, p. 5. Under the proposed rule, if any activities involve "**mixed**" "persuader activity" **and** "advice," the activities would be treated and reported as "persuader activity." See Notice of Proposed Rulemaking, 76 Fed. Reg. 36192 (June 21, 2011); Proposed Rule Form LM-10 Instructions, p. 5.

The structure of the LMRDA reporting provisions and exemptions make it clear that the exemptions cut into the reporting requirements and not the other way around. The language of the LMRDA reporting provisions can not reasonably be interpreted to narrow the broad language of the exemption that follows them. Instead, anything fitting within the term "advice" is exempted from the reporting requirements already set out above the exemption. Thus, any and all advice, even "advice" combined with persuader activity, is within the exemption. That is the very purpose of the "exemption" -- to "exempt" advice

which is or includes persuader activity that would otherwise be covered and subject to reporting requirements.

The proposed rulemaking's conflict with the statute is clear from the examples of activities that the DOL asserts would be reportable. The following would be reportable if the activity were designed to persuade employees on union organizing and collective bargaining:

- Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees
- Drafting, revising, or providing a speech for presentation to employees
- Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees
- Drafting, revising, or providing website content for employees
- Planning individual or group employee meetings
- Developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness
- Training supervisors or employer representatives to conduct individual or group employee meetings
- Coordinating or directing the activities of supervisors or employer representatives
- Establishing or facilitating employee committees
- Developing personnel policies or practices
- Deciding which employees to target for persuader activity or disciplinary action
- Conducting a seminar for supervisors or employer representatives
- Other [unspecified]

See Proposed Rule 5 Form LM-10, p. 3 and LM-20, p. 2.

But the rulemaking fails to take into account the fact that all of the listed activities could be integral parts of exempt advice. To illustrate by way of hypothetical, suppose that pursuant to an employer's request a consultant develops personnel policies and practices. The consultant then provides them in writing to the employer with a cover memorandum that says they are provided as a "recommendation regarding a decision or course of conduct" to the employer based on legal authorities. The employer then decides whether or not to follow the recommended decision or course of conduct. In this example, the consultant's activity plainly is "advice" and, therefore, exempt activity. However, despite that fact, the recommendation would be reportable under the revised interpretation. And such a recommendation could include anything from a policy addressing employer solicitation, to a sexual harassment policy, or even to one covering employer rules of conduct. As this

example demonstrates, the rulemaking's list of activities that need to be reported grossly and obviously misrepresents the scope of the LMRDA reporting obligation because it essentially ignores the advice exemption altogether.[2] It is as if the advice exemption no longer exists.

Likewise, the proposed rulemaking includes a list of "information supplying activities" by consultants that would be reportable, including supplying information from any and all of the following sources:

- Research or investigation concerning employees or labor organizations
- Supervisors or employer representatives
- Employees, employee representatives, or union meetings
- Surveillance of employees or union representatives (video, audio,
- internet, or in person)
- Other [unspecified]

See Proposed Forms LM-10, p. 3 and LM-20, p. 2.

Of course, any of this information could be part and parcel of a consultant's provision of "advice," a recommendation on a decision or course of action, to an employer. As such, the activity would be exempt "advice" and the listing provided in the rulemaking grossly distorts the scope of the LMRDA reporting obligation because it ignores the advice exemption altogether. Again, it is as if the advice exemption does not even exist.

V. THE PROPOSED RULEMAKING WILL EVISCERATE THE PRIVILEGE ACCORDED ATTORNEY-CLIENT COMMUNICATIONS

Under the proposed rulemaking, certain "advice" provided by attorney-consultants to employer-clients that has a persuasive object or that is mixed with persuader activity will be deemed outside the scope of the newly-narrowed advice exemption. With the narrowed

[2] That the proposed rulemaking is an attempt to turn reality on its head is made clear by the DOL's expressed reliance in the rulemaking on "the case in which an employer essentially serves as a conduit for persuasive communication or material developed or prepared by an outside consultant or lawyer." See Notice of Proposed Rulemaking, 76 Fed. Reg. 36183 (June 21, 2011). The proposal uses this "case" as an example of activity that it argues should not be within the scope of the advice exemption. But the description of the "case" ignores the facts and legal relationships between and among (1) the consultant and (2) the employer and its supervisors -- namely, that the employer and its supervisors are the principals hiring the consultant and the consultant is dealing in only an advisory role, subject to the ultimate authority of the employer to decide and take action on the advice. In the "case" example, the persuasive message given by the employer is the employer's message, not the consultant's sent through a conduit or "middleman." The giving of the message is the employer's "decision or course of action" based on the "recommendation" of the consultant – a recommendation that is plainly "advice" within the dictionary definitions cited above. The reality is that consultants for employers serve in an advisory role when not engaged in communications with employees either (1) directly or (2) indirectly through third parties not affiliated with the employer.

exemption, both the employer-client and the attorney-consultant will have an obligation to report the nature of the agreement. This would involve a disclosure of attorney-client privileged material, viz., the nature of the legal advice being provided. The fact that full extent of the advice would not be revealed by the reporting obligation is of no matter -- the revelation of the attorney-client relationship would be damage enough. As such, the proposed narrow interpretation of the advice exemption will essentially eviscerate the attorney-client privilege. This result will impair the ability and motivation of employers to seek legal counsel with respect to rights and obligations under federal labor and employment laws, including the LMRDA and the National Labor Relations Act ("NLRA"). Employers in need of or desiring legal advice may choose simply to go without the legal advice and either simply (1) remain mute or (2) take the risk of action without the benefit of the legal advice. These results are precisely those the attorney-client privilege is intended to help prevent. Public policy considerations should weigh against such an assault on the attorney-client privilege and employer access to legal counsel, access which promotes employer compliance with the applicable laws, including the LMRDA itself.

VI. IF THE PROPOSED RULEMAKING IS ADOPTED, GUIDANCE IS REQUESTED ON WHEN A REPORTING OBLIGATION IS TRIGGERED, AND WHAT MUST BE REPORTED

Under the proposed rulemaking, the DOL essentially re-writes the advice exemption. This places in question many activities of attorneys providing advice while acting in their representative capacity as legal counsel. For this reason, clarification of what, if any, activity within the scope of providing "advice" will be considered by the DOL to be within the scope of the advice exemption, and, as such, not be reportable is essential. Indeed, without clarification, DOL would place most management labor law firms in the conundrum of having to report or not engage in large areas of their practice not even remotely associated with persuader acts. Questions with respect to specific activities are posed below.

(A) What Would Be Considered as Reportable Activity?

1. If legal counsel prepares a campaign communication and advises the client on the distribution of the letter to employees, would this be considered "persuader" activity that must be reported?

2. If the client exercises its right of final approval of the letter to employees prepared by counsel, would this still be considered "persuader" activity that must be reported?

3. If the client provides counsel a letter or a speech to employees for review, and counsel simply advises the client whether the letter/speech is legal or not, would this be considered "persuader" activity that must be reported?

4. If the draft letter prepared by the client contains statements that would be unlawful, and counsel advises the client how to edit the letter in order to make the communication legal, would this be considered "persuader" activity that must be reported?

5. What if counsel advises the client regarding a better, more effective way to phrase the letter, would this be considered "persuader" activity that must be reported?

6. If counsel advises a client's supervisors on what to say to rank-and-file employees during a union election campaign, would this be considered "persuader" activity that must be reported?

7. If counsel advises a client's supervisors on how to respond to employee questions during a union election campaign, would this be considered "persuader" activity that must be reported ?

8. If counsel assesses a client's labor relations environment and then advises the client of what counsel believes are the labor relations issues supporting the union organizing campaign, would this be considered "persuader" activity that must be reported?

9. Assuming there is no union activity and counsel prepares or revises a No Solicitation/ Distribution policy for a client's handbook, would this be considered "persuader" activity that must be reported?

10. What if counsel reviews a client's employee handbook and advises the client regarding the handbook's legality, would this be considered "persuader" activity that must be reported?

11. What if counsel reviews a client's handbook and advises the client regarding a new policy for handling employee discipline, would this be considered "persuader" activity that must be reported?

12. Would it be considered a "persuader" activity for counsel to advise and represent clients in the following matters:

    - NLRB representation hearings and any appeals thereof?

    - Unfair labor practice trials and appeals?

    - Negotiating collective bargaining agreement?

- Handling labor arbitrations?

- Conducting or interpreting employee attitude surveys?

- Drafting or revising policies or procedures designed to enhance employee perceptions in the workplace?

13. If counsel prepares a letter for distribution to employees in conjunction with the handling of an unfair labor practice settlement, would this be considered "persuader" activity that must be reported?

14. If counsel prepares and advises a client regarding a draft letter to employees seeking their approval of a contract in a union ratification vote, would this be considered "persuader" activity that must be reported?

15. If counsel develops a training program on sexual harassment which explains how employee complaints of harassment should be filed, processed and handled, would this be considered "persuader" activity that must be reported? Does it make any difference whether the training is for supervisors or rank-n-file employees?

16. If counsel develops a training program on discipline and how to respond to issues of employee misconduct, would this be considered "persuader" activity that must be reported? Does it make any difference whether the training is for supervisors or rank-and-file employees?

17. What if counsel develops a seminar for a business or trade association, or a seminar that is open to the general public, and the program includes information and on how to persuade employees in an election campaign, would this be considered "persuader" activity that must be reported?

- What if the program includes "Sample" communications that can be used as templates for distributions to employees during a union campaign?

- Or discusses the most common employee issues in present day election campaigns?

- Or simply discusses how to develop work procedures and policies so as to better support an expanded bargaining unit?

- Or simply discusses the practices and procedures that will help ensure that an individual or group thereof are determined to be supervisors under the NLRA?

(B) <u>What Must Be Reported After Reportable Activity Has Occurred?</u>

1. If counsel does engage in a "persuader" activity, what specifically must be reported on the annual LM-21 forms:

   - The fees charged that particular client only for the case involving the persuader acts?

   - The fees charged that particular client only for all traditional labor cases?

   - The fees charged that particular client for all labor relations work performed by the firm?

2. In the event counsel advises Client "A" on matters that would be considered reportable activity, does counsel then have an obligation to report information related to legal services provided to Client "B," Client "C," Client "D," etc., even though the legal services provided to those clients would not otherwise be reportable?

3. What is encompassed within the scope of the phrase "labor relations advice or services?"

   - Only work performed in conjunction with union organizing or NLRB election campaigns?

   - What about legal services strictly related to the following areas of legal practice:

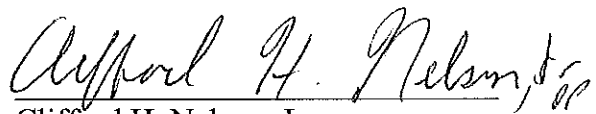
     - Workers' Compensation
     - OSHA
     - ERISA Benefit Plans
     - Title VII Litigation
     - Immigration
     - Wage and Hour

VII. CONCLUSION

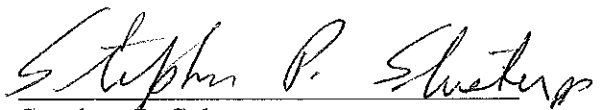
The proposed rulemaking, under the guise of re-interpretation of the "advice exemption," eliminates that exemption's function as an exemption. Activity that would otherwise be persuader activity subject to the disclosure obligation under the LMRDA is statutorily exempt under that exemption. The currently-proposed re-interpretation contravenes the plain language of the advice exemption and the DOL should not adopt it. The proposal serves to legislate changes in a fashion contrary to the statute itself. The interpretation of the advice exemption used by the DOL for nearly 50 years correctly applies the ordinary meaning of the term "advice" as used in the statute. The DOL should continue to use that interpretation, for it is consistent with the language of the LMRDA and Congressional intent to exempt from disclosure any and all advice, even advice with a persuasive object. The proposed re-interpretation of the advice exemption is contrary to the statutory language and would be place burdens upon employers and their advisors that Congress sought to exempt them from by means of that exemption. In conclusion, we urge the DOL to reconsider and abandon its proposals as misguided and contrary to the Act itself.

Respectfully submitted,

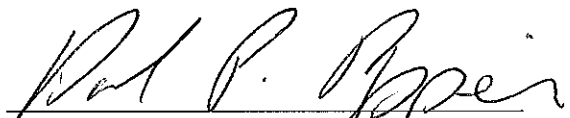
For the Firm
CONSTANGY, BROOKS & SMITH, LLP



Clifford H. Nelson, Jr.
Co-Chair – Traditional Labor Practice Group



Stephen P. Schuster
Co-Chair – Traditional Labor Practice Group



David P. Phippen
Of Counsel – Traditional Labor Practice Group