COMMENTS ON THE PROPOSED INTERPRETATION OF THE LMRDA ADVICE EXEMPTION

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Submitted by

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THE AIRLINE INDUSTRIAL RELATIONS CONFERENCE

AND

THE NATIONAL RAILWAY LABOR CONFERENCE

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SUMMARY OF COMMENTS

The June 21, 2011 Notice of Proposed Rulemaking ("NPRM") fails to articulate any sound policy reason for expanding the Labor-Management Reporting and Disclosure Act ("LMRDA") reporting obligation in the airline and railroad industries (or any other industry). The reasons cited by Department of Labor ("DOL") are drawn from experience in union organizing campaigns under the National Labor Relations Act ("NLRA"), which cannot be extrapolated to the Railway Labor Act ("RLA"). The airline and railroad industries are among the most heavily unionized in the country, far exceeding the average rate of unionization in the industries regulated by the NLRA. Because a large percentage of employees in the airline and railroad industries are represented by unions, and have been for decades, the impact of the proposed rule in these industries would primarily be felt in the collective bargaining process, rather than the union organizing process.

The proposed rule, if adopted, would have a detrimental impact on the collective bargaining process under the RLA. Because the airline and railroad industries provide transportation services that are essential to our national economy, there is a strong public policy favoring the peaceful resolution of labor disputes in these industries, through the procedures of collective bargaining and mediation established under the RLA. The National Mediation Board ("NMB") conducts the mediation process on a confidential basis, and has broad authority and discretion to determine when the parties should be released from mediation and potentially exercise their right to engage in self-help. *See generally Local 808, Teamsters v. NMB*, 888 F.2d 1428 (D.C. Cir. 1989).

By subjecting advice on collective bargaining matters, as well as union representation matters, to the LMRDA's intrusive reporting obligations, the proposed rule would discourage airlines and railroads from seeking advice from outside counsel and consultants on these matters, and would provide a strong disincentive for law firms and consultants to provide such advice – advice that, in many cases, would help airlines and railroads successfully resolve their collective bargaining negotiations without a disruption of essential transportation service.

There is no evidence in the legislative history of the LMRDA to suggest that Congress intended to require intrusive reporting of attorney-client and consultant relationships that support the collective bargaining process in the airline and railroad industries. Instead, Congress was concerned with bribery, corruption, and improper influence by outside consultants hired by employers to persuade employees in the context of a union organizing campaign. The Senate report on the LMRDA explains that the consultant reporting obligations were designed to target "middleman flitting about the country" in order to "work directly with employees or through committees to discourage legitimate organizational drives or set up company-dominated unions [and] negotiate sweetheart contracts."

These concerns had been addressed in the airline and railroad industries long before the LMRDA was enacted in 1959. The vast majority of employees in the airline and railroad industries were already represented by independent labor organizations by 1959. Indeed, when the RLA was enacted in 1926, it was the product of negotiations between representatives of the railroad industry and numerous rail labor organizations. Those rail labor organizations represented an "overwhelming majority" of railroad employees at the time of the original 1926 legislation. *Tex. & N.O.R. Co. v. Bhd. of Ry. & S.S. Clerks*, 281 U.S. 548, 563 n.2 (1930) (quoting H.R. Rep. 328, 69th Cong., 1st Sess.). Although company-dominated unions continued to exist after the 1926 Act, that issue was specifically addressed in the 1934 amendments to the RLA. *See generally* THE RAILWAY LABOR ACT 65-67 (2d ed. 2005). Thus, by 1959, the airline and railroad industries were heavily unionized and Congress had enacted specific legislation to combat company-dominated unions in those industries.

For some five decades after the LMRDA became law, DOL has properly limited the reach of federal reporting to the "middlemen" targeted by Congress in industries regulated by the NLRA, while allowing employers in all industries to obtain legal advice from outside counsel without triggering a reporting obligation. Under this longstanding interpretation of the LMRDA's advice exemption, reporting only has been required when the outside attorney engages directly with employees or in connection with some limited forms of information-gathering activity.

DOL's proposed new interpretation of the advice exemption is contrary to the plain language of the LMRDA, the legislative history, and DOL's longstanding interpretation of the statutory language. The proposed rule would require the reporting of activities that bear no relation to the evils that Congress intended to prevent with the passage of the LMRDA. Reporting would be required not only when an employer engages an attorney or consultant to act as a "middleman" and deal directly with employees, but also when an employer retains outside counsel to advise on how the employer may effectively persuade employees during a union organizing campaign or collective bargaining negotiations. Derivatively, the financial reporting obligation would extend to outside counsel's advice and services on a broad range of labor and employment laws, many of which did not even exist when the LMRDA was enacted – laws such as Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act ("ADEA"), the Occupational Safety and Health Act ("OSHA"), the Employee Retirement Income Security Act ("ERISA"), the Americans with Disabilities Act ("ADA"), and the Family and Medical Leave Act ("FMLA").

The proposed rule is not only contrary to the language, intent, and longstanding interpretation of the LMRDA, it is also in conflict with common law definitions of the scope of legal advice protected by the attorney-client privilege as well as the ethical obligations of attorneys who are hired by an employer to provide advice on a confidential basis.

For all of these reasons, the Air Transport Association ("ATA"), the Airline Industrial Relations Conference ("AIRCON") and the National Railway Labor Conference ("NRLC") urge DOL to withdraw the new proposed interpretation of the advice exemption set forth in the NPRM.

THE MEMBERSHIP OF ATA, AIRCON AND THE NRLC

ATA, AIRCON and NRLC represent virtually all of the major air and rail carriers covered by the Railway Labor Act. ATA is a trade association founded in 1936 that represents the leading U.S. passenger and cargo airlines.[1] The association's fundamental purpose is to foster a business and regulatory environment that ensures safe, secure and efficient air transportation.

AIRCON was formed in 1971 as a voluntary association of various passenger and air cargo carriers.[2] AIRCON's purpose is to facilitate the exchange of ideas and information concerning personnel and labor relations issues and to represent member carriers, who collectively operate in 49 states, concerning legislative, judicial and administrative matters.

The members of the NRLC include all United States Class I freight railroads and many smaller lines.[3] The NRLC, through its National Carriers' Conference Committee, represents most of its members in multi-employer collective bargaining with the major rail labor organizations. It also advises railroads on labor-related matters; administers industry-wide health and welfare plans for rail employees; represents the industry on rail labor issues before congressional committees, other governmental bodies, and the courts; provides training programs; and represents railroads in labor arbitration cases before the National Railroad Adjustment Board and other tribunals.

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[1] ATA's members are: ABX Air, Inc.; AirTran Airways; Alaska Airlines, Inc.; American Airlines, Inc.; ASTAR Air Cargo, Inc.; Atlas Air, Inc.; Continental Airlines, Inc.; Delta Air Lines, Inc.; Evergreen International Airlines, Inc.; Federal Express Corporation; Hawaiian Airlines; JetBlue Airways Corp.; Southwest Airlines Co.; United Airlines, Inc.; UPS Airlines; and US Airways, Inc.

[2] AIRCON's current members include: ABX Air, Inc., AirTran Airways, Inc., Alaska Airlines, Inc., Allegiant Air, LLC, Aloha Air Cargo, American Airlines, Inc., ASTAR Air Cargo, Inc., Atlas Air, Inc., Delta Air Lines, Inc., FedEx Express, Hawaiian Airlines, Inc., JetBlue Airways Corp., NetJets, Inc., Southwest Airlines Co., United Airlines, Inc., UPS Airlines, US Airways, Inc., Virgin America, and World Airways.

[3] The Class I freight railroads include BNSF Railway Co., CSXT Transportation, Inc., Grand Trunk Corp. (Canadian National), Kansas City Southern Railway Co., Norfolk Southern Railway Co., Soo Line Railroad (Canadian Pacific), and Union Pacific Railroad Co.

EXPLANATION OF ATA, AIRCON AND NRLC'S COMMENTS

I. The Predicate for the Proposed Rule Is Inapplicable to the Airline and Railroad Industries, and Would Interfere with the Peaceful Resolution of Labor Disputes in Those Industries.

As justification for a dramatic narrowing of the advice exemption, the NPRM cites studies concerning the "proliferation" of labor relations consultants and "substantial utilization of anti-union tactics that are unlawful under the NLRA." 76 Fed. Reg. 36,190. The cited studies are based on statistics concerning union representation elections conducted by the National Labor Relations Board ("NLRB"). *See id.* (citing Bronfenbrenner study). Based on these studies, the Department assumes that a reportable consultant agreement or arrangement exists in 75% of representation cases filed with the NLRB or the NMB, but finds that LM-20 forms are filed at a substantially lower rate. *Id.* at 36,186. However, even assuming that this 75% figure is an accurate estimate of the frequency with which employers engage labor relations consultants in NLRB elections, there is no evidence that it is an accurate estimate for elections conducted by the NMB in the airline and railroad industries.

Statistics and assumptions concerning the union election process under the NLRA cannot be extrapolated to the RLA. There are important differences between the union representation process under the NLRA and the RLA, which make any such comparison inappropriate. First and foremost, the airline and railroad industries are already heavily unionized, so there is no reason for many airlines and railroads to hire labor relations consultants to engage in persuader activity. Approximately 85% of employees in the railroad industry are represented by unions, and over 40% of employees in the airline industry are union-represented (the figure is even higher for passenger airlines).[4] These figures compare to a figure of about 7% in private sector industry generally.[5] Because of the historically high level of unionization in the airline and railroad industries, it cannot be assumed that employers in these industries respond to union organizing campaigns in the same way as employers in industries covered by the NLRA. *See Ruby v. Am. Airlines, Inc.*, 323 F.2d 248, 256 (2d Cir. 1963) ("The special situation in the railroad industry, where strong unions and management had become used to dealing with each other, differed vitally from the host of problems at which the Wagner Act was aimed – businesses of every size and description, many with a history of strong anti-union bias and with ample opportunity for strong-arm tactics.").[6]

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[4] *See* http://www.aar.org/Economy/~/media/aar/Background-Papers/Railroad-Collective-Bargaining.ashx; http://www.unionstats.com/.

[5] *See* http://www.bls.gov/news.release/union2.nr0.htm.

[6] Many representation elections under the RLA are conducted as a result of a merger or acquisition. *See, e.g., Northwest Airlines, Inc./Delta Air Lines, Inc.*, 37 NMB 368 (2010). Frequently, the employees of the pre-merger carriers are represented by two different unions, so the issue in the election is not *whether* the combined employee craft or class will be represented by a union, but *which* union will represent them. *See, e.g., United Air Lines/Continental Airlines*, 38 NMB 217 (2011).

When union representation elections occur in the airline and railroad industries, they are conducted on a system-wide (*i.e.*, nationwide) basis. *See Am. Airlines, Inc.*, 19 NMB 113, 126 (1991) ("The Board has long held that representation elections must include a carrier's entire system."); *Pa. R.R. Co.*, 1 NMB 23, 24 (1937) ("The Railway Labor Act does not authorize the National Mediation Board to certify representatives for small groups of employees arbitrarily selected. Representatives may be designated and authorized only for the whole of a craft or class employed by a carrier."). An organizing campaign in a nationwide bargaining unit, and the carrier's response to it, is fundamentally different from the paradigmatic single-location unit campaign under the NLRA. Airline and railroad employees work throughout a carrier's transportation system, often with little or only intermittent direct supervision. Therefore, the election campaign typically involves system-wide communications distributed by electronic and written means, with relatively few direct "persuader" meetings.

The rules and standards governing carrier conduct in representation election campaigns under the RLA are also significantly different from the rules and standards that exist under the NLRA. Given the size and geographic distribution of employees in a representation election in the airline or railroad industry, the NMB has declined to hold that any specific carrier conduct will result in a *per se* finding of interference. Instead, the NMB considers the "totality of facts and circumstances" in determining whether a carrier has interfered with the conditions for a fair election. *See United Air Lines*, 22 NMB 288, 314 (1995).

Certain employer tactics that are lawful and permissible under the NLRA may contribute to a finding of carrier interference under the RLA. For example, whereas "captive audience" meetings are commonplace under the NLRA, *see* 76 Fed. Reg. at 36,194 n.23 (citing study which found that employers held captive audience meetings in 82-93% of union organizing campaigns), similar mandatory meetings may contribute to a finding of election interference under the RLA if they are found to be "coercive" or have significantly increased in frequency during the election period. *See Stillwater Cent. R.R., Inc.*, 33 NMB 100, 135 (2006). The NMB also holds that election interference occurs if the carrier engages in a "pervasive" campaign that includes a "barrage of meetings and communications." *Petroleum Helicopters*, 25 NMB 197, 229 (1998); *Evergreen Int'l Airlines*, 20 NMB 675, 714 (1993).

Because the carrier's conduct will be reviewed under this "totality of facts and circumstances" standard, an attorney's advice to the carrier cannot be limited to opining on isolated communications, as the proposed rule seems to require. *See* 76 Fed. Reg. at 36,191. The lawyer's advice necessarily must consider the totality of the carrier's campaign, including the "timing and sequence of persuader tactics and strategies." *Id.*

Most importantly, there are significant differences in the collective bargaining process under the RLA, which militate against any effort to expand LMRDA reporting obligations when outside counsel or consultants are employed to assist a carrier in collective bargaining negotiations under the RLA. *See* 76 Fed. Reg. at 36,182 (asserting that "[r]eportable agreements include those in which a consultant agrees to plan or orchestrate a campaign or program on behalf of an employer to avoid or counter a union organizing *or collective bargaining effort*") (emphasis added); 76 Fed. Reg. at 36,191 (asserting that "[m]aterial or communications, or

revisions thereto, are persuasive if they…explicitly or implicitly encourage employees … to take a certain position *with respect to collective bargaining proposals*") (emphasis added). Unlike the NLRA, where negotiations typically are conducted directly between the parties through their conclusion and no provision for mandatory mediation with a federal agency exists, the collective bargaining process under the RLA is subject to mandatory mediation under the auspices of the NMB if direct conferences between the parties are unsuccessful. *See* 45 U.S.C. § 156. There is no reason for DOL to seek more intrusive reporting of carrier conduct during a process that is already subject to oversight by another federal agency, the NMB.

A common feature of modern collective bargaining under the RLA is that the carrier will communicate directly with its employees in order to inform them of the bargaining proposals that the carrier has presented to the union. When a tentative agreement has been reached with the union, the carrier may lawfully communicate with the employees in order to encourage them to ratify the agreement. *See Air Line Pilots Ass'n v. Flying Tiger Line, Inc.*, 659 F. Supp. 771, 774 (E.D.N.Y. 1987) ("The [RLA] does not in terms prohibit an employer from issuing any communication to its employees regarding collective bargaining issues."). DOL's proposed rule, however, would chill a carrier from seeking advice from outside counsel concerning such communications, and would discourage outside counsel from providing such advice.

The legislative history of the LMRDA provides no basis to conclude that Congress intended to impose burdensome federal reporting obligations on outside counsel and consultants who advise carriers on both the legal and labor relations aspects of successfully negotiating a collective bargaining agreement through the procedures of the RLA. Such advice furthers the statutory goal of obtaining, through peaceful negotiations, an agreement that can be ratified by a majority of the employees in the craft or class. *See Union Pac. R.R. Co. v. Price*, 360 U.S. 601, 609 (1959) ("The purpose of the Railway Labor Act was to provide a framework for peaceful settlement of labor disputes between carriers and their employees to 'insure to the public continuity and efficiency of interstate transportation service, and to protect the public from the injuries and losses consequent upon any impairment or interruption of interstate commerce through failures of managers and employees to settle peaceably their controversies.'" (quoting H.R. Rep. No. 328, 69th Cong., 1st Sess., p.1)).

Because of the strong public interest favoring the peaceful resolution of collective bargaining disputes in the airline and railroad industries, so as to avoid interruptions of essential transportation service in these industries, it is often necessary for the parties to mobilize public opinion in support of their positions at the bargaining table. *See Detroit & Toledo Shore Line R.R. Co. v. United Transp. Union*, 396 U.S. 142, 150 (1969). For this reason, it is impractical to distinguish between legal advice, on the one hand, and labor relations or public relations advice, on the other, in the context of collective bargaining negotiations under the RLA. Therefore, imposing an LMRDA reporting obligation when outside counsel or consultants are retained to advise a carrier during negotiations would not in any way advance the strong public policy goal of promoting peaceful labor relations in the airline and railroad industries. To the contrary, requiring that such advice be reported on an LM-10 and LM-20 form, and the even more intrusive LM-21 financial report, would provide a strong disincentive for carriers to seek advice

and for outside counsel or consultants to provide it. This ultimately would hinder, rather than promote, the peaceful resolution of collective bargaining disputes under the RLA.

II. The Proposed Rule Conflicts with the Plain Language of the LMRDA, the Legislative History, and DOL's Longstanding Interpretation of the Advice Exemption.

The advice exemption, codified in Section 203(c) of the LMRDA, provides that employers and their outside attorneys and consultants are *not* required to file any report covering services which are provided "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 and conditions of employment or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 433(c). In addition, Section 204 of the LMRDA protects from disclosure "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434.

DOL's longstanding interpretation of the advice exemption, in effect since the early 1960s, rightfully protects a wide range of consulting or advisory services provided to employers by labor relations consultants, law firms, and similar organizations. *See* DOL LMRDA Interpretative Manual § 265.005 ("Manual"). Courts have upheld DOL's longstanding interpretation even though it limits reportable "persuader" activity to *direct* communications between outside consultants and lawyers and non-management employees. *United Auto., Aerospace., & Agric. Implement Workers of Am. v. Dole*, 869 F.2d 616 (D.C. Cir. 1989). *See also Martin v. Power, Inc.*, 141 LRRM 2663 (W.D. Pa. 1992) (finding attorney consultant's preparation of letters and related materials for the employer were covered by "advice" exemption because consultant had no direct contact with employees to persuade them).

This interpretation of the advice exemption is fully consistent with the legislative history of the LMRDA. The Senate report explains that the LMRDA was designed to target "middlemen flitting about the country" in order to "*work directly on employees* or through committees to discourage legitimate organizational drives or set up company-dominated unions [and] negotiate sweetheart contracts." S. Rep. No. 86-187, at 10 (1959) (emphasis added). Congress targeted these "middlemen" not because they were providing advice to employers on these matters, but because they were involved in "bribery and corruption as well as unfair labor practices." *Id*. "The committee in drafting section [203(b)] was particularly desirous of requiring reports from middlemen *masquerading as legitimate labor relations consultants*." *Id.* at 39 (emphasis added).

The 1959 Senate report goes on to state that "[t]he committee did not intend to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations . . . ." S. Rep. No. 86-187, at 40. Similarly, the Conference Report states that the advice exemption was intended to be a

"*broad exemption* from the requirements of the section . . . ." H.R. Rep. No. 86-1147, at 33 (1959) (Conf. Rep.) (emphasis added).

An earlier Senate report explained the important distinction between reportable persuader activity by "middlemen" and the advice and related services supplied by "legitimate" outside counsel and consultants:

> Since attorneys at law and other responsible labor-relations advisers *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 [would not] be required to report.

S. Rep. No. 85-1684, at 8-9 (1958) (emphasis added).

This same distinction was articulated by Professor Archibald Cox when he testified before the Senate Subcommittee prior to the LMRDA's passage:

> *Payments for advice are proper. If the employer acts on the advice it may influence the employees.* But when an employer hires an independent firm to exert the influence, the likelihood of coercion, bribery, espionage, and other forms of interference is so great that the furnishing of a factual report showing the character of the expenditure may fairly be required.

Wirtz v. Fowler, 372 F.2d 315, 327 n.25 (5th Cir. 1966) (citing legislative history) (emphasis added).

In *Wirtz v. Fowler*, issued seven years after the LMRDA's passage, the Fifth Circuit reviewed the legislative history in detail and found that "[g]enerally it was felt that the giving of legal advice to employers was something *inherently different* from the exertion of persuasion on employees…." *Id.* at 330 (emphasis added). Similarly, the Sixth Circuit found that "Congress recognized that the ordinary practice of labor law does not encompass persuasive activities." *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1216 n.9 (6th Cir. 1985). *See also Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965) ("Primarily, as the legislative history records, the [disclosure] requirement is directed to labor consultants. Their work is not necessarily a lawyer's. Indeed, for a legal adviser it would be extracurricular. True, a client may desire such extra-professional services, but, if so, the attorney must balance the benefits with the obligations incident to the undertaking.").

In the face of the plain language and clear legislative history concerning the broad scope of the advice exemption, DOL's new proposed interpretation would dramatically narrow the exemption and trigger federal reporting for a broad range of labor relations advice provided by outside attorneys and consultants. 76 Fed. Reg. 36,178. Under this interpretation, DOL would consider a wide variety of lawyer or consultant activity to be reportable even if the lawyer or

consultant does not communicate directly with employees. DOL's position is that the duty to report "can be triggered even without direct contact between a lawyer … and employees, if persuading employees is an object, direct or indirect, of the [lawyer's] activity pursuant to an agreement or an arrangement with an employer." 76 Fed. Reg. at 36,191. The NPRM provides the following examples of activities that would be reportable:

- Drafting persuasive material, including videotapes or electronic and digital media, for consideration and use by an employer in communicating with employees. 76 Fed. Reg. at 36,191.
- Revision of the employer's own material or communications "to enhance the persuasive message" unless the revisions "exclusively involve advice and counsel regarding the exercise of the employer's legal rights." *Id.*
- Training supervisors and other management representatives to conduct individual or group employee meetings. *Id.*
- Conducting seminars or webinars which have "a direct or indirect object to persuade employees concerning their representation or collective bargaining rights." *Id.*
- Developing employer policies designed to prevent union organizing. *Id.*
- Determining the timing and sequence of persuader tactics and strategies for the employer. *Id.*
- Coordinating or directing the activities of supervisors or other managerial employees to engage in the persuasion of employees. *Id.* at 36,192.[7]

The proposed rule would require reporting of persuader activity even if it is "intertwined with" exempt advice. *Id.* at 36,191. The proposed rule cites the example of a lawyer who drafts a captive audience speech for an employer: "neither the lawyer's work to ensure its legal sufficiency or implications nor a characterization of the work product as legal advice would alter the reportability of the speech as persuader activity." *Id.* at 36,192.

[7] Notably, this interpretation of the advice exemption is even narrower than the interpretation proposed by the outgoing Clinton administration in January 2001, which was rescinded by the Bush administration in April 2001. 66 Fed. Reg. 18,864 (Apr. 11, 2001). For example, the following activities would not have been reportable under the Clinton administration interpretation, but apparently would be reportable under the current proposed interpretation:

- Edits or revisions to persuasive materials and communications initially prepared by an employer in order to enhance their persuasive value. 66 Fed. Reg. at 2788.
- Training of the employer's managers or supervisors with respect to lawful communication boundaries or strategies during a campaign. *Id.*
- Advice to the employer regarding the timing and the general content of persuasive communications. *Id.*

It appears that the only activities that would fall within the new interpretation of the advice exemption would be the following:

- Advising employer representatives about what they may lawfully say to employees. 76 Fed. Reg. at 36,191.
- Ensuring compliance with the law. *Id.*
- Providing guidance to an employer on NLRB practice and precedent. *Id.*[8]

This exceedingly narrow interpretation of the advice exemption would effectively eviscerate the advice exemption and would severely inhibit the "important and useful function" that outside counsel provide in contemporary labor relations. S. Rep. No. 86-187, at 40 (1959). It will be virtually impossible for outside counsel to provide any form of useful advice within the narrow confines of this proposed interpretation. Rather than risk the civil and criminal penalties that could be imposed for failing to report the agreement or arrangement with outside counsel, employers may simply refrain from seeking advice from outside counsel on union organizing or collective bargaining matters. And some law firms may decline to provide such advice, for fear of triggering the onerous LM-21 financial reporting obligations for all clients for whom the firm provides "labor relations advice and services" – a term that DOL presently interprets to include virtually any federal or state law dealing with the employer-employee relationship. *See* 29 U.S.C. § 433(b); Manual § 269.520.[9] Discouraging employers from seeking legal advice, and lawyers from providing it, clearly is not an outcome that Congress intended.

III. The Proposed Interpretation Is Inconsistent with the Common Law Definition of "Advice" Protected by the Attorney-Client Privilege.

The proposed rule's narrow interpretation of the statutory term "advice" also conflicts with the common law definition of legal advice for purposes of the attorney-client privilege. The common law definition of "advice" is relevant and significant because Congress is presumed to have understood and adopted the common law definition of terms used in legislation, absent any contrary legislative history. *See Nationwide Mutual Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992) ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (internal citations omitted); *S. Utah Wilderness Alliance v. Bureau of Land Mgmt.*, 425 F.3d 735, 763 (10th Cir. 2005) ("When Congress legislates against a backdrop of common law, without any indication of intention to

[8] This example further demonstrates that the proposed rule is focused on advice provided under the NLRA, not the RLA.

[9] While we understand that DOL is considering a proposed revision to the LM-21 form later this year, the existing obligations under the LM-21 are extremely intrusive and burdensome. Any attorney or consultant who files at least one LM-20 report also must annually file the LM-21 "Receipts and Disbursements" report, which contains additional financial information for the relevant fiscal year. 29 U.S.C. § 433(b). This additional information includes receipts and disbursements not only for the employer for whom the attorney or consultant engaged in persuader activities, but also for all other employers for whom the attorney or consultant supplied "labor relations advice or services." 29 U.S.C. § 433(b); Manual § 260.300.

depart from or change common law rules, the statutory terms must be read as embodying their common law meaning.") (internal citations omitted).

In the case of the LMRDA, it is clear that Congress understood and adopted the common law meaning of the term "advice" for purposes of the attorney-client relationship. Indeed, the proposed rule recognizes that "Congress intended to afford to attorneys the same protection as that provided in the common-law attorney-client privilege…." 76 Fed. Reg. at 36,192. Yet, other than citing a few terse dictionary definitions, s*ee* 76 Fed. Reg. at 36,183, the NPRM disregards the case law that defines the scope of an attorney's "advice" at common law. In particular, the proposed rule is in conflict with the common law insofar as DOL would not apply the advice exemption to legal advice that is "intertwined" with persuader activity. *Id.* at 36,191.

The common law definition of "advice", as established at the time the LMRDA was enacted, clearly encompasses legal advice that is intertwined with non-legal advice, such as the "economic or policy or public relations aspect" of the matter about which the client seeks the lawyer's advice. *See United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 359 (D. Mass. 1950), cited as a leading opinion in Attorney-Corporate Client Privilege, § 3:28, at 201 (John W. Gergacz, ed., 3d ed. 2011). Indeed, courts recognize that there is a public interest in the lawyer being more than just a "predictor of legal consequences":

> His duty to society as well as to his client involves many relevant social, economic, political and philosophical considerations. And the privilege of nondisclosure is not lost merely because relevant nonlegal considerations are expressly stated in a communication which also includes legal advice.

United Shoe, 89 F. Supp. at 359.

This common law definition has endured throughout the LMRDA's existence. *See, e.g.*, *Note Funding Corp. v. Bobian Investment Co., N.V.*, No. 93-Civ.-7427 (DAS), 1995 WL 662402, at *2 (S.D.N.Y. Nov. 9, 1995) ("When providing this [legal] assistance, counsel are not limited to offering their client purely abstract advice as to the rules of law that may apply to their situation . . . counsel will often be required to assess specific tactics . . . and their evaluation of alternative approaches may well take into account not only the potential impact of applicable legal norms, but also the . . . benefits or risks of these alternative strategies.").

The NPRM mischaracterizes the scope of the common law definition of "legal advice" by stating that "the deliberate disclosure [] of material or communications to third parties (the employees)" waives the attorney-client privilege for the advice rendered. 76 Fed. Reg. 36,183. But the common law recognizes that preparing or commenting on drafts of such communications fall within the lawyer's role of providing advice to the client, even if the client ultimately presents the final version to a third party. *See Huston v. Imperial Credit Commercial Mortg. Inv. Corp.*, 179 F. Supp. 2d 1157, 1181 (C.D. Cal. 2001) ("All of the advice given to a client as to what provisions to include, or not include, in a document, and how those provision [sic] should be drafted are not stripped of any attorney-client privilege or confidentiality."); *S.E. Pa. Transp.*

Auth. v. CareMarkPCS Health, L.P., 254 F.R.D. 253, 265 (E.D. Pa. 2008) ("Preliminary drafts of [documents] are generally protected by attorney/client privilege, since they may reflect not only client confidences, but also legal advice and opinions of attorneys, all of which is protected by the attorney/client privilege.") (internal quotations omitted); *McCook Metals L.L.C. v. Alcoa Inc.*, 192 F.R.D. 242, 255 (N.D. Ill. 2000) ("Although the final executed [document] is not privileged because it is communicated with an outside party, all previous drafts prepared by or commented upon by an attorney necessarily contain legal advice from the attorney as to the wording of the [documents] for the benefit of the client, and thus are privileged.").

DOL's longstanding interpretation of the advice exemption, which has been endorsed by the D.C. Circuit, is consistent with the common law definition of "advice" because it protects advice that overlaps with persuasive activity, such as providing persuasive materials, document drafts, and strategies for use by the employer. *See Dole*, 869 F.2d at 618. In the NPRM, DOL asserts that it has "administrative authority and discretion" to change this longstanding position and require the reporting of advice that is "intertwined" with persuader activities. *See* 78 Fed. Reg. 36,191. DOL, however, does not have authority or discretion to interpret the advice exemption in a way that conflicts with the common law that existed at the time the LMRDA was enacted. Plainly, DOL's new interpretation conflicts with the common law definition of advice – a definition that privileges from disclosure communications that include "relevant nonlegal considerations" along with the lawyer's advice. *United Shoe*, 89 F. Supp. at 359.

Furthermore, the proposed rule conflicts with ethical rules, such as ABA Model Rule of Professional Conduct 1.6, that obligate attorneys in some situations to maintain the confidentiality of a client's representation and fee arrangement with a firm. The proposed rule asserts that "[i]n general, the fact of legal consultation, clients' identities, attorney's fees and the scope and nature of the employment are not deemed privileged." 76 Fed. Reg. 36,192. However, there are important exceptions to this general rule, and those exceptions present a direct ethical conflict with an LMRDA reporting obligation. *See United States v. Monnat*, 853 F. Supp. 1301 (D. Kan. 1994) (finding that IRS reporting obligation conflicted with attorney's ethical obligations); ABA Model Rule 1.6, Comment [13] ("Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law."). The proposed rule fails to resolve this conflict.

IV. The Proposed Rule Seems to Expand, Without Explanation, the Scope of Reportable Information Supplying Activities.

In addition to expanding the scope of reportable "persuader" activity under Section 203(b)(1) of the LMRDA, it appears that DOL intends to expand the scope of reportable "information supplying" activity under Section 203(b)(2). Section 203(b)(2) requires outside attorneys and consultants to report an agreement or arrangement "to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding." 29 U.S.C. §

433(b)(2). DOL's new proposed LM-20 form, unlike the existing LM-20 form, specifically includes the following broadly defined categories of reportable information supplying activities and 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)

76 Fed. Reg. at 36,208. The NPRM does not explain whether these categories are intended to expand DOL's five decades-old interpretation of reportable "information supplying" activity. In fact, the NPRM provides little to no guidance on whether DOL intends to alter the existing scope of the duty to report Section 203(b)(2) arrangements, which are distinct from "persuader" arrangements under Section 203(b)(1). To the extent that DOL is seeking to expand the reporting obligation to encompass a broad range of general research services, including research within publicly available sources and databases, such an obligation is not supported by the LMRDA, its legislative history, or DOL's longstanding interpretation.

Nowhere in the legislative history or DOL's Interpretative Manual is there any indication that reportable "information supplying" activity should encompass research from publicly available sources. Rather, the purpose of the LMRDA is to expose "labor spies" and covert surveillance of in-person union activities, meetings, and communications. *See Wirtz v. Fowler*, 372 F.2d 315, 324 (5th Cir. 1966) ("It is true, of course, that the McClellan Committee, in which the LMRDA had its genesis, was primarily concerned with management-hired labor spies and undisclosed middlemen who engaged in espionage and deceptive persuasion."). Consistent with this specific legislative purpose, the Interpretative Manual's examples of reportable "information supplying" include engaging a consultant to "sit outside the place where the union organizers are meeting with other employees . . . and record the names of the employees who are going in and coming out." Manual § 256.100. Other examples include "planting" a consultant's employee in the union to supply information on the organizing strategy, or hiring a detective agency to follow union organizers and supporters. *See* Manual §§ 257.205; 257.210.

DOL is obligated to explain what it is attempting to achieve through the proposed revision to the LM-20 form. The NPRM's silence concerning the intended scope of reportable information supplying activity suggests that it remains as it has been for decades – limited to direct surveillance and spying by outside consultants.

CONCLUSION

For all of the foregoing reasons, ATA, AIRCON and NRLC urge DOL to withdraw the NPRM and adhere to its longstanding interpretation of the advice exemption.

Respectfully submitted,

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