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Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5609
Washington, DC 20210

Re: RIN 1215-AB79 and 1245-AA03; Proposed Rule on Labor-Management Reporting and the Disclosure Act; Interpretation of "Advice" Exemption

Dear Mr. Davis:

The International Foodservice Distributors Association ("IFDA") hereby submits the following comments in response to the Notice of Proposed Rulemaking ("Proposed Rule") by the Department of Labor Office of Labor-Management Standards ("Department") published in the Federal Register on June 21, 2011.[1] The Proposed Rule would significantly narrow the interpretation of the "advice" and the "advice exemption" to "persuader activity" reporting requirements of the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA"), 29 U.S.C. 401).

By way of background, IFDA is the non-profit trade association that represents businesses in the foodservice distribution industry. IFDA's members are located across North America and internationally, and include leading broadline, system, and specialty distributors. They operate more than 700 distribution facilities and represent annual sales of more than $110 billion. Our members help make the food away from home industry possible, delivering food and other related products to restaurants and institutions. IFDA provides research, educational opportunities, and business forums to its members to help food distributors succeed. In addition, we provide important representation on Capitol Hill and with the Administration, sharing the perspective of leading foodservice distributors with policymakers to shape the legislative and regulatory process.

At a time when the Department should be focusing its efforts on job creation, it is, instead, proposing to tie the hands of employers during union organizing campaigns and restrict their access to legal counsel. The Department would do so by altering the long-standing interpretation of what activities constitute "advice" to employers, and, therefore, are exempt from the LMRDA's persuader reporting obligations. The Proposed Rule would effectively

[1] 76 Fed. Reg. 36178 (June 21, 2011).

eliminate the exemption that Congress expressly authorized and seriously violate the sanctity of the attorney-client relationship that Congress sought to protect in the LMRDA. IFDA and its members are strongly opposed to the Proposed Rule and believe it must be withdrawn.

I. Background

The LMRDA requires reporting and disclosure by unions, union officials, employers, and labor consultants in certain specific situations. The employer reporting requirements include any agreement or arrangement with an outside consultant under which the consultant undertakes activities to "persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing."

Employers are required to disclose on a Form LM-10 any agreement with a labor consultant that involves persuader activity. Similarly, labor consultants must file a Form LM-20 disclosing their agreements with employers to engage in persuader activity. Subsequently, the labor consultant is required to file a Form LM-21 detailing receipts or disbursements on account of both persuader activities and a broad range of "labor relations advice and services" it provides to all employers. The Department has not proposed any changes to the Form LM-21 as part of this current effort to change the Form LM-10 and Form LM-20. Nevertheless, the proposed changes to the Forms LM-10 and LM-20 will directly impact what will need to be reported on the Form LM-21.

The LMRDA includes a broad exemption from the reporting requirements for persuader activity arrangements based on "advice" provided to an employer. Section 203(c) of the statute states that:

> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer.

The "advice" exemption reflects Congressional intent to protect the attorney-client relationship and covers legal advice by outside legal counsel retained by an employer. The "advice" exemption, however, is not limited to just legal advice.

The LMRDA exempts attorneys from reporting any information protected by the attorney-client privilege. Specifically, Section 204 states that:

> Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

The Department itself acknowledges that, by this provision, "Congress intended to afford attorneys the same protection as that provided in the common-law attorney-client privilege, which protects from disclosure communications made in confidence between a client seeking legal advice and an attorney."[2]

The Department acknowledges that the current interpretation of the "advice" exemption has been in place since 1962. As reiterated in the 1989 memorandum from then Acting Deputy Assistant Secretary for OLMS Lauro, the Department's interpretation has been to generally exempt from the persuader reporting obligations an employer-employee agreement pursuant to which "the consultant has no direct contact with employees and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees which the employer has the right to accept or reject." [3] The distinction between the consultant's direct and indirect contact with employees has provided clear direction on the scope of the "advice" exemption. Therefore, one would expect that such longstanding rules that have been in effect for nearly 50 years would be worth maintaining as is.

However, the Department is now proposing a "reinterpretation" of the "advice" exemption that would, in practice, effectively eliminate it. Under the Proposed Rule, any activity that is directly or indirectly related to persuading employees would fall outside of the "advice" exemption. The duty to report can be triggered even without direct contact between a lawyer or other consultant and employees, if persuading employees is, in whole or in part, a direct or indirect object of the activity. For example, the "advice" exemption would not apply if the lawyer or other consultant prepares or provides a persuasive script, letter, videotape, or other material or communication, including electronic and digital media, for use by an employer in communicating with employees. Similarly, a lawyer or other consultant's revision of the employer's materials or communications to enhance the persuasive message also falls outside of the "advice" exemption and triggers the reporting requirement. Under the Proposed Rule, persuader activity would extend beyond materials and communications to include, among other things, training supervisors and other management representatives to engage in persuader activity and creating employer policies and practices designed to prevent organizing whether or not the lawyer or other consultant is in direct contact with employees. In a departure from the current interpretation, reporting is required for conduct that includes both advice and persuader activity.

If the Proposed Rule is finalized, a clear and objective standard that has been in place for nearly 50 years would be replaced by a vague and overly broad test that would render the statutory "advice" exemption meaningless. Our objections to the Proposed Rule are explained more fully below.

II. <u>There is No Need to Change the Current Interpretation of the "Advice Exemption"</u>

There is no public policy or other legitimate rationale that warrants the proposed changes to the existing interpretation of the "advice" exemption. The very origin and duration of the

[2] *Id.* at 36192.
[3] *Id.* at 36181.

current rules establish a strong presumption that the rules are proper and fully consistent with the language and purpose of the LMRDA. The Department appears to blame the current rules for the so-called "underreporting" problem, which is derived from the low number of LM-10 and LM-20 reports being filed compared to the numbers of firms and consultants appearing in National Labor Relations Board ("NLRB") representation cases. However, there is no empirical data from Department investigations or enforcement actions to support the assertion about ongoing "substantial underreporting" of persuader activity under the LMRDA. Even if such underreporting is taking place, the Department has not demonstrated why the existing rules would not be sufficient to enforce the LMRDA and compel reporting.

III. The Proposed Changes are Overbroad and Vague and Inconsistent with Statutory Intent

Instead of the bright-line distinction between direct versus indirect contact with employees, persuader reporting under the Proposed Rule would be triggered if persuading employees is a direct or indirect object of the activity. This ambiguously defined new test contravenes the broad "advice" exemption that Congress intended. It would effectively amend the statute to eliminate the "advice" exemption that Congress created. With criminal penalties for willful failures to report or false reporting under the LMRDA, the breadth and vagueness of the proposal is certain to have a chilling effect on both employers and their legal counsel.

IV. The Proposed Rule will interfere with the Attorney-Client Relationship and Restrict Employer Access to Legal Counsel

For the past 50 years, the Department has respected the Congressional intent expressed in the LMRDA to protect the attorney-client privilege through the "advice" exemption. The current bright-line rule has been upheld by the courts, and has provided clear guidance over the years to employers and attorneys about what constitutes reportable activity. The Department's proposal, however, would upend this settled area of the law by replacing clear and straightforward definitions that have worked well for half a century with vague definitions that will create uncertainty among employers and attorneys. Under the Proposed Rule, it will be significantly more difficult for attorneys to know whether they must report activity undertaken for a client. The Department's repudiation of the longstanding interpretation that the advice exemption controls in situations of mixed advice and persuader activity will add to the uncertainty and undoubtedly interfere with the attorney-client relationship and the availability of candid, proactive legal advice.

The Department's novel and misguided interpretation will put at risk the ability of an employer and attorney to have privileged conversations about a variety of labor and employment matters. The attorney-client privilege will be threatened anytime the Department undertakes an investigation into whether an attorney complied with the new persuader activity reporting obligations and the substantially narrowed advice exemption. These types of investigations would likely arise from a union allegation that a company's lawyer had engaged in persuader activity and failed to report. If the lawyer took the position that its work for its employer-client did not involve persuader activity, the Department of Labor investigator would presumably be

required to either accept that representation as being true, which is not likely, or make further inquiry into the nature of written and oral communications between the employer and its attorney. Consequently, the employer's right to communicate with its attorney in confidence will be violated, and the attorney-client relationship between the employer and legal counsel will be undermined.

Attorney-client privilege may protect the contents of privileged communications against being disclosed in LMRDA report forms. However, the reporting requirements still would infringe on other important matters considered confidential information in the normal course of attorney-client matters. The consequence of one inadvertent persuader activity under the overbroad proposal would expose the law firm to potential reporting under the LM-21 of information as to other employer-clients to whom it renders labor relations advice and that are customarily considered confidential. This could, in turn, lead to possible ethical dilemmas based on the rules governing the practice of law in many states that prohibit attorneys licensed in that jurisdiction from disclosing the identities of their clients, the services rendered to them, or the fees paid by clients.

Even in the states that do not have exact ethical rules on point, employers' access to lawyers willing to give legal advice will be restricted because of the threat of unacceptable but required reporting requirements. The very fact that any specific employer has retained any specific attorney or law firm, and the facts and financial terms of that arrangement, are confidential matters. However, those items would need to be reported and become public information under the Proposed Rule if any law firm employed a single attorney who engages in a single instance of persuader activities for a single employer client. The resulting public disclosures for employers not involved in that single instance of persuader activity could be damaging or harmful to their business activities.

If the Proposed Rule is finalized, legal services rendered to employers that now fall within the "advice" exemption could be deemed persuader activity, triggering extensive reporting requirements for the employer and their legal counsel. In order to avoid even the appearance of actions that could be considered "persuader" activity and require potential LM-21 reporting of the names and fees of all clients to whom it provided labor relations advice or services, law firms may need to take new measures based on ethics rules and to protect other employer-client confidentiality.

Faced with these reporting obligations if they continue to offer what would be considered persuader activity under the proposed broad and vague standard, many law firms may stop offering employers advice or services regarding union organizing and collective bargaining altogether. As a result, employers will most likely have to navigate the complex waters of union organizing and collective bargaining without legal counsel, increasing the risks for violating the law. The Proposed Rule would, therefore, interfere with established attorney-client relationships that the employer has developed and come to depend on. Employers will lose the protection of attorney-client privilege for critical discussions that historically and without question have been immune from discovery and government intrusion. If employers must turn to non-lawyer

persuader consultants for advice, then those advice conversations would not be protected from discovery by the attorney-client privilege.

We must ask if the consequence of more restricted access by employers to legal counsel with respect to union organizing is intended, particularly considering proposals put forth by the NLRB to greatly shorten the time between the filing of a petition and the conduct of an election. The NLRB proposal would significantly reduce the time available for an employer to communicate with its own employees about unionization and respond to any misinformation. Any employer without its own legal advisor on staff will have little time to shop around for competent legal counsel during this brief, but critical, time. Small employers will be particularly harmed if their access to legal counsel is restricted.

Without access to legal counsel, employers would be forced to go it alone in complex and ever-changing areas of law, increasing the risks for violations of the law. Employers today routinely depend on legal advice from outside counsel for review and revision of policies and practices in order for the business to comply with many employment laws and regulations dealing with a wide range of issues unrelated to employee rights on organizing and bargaining through representatives. However, the Department's proposed changes are so broadly worded and vague that there may be reporting requirements in any of those areas whenever an employer seeks to obtain outside assistance, including legal advice, and the arrangement is exclusively for legal compliance purposes unrelated to the right to organize and bargain.

The Proposed Rule would seriously undermine the confidential attorney-client relationship, a relationship that Congress sought to preserve in the LMRDA. The expanded reporting requirements would dissuade employers from seeking legal advice during union organizing campaigns and deter law firms from offering labor relations advice for fear of triggering persuader reporting obligations. Employers are entitled to the same attorney-client privileges and other protections for confidential information about the attorney-client relationship afforded other business clients in any other area of law. Any rulemaking that so violates the attorney-client relationship and employers' fundamental right to counsel is without justification and must be withdrawn.

V. The Proposed Rule will Chill Employer Free Speech

By limiting employers' access to legal counsel, the Proposed Rule will make it much more difficult for employers to understand their rights and obligations during union organizing campaigns. Section 8(c) of the National Labor Relations Act guarantees employers the right to communicate their position on unionization to employees. However, without access to legal counsel, employers are much less likely to fully appreciate their rights under the NLRA and how to properly exercise them. Some employers, without the benefit of legal counsel during union campaigns and collective bargaining are more likely to violate the law. At the same time, many employers, fearful of violating the law without access to legal counsel to guide them, may simply silence themselves and refrain from responding to union rhetoric and effectively communicating with employees during an organizing campaign, giving the unions a distinct and unjustified advantage. Employees would hear only one-side of the story on unionization before casting their

ballots, undermining their ability to make informed decisions about unionization. Coupled with the NLRB's proposed rule for so-call "quickie" elections, the Department's proposed changes to the "advice" exemption would chill employers' federally protected free speech rights and tip the scales even more decidedly in favor of unions.

Employers proceeding without any legal counsel are left with the choice of either saying nothing to employees about unionization or talking to employees without knowing if the speech is lawful or not and increasing the risk for unfair labor practices or other litigation as a result. This is a no-win situation for employers, especially those small employers without "in-house" labor lawyers or a large legal department.

What the Department presents as a mere "reinterpretation" of the "advice" exemption, is, in fact, a violation of employers' constitutional rights and must be stopped. The Proposed Rule would limit the ability of employers to communicate with their own employees during organizing campaigns. Is so doing, the proposal would restrict employers from exercising their free speech rights guaranteed by the First Amendment.

VI. The Proposed Rule Will Increase Costs on Businesses

Executive Order 13563 directs that regulatory agencies take into account the benefits and costs of their regulations and consider their impact on economic growth and job creation. The Proposed Rule imposes potential costs and burdens far beyond how many minutes it takes to read so many words in the new LM-10 Form instructions, or how long it may take to look up certain information and transfer numbers to the LM-10 Form at the right space. The Department fails to account for the true cost of its proposal, which includes the cost to employers of restricting their access to established legal counsel and of obtaining alternative legal counsel. The true cost of the Proposed Rule also includes potential increases in employment and labor law violations by employers not able to obtain timely or reliable legal advice from their established outside counsel or others knowledgeable in the field as a result of restricted access to legal advice. In the Proposed Rule, the Department mentions the LM-21 in passing only, just to note that it is not the focus and will be addressed by separate rulemaking later in 2011 after the comment period on the current proposal is closed. It is disingenuous for the Department to ignore or to make changes to the "advice" exemption without full and express consideration of the costs, effects and consequences due to the resulting changes to LM-21 reporting.

In contravention of the above Executive Order, the Department has not provided a true accounting of the costs that such proposed changes would impose on employers, as well as the impact on the economic growth and job creation. This rulemaking cannot proceed further until the Department provides a full and complete accounting of the actual costs of the rule, especially for small businesses, and provided stakeholders with the opportunity to comment on those costs.

VII. Conclusion

IFDA and its members are strongly opposed to the Proposed Rule. For nearly 50 years, the existing interpretation of the "advice" exemption has provided clear direction to employers and their consultants about their reporting obligations under the LMRDA. It has preserved the sanctity of the attorney-client relationship as Congress intended. Why should the Department propose to render the statutory exception meaningless and restrict employers' access to legal counsel in connection with union organizing and collective bargaining? Why should the Department attempt to violate the First Amendment by chilling employer free speech and undermining the ability of employees to make informed decisions about unionization? Why should the Department act to potentially increase employer violations of the law by decreasing their access to legal counsel? Unfortunately, the Department's objective in this rulemaking is crystal clear. Because Congress has refused to alter union organizing rules, the Department has decided it will act unilaterally on behalf of organized labor to place employers at such a disadvantage that they cannot prevail in a union organizing campaign. This may serve the Department's misguided and illegal goal of facilitating unionization, but it is inconsistent with statutory language and violates employers' right to legal counsel. During these challenging economic times, we call upon to Department to direct its resources toward job creation and abandon its unjustified and harmful proposal. Accordingly, the Board must withdraw the Proposed Rule.

Respectfully submitted,

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