International Union of Operating Engineers
AFFILIATED WITH THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

September 21, 2011

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

Re: RIN 1215-AB79 and 1245-AA03

Dear Mr. Davis:

The International Union of Operating Engineers (IUOE) submits these comments in response to the Department of Labor's notice of proposed rulemaking with regard to the "advice" exemption to the reporting requirements set forth in § 203 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 433. 76 *Fed.Reg.* 36178 (June 21, 2011).

The IUOE supports the DOL's proposed interpretation of the "advice" exemption as a far superior interpretation than the current interpretation under which the advice provision in § 203(c) "trumps" coverage provision in § 203(b). 76 *Fed.Reg.* at 36181, citing *International Union, United Automobile Workers v. Dole*, 869 F.2d 616, 618 (DC Cir. 1989). The proposed interpretation 1) gives effect to all the language in both sections 203(b) and 203(c), and 2) the more narrow construction of the advice exemption effectuates the dominant purpose of the disclosure statute, which is to subject persuader activity to "glaring publicity." *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1215 (6th Cir. 1985)("Congress determined that persuasion itself was a suspect activity and concluded that the possible evil could best be remedied through disclosure. It was hoped that persuasive activity would be curbed by subjecting persuaders to glaring publicity.")

The IUOE also submits that there is a need for improved enforcement of reporting obligations since consultants routinely fail to report **direct** persuader activity despite the fact that there is no ambiguity concerning the requirement that such activity be reported. The IUOE's comments further address the comments submitted by opponents of the proposed rule, particularly those that seek to create a broad exemption for attorneys.

Clear guidance on conduct that must be reported and enforcement of these obligations are greatly needed more than ever before, since contemporary means

of communication often blur the distinction between direct and indirect contact as the use of e-mail and websites to communicate with employees has increasingly become a substitute for meetings or one-on-one communications. The use of covert drafters to convey electronic messages to workers becomes a more powerful weapon against the exercise of employee free choice as the sheer volume of electronic communications increases.

I. DIRECT PERSUADER ACTIVITY – BETTER ENFORCEMENT NEEDED

The DOL states that "current reporting under the LMRDA about persuader activity is negligible, as a result of the current overly broad interpretation of the advice exemption." 76 *Fed.Reg.* at 36182. The DOL quotes a former anti-union consultant who wrote that "few union busters" file reports, because "As long as [the consultant] deals directly only with supervisors and management, [the consultant] can easily slide out from under the scrutiny of the Department of Labor, which collects the Landrum-Griffin reports." *Id.* at 36187.

The IUOE agrees that the overly broad interpretation of the advice exemption has enabled consultants to evade coverage obligations, and that closing this loophole is necessary. However, lax enforcement of violations of clear reporting obligations is also a significant cause of underreporting.

A. Lawyers Fail to Report Direct Persuader Activity

Throughout the various revisions of the DOL's interpretation of Section 203, one interpretation has remained constant: direct persuader activity by attorneys must be reported. *International Union, United Auto., Aerospace & Agr. Implement Workers of v. Dole*, 869 F.2d 616, 618 (D.C. Cir. 1989). The Secretary contrasted such activity with conduct that would not constitute advice: "where the attorney-consultant has direct contact with employees or he himself engages in the persuader activity alleged." *Id.*

At a May 24, 2010 public meeting,[1] regarding employer and consultant reporting, the IUOE reported on an incident of direct persuader by an attorney that was not reported to the OLMS:

> During IUOE Local 49's [Minneapolis, Minnesota] 2007 campaign seeking to represent a unit of about 30 Knife River employees, Timothy Ewald, an attorney with Leonard Street and Deinard, directly addressed the employees in mandatory meetings during work time, and encouraged the employees to vote against the union in an upcoming election. The

[1] *See* 76 *Fed.Reg.* at 36182, citing 75 *Fed.Reg.* 27366.

union prevailed in the election despite the lawyer-orchestrated effort to derail the union. However, the union was unable to obtain a contract and has since been decertified. The attorney clearly engaged in direct persuader activity and should have filed an LM report, but failed to do so. Ewald's conduct illustrates the need for greater enforcement.

B. Consultants Who Directly Address Employees in Captive Audience Meetings or One-on-One Contacts Fail to Report This Activity

In the IUOE's experience, following the filing of NLRB petitions, employers have brought in unidentified union busters for the purpose of intimidating and harassing workers, disparaging the IUOE and its officers and labor unions in general, conducting captive audience meetings, and collecting information from workers and spreading misinformation to them. The IUOE has encountered consultants who research NLRB filings to learn of new representation petitions for the purpose of soliciting clients with offers of assistance in union busting strategies. *See* September 16, 2011 comments filed by Robert Heenan, Business Manager of IUOE Local 542, Fort Washington, Pennsylvania.

II. THE IUOE SUPPORTS A NARROW CONSTRUCTION OF THE "ADVICE" EXEMPTION AS NECESSARY TO EFFECTUATE THE DOMINANT OBJECTIVE OF THE DISCLOSURE STATUTE

The IUOE supports the proposed interpretation of the advice exemption since this interpretation does not swallow the rule requiring disclosure of direct and indirect persuader activity. The current interpretation allows the exemption to override the coverage requirement when an activity encompasses both advice and persuader activity.

The Supreme Court has stated that an exemption in a statute is to be construed in a manner that effectuates the purpose of the statute. *See Department of Interior v. Klamath Water Users Protective Ass'n,* 532 U.S. 1, 8 (2001) ("[T]hese limited exemptions [in FOIA] do not obscure the basic policy that disclosure, not secrecy, is the dominant objective of the Act," *Department of Air Force v. Rose,* 425 U.S. 352, 361, 96 S.Ct. 1592, 48 L.Ed.2d 11 (1976); "[c]onsistent with the Act's goal of broad disclosure, these exemptions have been consistently given a narrow compass," *U.S. Department of Justice v. Tax Analysts,* 492 U.S. 136, 151, 109 S.Ct. 2841, 106 L.Ed.2d 112 (1989); see also *FBI v. Abramson,* 456 U.S. 615, 630, 102 S.Ct. 2054, 72 L.Ed.2d 376 (1982) ("FOIA exemptions are to be narrowly construed").

The dominant objective of Section 203 is to require "goldfish-bowl publicity" as a means to "neutralizing the evils of persuaders." *Price v. Wirtz*, 412 F.2d 647, 650 (5th Cir. 1969)(en banc). Section 203(b) creates a reporting obligation for "any person" who undertakes "activities where **an** object thereof is, directly or indirectly" to "1) 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; or (2) 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." Emphasis added.

The reporting obligation under the broad disclosure statute is triggered so long as **an** object of the activity is to persuade or supply information; persuasion or supplying information need not be the exclusive object or even a primary object. Thus, for a consultant's activity to be reportable, only **one** of its objects needs to be that of persuasion, and clearly, whatever may be the scope of the term "advice," it does not exempt from the reporting requirement activities that amount to persuasion.

Section 203(c), by contrast, provides that an employer or consultant need not file a report regarding his services "by reason of" his giving or agreeing to give advice. The two sections can be reconciled by an interpretation that where one of the objects in sections 203(b) is present, the exemption is inapplicable even if the giving of advice was also involved. Indeed, unless "advice" means advice "independent" of persuader activity, the word "advice" has "no meaning whatsoever." *Douglas v. Wirtz*, 353 F.2d 30, 32 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966). The Secretary's current construction of the section 203 can be sustained only by ignoring part of the statutory scheme.

Rather than ignoring part of the statutory scheme, the proposed rule more appropriately gives effect to all the language in both section 203(b) and 203(c), which is consistent with fundamental principles of statutory construction. A "fundamental axiom of statutory interpretation that a statute is to be construed so as to give effect to all its language." *Lowe v. S.E.C.*, 472 U.S. 181 (1985). *See Cooper Industries, Inc. v. Aviall Services, Inc.*, 543 U.S. 157, 158 (2004)("[T]he Court must, if possible, construe a statute to give every word some operative effect.") A reading of 203(c) that limits the exemption to advice and does not allow a consultant to use his or her advice function to evade disclosure is consistent with the dominant purpose of the persuader statute.

As discussed below, management lawyers would have the DOL stretch the advice exemption to encompass all activity that may occur in the context of giving advice. However, while section 203(c) states that nothing shall require any

person to file a report "by reason" of his giving advice to or representing an employer before any court, an attorney is required to file a report if his or her actions go beyond giving advice or he or she gives advice on how to be more persuasive in communicating an anti-union message to employees.

III. ATTORNEY PERSUADERS CANNOT USE THEIR ADVICE FUNCTION TO AVOID REPORTING OBLIGATIONS

The vast majority of commenters focus on protection of the attorney-client relationship even though Congress specifically intended that lawyers who strategize with clients in union avoidance and orchestrate anti-campaigns are consultants subject to disclosure requirements. Lawyers cannot use their law licenses as a shield when the range of services that they provide extends far beyond advice on compliance with the law and crosses the line into functions that are performed by non-lawyer union busters.

The concern of the management labor bar over the impact of the persuader disclosure requirement is nothing new. At a 1959 mid-winter meeting, the American Bar Association (ABA), which was concerned about the ramifications the proposed legislation might have upon attorneys, adopted a resolution that would have exempted even the existence of an attorney-client relationship from coverage. *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1218 (6th Cir. 1985). The ABA resolution did not become law.

A. Congress Specifically Rejected the Exclusion of Lawyers From Reporting Obligations

Congress, from the beginning to the end of the legislative process, was acutely concerned with the effect the reporting requirements would have on attorneys. As summarized by the Fifth Circuit in *Wirth v. Fowler*, 372 F.2d 315, 328 (5th Cir. 1966), during Senate debate, Senator Goldwater proposed two amendments. The first, to add a definition of "Labor relations expert, adviser or consultant," specifically excluded an attorney engaged in the practice of law when first proposed. 105 Cong.Rec. 6555-56; II Leg. Hist. (NLRB) 1161; Leg. Hist. (Labor) 221-22. Senator Goldwater himself, however, modified his proposed amendment to remove the exclusion of attorneys. 372 F.2d at 328.. In clarification of the proposed amendment, Senator Kennedy asked: "What effect would the Senator's amendment have on the requirement that attorneys be subject to the law when they are acting as Labor relations consultants"? *Id.* Senator Goldwater replied "they would be subject to the law." *Id.* As so modified, the amendment was accepted by Senator Kennedy. *Id.*

B. Management Lawyers Perform "Extra-Professional Services"

In 1965, the Fourth Circuit expressed the view (*Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966)) that when a lawyer engages in practices described in § 203(b)(1), he is engaging in "extracurricular" or "extra-professional services" and in work that "is not necessarily a lawyer's" (emphasis added):

> Our view-that a lawyer is obligated to reveal receipts, expenditures and the names of his clients in connection with other labor relations advice or services, if he participates in the practices categorized in § 203(b)(1)-does no injustice to the lawyer. Primarily, as the legislative history records, the 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. Of course, one unforeseeable burden may be the subsequent necessity of listing clients who, prior to the persuasion services, were given non-reportable advice without any thought that a later activity would force a report of their names. Here, however, it is well to remember that, save in unusual circumstances, the name of a client is not shielded by the attorney-client privilege. Cf. *N.L.R.B. v. Harvey*, 349 F.2d 900, decided by this court on July 7, 1965, with opinion by Butzner, D.J. Of course, the content of the communications between the lawyer and the client, even on the subject of labor relations, need not to be included in the report by virtue of § (b). § 204, 29 U.S.C. 434.

The Fifth Circuit similarly distinguishes between a lawyer serving clients in labor relations matters and a lawyer "wander[ing]" into the realm of the "suspect field of persuader activity" (*Price v. Wirtz*, 412 F.2d 647, 650 (5th Cir.1969) (en banc)):

> Since a principal object of LMRDA was neutralizing the evils of persuaders, it was quite legitimate and consistent with the Act's main sanction of goldfish-bowl publicity to turn the spotlight on the lawyer who wanted not only to serve clients in labor relations matters encompassed within § 203(c) but who wanted also to wander into the legislatively suspect field of a persuader.

As noted in the preamble to the proposed rule, the 1980 Subcommittee Report recognized the evolution of the role of lawyers during the 20 years that had elapsed since the passage of the LMRDA. 76 *Fed.Reg.* at 36185. The Report states that (*Id.*):

Many lawyers no longer confine their practice to traditional services such as representing employers in administrative and judicial proceeding or advising them about the requirements of the law. They also advise employers and orchestrate the same strategies as non-lawyer consultants for union "prevention," union representation election campaigns, and union decertification and deauthorization. Lawyers conduct management seminars, publish widely, and often form their own consulting organizations.

Major management law firms market themselves as experts in formulating "comprehensive and strategic union avoidance tactics." Their ability to attract business is not based exclusively on their expertise in labor law; indeed, a law firm's reputation in the orchestration of aggressive anti-union campaign is its best advertisement. The following are examples of the descriptions of the legal and "extra-legal professional services" offered by prominent management firms:

Jackson Lewis LLP – Managing Partner Rick Grimaldi
http://www.jacksonlewis.com/people.php?PeopleID=1231

Mr. Grimaldi regularly assists business clients with traditional labor matters such as formulating comprehensive and strategic union avoidance tactics, protecting employers in union election campaigns, negotiating collective bargaining agreements and defending grievance and unfair labor practice claims.

Littler Mendelson – Robert Long
http://www.littler.com/people/robert-c-ong

Robert also has an extensive union avoidance practice, including handling policy and strategy development activities, union vulnerability risk assessments and related management training and representation proceedings before the NLRB.

Miller Johnson –
http://www.millerjohnson.com/services/xprServiceDetailMillJ.aspx?xpST=ServiceDetail&service=327

Union Avoidance

The Union Avoidance Practice Group represents public and private employers who wish to establish and/or maintain a union-free workplace. Our union avoidance attorneys have more than 100 years of combined experience in over 600 campaigns combating union organization efforts on behalf of contractors, hospitals, government, schools, manufacturers,

transportation and distribution companies, retail establishments, and a wide variety of service companies.

Ruderman & Glickman, P.C. - http://www.rglaborlaw.com/

Experienced with Union Relations

Based in Springfield, New Jersey, our firm has more than 20 years of legal experience handling union relations for employers. Specifically, we:

- Provide supervisory union avoidance training
- Identify when workers are initially attempting to unionize
- Run election campaigns once a union is on the scene
- Develop strategies for election campaigns
- Inform employees about the company's position regarding unions
- Handle National Labor Relations Board (NLRB) petition matters

Our firm has a proven track record of success in running campaigns and winning elections. Our accomplishments include the decertification of the United Auto Workers (UAW) after seven years of unionization. After defeating or decertifying a union, our focus shifts to rebuilding trust between management and employees and helping businesses grow toward a more productive future.

C. Management Attorneys Are Adept at Avoiding Disclosure Obligations

Management attorneys know how to evade reporting obligations, and the management bar has used the DOL's broad interpretation of "advice" to its advantage in so doing. Management lawyers know the difference between advice concerning the lawfulness of an employer's statements or activities and persuader activity, and are adept at ensuring that they do not cross the line into what is unequivocally direct persuader activity. Management counsel appears at captive audience meetings, for example, as the employer's partner in persuading employees to reject union representation. At such meetings, counsel refrains from directly addressing employees, but actively coaches the employer as the anti-union message is delivered.

The lawyer often appears to be a puppeteer as counsel whispers to the management's representative before each response to employee inquiries. At the OLMS stakeholder meeting in May 2010, the IUOE provided an example of a management lawyer's finesse in avoiding reporting obligations. To the employee audience, management lawyer Richard Ross appeared to be the ventriloquist with the employer as the puppet:

In a 2009 campaign involving Great Western Metal Recycling, Richard Ross of Frederikson & Byron coached Scott Hellberg, Vice President of Operations, throughout captive audience meetings with small groups of employees during which the employer encouraged the workers to vote against the union in the upcoming election. The meetings were held in April 2009, including one that was held a little more than 24 hours before an April 17, 2009 election. At these meetings, Ross was careful not to directly address the workers, but repeatedly conferred with Hellberg in whispers. Hellberg would then add to or modify his prior statements. The employees believed that, while Ross did not speak at the meeting, he was controlling the company message, and was there to make sure Hellberg did not go "off script." Under the DOL's current interpretation of Section 203, it is unclear whether Ross would be required to report his activity. While the employer was clearly the attorney's mouthpiece at the meetings that Ross attended, Ross did not speak directly to the workers. If, as urged by the AFL-CIO, the DOL returns to its original interpretation of Section 203, Ross would be required to report his role in such efforts to persuade the employees to vote against the union.

Despite the captive audience meetings and the dissemination of anti-union literature, IUOE Local 49 prevailed in the Great Western election, 29 to 1.

The use of lawyers in captive audience meetings has become a powerful weapon in an anti-union employer's arsenal. Some employers may choose to pay for the presence of an attorney at captive audience meetings for the primary purpose of ensuring that the employer's unscripted comments or off-the-cuff responses to employees' questions to scripted comments fall within permissible employer speech under Section 8(c) of the National Labor Relations Act. However, by attending persuader meetings and conferring with the employer during the course of these meetings, the attorney directly participates in conveying the anti-union message.

The presence of counsel at a meeting held for the purpose of persuading employees to vote against a union sends a message to the employees. The experience of IUOE organizers is that the very presence of counsel has a chilling effect on the exercise of Section 7 right and serves to dissuade union support. The presence of attorneys lends more credibility to the employer's message and creates an impression that participation in union activity could result in a lawsuit against the employees. The IUOE attempts to "inoculate" the employees against the anticipated participation of attorneys in these meetings, but the employees are nonetheless fearful that the attorney's services will be used by the employer in retaliating against the employees.

In the context of considering Section 8(c) of the National Labor Relations Act, the Supreme Court declared that any balancing of the employer rights of free speech and the rights of employees to be free from coercion, restraint, and interference "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *N.L.R.B. v. Gissel Packing Co.* 395 U.S. 575, 616 (1969).

D. The Interpretation of Advice Urged by the Management Bar Would Eliminate Indirect Persuader Activity as Reportable Conduct by Attorneys

In opposing the proposed rule, attorney commenters have argued for interpretation of the advice exemption that would exclude any reference to revising and editing communications prepared by the employer so long as the editing and revising does not "enhance" the message.[2] Other attorneys have opined that the proposed interpretation would trigger disclosure if persuader activity is a potential byproduct.[3]

The DOL has made clear in issuing the proposed rule that revisions made for the sole purpose of ensuring that the written communications are lawful does not trigger reporting obligations (76 *Fed.Reg.* at 36191(emphasis added)):

> Similarly, a consultant's revision of the employer's material or communication to **enhance** the persuasive message also triggers the duty to report, unless the revisions exclusively involve advice and counsel regarding the exercise of the employer's legal rights.

In issuing the final rule, the DOL should reiterate to avoid any plausible deniability on the part of the management bar that enhancement encompasses **any** edits or revisions that have the potential to render the anti-union communication more persuasive.

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[2] *See e.g.*, August 2, 2011 comments of Richard Ross of Fredrickson & Byron: "I respectfully submit that the proposed change be modified to eliminate any reference to revising, editing, reviewing, or advising employers on its communications with its employees, so long as the revision does not 'enhance' the message. Merely editing any communications to insure that the communication is lawful, does not 'enhance' the message."

[3] *See e.g.,* August 12, 2011comments of R. Michael Lowenbaum of The Lowenbaum Partnership LLC, "The proposed rules effectively eviscerate the Advice exemption and require reporting in every instance, regardless of the purpose of the attorney's drafting, editing, or communication with an Employer if a *potential* byproduct of that advice is that it might somehow play some role in persuading an employee regarding union representation." Emphasis in original.

Management attorneys seek to have the tail wag the dog. The mere fact that advice, editing, and revisions are included in a full package of union avoidance services to a client does not transform behind the scenes participation in the creation of persuader materials into pure advice. Such a reading of enhancement would exempt attorneys from reporting any indirect persuader activity.

An exemption for all indirect persuader activity undertaken by lawyers is contrary to the statutory language and Congressional intent. If only direct persuader activity of lawyers were covered, the attorney-client privilege exemption in section 204 would be unneeded. No reasonable interpretation of attorney-client privilege would exempt an attorney's direct communications with third parties.

E. The Management Bar Cannot Rely on Attorney-Client Privilege to Evade Reporting Obligations

There is no conflict between an attorney's obligation to file a Form LM-20 and her/his the obligation to confidential communications.

1. Attorney-Client Privilege Does Not Encompass the Fact of Legal Consultation or Fees

The attorney-client privilege only precludes disclosure of *communications* between attorney and client and does not protect against disclosure of the facts underlying the communication. *Humphreys*, 755 F.2d at 1219, citing *Upjohn Co. v. United States,* 449 U.S. 383, 395 (1981). In general, the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment are not deemed privileged. In *In re Grand Jury Investigation No. 83-2-35,* 723 F.2d 447 (6th Cir.1983), *cert. denied,* 467 U.S. 1246 (1984), the court reiterated the principle that the attorney-client privilege should be narrowly construed and held that the attorney-client privilege does not protect the identity of a client except in very limited circumstances. In *United States v. Haddad,* 527 F.2d 537, 538-39 (6th Cir.1975), *cert. denied,* 425 U.S. 974 (1976), the court held that the amount of money paid or owed by a client to his attorney is not privileged except in exceptional circumstances not present in the instant case.

The Sixth Circuit in *Humphreys* concluded that "none of the information that LMRDA section 203(b) requires to be reported runs counter to the common-law attorney-client privilege." 755 F.2d at 1219. Any other interpretation of the privilege created by section 204 would render section 203(b) "nugatory" as to persuader lawyers. *Id.*

2. Third Party Disclosure Negates Attorney-Client Privilege

When a party discloses a document which is protected by the attorney-client privilege to a third-party, the party waives the attorney-client privilege on any revisions or later drafts of the document on the same subject matter as the earlier versions. *See Fort James Corp. v. Solo Cup Co.,* 412 F.3d 1340, 1349 (Fed.Cir. 2005) (waiver applies to all other communications relating to the same subject matter); *United States v. Collis,* 128 F.3d 313, 320 (6th Cir.1997) (scope of waiver turns on scope of disclosure and inquiry is whether disclosure involves same subject matter as desired testimony); *General Electric Co. v. Johnson,* 2006 WL 2616187 at *18-*19 (D.D.C. Sept. 12, 2006) (finding waiver as to all drafts and revisions of disclosed documents on same subject matter).

3. The Attorney-Client Privilege is Designed to Protect the Client, Not the Attorney

Employers, workers, and the general public would greatly benefit from knowledge of the staggering costs charged by law firms and other consultants for persuader activity. If the DOL enforces the requirement that law firms and other consultants disclose the costs of such activity, employers would have the ability to compare the costs of offering benefits and/or raises to their workers to the fees that high powered law firms charge year after year to defeat union representation. Armed with this knowledge, some employers – particularly smaller employers – may decide to negotiate in good faith rather than to pay law firms that have a strong self-interest in collecting the fees that they earn for union-busting. The harder law firms fight the union, the more they earn.

IV. LOBBYING DISCLOSURE AND CAMPAIGN FINANCE DISCLOSURE DEMONSTRATE THAT CONGRESS HAS REQUIRED PUBLIC DISCLOSURE IN OTHER ARENAS WHEN THE POTENTIAL FOR CORRUPTION IS HIGH

The Supreme Court has recognized that disclosure is an effective means of countering actual corruption and the appearance of corruption. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976), *quoting* L. Brandeis, *Other People's Money* 72 (1933):

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light is the most efficient policeman.

The DOL has aptly noted that the LMRDA's provisions requiring the disclosure of consultant participation in representation elections have "close analogs" in federal election campaign law. 76 *Fed.Reg.* at 36184. As discussed below, the LMDRA's disclosure requirements also have close analogs in lobbying

disclosure requirements mandated by the Lobbying Disclosure Act of 1995 (LDA), 2 U.S.C. § 1601, as amended by the Honest Leadership and Open Government Act of 2007.

A. Similar to the Persuader Reporting Obligations, the Lobbying Disclosure Obligations Require an Assessment of the Nature of One's Activities to Determine Reporting Obligations

Like the Section 203 of the LMRDA, the LDA requires an individual who engages in the regulated activity to assess the nature of his or her conduct to determine whether such conduct triggers a reporting obligation. In the LDA context, the self-assessment involves an analysis of the **content** of communications with covered officials and the potential lobbyist's **intent** when engaging in "lobbying activity." With regard to content, a individual must assess whether the subject matter of his or her written or oral communications with covered officials is encompassed within the subject matter included in the definition of "lobbying contact" in 2 U.S.C. § 1602(8). The following types of communications are listed in 2 U.S.C. § 1602(8)):

(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
(iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

With regard to intent, see 2 U.S.C. § 1602(7), which provides that the term "lobbying activity" means "lobbying contacts and any efforts in support of such contacts, including preparation or planning activities, research and other background work that is **intended**, at the time of its preparation, for use in contacts, and coordination with the lobbying activities of others."

B. Lobbying Contacts Do No Lose Their Character as Such When These Communications Also Include Non-lobbying Content

Proponents of a broad advice exempt maintain that if advice and persuader activity are part of the same communication, the advice function should control and the persuader activity need not be reported.

Under the LDA, lobbying contacts do not lose their character as such when communications include both lobbying and non-lobbying content. The opposite result would obviously undercut the reporting obligations under the LDA. Indeed, lobbyists could use such a loophole to avoid their reporting obligations by devoting part of their time with a covered official to a discussion of topics other than lobbying.

By analogy, the goldfish-bowl publicity goal of the persuader statute would be undercut if a consultant could evade his or her reporting obligations by combining advice with persuader activity.

The IUOE appreciates the opportunity to comments on the proposed rule.

Respectfully submitted,

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Elizabeth A. Nadeau
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RG/EN:fg