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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

WASHINGTON, D.C.

Sheppard, Mullin, Richter & Hampton LLP ("Sheppard Mullin") respectfully submits the following comments regarding the new proposed revised interpretation of the Labor-Management Reporting and Disclosure Act ("LMRDA"), and in particular the new proposed interpretation of the LMRDA's "advice" exemption, announced by the National Labor Relations Board ("NLRB") on June 6, 2011.[1] Sheppard Mullin's comments are

[1] Sheppard Mullin is an international law firm headquartered in Los Angeles, California, with additional offices in Orange County, Century City, San Francisco, Palo Alto, Santa Barbara, San Diego, Del Mar, New York, Washington D.C., Shanghai, Beijing, Brussels, and London. The labor and employment practice group at Sheppard Mullin consists of

intended to elaborate on the practical, legal and ethical concerns of the law firm community, particularly with respect to the impact of the new interpretation on the attorney-client privilege, and attorneys' ethical obligations with respect to client confidences.

As detailed herein, when considered in the attorney-client context, the Board's proposed changes (1) improperly intrude upon communications that are protected by the attorney-client privilege; (2) fail to accurately account for the ethical obligations of labor attorneys; (3) will require the Board to delve impermissibly into privileged attorney-client communications in order to discern whether violations of the LMRDA have occurred; and (4) will create perverse incentives by discouraging employers from seeking legal counsel, and by discouraging attorneys from counseling employers. Each of these concerns is explored in more detail below.

I. The Proposed Change to the "Advice" Exemption Under The LMRDA Fails To Adequately Account For The Attorney-Client Privilege.

Section 204 of the LMRDA ("Section 204") exempts from the LMRDA's reporting obligations any "information which was lawfully communicated to . . . [an] attorney by any of his clients during the course of a legitimate attorney-client relationship." 29 U.S.C. § 434. As noted by Senator Barry Goldwater when he first introduced the amendment to the LMRDA that was subsequently enacted as Section 204, this provision "specifically exempts from the reporting requirements of the [LMRDA] any communications between an attorney and his client." 105 Cong. Rec. 19759-62 (1959). Senator Goldwater went on to state that the provision was necessary in order to preserve the "sanctity of relations between attorney and client." Id. By enacting "section 204, Congress intended to accord the same protection" to attorney-client communications "as that provided by the common-law attorney-client privilege." Humphreys, Hutcheson and

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over 85 attorneys, many of whom devote a substantial portion of their practice to representing employers in labor-management disputes before the Board and its Regional Offices.

Mosely v. Donovan, 755 F.2d 1211, 1219 (6th Cir. 1985); see also Wirtz v. Fowler, 372 F.2d 315, 332 (5th Cir. 1966) (noting "a legislative intent to make § 204 roughly parallel the common-law attorney-client privilege.").

In its Notice of Proposed Rulemaking: Labor-Management Disclosure Act; Interpretation of the "Advice" Exemption, 76 F.R. 36178 (June 21, 2011) ("NPRM"), the Board acknowledges Section 204's protection of attorney-client communications. However, the Board also notes that there has been an "increase in the use of law firms to assist employers in their union avoidance activities." NPRM at 36185. As expressed by the Board, often "at the first sign of union activity at a facility management seeks the advice and counsel of one or more attorneys." NPRM at 36186, quoting Bruce E. Kaufman and Paula E. Stephen, *The Role of Management Attorneys in Union Organizing Campaigns*, 16 Journal of Labor Research 439 (1995). In many cases "the attorney's role is largely one of providing legal assistance, such as advising supervisors on what constitutes an unfair labor practice under the NLRA." Id. "In other situations, the attorney not only provides legal counsel but also plays an important . . . role in developing and implementing the company's anti-union strategy and campaign tactics." Id.

Currently, privileged communications between attorneys and their employer clients are exempted from the LMRDA pursuant to the LMRDA's "advice" exemption, which has long been interpreted to exclude from reporting actions such as the preparation of written material, so long as the employer is free to "accept or reject" that material. NPRM, at 36180. As described by the Board, the current interpretation of the advice exemption "views most activity other than direct contact between a consultant and employees as falling within the 'advice' exemption." NPRM at 36187. Thus, employers and attorneys can be confident that their privileged communications will not trigger a reporting obligation under the LMRDA, since the advice exemption is broad enough to cover those communications. Here, however, the Board proposes to narrow the "advice" exemption such that it will not cover communications that "go beyond mere advice and . . . have a direct or indirect object to persuade employees with respect to their statutory

rights." NPRM at 36182. Under this interpretation, while some attorney-client communications would continue to be exempted from the LMRDA, others would not, depending on whether or not the communication was considered to "go beyond mere advice." Id.

Hence, the proposed interpretation of the "advice" exemption eliminates what had previously been a "bright line" rule, in favor of an interpretation under which privileged communications can potentially trigger reporting obligations. This appears to be at odds with the directive of Section 204. In addressing this issue, the Board has simply stated that its intent is still that where "an attorney's report about his or her agreement or arrangement with an employer may disclose privileged communications, for instance where an attorney provides an employer with both legal advice and engages in persuader activities, the privileged matters are protected from disclosure." NPRM, at 36192. Yet, the Board still appears to contemplate both that privileged activities will be reported, and that privileged communications will trigger reporting obligations. Indeed, much of what the Board has described as "persuader activity" involves communications that are necessarily protected by the attorney client privilege. Thus, attorney and employer reporting obligations remain unclear.

For example, the Board has stated that persuader activities under the proposed interpretation would include "revision of the employer's 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." NPRM, at 36191. Yet, regardless of whether or not the employer's persuasive message is in some way "enhanced" by an attorney's revision of an employer's proposed communication, an attorney's revision of an employer's draft written material will necessarily constitute a privileged communication. Revisions "made on [a] document" that "reflect suggestions by the attorneys" regarding how a matter should be stated reflect the lawyer's advice to the client, and as such are protected by the attorney-client privilege. See Freeport-McMoran Sulphur, LLC v. Mike Mullen Energy Equip. Res., Inc., Civ. A. No. 03-1496 c/w 03-1664

SECTION: "A" (4), 2004 U.S. Dist. LEXIS 10197, at *62. (E.D. La. June 3, 2004.) As one treatise summarizes, "[i]f a lawyer sends a client a stand-alone document suggesting changes to a client-created draft, it is difficult to imagine any court finding that separate document unprotected." Thomas E. Spahn, The Attorney-Client Privilege: A Practitioner's Guide, § 4.906, p. 175 (2007). "As might be expected, most courts take the same approach to comments or revisions that a lawyer makes in a client's contemporaneous draft documents." Id. Regardless of whether or not the lawyer's revisions "exclusively involve advice," they still necessarily constitute privileged communications between the attorney and his or her client.

It should be noted here, as set forth more fully below, that any review of this issue would necessarily require revelation of attorney work product, in order to determine whether or not the attorney communication is exempted from the rule of disclosure. For instance, where counsel determines in his or her professional capacity that a communication puts a client at risk of an unfair labor practice, it will be extremely difficult to separate any revision made to that communication from reportable conduct under the new rule. In any event, by stating that attorney-client communications which do not "exclusively involve advice" would be subject to reporting, the Board's proposed interpretation necessarily contemplates the reporting of privileged communications.

Similarly, the Board's NPRM states that persuader activity would include "training or directing supervisors and other management representatives to engage in persuader activity." NPRM, at 36191. In doing so, the Board's rule in this context necessarily involves disclosure of privileged communications. As noted by the U.S. Supreme Court, attorney-client privilege applies not only to communications between an attorney and a client corporation's "control group," but often extends to communications with lower-level employees as well, since the "attorney's advice will . . . frequently be more significant to noncontrol group members than to those who officially sanction the advice," and the attorney must be able to "convey full and frank legal advice to the employees who will put into effect the client corporation's policy." Upjohn v. United

States, 449 U.S. 383, 392 (1981); see also Duplan Corp. v. Deering Milliken, Inc., 397 F. Supp. 1146, 1164 (1974) ("After the lawyer forms his or her opinion, it is of no immediate benefit to the Chairman of the Board or the President. It must be given to the corporate personnel who will apply it."). Thus, while the Board has indicated that an attorney's communications with members of management or other supervisors may constitute reportable activity, such communications will almost always be privileged. This further threatens attorney-client privilege, thereby serving to discourage diligent and responsible employers from obtaining competent legal counsel to train their managers regarding what they can and cannot do during the course of a union organizing drive.

Further, the Board's proposed Form LM-20 is designed in such a way that it cannot be completed without breach of the attorney-client privilege. In particular, the Board has established a "checklist of activities" so as to "ensure more complete reporting of . . . persuader activities." NPRM, at 36194. Similarly, the proposed Form LM-20 requires attorneys to indicate whether or not they have engaged in any communications with the purpose to "persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize . . . ." Yet, the "motivation of the client in seeking representation," as well as descriptions of the "specific nature of the services provided" are protected by the attorney-client privilege. U.S. v. Amlani, 169 F.3d 1189, 1195 (9th Cir. 1999), quoting Clarke v. American Commerce National Bank, 974 F.2d 127, 129 (9th Cir. 1992). In addition, the proposed Form LM-20 would require the attorney to identify any "subject employees" about whom the attorney counseled the employer, which would necessarily reveal privileged communications and information. Thus, attorneys subject to a reporting obligation under the Board's proposed "advice" interpretation will be forced to choose between either completing the form or maintaining the attorney-client privilege. While the Board has indicated that the attorney-client privilege should be maintained, its simultaneous requirement that law firms complete the Form LM-20 creates an untenable tension with that directive.

At the very least, the new proposed interpretation will create confusion as applied to attorneys. Attorneys will not know whether all persuader activity must be reported, or if only that persuader activity which does not occur within the context of privileged communications creates a reporting obligation. Such confusion is not present under the Board's current interpretation of the LMRDA's "advice" exemption, and the "bright line" rule maintained by the Board. This type of clarity is necessary in order to preserve the attorney-client privilege. As stated by the U.S. Supreme Court, an "uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all." Upjohn, 449 U.S. at 393. Consequently, any interpretation of "advice" that renders application of the privilege unclear is at odds with the directive of Section 204.

In light of these concerns , Sheppard Mullin's position is that the current interpretation of the LMRDA's "advice" exemption should not be changed. If the Board is inclined to proceed with the proposed changes, significant further hearings and analysis should take place regarding the practical and legal implications of the proposed new interpretation's effect on attorney-client communications, in light of the attorney-client privilege. At the very least, the Board should revise or clarify its proposed interpretation such that privileged attorney communications will not trigger an attorney's reporting obligations under the LMRDA, and that privileged activities will not have to be reported, so that the attorney-client privilege is properly maintained.

II. The Board's Proposed Interpretation Would Require Attorneys to Violate Their Ethical Obligations.

The proposed narrowing of the LMRDA's "advice" emption is also in conflict with attorney ethical obligations. Under the Rules of Professional conduct, an attorney generally has an obligation to maintain client confidences. See Model Rules of Professional Conduct, Rule 1.6 ("A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . ."). Most states, as well as the District of Columbia, impose an obligation on attorneys to maintain

confidential client information unless the client consents to disclosure.[2] An attorney's ethical obligation to maintain the 'confidences' and 'secrets' of clients is broader than the attorney client privilege. See, e.g. U.S. v. Falzone, 766 F.Supp. 1265, 1279 (1991); Wise v. Consolidated Edison Co. of New York, 723 N.Y.S. 2d 462, 463 (2001); Dietz v. Meisenheimer & Herron, 177 Cal. App. 4th 771, 786 (2009). Thus, by requiring attorneys to complete the proposed Form LM-20, and include the information requested, the Board would effectively be requiring attorneys to contravene their ethical obligations.

The NPRM eschews concern for the tension between the employer's ethical obligations of confidentiality, and the reporting of persuader activity under the new proposed rule, by noting that the "fact of legal consultation, clients' identities, attorney's fees and the scope and nature of the employment are not deemed privileged." NPRM at 36192. Yet, this does not properly account for the scope of what is requested by the Form LM-20. Indeed, as noted above, much of the information sought by the Form LM-20 does fall within the attorney-client privilege. Moreover, the Board's comment does not take into consideration attorney ethical obligations. Such obligations go beyond requiring simply that the attorney maintain the confidentiality of privileged communications. Rather, attorneys are ethically (and, by virtue of state bar requirements, legally) obligated to refrain from disclosing any client confidences, regardless of whether those confidences are simultaneously protected by the attorney-client privilege.

By way of example, the proposed Form LM-20 requires the attorney to both detail the "terms and conditions" of the arrangement with the client, and to physically attach the written agreement to the form. Yet, in most jurisdictions attorneys are ethically obligated to keep in confidence the facts and circumstances of the representation of their clients. In California, for example, state law specifically holds that a "written fee contract"

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[2] *See. e.g.,* Ala. Rules of Prof'l Conduct R. 1.6; D.C. Rules of Prof'l Conduct R. 1.6, cmt. 7; Ill. Rules of Prof'l Conduct R. 1.6; Mass. Rules of Prof'l Conduct R. 1.6(a), cmts. 4 and 5; Minn. Rules of Prof'l Conduct R. 1.6; Nev. Rules of Prof'l Conduct R. 1.6; N.J. Rules of Prof'l Conduct R. 1.6; N.Y. Rules of Prof'l Conduct R. 1.6; Tex. Disciplinary Rules of Prof'l Conduct R.1.05.

between an attorney and client constitutes "confidential information," which the attorney is ethically obligated to maintain in confidence. Cal. Bus. & Prof. Code §§ 6149, 6068(e). Thus, while the written agreement with the client would arguably not be protected by the attorney-client privilege, the employer would be ethically obligated to refrain from disclosing it to the Board. An attorney who reported the information requested by the proposed Form LM-20 could therefore be subject to discipline, up to and including disbarment.

Consequently, even where attorney-client privilege is not implicated, the Board's revised interpretation of the advice exemption is in conflict with well-established attorney obligations. Indeed, ABA Model Rule 1.6 expressly forbids the attorney from revealing "information relating to the representation of a client unless the client gives informed consent." Yet, that is precisely what the Board asks attorneys to do here. Thus, the Board's revised interpretation creates an ethical quandary for attorneys; either they comply with the Board's reporting requirements, or they comply with the ethical rules of their state.

Sheppard Mullin posits that these ethical concerns provide further justification for the Board to retain its current interpretation of the LMRDA's "advice" exemption. If the Board is still intent on adopting the proposed changes, a review and analysis should be conducted to determine how attorneys may comply with the LMRDA's reporting obligations without violating legal and ethical mandates. At present, the Board has not yet reviewed the impact of its proposed interpretation on these types of ethical obligations. Sheppard Mullin believes that such a review must be conducted prior to the implementation of any new interpretation of the LMRDA requiring disclosure of attorney-client information.

III. The Board's Proposed Interpretation Will Require The Board To Delve Impermissibly Into Privileged Conversations In Order To Discern Whether A Violation Has Occurred.

Perhaps the most troubling aspect of the Board's proposed narrowing of the advice exemption is the extent to which the analysis of any allegation violation of the LMRDA will require the Board to examine specific lawyer-client communications. As proposed by the Board, reporting under the revised advice exemption would be required "in any case in which the agreement or arrangement, in whole or part, calls for the consultant to engage in persuader activities, ***regardless of whether or not advice is also given***." NPRM, at 36182 (emphasis added). Thus, regardless of the overall nature and purpose of the arrangement, an attorney would have to report if he or she engaged in "any . . . actions, conduct, or communications designed to persuade employees." Id. at 36182. Consequently, under the proposed interpretation, ***any*** action or communication that is deemed to constitute persuader activity will subject any and all interactions between the attorney and client subject to Board scrutiny.

As applied to attorneys, the determination of whether a reporting violation has occurred will turn on the ***content of specific attorney-client communications***. Indeed, in order to enforce the LMRDA's reporting obligations under the new proposed interpretation, the Board will necessarily have to thrust itself into the most privileged of communications between attorney and client. Consider what will happen where it is alleged that an employer has retained a law firm to, in part, perform activities that fall outside of the revised definition of "advice," and it is asserted that the employer and the law firm violated the LMRDA by failing to report such activity If the employer and law firm deny this to be the case, the Board will be left with two choices. It can either take the employer and law firm at their word, and refrain from looking into the matter further, or it can investigate the specific communications between attorney and client to determine whether persuader activity has occurred. If the Board intends to review the matter at all,

its investigation would have to center around a review of communications between the attorney and the employer client.

Take the case of an employer whose employees have petitioned for a representation election. The employer could retain a law firm and ask that it engage in activities such as meeting with representatives of management and other supervisors to discuss what they may or may not say to employees. In the event that an employee or union representative claims that the law firm conducted these meetings not simply to advise these individuals of their legal obligations, but also spoke to them about how best to encourage employees to vote against certification of the union, the Board would be placed in a quandary. It could either leave the matter alone (presumably above the objection of the union), or it could investigate and review what was said during these meetings, in order to determine whether any of the employer's communications were made with the "purpose" of persuading the employees not to certify the union. Such an inquiry would thrust the Board into the heart of the attorney-client privilege.

Indeed, not only would investigation of alleged violations under the revised interpretation require a review of attorney-client communications, it would in fact require the Board to parse the intent of what was said during those communications. Consider what is perhaps the most basic of employer questions to an attorney during the course of a union organizing drive: "What can I say to the employees?" In positing this question to the attorney, the employer is seeking advice, in the most fundamental way, as to the manner in which it can exercise its rights without violating the law. In responding to this question, the attorney will most certainly be providing his client with "advice", in that the attorney's response will indicate what the employer is permitted to say. But the attorney could also describe for the employer some arguments it could make that would dissuade employees from voting in favor of the union. The Board will have no way of knowing whether the lawyer's advice also included information designed to persuade employees unless it inserts itself in the conversation, dissects what was said, and analyzes the purpose of each statement made by the attorney to his or her client. In these circumstances,

regardless of whether or not a reporting violation actually occurred, the privilege would be eviscerated, because the entire attorney-client communication would have become subject to Board scrutiny.

The same result would also be likely if the attorney were asked to review an employer's proposed communication to employees. For example, say the employer proposes to tell employees: "Even if you elect the union, we are not going to agree to anything with them." The attorney revises this sentence to say "Even if the union is elected, the employer is not required to agree to the union's proposals or a contract but must only bargain in good faith." The attorney's advice has steered the employer clear of a violation of the NLRA, but has also potentially helped him persuade the employees, by noting that the employer is not required to agree to the union's proposals, or to a union contract. Whether or not the attorney revised the sentence in order to avoid the violation of law, or to better persuade the bargaining unit employees, is difficult to discern. Either way, the Board would have to review not only the attorney-client communication, but also the various motives behind it in order to determine whether a violation had occurred. The Board would have to ask not only "What did you talk about with your client?", but "Why did you say that to your client?" It is difficult to see how the attorney-client privilege could be maintained in the face of such an inquiry from the Board.

Thus, even the most basic enforcement of the LMRDA under the Board's proposed interpretation would require a review and analysis of the most privileged of conversations. Such an investigatory scheme is untenable. Given the potential for these types of inquiries by the Board, an employer would never know whether, at some later point, an allegation would be made that the attorney had engaged in "persuader" activities, such as would require an investigation and review of all of the client's privileged attorney-client communications. Yet, as the Supreme Court has explicitly stated, "if the purpose of the attorney-client privilege is to be served, the attorney and the client must be able to predict with some degree of certainty whether particular discussions will be protected." Upjohn, 449 U.S. at 393. Here, the Board's revised interpretation would leave open the

possibility that a subsequent allegation of a reporting violation would subject any and all attorney-client communications to review. This would effectively eviscerate attorney-client privilege, as neither attorney nor client would ever be able to confidently rely on the confidentiality of their communications with one another.

Sheppard Mullin was recently involved first-hand in a case evidencing the impropriety of this type of government review. In Costco v. Superior Court, 47 Cal. 4th 725 (2009), the California Supreme Court reviewed the appropriateness of a trial court's actions with respect to an advice letter prepared for a client by Sheppard Mullin attorney Kelly Hensley. In the case, the plaintiffs sought to compel production of the letter, arguing that it included both privileged and unprivileged information. Id. at 731. In response, the trial court conducted an *in camera* review of the letter, and ordered the production of a redacted version of it. Id. The California Supreme Court found these actions abhorrent to the attorney-client privilege, and reversed both the trial court and a Court of Appeal. In doing so, the California Supreme Court found the letter to be entirely protected by the attorney-client privilege, "irrespective of the letter's contents," because it constituted a communication from Sheppard Mullin to a client. Id. at 731-732. As such, under California law, the trial court could not "demand *in camera* disclosure of the allegedly privileged information itself for this purpose." Id. at 737. Indeed, it was improper for the trial court to even review the letter, knowing that it constituted a privileged communication between attorney and client. Rather, "because the privilege protects a *transmission* irrespective of its content, there should be no need to examine the content in order to rule on a claim of privilege." Id. at 739.

Here, the type of review that would be required under the Board's proposed interpretation of the "advice" exemption is precisely the kind of review that was found to be improper in Costco. Indeed, any analysis of potential violations of the LMRDA under the proposed interpretation will require the Board to review specific *transmissions* between attorney and client, thereby subjecting the contents of such a communications to scrutiny. Such a review necessarily violates of the attorney-client privilege. Consequently, while

the Board has stated that its revised interpretation will continue to protect attorney-client privilege, the realities of its enforcement of the LMRDA under the proposed rule is fundamentally at odds with that proposition. The Board proposes no mechanism by which it can avoid or resolve this very fundamental dilemma.

This stands as further reason why Sheppard Mullin proposes that the Board retain its current interpretation of the LMRDA's advice exemption. Alternatively, the Board should exempt attorneys from this revised interpretation, or should exempt any otherwise reportable activity that occurs during the course of privileged communications. At the very least, further review and analysis is required before this new interpretation is applied to attorneys, given the clear and inherent conflict between enforcement of the LMRDA under this proposed interpretation and the Board's acknowledged adherence to the principle of attorney-client privilege. Because the Board's proposed interpretation of the "advice" exemption will create an overlap between privileged communications and reportable activity, the Board should take time to assess the interplay of these two countervailing directives before adopting the proposed interpretation.

IV. The Board's New Interpretation Will Create Perverse Incentives For Employers and Attorneys.

As an additional consideration, the Board's new proposed interpretation of the "advice" exemption will create perverse incentives for both employers and law firms. First of all, there will be a disincentive for employers to consult with legal counsel. Employers who consider seeking legal counsel will be faced with the prospect of having to disclose their consultation with counsel, including the money paid to counsel and the specific tasks counsel perform, in a public document. And, while the employer can potentially avoid such a disclosure if the law firm offers only what is deemed to constitute "advice", an employer seeking legal counsel cannot be expected to know with precision what sorts of assistance from a law firm will be held to constitute "persuader" activity under the LMRDA. In addition, there is the risk that the employer will, through its questions to an attorney, or by virtue of the attorney's responses, inadvertently subject

itself to the LMRDA's reporting requirements under the new interpretation. Moreover, even if the law firm ***does*** limit itself to providing "advice", as defined by the Board, all it would take is one allegation that the law firm engaged in persuader activity for the entirety of the client's communications with the attorney to become subject to Board scrutiny. This will likely serve as a strong deterrent to employers who consider seeking legal counsel. As Senator Goldwater stated when introducing the amendment that became Section 204, "if I were involved in a situation in which an attorney was representing me, and a report had to be made, I would not want all of the intimate details of communications between the attorney and me to become pubic property." 105 Cong. Rec. 19759-62 (1959).

A rule or interpretation that discourages employers from seeking legal counsel would have a tangible detrimental affect on all parties involved in Board elections. While attorneys can and often do advise employers regarding arguments they can make against union certification, in the course of doing so the attorney will also advise the employer about what it cannot do or say. Absent this counsel, employers who attempt in good faith to communicate with their employees will be more prone to inadvertent violations of the NLRA. This in turn will lead to the invalidation of more election results, and an increased workload for the Board. It will also result in the violation of more employees' Section 7 rights, as the Board cannot expect that it will be able to catch and remedy every unfair labor practice that is committed by employers who lack legal counsel. Moreover, even where unfair labor practices are identified and investigated by the Board, it may take an extended period of time before the Board is able to remedy them.

In this sense, the Board's proposed revision to the advice exemption ignores the maxim that an ounce of prevention is worth a pound of cure. The Board's rule would discourage employers from seeking legal advice at the early stages of union organization, when the employer can still alter its course of conduct and avoid violations of the Act. Instead, these employers would be more likely to wait until later to hire legal counsel, after they have been accused of unfair labor practices, and are required to respond to the Board.

Sheppard Mullin submits that the involvement of legal counsel early in organization proceedings, when counsel can caution against any courses of conduct that may serve to violate the Act, is preferable to a system that discourages such involvement unless and until the employer is subject to a Board investigation.

The Board's revised interpretation will also serve to discourage law firms from providing advice to employers who have questions about what is permissible under the NLRA. This is particularly true because, as part of the Board's efforts to revise its interpretation of the "advice" exemption, as well as Forms LM-10 and LM-20, the Board has not undertaken to make any changes to Form LM-21. As such, a law firm that is deemed to have engaged in persuader activity within the meaning of the LMRDA would have to subsequently complete a Form LM-21, thereby disclosing not only the details of the arrangement with the client for whom the law firm performed persuader activities, but also setting forth the financial details of the "labor relations advice" provided to other employers, even those for whom the law firm engaged in no persuader activities whatsoever. In essence, any firm that engaged in any "persuader" activity at a client's request would effectively have to open its books to the NLRB.

This serves as a strong disincentive for law firms to provide advice to employers who have questions regarding their communications and actions during the course of union representation elections or organizing drives. By engaging with the employer in these circumstances, the law firm risks having its actions deemed "persuader" activity, thereby potentially subjecting not only the relationship with that client to public scrutiny, but also the confidentiality of all of the law firm's client relationships. As noted above, this would create a serious ethical dilemma for attorneys, particularly in light of the scope of the required disclosure. Moreover, it is to be expected that most clients would not appreciate having the details of their relationship with a law firm subject to public scrutiny just because communications by one attorney in the firm to a different client were found to constitute persuader activity within the meaning of the LMRDA. Thus, law firms will

have a real financial incentive to refrain from providing legal advice to employers during the course of union elections.

As such, the Board's proposed interpretation will discourage attorneys from providing employers with legal counsel. Even if individual attorneys are willing to provide the advice requested, their law firms may not permit them to provide such advice, given the potential ramifications of an alleged reporting violation, as well as the client concerns that would be raised by the disclosure of information in Forms LM-20 and LM-21. Thus, employers with questions during the course of a representation election will be more likely to turn to unlicensed labor consultants, who lack the knowledge of Board law that seasoned labor counsel will have, and who are not subject to the same ethical obligations and restraints as attorneys. This too will serve to increase violations of the NLRA.

Sheppard Mullin respectfully submits that the Board should avoid the adoption of an interpretation of the LMRDA that will serve to discourage employers from seeking legal counsel, and which will discourage attorneys from providing that counsel. Such a rule increases the likelihood of unfair labor practices, which will not only burden the Board, but will negatively impact employers and employees alike. At the very least, additional time should be taken to review this issue, so that solutions can be suggested to alleviate these serious concerns.

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V. Conclusion

Sheppard Mullin thanks the Board for the opportunity to submit these comments, and hopes that they are of assistance to the Board in further considering the important proposed changes.

Dated: September 21, 2011

Respectfully submitted,

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