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September 21, 2011

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 1245-AA03, Proposed Rules Interpreting the "Advice" Exemption

Dear Mr. Davis:

On behalf of the National Mining Association and its member companies, we submit these comments in response to the Notice of Proposed Rulemaking with respect to the Department of Labor's Proposed Rules Interpreting the "Advice" Exemption (the "Proposed Rules"). The Proposed Rules are the subject of a notice published in the *Federal Register* on June 21, 2011 (76 Fed. Reg. 36,178).

I. INTRODUCTION

The National Mining Association ("NMA") is a trade association representing producers of most of America's coal, metals and industrial and agricultural minerals. NMA's membership includes more than 325 corporations involved in all aspects of the mining industry, including but not limited to coal, uranium, metal and industrial mineral producers, mineral processors, equipment manufacturers and other companies that supply goods and services to the mining industry. NMA's members include not only several large employers that employ more than 1,000 employees, but also numerous small employers with fewer than 100 employees.

Many NMA members companies, including our largest members, have both union and non-union operations. At their represented operations, most of our

members have maintained successful relationships for decades with the unions representing those employees.

The Proposed Rules will severely compromise the free speech of an employer guaranteed by Section 8(c) of the Labor Management Relations Act (the "LMRA"). Perhaps even more importantly, the Proposed Rules constitute a dangerous and unprecedented assault on the confidential attorney-client relationship, and will have a materially adverse impact on the rights of employees who participate in union representation elections administered by the National Labor Relations Board (the "Board"). Additionally, the Proposed Rules will do nothing to further the purposes of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401 *et seq.* (the "LMRDA").

NMA believes that the current interpretation of the Advice Exemption applied by the Department of Labor ("DOL" or the "Department") properly delineates who is and is not required to report activity under the LMRDA's persuader reporting requirements, and is consistent with both the statutory language and Congressional intent of the LMRDA. At the same time, the current rules adequately protect an employer's right to free speech, as well as its prerogative to retain competent legal counsel. The current rules also advance the right guaranteed to employees under Section 7 of the LMRA to make a free and informed choice as to whether they wish to join a union. Preservation of these rights is central to achieving fair and informed elections – the very aim of the LMRA and LMRDA. The current proposal will substantially and unjustifiably erode their application.

II. SUMMARY

As discussed more fully below, NMA opposes adoption of the Proposed Rules for several reasons. The proposed interpretation of the Advice Exemption is overly narrow, difficult to apply to the realities of how employers are advised about labor relations issues (particularly in light of union organizing campaigns) and will all but eliminate the practical application of the exemption. As a result, the Proposed Rules will limit employers' access to outside counsel, leading employers to either silence themselves or engage in conduct that may fall outside the limits of permissible activity set forth in the LMRA. The former outcome – employer silence during an organizing campaign –would result in impermissible limitations on an employer's 8(c) rights and an employee's right to be fully informed of *all* relevant issues before making important unionization decisions. The latter outcome is even more troublesome to NMA, as it amounts to a blatant violation of an employer's right to seek counsel and to apprise itself of the law before taking action during a critical union election.

The Department should be especially reluctant to issue such regulations where there has been no showing that the Proposed Rules are justified or needed. As explained below, the Proposed Rules do not further the purposes of the LMRDA. Congress enacted the persuader disclosure provisions to bring public exposure to

the problem of unscrupulous labor relations consultants[1] and nefarious "union-busters" who set up company-dominated unions, engaged in bribery, corruption and employee surveillance, or otherwise engaged in unethical practices. The Proposed Rules, however, would require public disclosure of a significantly broader and qualitatively different set of activities, including nearly all legitimate forms of labor relations advice provided to employers. NMA is particularly concerned about public disclosure of traditional legal advice provided by attorneys to help employers stay on the right side of the complexities of the LMRA.

The effect is clear: the Proposed Rules would make it considerably more difficult for employers to exercise their statutory right of free speech during a union organizing campaign. Well-intentioned employers recognize that the current law regulating employer communications in a union organizing campaign regulated by the Board is both nuanced and complex. Compliance challenges are made more difficult given the steady output of Board decisions that change the rules. Employers have every right to engage experts to ensure their communications are both legal and effective. The concerns that led Congress to enact the persuader disclosure regulations provide no justification requiring the detailed disclosure[2] of engagements and fees paid to attorneys and consultants to help employers comply with the LMRA.

Furthermore, the academic research cited by DOL as support for the Proposed Rules is biased in favor of, and often based solely on suspect anecdotal evidence obtained from, union organizers. The research is also unrelated to the LMRDA's purposes and does not support the need for further disclosure of labor relations consulting agreements. The Department's reliance on a strained analogy to the Federal Election Campaign Act ("FECA") demonstrates the lack of a rational basis for the Proposed Rules. With no basis in either the text or the legislative history of the LMRDA or credible academic research to support the radical change proposed by the Department, the Proposed Rules fail to meet the standards required by the Administrative Procedure Act, 5 U.S.C. 706(2)(A). Therefore, as explained more fully below, NMA urges the Department to abandon the Proposed Rules.

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[1] Unless otherwise stated, references herein to "labor relations consultants" refer to both outside legal counsel and to labor relations consultants who are retained by employers to assist in responding to union organizing drives.

[2] The proposed disclosure forms require disclosure of a wealth of information. The Forms LM-10 and LM-20 require disclosure of the terms and conditions of the consultant agreement or arrangement, and any written agreement must be attached. In addition, the nature of the activities, the period during which they were performed, the name of the person performing them, the extent to which the activity has been completed, and the identities of the employee groups or labor organizations who are to be persuaded, must be identified. The LM-10 also requires employers to disclose the date, amount, kind and circumstances of any payments made to the consultant. The Form LM-21 requires labor relations consultants to disclose within 90 days of the end of their fiscal year all receipts and disbursements on account of labor relations advice and services, even if unrelated to persuader activity.

III. By Nearly Eliminating the Practical Application of the Advice Exemption, the Proposed Rules Will Harm Employers and Employees Through the Chilling of Lawful Employer Speech.

A. The Proposed Interpretation of the Advice Exemption Is Overly Narrow and Difficult to Apply.

Since 1962, DOL has consistently applied a clear interpretation of the Advice Exemption contained in the LMRDA. Section 203(c) of the LMRDA provides that "[n]othing 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." DOL has interpreted the Advice Exemption to mean that when a consultant's activity "is submitted orally or in written form to the employer for his use, and the employer is free to accept or reject the oral or written material submitted to him," that activity is not reportable. *See Int'l Union, United Auto. Workers v. Dole*, 869 F.2d 616, 617, 620 (D.C. Cir. 1989) (upholding this long-standing interpretation); *see also* DOL LMRDA Interpretive Manual, § 265.005 (the "DOL Manual") ("[i]n a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report"). The Advice Exemption, however, does not apply to situations where the lawyer or consultant interacts directly with non-management employees, *i.e.,* engages in actual persuader activity. *See UAW v. Dole,* 869 F.2d at 618; DOL Manual, § 265.005 ("[I]t is plain that the preparation of written material by a lawyer, consultant, or other independent contractor which he directly delivers or disseminates to employees for the purpose of persuading them with respect to their organizational or bargaining rights is reportable").

In contrast to this long-standing interpretation,[3] which provides a bright-line rule that clearly defines what is and is not "advice" exempt from reporting, the new interpretation embodied in the Proposed Rules requires both the employer and the labor relations consultant to speculate as to the scope of the Advice Exemption. The proposed Instructions for Forms LM-10 and LM-20, for example, demonstrate that many activities that at first blush appear to be defined as "advice" by DOL will actually be subsumed into the category of reportable persuader activity. Both sets of instructions define "advice" as "an oral or written recommendation regarding a decision or a course of conduct." 76 Fed. Reg. at 36,211, 36,224. They further state that the following activities constitute "advice" for which reports are not required: where a "consultant . . . exclusively counsels employer representatives

[3] The Department attempts to obscure the historical fact of its consistent interpretation of the Advice Exemption by suggesting that it had occasionally expressed doubts about the 1962 interpretation, and by citing to earlier interpretations. 76 Fed. Reg. at 36,179-80. This argument is unconvincing. Whatever one may think of the merits of the Advice Exemption, the one thing that is not seriously in dispute is that DOL has successfully defended its long-standing interpretation. *See UAW v. Dole*, 869 F.2d at 617-620.

on what they may lawfully say to employees, ensures a client's compliance with the law, or provides guidance on NLRB practice or precedent . . . ." *Id.* at 36,212, 36,225. However, the instructions also state that the employer and labor relations consultant must report, among a list of other things, the following "persuader" activity: "drafting, revising, or providing a persuader speech," "coordinating or directing the activities of supervisors or employer representatives to engage in the persuasion of employees," or "draft[ing] or implement[ing] policies for the employer that have as an object to directly or indirectly persuade employees." Moreover, the forms provide a catch-all in their instructions which states that "agreements or arrangements . . . in which a consultant . . . otherwise engages on behalf of the employer, in whole or part, in any other actions, conduct, or communications designed to persuade employees" are reportable. *Id.* at 36,211-12, 36,225.

There are numerous instances where "advice," particularly legal advice, inevitably will be given in the context of what would be deemed under the Proposed Rules as reportable persuader activity. Some examples include:

- An attorney who counsels employer representatives on what they may lawfully say to employees (which the instructions state is non-reportable "advice") may do so in the context of suggesting lawful language for an employer communication, which is a reportable activity;

- a consultant who drafts or revises an employee handbook for a client to ensure that it both complies with the law and reflects sound employee relations policy (which the instructions state is non-reportable "advice") may be reviewing handbook policies that are designed to improve employee-management relations, which in turn "have as an object" directly or indirectly persuading employees, which is a reportable activity;

- the catch-all rule regarding persuader activities is so broad as to incorporate some aspect of nearly any communication providing advice regarding labor relations.

Additionally, DOL has long applied the Advice Exemption as the controlling provision in its analysis of reportable activity. *See UAW v. Dole*, 869 F.2d at 618. As a result, when advice and persuader activity were intertwined, as in the examples above, DOL gave effect to the Advice Exemption by rendering the entire activity non-reportable. The Notice of Proposed Rulemaking states that under the proposed revised interpretation, this approach will be reversed. Now, DOL would find that "if a consultant engages in activities constituting persuader service, then the exemption would not apply even if activities constituting 'advice' were also performed or intertwined with the persuader activities." 76 Fed. Reg. at 36,191. Accordingly, any activity undertaken that is directly or indirectly related to persuading employees – even if it does incorporate "advice" on lawful

communications or legal compliance – will now be reportable. By switching persuader activity to the controlling provision, almost all consultation with labor relations consultants will be subject to the disclosure requirements. As a result, nearly all such advice will be rendered reportable despite the Proposed Rules' lip-service to the notion that "advice," including legal advice that is supposed to be protected from disclosure under Section 204 of the LMRDA, remains unreportable activity.

Indeed, it appears as though under the Proposed Rules, the only "advice" regarding employee communications that would still considered exempt from reporting is simple "yes" or "no" advice about what the employer is lawfully allowed to say to its employees. Obviously, no client would be satisfied or adequately advised by such limited advice. If, however, an attorney were to fulfill his advisory duties and suggest, based on knowledge of the intricacies of the Board's case law, more defensible language in an employee communication to substitute for language suggested by the employer, that "advice" would be subject to disclosure because the suggested language will, by its nature, be designed to persuade employees. Because the simple "yes" or "no" advice as to the legality of an employer's proposed communication would not provide sufficient direction to the employer, the employer would be left guessing as to what language would be appropriate and lawful for communication to its employees. There is simply no justification for such an invasion into the substance of communications between a client and its lawyer.

B. The Overly-Narrow Interpretation Proposed Will Limit Employers' Access to Outside Counsel

Both employers and labor lawyers will have reason to limit engagements that could be deemed persuader activity under the Proposed Rules. The disclosure reports are public and, as stated by DOL, are intended to provide employees with information about the source of the information they are receiving regarding unionization. What DOL has not acknowledged, however, is that the unions will access these reports and use them as additional ammunition in organizing campaigns. . The ammunition would be used in predictable terms, such as: "Last year in this state, Mining Company X spent exorbitant amounts of money on lawyers and consultants in an effort to keep employees from getting union protection." The Proposed Rules thus permit unions to characterize in a negative light an employer's prudent steps to get competent legal advice on how to act within the confines of the law. Employers will be reluctant to give unions such leverage, and thus may be less likely to turn to competent labor counsel for advice that will now be deemed reportable persuader activity.

The proposed change in the reporting requirement would also directly interfere with, and may limit, attorneys' relationships with other clients for whom no persuader activity is performed. In many cases, labor relations consultants who engage in persuader activities must report, on the annual Form LM-21, *all* clients and fees for whom any "labor relations advice or services" have been provided, not merely those clients who have received persuader services. *See* 29 U.S.C. §

433(b); DOL Manual § 260.300; *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985). According to the DOL Manual, the reporting of "labor relations advice or services" is expansive, and includes general advice or services concerning employee organizing or concerted activities, collective bargaining activities, and any advice bearing on the employer-employee relationship. DOL Manual § 269.520. In the past, attorneys who did not want to subject their labor relations clients to public exposure in the LM-21 could easily define the limits of their work in the area of labor and employment law to exclude direct persuader activity. By broadly defining and requiring more reporting of persuader activity, however, the Proposed Rules will now by implication require nearly all labor lawyers to disclose on the LM-21 form information about other engagements unrelated to persuader activity. Yet the Department does not address the implications of the Proposed Rules on the scope of reporting contained in the LM-21[4] and therefore we must assume DOL will continue to seek enforcement of its broad reporting requirements.

The extensive disclosures required by the Proposed Rules will confront outside counsel practicing in the field of labor and employment law with a real dilemma. They may have to assume the risk of being unfairly accused of unethical practices or face the prospect of losing clients who do not want their attorney-client relationship exposed in a public filing. Even if not privileged, clients justifiably expect that their attorney-client relationships and expenditures for legal fees will be kept confidential and protected from public disclosure. This expectation is spelled out in the ABA's Model Rule of Professional Conduct 1.6, which states that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or" among other things, to comply with the law. Given this ethical obligation, which is incorporated in some fashion into the vast majority of state bar ethical rules, lawyers will be left to make a judgment about whether the disclosure of confidential information regarding all of their labor relations clients is in fact lawfully required.[5] Attorneys who disclose their non-persuader client relationships therefore risk facing ethics charges from former clients who are upset about public exposure of what they believed was confidential information about engagements. Clients who do not want to risk public exposure of their legal

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[4] For instance, in its consideration of the recordkeeping burdens the Proposed Rules impose, DOL has not even considered the corollary burden of increased LM-21 filings that will result from imposing increased LM-20 filing requirements.

[5] *Compare Donovan v. Rose Law Firm,* 768 F.2d 964 (8th Cir. 1985) (annual report need not include non-persuader activity engaged in by the consultant) *with Humphreys,* 755 F.2d 1211 (reaching opposite conclusion). The LMRDA's grant of civil enforcement authority to the DOL, and the availability of criminal penalties upon the failure to report persuader activity will likely tip the scales in favor of disclosure. *See* 29 U.S.C. §§ 439, 440. Under the Proposed Rules, corporate officers of both the employer and labor relations consultant will fear signing any report that does not incorporate *all* activity that could even be argued at the extremes to be reportable activity. The potential for corporate officers becoming subject to an investigation for failure to report persuader activity will become all the more real when zealous union activists begin to call out labor relations consultants for failure to report all alleged reportable activity.

representation and client confidences may also be less likely to engage those attorneys who may be subject to LM-21 reporting requirements.

There is simply no justification for the Department's overstepping into the attorney-client relationship in this way.[6] Employers have a legitimate interest in maintaining strong confidential associations with their legal counsel. By expanding the universe of what is deemed to be persuader activity, and requiring extensive disclosure of attorney-client relationships involving persuader and non-persuader activity, the Department will put those relationships at risk, unjustifiably penalizing employers who rely on counsel to ensure their compliance with the LMRA and other labor laws.

C. The Overbroad and Vague Interpretation of the Advice Exemption Will Infringe on Employer and Employee Rights

Employers who cannot access the advice of counsel without triggering the persuader disclosure rules may either silence themselves for fear of engaging in unlawful conduct or engage in conduct that may fall outside the limits of permissible activity set forth in the LMRA because they were not sufficiently familiar with the ever-changing nuances of the law. Both results are unacceptable and antithetical to the purposes of the very laws these rules purport to serve.

1. Employer Free Speech, Guaranteed by the LMRA, Will Be Limited by the Proposed Rules

One of DOL's justifications for its revised interpretation of the Advice Exemption is that expanded disclosures of labor consultant roles in a campaign will supposedly encourage "[n]on-disputatious representation elections," by eliminating "[p]ressurized campaign tactics" that can lead to objections brought before the NLRB. 76 Fed. Reg. 36,189. DOL's assumption is that it is consultant participation in campaign elections that will lead to inordinate campaign pressure, while an election without such employer-side consultants will lead to "well-reasoned and accurate information" provided by both employer and union. 76 Fed. Reg. at 36,189.

This assumption is simply wrong. Employers engage consultants and lawyers to assist them in ensuring that they do not run afoul of the law when the employers inform employees of the other side of the unionization story. For example, union organizers may not provide accurate information about the financial costs of belonging to a union, the potential for mine closures, and/or the possibility of forced walk-outs and decreased focus on individual advancement and merit-based compensation. Employers have both a right and a need to address such issues,

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[6] Moreover, to require an attorney to disclose client confidences of this nature, particularly where the disclosures are not even related to reportable persuader activity envisioned by Congress, is an invasion of the province of the states and their respective bars, which have exclusive authority to regulate attorney conduct.

and to make sure their employees are fully informed before making a decision on the question of unionization.[7] Employers also must be given an opportunity to address the promises made by union organizers, such as guaranteed higher wages and benefits associated with joining a union, and to provide meaningful information concerning important factual issues that may surface during the campaign. To presume, therefore, that an employer's use of labor consultants is more likely to lead to "pressurized campaign tactics," rather than simply the lawful exercise of an employer's rights under the labor laws, is unwarranted. It should also be noted that union organizers at times make campaigns disputatious by initiating attacks on employers, thereby furthering the need for employers to be able to freely engage legal counsel to lawfully address such problems.

The labor movement's existing structural advantages[8] in union representation elections are particularly pronounced in the mining industry. Unlike other labor unions, those representing miners have a unique ability to gain access to mining industry employees through the Federal Mine Safety and Health Act of 1977 (Mine Act). Section 103(f) of the Mine Act provides that "a representative authorized by [the mine operator's] miners shall be given an opportunity to accompany [Mine Safety and Health Administration representatives] during the physical inspection of any coal or other mine made pursuant to" Section 103. Pursuant to this provision, miners have designated non-employee union organizers as their Section 103 (f) representatives, thereby giving the organizers access to the employer's property and employees. *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990) (walkaround rights extended to United Mine Workers of America ("UMWA") representative even though he was not employed at the mine). *See also*, *Thunder Basin Coal Co. v. Reich,* 510 U.S. 200 (1994) (UMWA organizer properly designated as a miner representative pursuant to MSHA Section 103(f) with walkaround rights at non-union facility). The increased access opportunity afforded by the Mine Act makes it even more important that mining industry employers retain their right to communicate with their employees.

There is simply no justification for limiting employer rights in the fashion proposed. The LMRA's conceptual underpinning is to ensure that representational elections are free, fair and predicated on informed decisions by those directly impacted – aims that are seriously undermined by the Proposed Rules. Section 8(c) of the LMRA specifically permits employers to discuss the pros and cons of

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[7] Mining industry employers have an understandable desire to address union campaign rhetoric, as mining industry unions have been found guilty in the past of making material misrepresentations, and threats, violence and unlawful coercive behavior during organizing campaigns. *See*, *e.g., UMWA District* 29, 308 NLRB 1155 (1992) (UMWA unlawfully threatened employees with physical harm and job loss during organizing campaign); *Kerry Co. Co. v. UMWA District 5,* 488 F. Supp. 1080 (W.D. Pa. 1980), *aff'd*, 637 F.2d 957, (3d Cir.), *cert. denied*, 454 U.S. 823 (1981) (UMWA found guilty of threats and violence during organizing efforts).

[8] Unions' structural advantages will be made all the more significant by implementation of the NLRB's current rulemaking proposal for "quickie elections," which would shorten the time period between the filing of a petition and the election, thereby allowing employers even less time in which to communicate with their employees in response to a union organizing effort. *See* 76 Fed. Reg. 36,812.

unionization with their employees during a union organizing campaign. Simply put, this freedom of speech guaranteed by Section 8(c) will be rendered illusory if employers no longer believe they can freely engage in communications with their employees because they did not engage outside counsel to ensure that their employee communications are lawful.

The Proposed Rules are also profoundly undemocratic. DOL's admitted purpose in curbing pressurized campaign tactics "that approach, but may not cross into, objectionable election conduct or unfair labor practices" runs directly contrary to the Supreme Court's recognition that "uninhibited, robust, and wide-open debate in labor disputes" is an essential part of labor-management relations in this country. *See Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008) (recognizing that the enactment of Section 8(c) "manifested a 'congressional intent to encourage free debate on issues dividing management and labor'"). Procedures that effectively limit an employer's right to disseminate information are also contrary to the Supreme Court's emphasis on the importance of procedures that result in an informed employee electorate. *See NLRB v. Wyman-Gordon,* 394 NLRB 759 (1969) (upholding Board procedures requiring employers to produce an *Excelsior* list because that disclosure "ensured a free choice of bargaining representatives *by encouraging an informed employee electorate"*) (emphasis added). By effectively limiting employer speech, the Proposed Rules make it likely that an increasing number of Board-sponsored elections will not result in such informed employee decisions.

2. The Proposed Rules Will Infringe on Employees' Section 7 Rights

Not only will employer rights be undermined by the promulgation of the Proposed Rules, but employee rights guaranteed by the LMRA will also be limited. Section 7 of the LMRA specifically grants employees the "right to refrain" from forming, joining or assisting a labor organization. 29 U.S.C. §157. The Proposed Rules' effective restriction on employer speech impermissibly limits the fundamental right of employees "to refrain" from these activities. Employees who wish to receive information from their employer, so as to allow them to make an educated decision as to whether to join a union, would no longer be able to hear the proverbial "rest of the story." As a result, they will be less informed and therefore less free to exercise their right to refrain from unionization or other union-related activities. Such an outcome is inconsistent with employees' statutory rights.

3. The Proposed Rules Will Actually Increase Campaign Pressure and Disputatious Elections

DOL has also ignored the fact that, by virtue of its efforts to eliminate so-called campaign pressure influenced by the use of consultants, the agency will be increasing campaign pressure brought by the unions themselves. There is no doubt that unions will take the LMRDA disclosures required by the Proposed Rules and use them to argue that an employer is spending excessive amounts of money in an

attempt to defeat the union campaign. Given that, as discussed below, the fee disclosures on the LM-10, LM-20 and LM-21 forms will be significantly inflated beyond what Congress viewed as "persuader" activity, it is questionable whether the unions will in fact be providing the electorate with "well-reasoned and accurate information" as opposed to rhetoric and mischaracterizations about so-called excessive employer expenditures on labor relations consultants. *See* 76 Fed. Reg. at 36,189. Just as the amount of money a defendant in a jury trial spends to obtain legal counsel cannot be used against him to unfairly imply a higher likelihood of liability, so too should unions be restricted from using inflated attorney fee numbers to cast in a negative light the employer's decision to seek legal advice to ensure its actions comply with the law.

The further irony behind the DOL's logic is that in the course of seeking to avoid "disputatious" representation elections, the Proposed Rules will likely result in more election interference charges brought before the Board. Employers typically employ outside consultants or labor lawyers to ensure that, in the course of communicating with their employees, they stay on the right side of the LMRA, and engage in only lawful speech. If employers are discouraged from hiring consultants and lawyers, and continue to engage in speech during union organizing drives, they are more likely to unintentionally run afoul of the LMRA. Such employers would then face election interference charges that, as DOL argues, result in protracted litigation, heighten acrimony between the parties, and ultimately prevent bargaining during election-related litigation. 76 Fed. Reg. at 36,189.

This problem with be particularly felt by smaller employers, including many NMA member companies. Many small to medium-sized employers, including a sizable portion of the mining industry, likely do not have in-house staff with the experience to address the complex issues that may arise in assessing appropriate employee communications. Those employers who (a) do not have the size or funds to support such in-house experts, or (b) have not faced union organizing drives in the past, and therefore have not brought in-house the necessary experts, will face the most pressure as a result of the Proposed Rules.

IV. DOL Is Not Fulfilling Congress' Intent

A. Congress Was Not Concerned About the Types of Activities DOL Now Deems to Be Reportable Activities.

1. Congress Sought to Expose Union-Busting Middlemen Through the LMRDA Persuader Reporting Requirement

As demonstrated by the very legislative history of the LMRDA that is cited in the Notice of Proposed Rulemaking, DOL's extremely narrow and unworkable interpretation of the Advice Exemption is simply not what Congress intended when it enacted the LMRDA. The legislature, when drafting the LMRDA, primarily was concerned with "union-busting middlemen" engaged by employers "for the purpose of interfering with the right of employees to join or not to join a labor organization

of their choice, a right guaranteed by the National Labor Relations Act." 76 Fed. Reg. at 36,184 (*quoting* S. Rep. No. 86-187, at 10-11 (1959)). Congress was not concerned with lawyers or consultants who are hired to guide employers through the complexity of the Board's case law during an organizing campaign. It most certainly was not concerned with things like attorneys' review and editing of personnel policies or revising employer speeches for compliance with the law.

Rather, the purpose of requiring disclosure of employer arrangements with labor relations consultants was to make public those employer "expenditures" on consulting activities that were hidden or "usually surreptitious because of the unethical content of the message itself." *Id.* More specifically:

> The report of the McClellan committee describes management middlemen flitting about the country on behalf of employers to defeat attempts at labor organization. In some cases they work directly on employees or through committees to discourage legitimate organizational drives or set up company-dominated unions. These middlemen have been known to negotiate sweetheart contracts. They have been involved in bribery and corruption as well as unfair labor practices. The middlemen have acted, in fact if not in law, as agents of management. Nevertheless, an attorney for the National Labor Relations Board has testified before the McClellan committee that the present law is not adequate to deal with such activities.
>
> The committee believes that employers should be required to report their arrangements with these union-busting middlemen.

S. Rep. No. 86-187, at 406 (portions cited by 76 Fed. Reg. at 36,184).

Thus, the labor relations consultant reporting requirement was necessary to "requir[e] reports from middlemen masquerading as legitimate labor consultants," who engage in activity "designed to interfere with the free choice of bargaining representatives by employees and to provide the employer with information concerning the activities of employees or a union in connection with a labor dispute." S. Rep. No. 86-187, at 39-40.

Not only did Congress make clear what types of activities it was concerned about, it also made clear what activities it was *not* concerned about. According to the legislative history of the LMRDA, "under this subsection an employer would not be required . . . to report expenditures to obtain legal advice in connection with labor management relations." S. Rep. No. 86-187, at 11. As the Sixth Circuit has found, "Congress recognized that the ordinary practice of labor law does not encompass persuasive activities." *Humphreys*, 755 F.2d at 1216, n. 9 ("'Primarily, as the legislative history records, the [disclosure] requirement is directed to labor consultants. Their work is not necessarily a lawyer's. Indeed, for a legal adviser it would be extracurricular. True, a client may desire such extra-professional services, but, if so, the attorney must balance the benefits with the obligations

incident to the undertaking.'") (*quoting Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir.1965), *cert*. *denied*, 383 U.S. 909 (1966)).

That an Advice Exemption was even included in the LMRDA demonstrates that Congress envisioned that some advice exempted from disclosure would ultimately be used by the employer in the persuasion of employees. Indeed, advice wholly unrelated to the persuasion of employees is not arguably covered by the LMRDA's definition of reportable persuader activity, and therefore would not have required a specific exemption in the statute. Therefore, the DOL's traditional interpretation of the Advice Exemption, which applies the exemption in instances where the employer ultimately may choose to use that advice in an attempt to persuade employees, is consistent with the design of the statute itself, as well as the statute's legislative history.

2. DOL Seeks to Expose Legitimate Legal Advice and Labor Relations Consulting Activity Through Its Interpretation of the LMRDA's Advice Exemption.

While the reporting requirement envisioned by the Proposed Rules would certainly include this type of nefarious activity at the heart of Congress' intent, the Proposed Rules go well beyond what Congress saw as the type of activity that necessitated "expos[ure] to public view." *Id.* at 10-11. In fact, it requires reporting based on protected attorney-client communications, even though those underlying communications are protected from disclosure by the LMRDA itself. 29 U.S.C. § 434. For example,

- **Employer Communications.** As discussed above, an attorney's review of an employer communication to its employees regarding the costs and benefits of unionization would render the labor relations consultant agreement, fees and scope of work subject to disclosure unless the review was limited to blanket approval or disapproval of language in the speech, without any suggestions for lawful changes. Even an outside counsel-drafted audio-visual presentation for use in training employees about the employer's anti-discrimination or harassment policies appears to be reportable persuader activity under the new interpretation because such policies inform employees about an employer's positive working environment and could be viewed as persuading employees not to choose unionization.

- **Seminars.** Similarly, DOL has made clear that it will generally assume that seminars held for supervisors by labor relations consultants will involve reportable persuader activity, and that training on how to conduct employee meetings will similarly be considered to be persuader activity, because the ultimate object will be to persuade employees. 76 Fed. Reg. at 36,191. Indeed, it appears that if a labor relations consultant provides even one example of permissible employer speech in such a seminar, the seminar will become a reportable persuader activity.

- **Employee Policies.** The Proposed Rules are so extreme that outside employment counsel would be subject to the disclosure requirements if the employee handbook drafted by the lawyer contains policies supportive of the right of employees to choose whether or not to join a union through NLRB-conducted secret ballot elections. It even appears that a lawyer-drafted handbook (written outside the laboratory conditions period) that contained an open-door policy, or other positive employee-friendly policies that encourage positive and lawful labor-management relations, would be subject to the revised disclosure requirements.

These activities, and others like them, truly benefit employees and are not anywhere near the types of clandestine and unethical activities, such as "bribery and corruption as well as unfair labor practices," that Congress was concerned with in enacting the LMRDA. *See* S. Rep. No. 86-187, at 10. Indeed, these activities are not even at the edges of what Congress envisioned.

Moreover, by making persuader activity the controlling activity when determining if advice intertwined with persuader activity must be reported, DOL is requiring exactly what Congress guaranteed would *not* be required – reporting expenditures to obtain legal advice. The current interpretation of the Advice Exemption encapsulates exactly the type of activities about which Congress was concerned, and exempts the types of activities about which Congress was not concerned. Thus, where the employer makes the ultimate decision about what it wants to present to its employees after having received a draft advising the employer of what can properly be said to its employees, and there is no "deceptive arrangement" underlying the communications, there is no need to report the activity. DOL's nearly 50 years of consistent interpretation of the Advice Exemption correctly implemented Congress' intent in this regard.

B. The Research Cited by DOL in Support of its Regulations Is Specious and Unrelated to the Intent of the LMRDA's Persuader Reporting Requirements

DOL's reliance on specious research and unreliable data in support of its Proposed Rulemaking is further evidence that the proposed interpretation is ill-conceived and unnecessary. Moreover, it demonstrates that the Proposed Rules are a solution looking for a problem. There is simply no credible evidence cited by DOL that indicates that the disclosures required by the proposal will somehow address unlawful activities, level the playing field, or undo some distinct advantage that employers hold in the union organizing context.

There is no credible evidence cited by DOL that demonstrates that the increased use of consultants has led to an increase in the types of union-busting or nefarious persuader activity that Congress was concerned about in enacting the LMRDA. DOL itself admits that the "aggressive and even unlawful tactics" of which it is concerned are utilized by employers "[w]ith or without the advice of labor

consultants." 76 Fed. Reg. at 36,190. Moreover, it assumes a level of unlawful activity based on poorly-supported research. In *No Holds Barred: The Intensification of Employer Opposition to Union Organizing* (2009) (cited at 76 Fed. Reg. at 36,186, 89, 90, 94), for instance, Professor Kate Bronfrenbrenner relies on *allegations* of unfair labor practices, assuming – without any offer of proof – that the allegations have merit. The study also relies on anecdotal data that appears to come exclusively from interviews with union organizers, without any thought given to the obvious biases likely held by such individuals. Similarly, Chirag Mehta and Nik Theodore's *American Rights at Work, Undermining the Right to Organize: Employer Behavior during Union Representation Campaigns* (2005) (cited at 76 Fed. Reg. at 36,186, 94), is based on a survey of union organizers and union-selected activists, and was based only on Chicago-region union representation campaigns related to previously unrepresented workers, who are less likely than previously-represented workers to elect a union representative. To our knowledge, none of Professor Bronfrenbrenner's research has been subject to peer review or any other validation procedure commonly used in academic research. Moreover, Mr. Mehta is known to have received significant sums from the Service Employees International Union (the "SEIU"), and both his report and *No Holds Barred* were produced for or commissioned by American Rights at Work – an entity with close ties to unions, including the SEIU.[9]

DOL similarly relies on the published works of John Logan, including *The Union Avoidance Industry in the U.S.A.*, 44 Brit. J. of Indus. Rel. 651, 653 (2006) and *Consultants, Lawyers, and the 'Union Free' Movement*, 33 Indus. Rel. J. 197, 212 (2002). Logan, like DOL itself, does not distinguish between legal and illegal campaign tactics when deriding employers' use of attorneys or consultants, and provides no justification for preventing the employer from exercising its right to speak freely within the confines of the LMRA. While he criticizes employers for making use of consultants and attorneys, he fails to acknowledge that such an increased use of consultants and attorneys may simply mean that employers are working harder today than they did in the past to ensure that their employee communications remain on the correct side of the law, and do not violate the LMRA or lead to unfair labor practice charges.

Thus, NMA agrees with the conclusions reached by several studies that have criticized the research of Bronfrenbrenner, Mehta and Logan as unreliable.[10] While it is admittedly the case that certain consultants and lawyers engage in "shady" activities, such as those activities cited by DOL as anecdotal evidence in its Notice of Proposed Rulemaking, there is no evidence in the literature cited that all, most, or even many of the lawyers and consultants engaged by employers today engage in anything other than proper conduct on the right side of the law. The discrepancies of a very small number of questionable consultants hardly constitute

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[9] Mehta and Theodore, for instance, write in the Acknowledgements to their paper that they "gratefully acknowledge all of the union representatives and workers who dedicated countless hours to provide accurate and thorough information that made this investigation possible."

[10] *See, e.g.,* http://www.uschamber.com/sites/default/files/reports/0908_unionstudies_coercion.pdf.

compelling justification for freezing the attorney-client relationship and diminishing the application of the attorney-client privilege for all.

Furthermore, there is no evidence of any causal relationship between an employer's hiring of a labor relations consultant and poor collective bargaining relationships. DOL relies on purported evidence that unions and employers to take longer to reach a first contract when a labor relations consultant has been employed. 76 Fed. Reg. at 36,189-90. DOL, however, has presented no link between the hiring and the length of bargaining. It is entirely possible, and more likely, that the root cause of lengthy bargaining relates to the size of the bargaining unit, the sophistication of the employer and/or union, or unrealistic promises the union made to employees during its campaign. The more sophisticated employer with a larger bargaining unit at issue is more likely to (a) hire a labor relations consultant to help it manage the complexities of union organizing and collective bargaining law, and (b) face more, and more complex, topics to be subject to collective bargaining.

A federal agency undertaking a rulemaking pursuant to the Administrative Procedure Act must "examine the relevant data and articulate a satisfactory explanation for its action *including a rational connection between the facts found and the choices made.*" *Motor Vehicles Mft. Ass'n of U.S. Inc. v. State Farm Mut. Auto Ins. Co*., 463 U.S. 29, 43 (1983) (emphasis added); *see also Chamber of Commerce v. SEC*, No-10-1305 (D.C. Cir., July 22, 2011) (striking SEC rule as arbitrary and capricious because the agency lacked sufficient data to support its asserted justifications for the rule). As demonstrated above, DOL has failed to show a rational connection between the relevant data and the Board's rationale for infringing upon the attorney-client privilege and employer and employee rights. The research and factual support cited by DOL lacks credibility and a rational relationship to the scope of the Proposed Rules. This lack of compelling evidence is particularly problematic given the degradation of both employer and employee rights likely to occur under the proposal.

C. DOL's Resort to an Analogy to FECA Demonstrates the Lack of Justification for an Overbroad Disclosure Requirement

DOL claims that the LMRDA's disclosure provisions "are not unlike the financial disclosure requirements in the [Federal Election Campaign Act]," which impose "reporting obligations on political committees and candidates that receive contributions or make expenditures of over a certain amount in a calendar year." 76 *Fed. Reg.* 36,188. As summarized by DOL, FECA's purpose is to aid voters in evaluating candidates by providing them with information "as to where political campaign money comes from and how it is spent by the candidate…." Further, by informing voters of the "sources of a candidate's financial support," the voters learn of "the interests to which a candidate is most likely to be responsive and thus facilitate predications of future performance in office." 76 Fed. Reg. at 36,188, quoting *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1971) (internal quotation marks and citation omitted). In other words, the purpose of the FECA is to allow voters to

determine which third-party interests a candidate might be "beholden" to when in office by virtue of the campaign donations made by those third-party interests.

As an initial matter, there is nothing in FECA that requires disclosure of information otherwise protected as attorney-client communications. Indeed, the disclosures required by FECA involve third party donations to candidates and public officials. Such donations clearly implicate an entirely different type of relationship than that which exists between an attorney and his client. NMA can conceive of no other law that interferes with the right of an entity to confer with counsel, and requires disclosure of attorney-client relationships merely by virtue of attorney review and editing of public communications for compliance with the law. For instance, libel lawyers regularly review newspaper articles prior to publication to determine whether they are on the right-side of applicable anti-defamation laws. This is legal advice not subject to public disclosure. Similarly, an antitrust lawyer may advise a client regarding what can lawfully be said at a meeting with a competitor. The lawyer may even provide suggested language to the client. This, too, is legal advice not subject to public disclosure, and is much more similar in nature to the type of disclosures covered by the Proposed Rules than are the disclosures required by federal election laws. There are likewise countless other areas of law in which the attorney-client relationship involves advice and suggestions about what can and cannot be lawfully said that do not require the type of disclosures proposed here. The attorney-client relationship should not be disrupted by public disclosure of sensitive information merely because attorneys fulfill their duties to adequately advise their clients.

Moreover, the analogy drawn by DOL between the LMRDA and FECA simply fails to support DOL's goal of justifying an overbroad persuader disclosure requirement. In the case of FECA, the public's interest in learning which third-parties donated to a political candidate, and how much, is based on the concept of influence-peddling. In the case of LMRDA-required disclosures, however, the interests of the employer and third-party consultant or lawyer are both coterminous and obvious. Learning that an employer has hired a consultant to assist it in persuader activity does not alert the employee to some outside interest that may have different interests than the employee believes the employer has. Rather, the employee only learns that a third-party with expertise in the applicable laws is aiding the employer in communicating to its employees about union organizing.

In sum, DOL's inability to cite to analogous disclosure requirements in other areas of law further demonstrates that the Proposed Rules go too far, and do so at the expense of Board-sponsored elections in which employees are fully informed.

V. Conclusion

NMA appreciates this opportunity to provide comments on the Proposed Rules. The Proposed Rules do not further the purposes of the LMRDA, and are not supported by relevant facts or substantiated data. Indeed, the rules as proposed will instead place severe and unwarranted limitations on the attorney-client privilege, an employer's right to free speech, and an employee's right to make well-informed determinations regarding unionization. NMA therefore cannot support the Proposed Rules, and strongly encourages the Board to abandon this misguided effort.

Please contact me should you have any questions or should you like any additional information regarding the issues raised in these comments.

Sincerely,

Bruce Watzman