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September 21, 2011

VIA E-FILE

Mr. 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: Comments on Proposed Rulemaking Regarding Persuader Activities under the LMRDA of 1959 by the Assisted Living Federation of America

Dear Mr. Davis:

We hereby submit on behalf of the Assisted Living Federation of America ("ALFA") the following Comments on Proposed Rulemaking Regarding Persuader Activities under the LMRDA of 1959. If you have any questions or comments, please contact Rick Grimes, President/CEO of ALFA at (703) 894-1805, or us.

Very truly yours,

JACKSON LEWIS LLP

Roger P. Gilson, Jr.
Edward V. Jeffrey
Michael J. Passarella

RPG/bb
cc: Rick Grimes, President and CEO
Maribeth Bersani, Senior Vice President, Public Policy
Assisted Living Federation of America

Comments on
Proposed Rulemaking Regarding
Persuader Activities under the LMRDA of 1959

Submitted on Behalf of the
Assisted Living Federation of America (ALFA)
By Jackson Lewis LLP
Roger P. Gilson, Jr.
Edward V. Jeffrey
Michael J. Passarella

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Mr. 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: Comments on Proposed Rulemaking Regarding Persuader Activities under the LMRDA of 1959 by the Assisted Living Federation of America (ALFA)

Dear Mr. Davis:

We hereby submit on behalf of the Assisted Living Federation of America ("ALFA") the following Comments in Opposition to the Department of Labor's Proposed Rule "to narrow" the statutory "advice exemption" to the reporting of persuader activities under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), published by the Division of Interpretations and Standards, Office of Labor Management Standards of the U.S. Department of Labor at 76 Federal Register 36178 on June 21, 2011.

The Interest of the Assisted Living Federation of America (ALFA)

Since 1990, ALFA has served as the voice for senior living communities and the residents those communities serve. Twenty years ago, the senior living industry consisted primarily of nursing homes. Assisted living was relatively new as a residential alternative to nursing home care. Today, the senior living industry offers seniors a variety of alternatives to traditional nursing homes, including "independent living," "assisted living," "special care communities" or Alzheimer care communities, "congregate housing," and "continuing care retirement communities" (CCRCs).

Assisted living has emerged as the most preferred and fastest growing long-term care option for seniors. Today, more than 38,000 assisted living communities are operating nationwide, employing an estimated 800,000 workers and serving more than one million seniors. While the assisted living industry as a whole is large and thriving, the vast majority of individual "communities" are smaller, professionally managed alternatives to institutional settings. Most have one Administrator and a handful of Department Directors and employ fewer than 100 employees per site.

Some ALFA member companies have union contracts. ALFA supports them and respects the rights of employees to engage in union and other protected, concerted activity, as well as to refrain from such activity. ALFA recognizes that the National Labor Relations Act ("NLRA" or "Act") guarantees employees the right to choose for themselves whether or not to engage in such activity. ALFA believes that senior living employees, who improve the lives of

our seniors each and every day, should have the opportunity to be informed of both the advantages and disadvantages of union representation before making that choice.

Senior living providers are experts in providing the talent and resources to enable seniors to have the highest quality of life possible. However, as with many small to mid-sized businesses, senior living communities are not experts in navigating the nuances of our ever-changing federal labor and employment laws. In addition, since employees at few assisted living communities have sought union representation, very few communities have knowledge or experience with unions or collective bargaining. To promote employee rights, their exercise of informed choice and navigate the changing terrain of labor laws, assisted living communities must be able to freely access the best labor relations and labor law advice available when facing labor relations matters ranging from a union recognition demand to collective bargaining negotiations.

Due to Section 203(c) of the LMRDA, the so-called "advice exemption," providers and the association have been able to obtain the advice they need to ensure that they: (1) understand the mechanics of labor law matters; (b) understand the facts and the law about unions and collective bargaining, (c) understand the strategic choices available to them; (d) understand "best practices," so they can remain the "employers of choice" in their communities; and (e) promote enlightened policies and procedures to enhance the job satisfaction of their employees who promote the quality of life for seniors each and every day. Finally, since employee relations is 90% communications, senior living employers need to be able to freely access advice on how to lawfully and effectively communicate with employees.

In drafting and enacting Section 203(c) of the LMRDA, Congress guaranteed the right to every employer to obtain expert advice in employment matters by exempting from reporting the services of attorneys and consultants who provide such advice. This advice exemption plainly states:

> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

This advice exemption is unqualified. While it certainly encompasses attorneys, it is not limited to attorneys. It uses the word, "person" and "other person," meaning any person other than the employer.

Under this provision, for example, a senior living provider could hire an employment law attorney and a consultant to evaluate, recommend and draft a "best practice" benefit plan (e.g. a VEBA trust to provide improved health care coverage at lower cost). While the project would entail "legal advice" concerning the requirements and limits under federal and state law, it would also necessarily involve the consultant's assessment of practical difficulties and the attorney's recommendations on the administrative burdens involved in maintaining a VEBA trust and state law limits. Under such an example, advice would typically be offered on how to appropriately and effectively communicate the change. Under this hypothetical scenario, neither the provider nor the attorney and consultant would be required to file a report with the DOL identifying the name of the lawyer and consultant, the nature of services they have been

asked to perform, and the areas in which advice was provided. Whether there was an ongoing but sporadic union organizing campaign against one of the communities would be irrelevant to whether the engagement was reportable under the LMRDA.

The exemption is not qualified. The fact that the advice is effective and improves employee satisfaction thereby indirectly affecting the employees' interest in having a union would be irrelevant, because the exemption states plainly:

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

That "section" referred to is none other than the requirement of reporting activities which may directly or indirectly persuade employees with respect to having a union. Thus, contrary to the proposed rule, the exemption does not limit advice to matters which are unrelated to directly or indirectly persuading employees from joining a union. Indeed, it assumes that they will be related to directly or indirectly persuading employees.

In drafting the exemption and placing it after the persuader provisions, Congress understood and intended that the "advice" exempted from disclosure related to persuasion. If it wanted to compel the reporting of "advice" related to persuasion, as the DOL proposes, , ***there would have been no need to draft an exemption at all.*** Moreover, if it wished, as the DOL does, to limit the exemption to pure "legal advice," it would have used those words. Clearly, many of the senators and representatives involved in drafting the law were trained lawyers, who were presumably familiar with the term "legal advice." However, they did not use it. Indeed, it would

have been wholly unnecessary for Congress to insert Section 203(c) if it did not seek to exclude legal and other advice relating directly or indirectly to a labor matter.

Congress was focused on labor law and the invidious practices of unscrupulous "middlemen," who directly interfaced with unions and employees and famously paid bribes to corrupt union officials and sometimes paid employees to form sham or "sweetheart" unions. Congress was targeting these "middlemen," not legitimate attorneys and consultants who stayed "out of the middle" and merely provided employers with advice on employee relations and union matters which the clients were free to reject or accept.

Indeed, the Senate Report on the bill that became the LMRDA, in describing the advice exemption, noted that the new reporting requirements were not intended to cover attorneys or consultants who were not the "unscrupulous middlemen" who engaged in bribery and the other misconduct identified by the McClellan Committee:

> The Committee did not intend to have the reporting requirement of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations who do not engage in activities in the types listed in Section 103(b).[1]

Indeed, Chairman McClellan stated that the law did not intend to regulate legitimate legal and labor relations "advice," as follows:

> I am compelled to observe that I see nothing wrong in seeking counsel and employing legal counsel, and employing even experts in labor-management relations, and those things. [2]

[1] S. Rep. No. 86-1684 (1958)(Conf. Rep.), at 40.
[2] Select Committee on Improper Activities in the Labor or Management Field, 85th Cong. Rep. No. 1417, at 293.

Similarly, the Committee observed that:

> Since attorneys at law and other responsible labor-relations advisers do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice, taking part in collectively bargaining and appearing in court and administrative proceedings nor would such a consultant be required to report.[3]

As the above quote from the legislative history shows, reporting was intended only for those who engaged in direct persuasive communications with employees – those who themselves "engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act." The Committee itself noted the breadth of the advice exemption: "Subsection (c) of section 203 of the conference substitute grants a broad exemption from the requirements of the section with respect to the giving of advice."

With the proposed rule, the Division disregards and nullifies the plain language of the statute, conflating its definition of advice with "persuasion," so that any advice which directly or indirectly relates to persuasion cannot be "advice" that is exempt from disclosure. Congress was not concerned with protecting from reporting and disclosure, retirement planning advice, investment advice, wellness advice or any other subjects that had no bearing on persuasion in a labor context. Congress would not have wasted its time and debated over such matters. They wanted to protect from disclosure advice that arguably fell within the ambit of direct or indirect persuasion on employee relation and labor matters.

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[3] S. Rep. No. 86-1684 (1958)(Conf. Rep.), at 8.

By requiring disclosure of advice which falls within the realm of labor or employee relations matters, the Division effectively takes a pen and strikes Section 203(c) from the page. This is not an exercise in statutory interpretation. It is an exercise in thwarting the will of the people manifested in the law their elected representatives enacted.

The implications of this proposed rule extend far beyond the labor arena and the narrow interests of unions which currently represent less than 7% of the private sector workforce. The Department's effective rescission of the "advice exemption" requires the disclosure of attorney and non-attorney advice in the vast arena of labor and employment law matters, which may arguably be deemed labor services that could indirectly impact an employee's perception of whether a union is necessary.

In 1959, there were a handful of federal laws relating to employment matters. Since then we have seen the enactment of the Civil Rights Acts of 1964 and 1991, the Immigration Reform and Control Act, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Worker Adjustment and Retraining Notification Act, the Family and Medical Leave Act, the Occupational Safety and Health Act, and the Health Insurance Portability and Accountability Act, among other laws. Currently, the employment law section of the American Bar Association includes attorneys in all these practice areas and only a relatively small portion are engaged in traditional labor (union-related) law, yet the labor attorney and all of these others and their clients must now report the engagement and fees paid, under the theory that it will help ensure that employees voting in a union election are better informed about their choices.

By requiring reporting and disclosure of such advice, the proposed rule achieves what Congress sought to avoid, that is, the reporting "advice" by "attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations." The DOL should not ignore the clear and unambiguous meaning of the exemption and the will of Congress, but apply the law as written and as interpreted for the past 50 years. Unless the rule is withdrawn, it will be a setback for senior living providers and any other employer wishing to obtain advice on best practices.

Wherefore, for all of the foregoing reasons, we urge that the Department withdraw the proposed rule in its entirety.

I. COMMENTS ON SPECIFIC AREAS OF CONCERN

A. The Proposed Rule Attempts to Amend the Statute Through Rulemaking

1. The Proposed Rule Fails the Test Established by the Supreme Court Because it is Contrary to the Clear Intent of the Congress

In an early case addressing the Administrative Procedure Act, the Supreme Court noted the concerns that led to its enactment:

> Multiplication of federal administrative agencies and expansion of their functions to include adjudications which have serious impact on private rights has been one of the dramatic legal developments of the [first half of the 20th] century. Partly from restriction by statute, partly from judicial self-restraint, and partly by necessity -- from the nature of their multitudinous and semi-legislative or executive tasks -- the decisions of administrative tribunals were accorded considerable finality, and especially with respect to factfinding. The conviction developed, particularly within the

> legal profession, that this power was not sufficiently safeguarded, and sometimes was put to arbitrary and biased use.[4]

Congress enacted the Administrative Procedure Act to address these concerns. In particular, the Court explained that one of the fundamental purposes of the APA was "to curtail and change the practice of embodying in one person or agency the duties of prosecutor and judge":

> Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself.[5]

While the APA prescribes uniform standards for the conduct of formal rule making, and addresses the law of judicial review, the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) established a two-part test for the reviewing agency statutory interpretations.[6]

The first step requires an analysis of the intent of Congress: "If the intent of Congress is clear, that is the end of the matter."[7] If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue,

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[4] Wong Yang Sung v. McGrath, 339 U. S. 33 (1950) (citations omitted).
[5] Id. (citing the Administrative Management in the Government of the United States, Report of the President's Committee on Administrative Management, 36-37 (1937)).
[6] In Chevron, the Supreme Court upheld the Environment Protection Agency's interpretation of the term "stationary source" as used in the EPA.
[7] Chevron, 467 U.S. at 842-43.

that intention is the law and must be given effect. The court is not guided by a single sentence or member of a sentence, but looks to the provisions of the whole law, and to its object and policy.

A court moves to the second step of the analysis only if Congress's intent in enacting the law is ambiguous. The second step requires an analysis of the agency's interpretation of the statute. If its interpretation is "permissible," courts will defer to the agency's interpretation unless it is arbitrary or capricious, an abuse of discretion, not predicated on reasoned decision making, or contrary to constitutional right. The agency's rule can also be overturned if the agency failed to observe the proper procedure required under the APA.

The proposed rule does not pass the first step of the Chevron analysis because the rule would have the effect of writing the advice exemption out of the statute and, therefore, goes against the clear intent of Congress.

The Supreme Court has refused to defer to agency interpretations in other cases in which the agency's interpretation was contrary to the clear intent of the Congress. For example, in Dole v. United Steelworkers of America, 494 U.S. 26 (1990), the Office of Management and Budget interpreted a provision of the Paperwork Reduction Act which required that an agency *collecting* public information must submit the request to OMB for approval. If OMB disapproves the request, the agency may not collect the information. The OMB interpreted this provision as authorizing it to review other agency regulations mandating *disclosure* by regulated entities.

The OMB disapproved of several provisions of the DOL's OSHA regulation which required disclosure of information. The DOL ultimately published a rule without the disclosure component. Several groups opposed the OMB's actions in striking the disclosure provision. They argued that the Act applied to "information collection requests" only, not disclosures. The Court agreed. No provision of the Act expressly declared whether Congress intended the Act to apply to disclosure rules as well as information gathering rules. The Court used "traditional canons of construction" and looked to the provisions of the whole law, not a single sentence, in determining that Congress never intended for the Act to apply to disclosure rules.

Similarly, in MCI Telecomms. Corp. v. AT&T Co., 512 U.S. 218 (1994), the Court did not defer to FCC action with regard to tariffs because the Act allowed the FCC only to "modify" the filing requirement of tariffs, not eliminate the filing requirement under certain circumstances. The Court declined to engage in review of the soundness of the FCC's change on policy considerations because the statute was not ambiguous and policy considerations are for Congress, not the courts. The Court noted that: "A federal agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."

The proposed rule, by "interpreting" the advice exemption out of the statute, is contrary to the clear intent of Congress. Therefore, the proposed rule violates the Administrative Procedure Act because it is "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right."[8]

[8] 5 U.S.C. Sec. 706(2)(C). In addition, the Department's propensity to misread and improperly interpret the statute is not limited to the advice exemption. In the proposed rule, the Department expands the definition of persuader

2. The Proposed Rule is Inconsistent with the Statutory Language: The False Dichotomy Between "Persuasive Activities" and "Advice"

The LMRDA establishes a reporting scheme which requires symmetrical reporting by employers and consultants. Employers must report "any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is 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 ...." (Sec. 203(a)(4.)).

Similarly, consultants must report: "any agreement or arrangement [pursuant to which such person] undertakes activities where an object thereof, directly or indirectly, [is] 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 ... ." (Sec. 203(b)(1.)).

However, the LMRDA provides a sweeping exemption for the provision of advice: "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions

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activity to include protected concerted activity. Notice of Proposed Rulemaking (NPRM) 36192. This interpretation directly conflicts with the express statutory language set forth in Sections 203(a) and (b).

of employment or the negotiation of an agreement or any question arising thereunder." (Sec. 203(c)).

The Department's consistent interpretation of the "advice exemption" since 1962[9] is that where the consultant has no direct contact with employees, and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees, which the employer has the right to accept or reject, the employer-consultant agreement is exempt from reporting under the Section 203(c) advice exemption.

This longstanding interpretation is consistent with the language and structure of the statute, which establishes the following simple, two-stage analysis:

> **First stage of the analysis:** Are the activities "persuasive"? That is, do they have an object, directly or indirectly, "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 ... ."
>
> If the activities are not persuasive, they are not covered by the LMRDA. They are not reportable.[10] If the activities are persuasive, they are covered by the LMRDA and may be reportable subject to the second stage of the analysis.
>
> **Second stage of the analysis:** Are the persuasive activities exempt from reporting under the "advice exemption," i.e., consistent with the person's "giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer" (or exempt by reason of ethical confidentiality consideration or privilege concerns[11])?

[9] The only exception was a brief period in 2001, when the Department issued, without rulemaking or the opportunity for comment, a very limited new interpretation of the advice exemption. However, the new interpretation was rescinded before it took effect and was never subject to judicial scrutiny.

[10] Subject to the DOL position that once any reportable persuasive activity is engaged in, all labor relations advice or services provided to any client during the reporting period is reportable.

[11] See Section E.2., infra.

> If the activities are persuasive but they are consistent with "giving or agreeing to advice" under the LMRDA, they meet the advice exemption and are absolutely exempt from the reporting requirement.[12]

The language of the LMRDA requires that the analysis be conducted in this sequence; since Sec. 203(c) provides an *exemption*, it follows that the activities must necessarily be persuasive before the advice exemption is considered, or there would be no need to exempt the activities from reporting. This is the point that the Department seeks to obscure in its lengthy discussion of the claimed distinction between persuasive activities and advice.

The correct inquiry mandated by the statute is, first, whether the activity is persuasive activity. If the answer to that inquiry is in the negative, there is no reporting requirement and no need to proceed further. However, if the activity is persuasive, the inquiry continues, for the statute and the will of Congress exempts persuasive activity from reporting if that activity falls within the advice exemption. The proposed rule is inconsistent with the statutory language because it ends the analysis at the first stage. If it is persuasive activity under the proposed rule it either cannot be advice or, if it is persuasive and advice, persuasive activity always trumps advice and the activity is reportable regardless of the definition of advice.

Under the proposed rule – again regardless of the definition of advice – the language of Sec. 203(c) is rendered meaningless surplusage if the advice involves persuader activity. Such a tortured construction of the statutory language is inconsistent with the will of Congress and inconsistent with the Department's interpretation of the statue for more than the

[12] If the advice exemption does not apply, the LMRDA looks to whether the activities are protected by the attorney-client communication exemption in Sec. 204.

last half century. The legislative intent and the will of Congress is frozen in time as of 1959. To reinterpret that will in 2011 requires one to conclude the Department has misread the statute for all these decades, has been wrong and has misled the public. Such a conclusion is not a re-interpretation of a statute – it is rewriting history. It is also arbitrary, capricious, and wrong.

3. The Proposed Rule is Internally Inconsistent: The Re-Interpretation of the Advice Exemption in Inconsistent with the Proposed Definition of "Advice"

The Department proposes the following as the definition of "advice": "With respect to persuader agreements or arrangements, 'advice' means an oral or written recommendation regarding a decision or course of conduct."[13] Yet the Department's proposed re-interpretation of the advice exemption is inconsistent with this definition of "advice."

The Department explicitly rejects the current interpretation, "which distinguishes between direct and indirect contact and asks whether or not an employer is 'free to accept or reject' materials provided."[14] The Department now claims that this is inconsistent with the definition of "advice":

> In particular, the interpretation of advice currently contained in section 265.005 of the LMRDA Interpretative Manual (IM) – that an activity is characterized as advice if it 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 – sets a standard that is not grounded in common or ordinary understanding of the term "advice" as used in section 203(c).
> . . .

[13] NPRM 36182.
[14] Id.

> "Advice" ordinarily is understood to mean a recommendation regarding a decision or a course of conduct. Thus, this common construction of "advice" does not rely on the advisee's acceptance or rejection of the guidance obtained from the advisor. Indeed, the act of supplying the guidance itself, or supplying a "recommendation regarding a decision or a course of conduct," constitutes the provision of advice, regardless of the advisee's ability or authority to act or not to act on it.[15]

The Department's proposed definition of "advice" is fine; it is in their proposed re-interpretation of the advice exemption that they go astray. The Department ignores the simple fact that to "recommend" is defined as: "to present as worthy of confidence, acceptance, or use; commend."[16] Simply stated, there is no advice without a recommendation (as the Department's definition of "advice" confirms) and, by definition, there is no recommendation without the client's ability to accept or reject.

The Department, by rejecting any consideration of the client's ability to accept or reject the advice, has proposed a re-interpretation of the advice exemption that is inconsistent with the statutory language and that is inconsistent with the Department's own proposed definition of "advice." This might be seen as a mere error in analysis, were it not for the Department's acknowledgment that the re-interpretation was designed to achieve an end; i.e., to correct the perceived problem of under-reporting under the existing interpretation:

> The focus on whether an employer can "accept or reject" the material submitted by a consultant has resulted in an overbroad interpretation of "advice" that, in the Department's present view, exempts from reporting agreements and arrangements to persuade employees for which disclosure is appropriate. The interpretation now proposed by the Department better serves the purposes of

[15] NPRM 36183 (citations omitted).
[16] Random House Webster's College Dictionary (2nd ed. 1999).

section 203 to provide the level of disclosure for persuader agreements as described.[17]

4. The Proposed Rule is Inconsistent with the Statutory Language: "Advice" Reinterpreted as "Legal Advice"

The Department's proposed re-interpretation of the advice exemption is inconsistent with the definition of "advice" as it is used in the statute and is inconsistent with the accepted meaning of advice under any objective definition. The proposed rule limits advice to "legal advice," and compounds its error by narrowly defining and taking a jaundiced view of what may constitute legal advice. While the Department craftily avoids taking this position explicitly, its true motivation is revealed in the description of those agreements or arrangements that are exempt under Sec. 203(c) in the proposed rule:

> *Exempt Agreements or Arrangements*
>
> *No report is required concerning an agreement or arrangement to exclusively provide advice to an employer. For example, a consultant who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law, or provides guidance on NLRB practice or precedent, is providing "advice." Reports are not required concerning agreements or arrangements to exclusively provide such advice.*[18]

The Department's proposal is clear that advice is limited to the following: if an attorney or consultant (1) counsels employer representatives on what they may lawfully say to employees, or (2) ensures a client's compliance with the law, or (3) provides guidance on NLRB practice or precedent, the attorney or consultant is providing "advice" and the activities are not reportable.

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[17] NPRM 36183.
[18] NPRM 36192-36193.

The Department's proposed re-interpretation of the advice exemption seeks to narrow the advice exemption to legal advice in its purest and most technical form. This is inconsistent with the plain language of the statute, which provides an exemption for "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 ... ."

5. The Proposed Rule is Inconsistent with the Meaning of "Advice" in Labor Relations Cases

The Department's proposed re-interpretation of the advice exemption is inconsistent with the meaning of "advice" as it applies to labor cases. The NLRB applies a "totality of the circumstances" test in certain unfair labor practice cases and when ruling on objections alleging that an employer interfered with an NLRB election. This often includes the review of conduct that is not unlawful, as the NLRB looks to whether all the conduct – lawful and unlawful – reasonably tended to coerce employees (in unfair labor practice cases) or reasonably tended to interfere with employees' free and uncoerced choice in the election (in objections cases).

The NLRB has described the standard in these terms:

> The applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation was adopted by the Board in Rossmore House. Under Rossmore House, the Board considers whether, under the totality of the circumstances, the questioning at issue would reasonably tend to coerce the employee in the exercise of rights protected by Section 7 of the Act. In analyzing alleged interrogations, the Board "considers such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the

> information sought, the identity of the questioner, and the place and method of the interrogation.[19]

The totality of the circumstances in an objections case may include such details as the scheduling and sequencing of employee meetings, the identity of those in attendance at the meetings, the location of the meeting, the identity of the speaker and listener(s), the content of the presentation and its relationship to previous and subsequent communications, the employer's policies (especially if they are referenced in the employer's communications), and many other aspects of the employer's pre-election conduct.

The Department seeks to cast guidance on these issues as persuasive activities, suggesting that it constitutes the "orchestrating, planning, or directing a campaign to defeat a union organizing effort." Again, this fails to follow the analysis required by the statute. If the guidance on these issues constitutes persuasive activities, then the analysis reaches the advice exemption. If the activities qualify as advice, then they are exempt from reporting.

In this case, guidance on these issues would qualify as advice, because these issues are relevant to the ultimate determination whether the employer committed an unfair labor practice or objectionable conduct. Thus, it is exempt from reporting.

As noted above, the Department's attempt to narrow the interpretation of advice so that it applies only to "legal advice" is inconsistent with the statutory language and the will of Congress. However, even if one accepts, *arguendo*, the limitation of the advice exemption to "legal advice," the Department's proposal would require reporting of "legal advice" because

[19] Matros Automated Electrical Construction Corp., 353 NLRB 569 (2008) (citations omitted).

guidance on these matters, which are deemed "non-legal" and "persuader activities" under the proposed rule, "infects" the legal guidance making it reportable.

Indeed, several of the categories of reportable "persuader activities" listed in Proposed Form LM-20 would apply to advice on these matters, including: "Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees," and "Training supervisors or employer representatives to conduct individual or group employee meetings."

This example demonstrates the failure of the proposed re-interpretation of the advice exemption. There is no question that guidance on these issues is a "recommendation regarding a decision or course of conduct," as advice is defined in the proposed rule. Yet the Department claims that, because there is a persuasive component, it is not advice under the advice exemption even though it meets the Department's own definition of "advice."

The existing, 50-year interpretation of the statute, would address these issues cleanly, comprehensively, and logically. Under the existing interpretation, the same basic analysis applies, and "orchestrating, planning, or directing a campaign to defeat a union organizing effort" would be reportable unless it constituted advice. How would one determine whether it was exempt advice or reportable persuasive activities? By applying the simple test and asking whether the client had the right to accept or reject the guidance. If the client had the right to accept or reject the guidance, it is exempt advice. If the client did not have the right to accept or reject the guidance, then the consultant or attorney was engaged in "orchestrating, planning, or directing a campaign to defeat a union organizing effort" and must report.

6. The Proposed Rule has the Effect of Interpreting the "Advice Exemption" Out of the Statute

The Congress included the advice exemption in the LMRDA. The Department may not usurp the authority of the Congress and itself amend the statute under the guise of rulemaking and the proposed re-interpretation of the advice exemption.

As we have shown above, the statute contemplates a two stage analysis. The first step is to determine whether the consultant or attorney has engaged in persuasive activities. If it is determined that the consultant or attorney has engaged in persuasive activities, then the analysis must move to the second stage to consider whether the advice exemption applies. If the advice exemption applies, the activities are not reportable even if the advice concerns persuasive communications.

The Department may interpret a statute though rulemaking but the Department cannot use rulemaking to contravene the statute and the will of Congress. The proposed rule fails this test. Under the statute, if activities are found to be persuasive activities, they are not reportable if they are exempt from reporting under the advice exemption. Under the proposed rule, if activities are found to be persuasive activities, the advice exemption would never apply.[20]

This view is totally contrary to the intent of Congress and the statute, and changes 50 years of Department interpretation. A basic rule of statutory construction requires that words are used for a purpose and, if used, they have meaning. The only reason to have an advice exemption is to make clear that advice regarding persuasive activity is exempt from reporting. If

[20] "Thus, if a consultant engages in activities constituting persuader services, then the exemption would not apply even if activities constituting 'advice' were also performed or intertwined with the persuader activities." NPRM 36191.

the statute was meant to require all matters dealing with persuasive activity to be reported, then the advice exemption would not be in the statute. If the advice exemption meant that advice unrelated to persuader activity was exempt, the language is unnecessary because only persuader activity is reportable. If the statute was intended only to exempt advice that met the definition of legal advice then the term "advice" in Sec. 203(c) is again meaningless and all that would be required is the exemption for the attorney-client relationship (Sec. 204).

The Department's proposed re-interpretation of the advice exemption is inconsistent with the statutory language, commonly accepted definitions of advice, common sense, and a half century of Department directive because it "interprets" the advice exemption out of the statute. The attempt to amend the clear language of the statue by rulemaking is an abuse of the rule making process.

B. The Proposed Rule is Inconsistent with Congressional Intent

1. The Congress Did Not Intend to Require Reporting for Advice Provided by "Legitimate Labor Relations Consultants"

There is no question that the Congress intended to curb the abuses of what it described as unscrupulous "middlemen" in labor management disputes. However, there is no support for the proposed rule, which appears to be intended to curb the advice of legitimate labor relations consultants and attorneys. The proposed rule will have the effect of interfering with employers' ability to obtain legitimate labor relations advice and, by doing so, impeding their ability to respond in a lawful and appropriate manner to the labor relations challenges with which they are confronted.

The McClellan hearings revealed the ugly side of labor relations in mid-20th century America. While most of the evidence related to union corruption and criminality, the hearings also uncovered evidence of serious misconduct by some labor relations consultants. The evidence of labor consultant misconduct was largely focused on the activities of Nathan W. Shefferman and his consulting firm, Labor Relations Associates of Chicago, Inc. The Committee found that:

> It was shown that Shefferman's agents flitted about the country from one client to another, violating the Taft-Hartley law with seeming impunity. A top attorney for the NLRB admitted that the present law is not sufficient to deal with this type of activity. It is the committee's opinion that for such a middleman to be found guilty of unfair labor practices in one community and then to go on to another community and commit the same offenses reveals a defect in the law as it is now written.[21]

In the conclusion to the section of the McClellan Committee's Interim Report dealing with the "middleman," the Committee noted that: "The hearings ended with Nathan Shefferman and his son, Shelton, invoking the fifth amendment on all matters. The silent Nathan Shefferman was a sharp contrast to his previous voluble appearance before the committee during the hearings on [Teamsters President] Dave Beck."[22]

The McClellan Committee's findings were referenced repeatedly during the discussion of the bill that became the LMRDA. The Senate Report on the bill described the unlawful practices of the "middlemen":

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[21] Select Committee on Improper Activities in the Labor or Management Field, 85th Cong. Rep. No. 1417, at 452.
[22] Id., at 297.

> 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.[23]

The Senate Report clearly stated that the bill was intended to address these evils:

> It is also plain that there are important sections of management that refused to recognize that the employees have a right to form and join unions without interference and to enjoy freely the right to bargain collectively with their employer concerning their wages, working conditions, and other conditions of employment. The hearings of the McClellan committee have shown that employers have often cooperated with and even aided crooks and racketeers in the labor movement at the expense of their own employees. They have employed so-called middlemen to organize "no-union committees" and engage in other activities to prevent union organization among their employees. They have financed community campaigns to defeat union organization. They have employed investigators and informers to report on the organizing activities of employees and unions. ... It is essential that any legislation which purports to drive corruption and improper activities out of labor-management relations contain provisions dealing effectively with these problems.[24]

One searches the legislative history in vain for any reference to consultants or attorneys drafting, reviewing and revising a proposed speech or letter which may be considered a persuasive communication, subject to client acceptance or rejection, which is intended for employee dissemination by the client, or training supervisors to conduct lawful individual or group employee meetings, or developing personnel policies or practices or any type of strategy dealing with NLRB elections or corporate campaigns. There are no such references because

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[23] S. Rep. No. 86-187 (1958)(Conf. Rep.), at 10.
[24] Id. at 6.

those activities have nothing to do with the nefarious and unlawful dealings of the "middlemen." Indeed, those activities are in the nature of advice which the Department now wants to be reportable because the advice involves persuasion.

The review of communications, training of supervisors, and development of policies and strategies are all legitimate activities, in contrast to the activities of the "middlemen" of the 1950s. There is no evidence that the Congress sought to subject these legitimate activities to the same "fishbowl publicity" reserved for the evils of Mr. Shefferman and his ilk. The Senate Report drew this distinction when noting that the Committee was "particularly desirous of requiring reports from middlemen masquerading as legitimate labor relations consultants."[25] When Senator Kennedy detailed the major points of the bill that would become the LMRDA on the Senate floor, he described the consultant reporting provisions as:

> Public financial reports of the operations of Shefferman-type middlemen; and a prohibition of channeling bribes and improper influence through such middlemen.[26]

The proposed rule is inconsistent with the Congressional intent that the LMRDA's reporting requirements should be imposed on the activities of "Shefferman-type middlemen," not on the relationship between employers and legitimate labor relations consultants and attorneys who render advice, i.e., recommendations concerning a course of action or strategy subject to the employer's acceptance, even if that advice involved persuasive communications.

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[25] Id. at 39.
[26] 86 Cong. Rec. S817 (daily. ed. January 20, 1959)(statement of Sen. Kennedy).

2. The Congress Did Not Intend to Require Reporting for Advice Provided by Attorneys Acting in the Course of Legitimate Attorney-Client Relationships

One also searches the legislative history in vain for any reference to misconduct committed by attorneys within the context of an attorney client relationship. There are no such references. The attorneys who came to the attention of the McClellan Committee were acting as "consultant middlemen." There is no evidence they held themselves out as attorneys providing legal services, counsel and advice to their clients.

The Senate Report on the bill that became the LMRDA, in describing the advice exemption, noted that the new reporting requirements were not intended to cover attorneys or consultants who did not engage in the misconduct identified by the McClellan Committee:

> The Committee did not intend to have the reporting requirement of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations who do not engage in activities in the types listed in Section 103(b).[27]

Indeed, Chairman McClellan advised, in the context of discussing the activities of Nathan Shefferman's consulting firm:

> I am compelled to observe that I see nothing wrong in seeking counsel and employing legal counsel, and employing even experts in labor-management relations, and those things. I think that we have some more, but it looks to me like we are developing a pattern of what to amounts to a payoff to union officials to have them disregard the rights of the working man or to be reluctant, if not to refuse, to test any drive for unionization.[28]

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[27] S. Rep. No. 86-1684 (1958)(Conf. Rep.), at 40.
[28] Select Committee on Improper Activities in the Labor or Management Field, 85th Cong. Rep. No. 1417, at 293.

Similarly, the Committee observed that:

> Since attorneys at law and other responsible labor-relations advisers do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice, taking part in collectively bargaining and appearing in court and administrative proceedings nor would such a consultant be required to report.[29]

As the above quote from the history shows, reporting was intended only for those who engaged in direct persuasive communications with employees – those who themselves "engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act" – and the employers who engage them. The Committee itself noted the breadth of the advice exemption: "Subsection (c) of section 203 of the conference substitute grants a broad exemption from the requirements of the section with respect to the giving of advice. This subsection is further discussed in connection with section 204."[30]

Section 204 makes clear that the reporting requirements were not intended to apply to advice provided to employers by attorneys acting in the course of "legitimate attorney-client relationship[s]":

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

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[29] S. Rep. No. 86-1684 (1958)(Conf. Rep.), at 8.
[30] Select Committee on Improper Activities in the Labor or Management Field, 86th Cong. Rep. No. 621, at 33.

A review of the legislative history makes clear that, as with labor consultants, the Congress was concerned with the unlawful activities of unscrupulous attorneys identified by the McClellan Committee. Senator Kennedy, in accepting the amendment which became Sec. 204, noted that:

> I will accept the amendment; and I hope it will encourage the bar associations of the United States to fulfill their responsibility in a more substantial way than they have so far in this particular problem of ethical practices. I think this responsibility is tied up completely with the problem of corrupt practices, "sweetheart deals," and all the rest of the racketeering and corruption which the committee found to exist in labor-management relations.
>
> * * *
>
> I was referring to lawyers who deal collusively with crooked unions, crooked union leaders, or crooked employers, and then, in an attempt to protect themselves, justify their actions on the basis of a confidential relationship.[31]

This confirms that the intent in subjecting the activities of attorneys to the reporting requirements, when acting as consultants, was to curb the unlawful activities identified by the McClellan Committee, such as **lawyers who deal collusively with crooked unions, crooked union leaders, or crooked employers, and then, in an attempt to protect themselves, justify their actions on the basis of a confidential relationship.** Nothing was ever intended to subject to reporting the relationship between an employer and its attorney, acting in the course of a legitimate attorney-client relationship, even where the subject matter of the advice may deal with a persuasive communication.

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[31] 86 Cong. Rec. S1164 (daily. ed. April 23, 1959)(statement of Sen. Kennedy)(emphasis added).

3. The Congress Had Nearly 50 Years to Amend the Statute if the Department's Longstanding Interpretation was Inconsistent with its Intent

The Department's interpretation of the advice exemption, as applied, has been consistent for nearly 50 years – since the 1962 memo by Solicitor of Labor Charles Donahue. Solicitor Donahue explained the interpretation, and its modification of the initial 1960 interpretation, as follows:

> [T]he Department ... originally took the position that [the exemptions in LMRDA section 203(b) and section 204] did not extend to drafting or revising speeches, statements, notices, letters, or other materials by attorneys or consultants for the use or dissemination by employers to employees for the purpose of persuading them with respect to their organizing or bargaining rights. This kind of help was not viewed as advice but, instead, was regarded as an affirmative act with the direct or indirect objective of persuading employees in the exercise of their rights.
>
> **Donahue observed that this position had been "reviewed in the light of Congressional intent," which revealed "no apparent attempt to curb labor relations advice in whatever setting it might be couched." Expert legal advice was often necessary, Donahue suggested, and thus: "Even where this advice is embedded in a speech or statement prepared by the advisor to persuade, it is nevertheless advice and must be fairly treated as advice. The employer and not the advisor is the persuader."**[32]

Solicitor Donahue in 1962 – forty-nine years ago, was making decisions almost contemporaneously with the legislative debate and the enactment of the statute. The Department in 2011 is rewriting history a half century after the fact. Such conduct is unacceptable, does not reflect the will of Congress and certainly undermines public confidence in the Department and its

[32] Charles Donahue, "Some Problems under Landrum Griffin in American Bar Association, Section of Labor Relations Law," Proceedings 48-49 (1962), as described and quoted in NPRM at 36180.

proposed rule. The proposed rule is nothing more than a disguised attempt to amend the statute by denying employers legitimate advice in a complex area and thereby restricting the employer's first amendment and NLRA free speech rights. The Donahue interpretation is consistent with legislative history as it relates to the application of the advice exemption to the drafting of communications. As the proposed rule notes, Solicitor Donahue explained that the drafting of communications for an employer "can reasonably be regarded as a form of written advice where it is carried out as part of **a bona fide undertaking which contemplates the furnishing of advice to an employer.**"[33] This is consistent with the statutory language and the legislative history.

The proposed rule, which would overturn the Department's consistent interpretation of the advice exemption, as applied, for nearly 50 years, is inconsistent with the statutory language and with the legislative history of the LMRDA. The proposed rule quotes selectively from the legislative history, and fails to anchor the quotes to the underlying illegal and unethical practices that were identified by the McClellan Committee and that led to the LMRDA. It would be arbitrary and capricious for the Department to issue a radical re-interpretation at this juncture, when the Congress has had nearly 50 years in which it to overturn the Department's interpretation by legislation, yet never did so.

[33] NPRM at 36180 (quoting Solicitor Donahue's 1961 memo) (emphasis added).

4. The Department Has Failed to Demonstrate Good Reasons for the Proposed Interpretation of the Advice Exemption After Nearly 50 Years of Consistent Interpretation Upon Which the Management Community Relied

The Department may enact rules and interpret the statute in accordance with the Administrative Procedure Act ("APA"). Through rulemaking the Department may not contravene the statutory language, or amend the statute in the guise of rulemaking for such efforts exceed the Agency's power.

The Department may change a statutory interpretation only if it can "show that there are good reasons for the new policy."[34] We maintain that the proposed interpretation contravenes the statute.

Nor has the Department shown that there are good reasons for the new policy. As we have said, the NPRM involves a change in the interpretation of a statute that has been in effect for more than a half century. But the NPRM does more than that, as it dramatically reverses a long standing interpretation of the LMRDA going to the heart of the law. The NPRM is not a clarification of a few points of contention; it is a reformulation and rejection of legislative intent.

In such cases, the Supreme Court has held that the agency proposing the new interpretation may be required to "provide a more detailed justification than what would suffice for a new policy created on a blank slate."[35] Specifically, the Court noted that when the "new policy rests upon factual findings that contradict those which underlay its prior policy; or when

[34] FCC v. Fox Television Stations, Inc., 129 S. Ct. 1800, 1811 (2009).
[35] Id.

its prior policy has engendered serious reliance interests that must be taken into account," the agency may not ignore the significance of those factors:

> It would be arbitrary or capricious to ignore such matters. In such cases it is not that further justification is demanded by the mere fact of policy change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy.[36]

The Department articulated a number of reasons for the radical re-interpretation of the advice exemption. However, these reasons are based upon: (1) a misreading of the statute and the legislative history over a period of a half century, and (2) the application of contemporary industrial relations research by a small group of partisan interested observers whose conclusions and recommendations are utterly unrelated to the problems identified by the Congress and which the LMRDA was enacted to address. Those observers are free, of course, to petition Congress for change, as was done with the proposed Employee Free Choice Act. But the Department cannot reply upon their "research" to justify what amounts to new legislation in the name of rulemaking.

Those observers may wish to have the Department address a new set of labor relations "problems" they perceive, and we do not begrudge them their beliefs, but there is no statutory regime in existence today to support those views. If they believe that their research supports new or expanded statutory prohibitions and requirements, they should lobby for a

[36] Id. at 11-12.

change in the law.[37] In the meantime, it would be arbitrary and capricious for the Department to implement the new rule to achieve these goals in the absence of a change in the law.

C. The Proposed Rule is Based Upon Flawed Assumptions and Flawed Data

1. The Proposed Rule Ignores the Reality of the "Uninhibited, Robust and Wide-Open Debate in Labor Disputes" Approved by the Supreme Court

The proposed rule makes repeated references to the concerns expressed by academic observers about the proliferation of labor relations consultants, their experience and expertise, and their impact on union organizing:

> Contemporary research in the industrial relations arena provides ample support for the conclusion that the consultant industry has mushroomed, and the use of consultants by employers to defeat union organizing efforts has similarly proliferated in recent years.
>
> Based on this review, there can be no doubt that "[e]mployer campaigns against unionization have become standardized, almost formulaic, in large part because employers frequently turn to outside consultants and law firms to manage their anti-union efforts.
>
> Another evolving dimension of the union avoidance industry is its increasingly sophisticated use of technology, including highly produced anti-union videos and the growing use of information technology. These methods permit consultants to more easily locate anti-union media stories and to disseminate persuader communication more quickly and easily.[38]

The proposed rule suggests – incorrectly – that the NLRB's charter is to police the truth or falsity of campaign communications by all parties involved with the contest:

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[37] Some of them did in connection with EFCA.
[38] NPRM 36185-36186 (citations omitted).

> [T]he NLRB has promoted and protected the value to employees of full and accurate information during representation campaigns in its regulation and maintenance of "laboratory conditions" surrounding union elections. The Board's high standard governing the conduct of the parties during representation elections requires the Board "to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."
>
> As with the Board's rules promoting employee free choice, the LMRDA's requirements regarding the disclosure of consultant participation in representation campaigns, and specifically the limitations on the interpretation of "advice" proposed here, advance the goals of an informed electorate able to distinguish between well-reasoned and accurate information and campaign pressure.[39]

Yes, the Board is concerned with "labor conditions" but the NLRB does not monitor the "accuracy" of communications instead leaving that responsibility to the parties.[40]

The Supreme Court has described the character of union representation campaigns in very different terms. First, the Court noted its own role in "curtail[ing] the NLRB's aggressive interpretation, [and] clarifying that nothing in the NLRA prohibits an employer 'from expressing its view on labor policies or problems' unless the employer's speech 'in connection with other circumstances [amounts] to coercion within the meaning of the Act.'"[41] The Court then described the role of the Congress in addressing the perceived excesses that resulted from the Wagner Act:

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[39] NPRM 36189 (citations omitted).
[40] This has been the standard for nearly 30 years. "In sum, we rule today that we will no longer probe into the truth or falsity of the parties' campaign statements … ." Midland National Life Insurance Co., 263 NLRB 127, 133 (1982).
[41] Chamber of Commerce of United States v. Brown, 554 U.S. 60, 66-67 (2008).

Concerned that the Wagner Act had pushed the labor relations balance too far in favor of unions, Congress passed the Labor Management Relations Act, 1947 (Taft-Hartley Act). 61 Stat. 136. The Taft-Hartley Act amended §§7 and 8 in several key respects. First, it emphasized that employees "have the right to refrain from any or all" §7 activities. 29 U.S.C. §157. Second, it added §8(b), which prohibits unfair labor practices by unions. 29 U.S.C. §158(b). Third, it added §8(c), which protects speech by both unions and employers from regulation by the NLRB. 29 U.S.C. §158(c). Specifically, §8(c) provides:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit."

From one vantage, §8(c) "merely implements the First Amendment," NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969), in that it responded to particular constitutional rulings of the NLRB. See S. Rep. No. 105, 80th Cong., 1st Sess., pt. 2, pp. 23–24 (1947). **But its enactment also manifested a "congressional intent to encourage free debate on issues dividing labor and management."** Linn v. Plant Guard Workers, 383 U.S. 53, 62 (1966). **It is indicative of how important Congress deemed such "free debate" that Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB's decisions on a case-by-case basis. We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word ... has been expressly fostered by Congress and approved by the NLRB."** Letter Carriers v. Austin, 418 U.S. 264, 272–273 (1974).[42]

[42] Id. (emphasis added).

The Supreme Court's approving description reflects the rough and tumble debate on the important issue of unionization. It would be wildly inaccurate to suggest that this is the course charted by employers alone. It is not, as the comments of one major labor leader attest:

> Dennis Rivera, 1199's president, invested a lot of energy, money and prestige into the effort to organize [Lawrence Hospital's] 270 nonprofessional workers, vowing to win after 1199 narrowly lost a unionization drive a year ago. The union spent $1.3 million on the campaign, or $9,000 for each worker who voted to join.
>
> "We will never accept defeat," Mr. Rivera said today, describing the strategy after last year's loss. "We will keep coming back. We will spend what it takes until we win."
>
> Mr. Rivera assigned 10 organizers to work full time on the campaign, and the union rented an office across the street from the hospital, which was one of just three nonunion hospitals left in Westchester County. The union also sent a pro-unionization video to every worker's home.[43]

Contrary to the Department's apparent beliefs, employees are able to evaluate the merits of the arguments which are presented to them. They understand that their interests and their employer's interests diverge at times, and they are quite capable of assessing information and evaluating the merits before making the decision whether to be represented by a union.

Moreover, the dramatic increase in union win rates in NLRB elections over the last 15 years puts the lie to the suggestion, implicit in the proposed rule, that employers and consultants have mastered the dark arts of political manipulation and that employees and unions are somehow powerless to resist.[44]

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[43] "After 37 Years, Union Wins at a Hospital in Bronxville," New York Times, April 13, 2002.
[44] Unions won nearly 68% of NLRB elections in 2010, up from 48% in 1995.

To the extent the Department justifies its re-interpretation of the advice exemption relying on the fact the employees should know the source of the information, this rationalization is without merit. First, the advice incorporated in employer communications are currently subject to employer acceptance or rejection. The fact that the advice is based upon an attorney or a consultant's recommendation – or something the employer read in USA Today – is irrelevant. If the employer adopts and communicates the message, where the employer obtained the advice does not matter. The employer as the employer is communicating as it may.

There is no middleman speaking to employees directly masquerading as someone other than who he really is. The employer is not a third party making a deal with a "crooked labor leader" or deceiving employees by establishing a vote "no" committee. Instead, the employer is getting advice to ensure it acts consistently with and not contrary to the purposes of the statute.

2. The Reporting Requirements Are Not Analogous to Disclosure Requirements Under Federal Campaign Laws or Union Reporting Requirements

The proposed rule claims that the LMRDA's reporting requirements "have close analogs in Federal election campaign law," because knowing the sources of a candidate's financial support "alert[s] the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." The proposed rule concludes that the LMRDA reporting requirements are similar, and that they will "shed light on the financial interests of third parties who have assumed a role in influencing the electorate...."[45]

[45] NPRM 36188.

These claims are puzzling and illogical. The LMRDA reporting requirements are not analogous to laws requiring disclosure of campaign contributions. If anything, the reporting requirements would be analogous to a requirement (if it existed) that a political candidate disclose the public relations firms that prepare the candidate's television and print advertising, and the speech writers who craft the candidate's remarks. Or disclose the fees paid to the candidate's lawyer who is advising about campaign finance rules but helps draft candidate speeches and assists in debate preparations. There is no public interest in the identity of these persons or the amounts they are paid because they are not running for office.

This points to a consistent theme running through the proposed rule. The Department claims to be under the impression that the labor consultants are in control of the messages that are communicated during an NLRB election campaign. The suggestion, implicit in the proposed rule, is that the employer is in thrall to the consultant, who forces upon the employer and the employees a divisive message and confrontational tone. Certainly this is not true.

We doubt that the giants of American capitalism are so easily dominated by a small army of consultants, and we suspect the reality is far simpler and less sinister: those employers who wish to remain union free retain experts such as labor consultants to assist them in achieving their efforts legally because labor law is a complex area – it is why there are currently 357 bound volumes of NLRB decisions. To expect any employer to know the law without advice is absurd.

Finally, the proposed rule suggests that expanded employer and consultant disclosure is appropriate because unions are subject to extensive disclosure requirements. In addition to the fact that the Administration has weakened union disclosure requirements, we note that union disclosure requirements are not analogous to expanded employer and consultant disclosure. Unions have a legal obligation to represent their members and they collect dues from their members to do so. The reporting requirements for unions reflect this by requiring unions to account for how their members' money is being spent. There is no analogous obligation flowing from the employer to his employees.

3. The Studies Cited in the Proposed Rule are Marked by a Lack of Objectivity and Credibility and do not Support the Stated Justifications for the Proposed Rule

The Department cites "industrial relations research" in support of the proposed re-interpretation of the advice exemption. The research studies they cite are marked by a lack of objectivity and credibility, and do not support the stated justifications for the proposed rule. A review of several of the cited research studies, and their authors, demonstrates this point. The reports of Kate Bronfenbrenner and John Logan are often cited by labor and its allies because the authors are sympathetic to unions and hostile to employers. The Department refers to various studies by Ms. Bronfenbrenner and Mr. Logan no fewer than 32 times in the NPRM.

Ms. Bronfenbrenner is not a disinterested observer. She has a personal position on the subject she purports to study objectively. Her position is revealed in her personal history and in her writings. Ms. Bronfenbrenner has worked for, and been associated with labor unions for more than 30 years. She started out as a union organizer. According to her biography: "Prior to joining the Cornell faculty in 1993, Bronfenbrenner was an Assistant Professor in Labor

Studies at Penn State University and worked for many years as an organizer and union representative with the United Woodcutters Association in Mississippi and with SEIU in Boston, as well as a welfare rights organizer in Seattle, Washington."

Ms. Bronfenbrenner has expressed her belief that it is critical to "rebuild an active and vital labor movement." This was the conclusion of an article she published in 1994:

> Unfortunately, time is running out. If the labor movement is going to reverse the downward spiral before it is too late, it needs immediately to reevaluate the way it has organized in the past and develop a comprehensive plan to revamp its organizing structure and strategy. Only then can labor law reform be achieved and only then can we rebuild an active and vital labor movement, which is so critical to the very existence of a democratic and humanist society.[46]

Ms. Bronfenbrenner's work is supported and funded, at least in part, by labor organizations and affiliated and allied groups. Her most recent paper is based upon data that was compiled as part of a larger study funded by, among others, the AFL-CIO, CTW and 23 affiliates: "This portion of the research was funded by ARAW [American Rights at Work], SEIU, and the AFL-CIO."[47]

John Logan also is not a disinterested observer. Mr. Logan is director of labor studies at San Francisco State University and a research associate at the University of California-Berkeley Labor Center. The Labor Center is a pro-labor group that offers, among other things, a

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[46] Kate Bronfenbrenner, "Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform" (1994). Articles & Chapters. Paper 18.

[47] Bronfenbrenner, K. and Warren, D. The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence. ISERP Working Paper Series 2011.01 (2011). www.iserp.columbia.edu/research/working-papers at fn 1. Ms. Bronfenbrenner's Vita also lists numerous grants from labor organizations and affiliated and allied groups. It also includes studies commissioned by such groups, and presentations and projects with such groups, including "a year-long project to develop and analyze pre-and post training evaluations for participants in SEIU education programs for staff development."

"Labor Summer Internship Program" and numerous workshops and seminars on union organizing. The Labor Center's Advisory Board is comprised primarily of unions and labor federations, along with community and academic groups.

Mr. Logan also has a personal position on the subject he purports to study objectively. Mr. Logan has written numerous articles and reports critical of management's opposition to unions, without distinguishing lawful opposition from illegal conduct. He publicly supported the Employee Free Choice Act, legislation sought by unions that would have made secret ballot elections optional: "Given [EFCA's] moderate provisions," the bill "would be considered a modest proposal in any other developed democracy … ."[48]

Earlier this year, Mr. Logan wrote about the intensifying "one-sided class war" against unions, lamented the current state of unionization, and explained how labor could win the battle:

> In 1978, Douglas Fraser, president of the Auto Workers union, accused corporate America of waging a "one-sided class war" against organized labor. That war has only intensified. As a result of aggressive employer opposition and weak legal protections for labor rights, private sector union membership now stands at the pitifully low level of 6.9 percent and shows no sign of rebounding anytime soon.[49]

In addition to the pro-union biases of Ms. Bronfenbrenner and Mr. Logan, their studies suffer from a consistent reliance on anecdotal evidence obtained from union organizers. In the case of Ms. Bronfenbrenner, statistics from her studies on alleged unlawful employer

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[48] John Logan, "Union Recognition and Collective Bargaining: How Does the United States Compare with Other Democracies?", http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/Spring 2009Vol10/Logan/html.
[49] John Logan, "Republicans 'one-sided class war' against unions," Buffalo News, April 14, 2011.

conduct during union organizing drives have been cited in other studies and in the media as if they were objective fact when they are really based upon the opinions of an interested party. In one of her recent papers Ms. Bronfenbrenner explained her methodology:

> Using in-depth surveys with the lead organizer conducted by mail, phone, or email, personal interviews, documentary evidence, and electronic databases, we compiled detailed data on election background, organizing environment, bargaining unit demographics, company and union characteristics and tactics, and election and first contract outcomes.[50]

Ms. Bronfenbrenner acknowledges and defends this approach, and rejects the idea that she should seek data from employers:

> [I]t is simply not possible to use employers as an alternate source. As we have demonstrated in previous studies, the overwhelming majority of employers are engaging in at least one or more illegal behaviors (at minimum 75% of the employers in the current sample are alleged to have committed at least one illegal action).[51]

Ms. Bronfenbrenner uses anecdotal evidence from union organizers as the basis for concluding that most employers engage in illegal behavior. She then uses her conclusion that most employers engage in illegal behavior as the basis for not seeking evidence from employers. This kind of circular reasoning may suit her personal views, but they do little for the integrity of her conclusions. One expects more from academic research. Nonetheless, the Department, in its proposed rule, cites the most notorious – and notoriously inaccurate – of Ms. Bronfenbrenner's statistics when they claim that:

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[50] Kate Bronfenbrenner, "No Holds Barred—The Intensification of Employer Opposition to Organizing," May 20, 2009, Economic Policy Institute Briefing Paper #235, p. 5.
[51] Id.

> With or without the advice of labor consultants, employers utilize aggressive and even unlawful tactics in opposing unions. Bronfenbrenner found that during the course of an NLRB-supervised election, 14% of employers utilize surveillance, 63% used supervisors to interrogate employees, 54% used supervisors to threaten employees, 47% threatened cuts in benefits or wages, 18% granted unscheduled raises, 46% made promises of improvement, and 41% harassed and disciplined union activists. Bronfenbrenner, No Holds Barred at 10-11. She further estimates that employers discharge union-activist employees in 34% of NLRB-supervised elections, with an average of 2.6 employees discharged per election. Id.[52]

These statistics have been convincingly refuted elsewhere.[53] However, a few of the most trenchant critiques deserve mention.

(1) The statistics that purportedly reflect unlawful employer conduct are based primarily upon interviews with union organizers; the researchers chose not to seek information from employers.[54]

(2) The statistics in an updated report suggest that a settlement is equivalent to a finding that the employer engaged in unlawful conduct (it is not), without noting that many settlements include a "non-admission clause."[55]

(3) The reports fail to state that NLRB records show that the NLRB dismisses approximately 25% of all cases against employers because they have determined that the cases have no merit.[56]

(4) The reports fail to state that NLRB records show that an employer was found to have engaged in unlawful conduct under the NLRA, by the NLRB or by a court, in only 2-3% of all cases in any given year.[57]

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[52] NPRM at 36190.
[53] See, e.g., "Responding to Union Rhetoric: The Reality of the American Workplace," U.S. Chamber of Commerce (2009).
[54] Kate Bronfenbrenner, "No Holds Barred—The Intensification of Employer Opposition to Organizing," May 20, 2009, Economic Policy Institute Briefing Paper #235, p. 5.
[55] Bronfenbrenner, K., and Warren, D. The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence. ISERP Working Paper Series 2011.01 (2011).
[56] Id.
[57] Id.

(5) The statistics in an updated report are based upon a tiny sample representing no more than 0.8% of all the unfair labor practice charges that were filed, and just 1% of the unfair labor practice charges that were filed against employers, in the year studied.[58]

While the apparent bias, flawed methodologies, and unsupported conclusions are more than enough to discredit the collection of academic reports cited in the proposed rule, the things that are not stated in the reports, and not mentioned in the proposed rule, are more revealing of the skewed perspectives of these academic writers and the Department, and the extent to which that perspective is out of touch with the state of the law and labor-management relations.

First, the reports and the proposed rule suggest that employers and labor consultants are engaging in unchecked unlawful conduct which has intensified in recent decades. Yet they fail to note the dramatic increase in union win rates during this period. As noted above, unions won 48% of NLRB elections in 1996 and nearly 68% in 2010. These statistics confirm that unions are better able to win elections today than at any time in more than 25-30 years.

Second, both Ms. Bronfenbrenner and Mr. Logan, in their criticism of employer conduct in NLRB election campaigns, fail to distinguish between lawful and unlawful tactics. For example, Ms. Bronfenbrenner's most recent report lists leaflets, letters, and captive audience meetings (all lawful), along with threats, surveillance, and discharges for union activity (all unlawful).[59] Mr. Logan has engaged in precisely the same obfuscation, by listing hired

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[58] Id.

[59] Bronfenbrenner, K. and Warren, D. The Empirical Case for Streamlining the NLRB Certification Process: The Role of Date of Unfair Labor Practice Occurrence. ISERP Working Paper Series 2011.01 (2011). www.iserp.columbia.edu/research/working-papers at Table 3.

management consultant, used anti-union videos, and supervisor one-on-one meetings (all lawful), along with promised improvements, granted unscheduled raises, and threatened full or partial closing (all unlawful).[60]

This reveals their real intent: to demonize and discredit lawful employer opposition to union organizing and, if possible, use legal means to restrict it or prohibit it. Ms. Bronfenbrenner has advocated for changes to existing labor law to expand union rights to communicate with employees and to restrict employer rights that have been recognized since the 1930s.[61] Mr. Logan has advocated for the Employee Free Choice Act, which he deemed "moderate," and he has warned that any movement in England towards "U.S.-style anti-union tactics … would likely have disastrous consequences for British workers."[62] These are acceptable personal views, but it is improper for these views to inform research that is presented as neutral and authoritative.

Third, both Ms. Bronfenbrenner and Mr. Logan pay far too little attention to the changes in the way unions conduct representation campaigns. The authors, and the Department in the proposed rule, paint a picture of asymmetric warfare between sophisticated corporate consultants schooled in psychology and labor relations, and innocent union organizers who just want to tell workers the truth. They paint a compelling picture, but not one that reflects the real world. The labor movement awakened years ago to the realities of campaigning. If anything, it

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[60] John Logan, "U.S. Anti-Union Consultants: A Threat to the Rights of British Workers," Trades Union Congress (2008), at Table One.
[61] Kate Bronfenbrenner, "Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform" (1994). Articles & Chapters. Paper 18.
[62] John Logan, "Union Recognition and Collective Bargaining: How Does the United States Compare with Other Democracies?", http://www.lera.uiuc.edu/Pubs/Perspectives/onlinecompanion/Spring 2009Vol10/Logan/html.

was they who taught management the tricks of the trade. In her own studies, Ms. Bronfenbrenner has detailed the strategies and tactics of a sophisticated union campaign.

For example, in a 2005 paper, she described "a comprehensive union-building strategy that incorporates the following ten elements, each of which is a cluster of key union tactics that are critical to union organizing success: 1) adequate and appropriate staff and financial resources, 2) strategic targeting and research, 3) active and representative rank-and-file organizing committees, 4) active participation of member volunteer organizers, 5) person to person contact inside and outside the workplace, 6) benchmarks and assessments to monitor union support and set thresholds for moving ahead with the campaign, 7) issues that resonate in the workplace and in the community, 8) creative, escalating internal pressure tactics involving members in the workplace, 9) creative, escalating external pressure tactics involving members outside the workplace, locally, nationally, and/or internationally, and 10) building for the first contract during the organizing campaign."[63]

4. The Facts Counter the Claim that the "Undisclosed Activities of Labor Relations Consultants are Interfering with Worker's Protected Rights"

The Department claims that the proposed rule will have a salutary effect on contemporary labor relations. The support for this claim rests in large part upon the claimed effect of labor consultants on unions' ability to achieve first contracts:

> As in 1959, there is strong evidence today that the undisclosed activities of labor relations consultants are interfering with worker's protected rights and that this interference is disruptive to effective and harmonious labor relations. For instance, research in

[63] Kate Bronfenbrenner, "Union Organizing Among Professional Women Workers: A Research Study Commissioned by the Department for Professional Employees," AFL-CIO (2005).

> the industrial relations arena shows that newly certified unions are much less likely to secure first a contract in cases in which the employer has hired a consultant.[64]

The Department acknowledges, at the end of a lengthy footnote, that "the observed effects may not be entirely attributable to the use of a consultant, as some employers may be less supportive of unionization and may choose certain tactics and strategies independent of the use of a consultant."[65] This is the first time in the proposed rule that the Department acknowledges that it is the employer's position on unionization (as opposed to the consultant's) that is relevant. However, the Department does not go far enough: it is likely that employers who prefer to operate union free, as the law allows, are likely to hire an expert such as a consult or an attorney to advise them. It is a question of correlation, not causation.

More importantly, research by the academic observers quoted throughout the proposed rule disproves the Department's claim about the effect of consultants on first contract settlements but the Department has not cited this aspect of their research. For example, Ms. Bronfenbrenner is cited for the proposition that, one year after an election, only 48% of units have negotiated a first contract.[66] In other research, Ms. Bronfenbrenner has claimed that the use of a consultant results in a first contract 75% of the time, while the first contract rate is 87% when a consultant is not used.[67]

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[64] NPRM at 36189.
[65] NPRM 36189-36190, FN 14.
[66] Id.
[67] Kate Bronfenbrenner, "Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform" (1994). Articles & Chapters. Paper 18. At Table 5.2.

Ms. Bronfenbrenner noted other factors which had a very strong negative effect on first contracts: if the employer made initial "concessionary" proposals, a first contract was achieved only 67% of the time, while the first contract rate was 83% without concessionary proposals. Where the employer's campaign included media ads and public events, a first contract was achieved only 50% of the time, while the first contract rate was 23% without the media ads and public events.[68] A 75% first contract rate belies the claim that consultants are having a serious and harmful negative effect on the achievement of first contract settlements.

In the same study, Ms. Bronenbrenner found that the probability of the union winning an election was reduced by only 3% if the employer used a consultant, much less than the effect of a change in the proposed unit (15% reduction in probability of union winning) or the employer having had a "participation plan" in effect prior to the union campaign (22% reduction in probability of union winning).[69]

In addition, other researchers have studied first contract negotiations in detail, and have found that the key factors in a union's success in achieving a first contract, and in the quality of that contract, have nothing to do with consultants. For example, studies have found that "the union's ability to innovate and to find new and effective ways to leverage power is the key to their achieving first contract success."[70] Studies also have found that "the organizer's personality and actions during a campaign are important determinants of first contracts."[71]

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[68] Id.
[69] Id.
[70] Lisa Jordan, Robert Bruno (2005), "Do the Organizing Means Determine the Bargaining Ends?", in David Lewin, Bruce E. Kaufman (ed.) 14 (Advances in Industrial & Labor Relations, Volume 14), Emerald Group Publishing Limited.
[71] Thomas F. Reed, "Securing a Union Contract: Impact of the Union Organizer" Industrial Relations: A Journal of Economy and Society, Volume 32, Issue 2 (1993).

The Department also cites Ms. Bronfenbrenner's research on alleged unlawful conduct by employers in support of their claim that "the undisclosed activities of labor relations consultants are interfering with worker's protected rights and that this interference is disruptive to effective and harmonious labor relations." This research has been debunked elsewhere, and was addressed above.[72] Finally, Mr. Logan has written that the state of American labor relations is better explained by cultural, political and economic factors:

> In the context of a growing union/non-union wage differential, heightened international and domestic non-union competition, deregulation, changes in the structure of corporate governance that elevated the importance of short term share value, and increasing employer demands for flexible work practices, many firms started to resist unionization more vigorously.[73]
>
> Employer anti-unionism in the United States is grounded in rational economic and job-control considerations.[74]
>
> [T]here are complex historic and cultural reasons why American employers are more hostile to unions than are employers in other developed nations ... . Union avoidance experts have not been the major cause of union decline in the United States in the past half century; nor have they been the sole source of the intensification of employer opposition to unionization since the 1970s. And employers do not unthinkingly or uncritically adopt the attitudes and advice of union avoidance experts.[75]

Perhaps the first contract statistics are a result of Section 8(d) of the NLRA, which requires good faith bargaining but not agreement. Perhaps unrealistic union demands play

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[72] See Section C.3, supra.
[73] John Logan, "The Union Avoidance Industry in the United States" British Journal of Industrial Relations (2003), at 654, 663.
[74] Id. at 663.
[75] Id. at 669.

a role. Perhaps for non-unionized employers the economy plays a role. Even long time unionized employers like the domestic car manufacturers and the UAW understand collective bargaining has changed.[76] It should be noted that Congress had the opportunity to change the law regarding bargaining and chose not to do so when EFCA failed to become law. The Department's reliance on first contract statistics is indicative of an agency that through rulemaking exceeds its authority by attempting to enact provisions that Congress rejected.

In short, the evidence does not support the Department's claim that the undisclosed activities of labor consultants are having a harmful impact on labor relations, and it certainly does not support an argument that the evils identified by the McClellan Committee are present in the labor relations arena today. These "facts" cited by the Department do not in any way create a compelling need to alter 50 plus years of consistent LMRDA interpretation.

D. The Proposed Rule Will Not Achieve its Stated Goals and is Contrary to the Goal of Harmonious Labor Relations

The Department claims that the proposed rule, and the radical re-interpretation of the advice exemption will have a salutary effect on contemporary labor relations:

> The Department views reporting of persuader agreements or arrangements as providing employees with essential information regarding the underlying source of the views and materials being directed at them, as aiding them in evaluating their merit and motivation, and assisting them in developing independent and well-informed conclusions regarding union representation and collective bargaining. Indeed, in the Department's view, full disclosure of the participation of outside consultants will lead to a better informed electorate, which invariably produces more reliable

[76] As reflected in recent negotiations between the Big Three U.S. automakers and the UAW, in which the final contract reflected the changing economic realities, whether negative (the 2007 contract) or positive (the 2011 contract, as described in the tentative agreement reached with General Motors on September 16, 2011).

> and acceptable election results less subject to charges and counter-charges, and thus becomes a less disputed, more stable foundation for subsequent labor-management relations.[77]

There are many reasons to question this claim, and there is cause for concern that the proposed rule will actually have a harmful effect on the state of labor relations.

1. The Proposed Rule Will Not "Assist Employees in the Decision Making Process Regarding Union Representation"

The Department claims that the proposed rule will "provid[e] employees with essential information regarding the underlying source of the views and materials being directed at them, aid[] them in evaluating their merit and motivation, and assist[] them in developing independent and well-informed conclusions regarding union representation and collective bargaining." The fact that advice was sought and obtained adds nothing to the employee's ability to make an informed choice. Given the NLRB rulemaking regarding new election procedures, any information about employer consultant relationships will be untimely.

The Department, and the academic observers whose studies they cite, claim that labor consultants tend to come on the scene after union organizing has begun. Since the NLRB's proposed revisions to its election rules will result in elections within as little as two weeks after a union petition, and since the first report required by the proposed rule is required within 30 days, the information contained in the report will not be known to employees until after the election has occurred.

[77] NPRM 36182-36183.

2. The Proposed Rule Will Not Create "More Informed Voters and More Effective Employee Participation" in NLRB Elections

The Department claims that the proposed rule will create "more informed voters and more effective employee participation" in NLRB elections. Unfortunately, it is likely to have the opposite effect. The proposed rule will interfere with the attorney-client relationship and inhibit employers from seeking expert advice on the important matters of labor relations. At the very least, this means that employees will receive less information and, in particular, less information (if any) from the employer before voting on the important question of union representation.

As noted above, the Supreme Court has described the intent of the Congress as follows:

> [C]ongressional intent [was] to encourage free debate on issues dividing labor and management. ... We have characterized this policy judgment, which suffuses the NLRA as a whole, as "favoring uninhibited, robust, and wide-open debate in labor disputes," stressing that "freewheeling use of the written and spoken word ... has been expressly fostered by Congress and approved by the NLRB."[78]

This "uninhibited, robust, and wide-open debate," featuring the "freewheeling use of the written and spoken word" requires that both sides participate vigorously in the process. The effect of the proposed rule would be to provide employees with less information, and to provide them with information that is presented by only one of the two interested parties to the debate. This would be inconsistent with the public policy judgment expressed by the Congress and approved by the Supreme Court.

[78] Chamber of Commerce of United States v. Brown, 554 U.S. 60, 67 (2008).

As previously touched upon, the academic observers cited throughout the proposed rule would make a very different policy judgment. They appear to believe that labor has a legitimate position and perspective to communicate, while management does not. They reject the idea that any employee would not want to join a union. In an early paper, Ms. Bronfenbrenner appeared to be perplexed by her finding that: "There were cases in this sample, albeit few in number, in which, despite a complete lack of employer opposition, the union still was unable to win an election."[79]

These observers do not concede that employers have, or should have, the right to communicate their position to their own employees. They take the position that any employer communication, regardless of its actual legality, interferes with employee free choice. These views are at odds with reality and the policy judgment expressed by the Congress and approved by the NLRB and the Supreme Court. For these reasons, it is inappropriate for the Department to rely upon these views as support for the proposed radical re-interpretation of the advice exemption.

3. The Proposed Rule Will Not Create "Greater Confidence and Trust in Labor-Management Relations"

The Department claims that the proposed rule will strengthen "the integrity of the union representation election process" because "voters [will] become better informed." "In this way, the public can be more confident that the election outcomes reflect the sound and informed intent of the voters. This in turn creates greater confidence and trust in labor-

[79] Kate Bronfenbrenner, "Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform" (1994). Articles & Chapters. Paper 18.

management relations." Here, too, we submit that the proposed rule is more likely to have the opposite effect.

The combination of the proposed rule and the NLRB's proposed revisions to its election rules will have the effect of removing the employer from any meaningful involvement in an important decision that will affect the workplace. This removal will create an electorate that is ill informed and will hear only one side of the equation – the union's side. Employers will be timid in reaching out for advice and counsel. Costs will increase due to reporting obligations and civil and criminal proceedings arising from enforcement. Law firms may abandon offering advice in any context due to ethical conflicts and costs arising as a result of proceedings before the Bar and the courts. Why? Certainly it is not because the Department has misread the law for 50 years.

It is worth noting that the NLRB has expressed concern about legal impediments to the employer's seeking expert advice in labor cases, and the negative effects it could have on the process. In a case involving numerous unfair labor practices, the General Counsel argued that due to the depth of the labor consultant's involvement, the consultant became the employer or co-employer of the supervisors, and was responsible for some of the unfair labor practices.[80] The NLRB, affirming the Administrative Law Judge, rejected this argument:

> I am convinced that from a public policy viewpoint there is no basis for imposing liability upon Respondent 2M, inasmuch as the role of 2M in this case was that of a labor relations advisor to the hospital. There is no evidence that it advised its client to violate the Act. **To hold Respondent 2M liable in these circumstances would constitute a serious intrusion into an employer's right to**

[80] St. Francis Hospital, 263 NLRB 834 (1982).

> **seek legal advice. In that regard, public policy has encouraged not discouraged obtaining professional assistance. If the General Counsel's theory is adopted, the effect would be to discourage a party from seeking such advice, whether it be from a law firm, labor relations consultant, or any other professional source. The result would very well be the commission of more, rather than fewer, unfair labor practices by uninformed parties.**[81]

The Department's proposed rule would have the same effect, if not a greater one. The LMRDA was intended to limit or, perhaps, to eliminate the unlawful and unethical activities of the unscrupulous "middlemen" that were retained by some employers in the 1950s by imposing reporting requirements on them. The Department now seeks to use these reporting requirements – intended to deal with the abuses of a different era – to limit the rights of employers to secure legitimate expert advice and, in turn, the right of employees to receive sufficient legal, legitimate, effective information from their employer to make an informed choice.

The Department's proposed rule is contrary to the intent of Congress and the rule, if adopted, will exceed the Department's rule making authority.

4. The Proposed Rule is Contrary to the Goal of Harmonious Labor Relations

The Department appears to adopt the unique, and skewed, perspective of the small group of interested academic observers whose reports are cited throughout the proposed rule. Their views have been described above. These views are echoed by organized labor whose self-

[81] Id. at 849 (emphasis added).

interest is beyond question. The Department, in adopting their views, fails to appreciate several important truths about the current state of labor relations.

These truths include the following:

(1) Employers, for the most part, receive competent and legitimate advice in the context of NLRB elections and have the opportunity to express their views;

(2) NLRB elections are professionally run in accordance with longstanding protocols which are accepted by both sides;

(3) Employees have selected union representation in an increasing percentage of all NLRB elections (increasing from 48% in 1996 to 68% in 2010); and

(4) Work stoppages and other severe disruptions to the flow of commerce have decreased dramatically over the last 50 years.

The NLRB election process is an example of workplace democracy and, as a microcosm of our democracy, it is sometimes messy. It is subject to the same passions and drama as any election and, while the results may be frustrating to one side, they are accepted. The process works. It is the province of Congress, not the Department of Labor, to make changes to this longstanding, accepted process. The consequences of any such changes should be carefully considered.

First, we can expect that the law of unintended consequences will assert itself here. As noted above, first contract studies have found that "the union's ability to innovate and to find new and effective ways to leverage power is the key to their achieving first contract success." These studies have found that "voluntary recognition is not always accompanied by easy negotiations."[82] The studies suggest that this is due to the fact that the union did not demonstrate its power to the employer during the organizing process, as there was no contentious campaign.

It is also possible that voluntary recognition alternatives make it easier for a union to achieve an undeserved recognition; that is, recognition despite the absence of true majority support demonstrated in an official, secret ballot election. If the Department places its thumb on the scale and assists unions in organizing by inhibiting the employer's ability to obtain expert advice on labor issues, the consequences may involve many more difficult negotiations, fewer first contracts, and a spike in work stoppages.

Second, by inhibiting employers from obtaining expert advice on labor matters, the proposed rule will invariably produce election results which are more likely to be contested by employers and, more importantly, not accepted as legitimate even if legal challenges fail. This, too, has predictable consequences for contract negotiations and the state of labor relations in general.

Third, the apparent political nature of the change will further erode public confidence and support for the government's role in labor relations matters, including support for

[82] Lisa Jordan, Robert Bruno (2005), "Do the Organizing Means Determine the Bargaining Ends?", in David Lewin, Bruce E. Kaufman (ed.) 14 (Advances in Industrial & Labor Relations, Volume 14), Emerald Group Publishing Limited.

government agencies, such as the Department and the NLRB, with which employers interact on a regular basis. These agencies are staffed by career civil servants with little appetite for the charged political and partisan atmosphere that surrounds these issues. That atmosphere clearly is not conducive to the goal of harmonious labor relations or public confidence in the ability of those charged with administering our labor laws and, one hopes, creating jobs and stimulating the economy.

Finally, the fact that the Department could easily achieve most of its stated goals in a manner that is simple, direct, and would not infringe upon the ability of employers to obtain expert advice on labor matters, or the attorney-client relationship, casts doubt upon the proposed rule and its motivations. If the Department were truly interested in helping employees to know that the employer received expert outside advice, the Department could work on a method of requiring employers to provide a disclaimer stating that the employer consulted outside experts in labor matters to assist with its communications. It will come as no surprise to the employees since the union has probably already informed them of such a development.[83]

E. The Proposed Rule May Require the Disclosure of Attorney-Client Privileged Information

It is not debatable that: "An independent judiciary and a sacrosanct confidential relationship between lawyer and client are the bastions of an ordered liberty."[84] The attorney-

[83] It should be noted that many employers already advise employees of this fact, because it is the only way to explain their sudden ability to converse about the details of labor issues. In addition, when unions sense that the employer has retained a consultant, they typically publicize their beliefs to employees and encourage them to ask questions about the source of the information disseminated by the employer.

[84] Edna S. Epstein, The Attorney-Client Privilege and the Work Product Doctrine, (5th Ed. 2007), p. 5.

client privilege serves as the backbone of that relationship. The right to assert the privilege belongs to the client.[85]

The privilege has been recognized in common law and by the Supreme Court for centuries. It is founded upon necessity, as clients are able to avail themselves of legal assistance only when "free from the consequences or the apprehension of disclosure." *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888).[86]

The elements of the privilege were stated in a seminal 1950 case, in which the court held that the privilege applies if:

> (1) the asserted holder of the privilege is or sought to become a client;
>
> (2) the person to whom the communication was made (a) is a member of the bar or court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
>
> (3) the communication related to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
>
> (4) the privilege has been (a) claimed and (b) not waived by the client.[87]

The proposed rule threatens the sanctity of the confidential relationship between the attorney and client and the attorney-client privilege. It would require the employer and its attorney to disclose the existence and nature of a client relationship even where the attorney has

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[85] Id. at 19.
[86] See United States v. Zolin, 491 U.S. 554, 562 (1989); Fed. R. Evid. 501.
[87] United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950).

not taken any public action on behalf of the client and the very existence and nature of the relationship between the attorney and client is a well-guarded confidentiality because disclosure of those matters would disclose the nature of the advice sought. It also would require the employer and its attorney to disclose the nature of confidential communications between them and the nature of advice rendered by the attorney to the employer.

1. The Agreement Between Attorney and Client May be Protected by the Attorney-Client Privilege in the Context of Labor Relations "Advice"

The agreement between an employer and its attorney is protected by the attorney-client privilege if it might "reveal the motive of the client in seeking representation."[88] When an agreement reveals the purpose behind the retention, it is privileged and cannot be disclosed.

Employers often retain attorneys, and labor and employment attorneys in particular, solely to provide advice as opposed to representation in court. During the course of this relationship, the attorney often does not perform any public or non-confidential duties on behalf of the employer. For instance, an employer may retain an attorney to review its employment policies and practices or give advice, subject to client acceptance or rejection, on how the employer can become an "employer of choice" in its industry or geographic area. There may be a number of reasons that an employer wants to keep the nature of the attorney's work and advice – and even the fact that an attorney has been retained to give advice on such matters – confidential. Requiring the employer and the attorney to disclose the fact of representation would reveal the relationship and, at the very least, the advice sought, which the client believed would remain confidential and, therefore, privileged.

[88] Avgoustis v. Shinseki, 639 F.3d 1340, 1345 (Fed. Cir. 2011), citing Clarke v. Am. Commerce Nat'l Bank, 974 F.2d 127, 129-30 (9th Cir. 1992).

For example, an employer retains an attorney after several employees complained to the human resources manager about being approached at home by union organizers. The attorney reviews and revises draft communications prepared by the client. The attorney deletes language, subject to client acceptance or rejection, that would be deemed unlawful, and suggests lawful language that makes the same point. In doing so, the attorney analyzes the law and recommends language that is lawful but also makes recommendations on language more likely to be effective in communicating the point; that is, the language recommended by the attorney's review is both lawful and more effectively persuasive than the language originally prepared by the employer. Under the proposed rule, this would not be deemed advice but rather persuasive activity and reportable. The employer (on Proposed Form LM-10) and the attorney (on Proposed Form LM-20 and Form LM-21) would be required to disclose the fact of representation, the nature of the retention and fees, even though the attorney did not communicate directly with any employees or, for that matter, take any public position on behalf of the client.

2. The Subject Matter of Representation May be Protected by the Attorney-Client Privilege in the Context of Labor Relations "Advice"

As a general proposition, a client's ultimate motive for litigation or for retention of an attorney is privileged.[89] The "general purpose of the work performed [by attorneys is] usually not protected from disclosure by the attorney-client privilege...but correspondence, bills, ledgers, statements, and time records which also reveal the motive of the client in seeking representation, litigation strategy, or the specific nature of the services provided, such as

[89] In re Grand Jury Witness (Salas and Waxman), 695 F.2d 359, 361-62 (9th Cir. 1982).

researching particular areas of law, fall within the privilege."[90] Similarly, employer records may be privileged if they "reveal something about the advice sought or given."[91]

The proposed rule would require employers and their attorneys to disclose information that is protected because its disclosure would "reveal something about the advice sought or given," or would reveal "the specific nature of the services provided." This is apparent in the elimination of the advice exemption and in the changes to Proposed Form LM-10 and Proposed Form LM-20. The forms explicitly require disclosure of information about the "nature of activities performed or to be performed," and the categories are quite specific as these examples show:

- Drafting, revising, or providing written materials [or speech] for presentation, dissemination, or distribution to employees
- Training supervisors or employer representatives to conduct individual or group employee
- Developing personnel policies or practices
- Conducting a seminar for supervisors or employer representatives

We agree that if the attorney communicates directly with employees regarding the exercise of their rights under the NLRA, the employer and the attorney are required to report without exception, even though reporting discloses the nature of the services performed, because the employer and the attorney have agreed to make those activities public and the attorney has become the actor for the client. However, anything less than direct communication is "advice"

[90] Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992).
[91] Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999).

so long as the client may accept it or reject it, and the privilege attaches and neither the employer nor the attorney can be forced to disclose the specific nature of the services provided.

3. The Subsequent Dissemination of Persuasive Materials Does Not Affect the Attorney-Client Privilege

The proposed rule attempts to sidestep the privilege concerns when it states that deliberate disclosure of materials designed to persuade employees waives "any attorney-client privilege that might have attached to the activity."[92] This misstates both the law and the concern. It is true that a letter itself, drafted or revised by counsel, is not privileged once it has been disseminated to employees. The same is true of a motion for summary judgment filed with a court. But in both cases all communications between the employer and the attorney, including the attorney's involvement in the preparation of the document, remain privileged.

In the case of the letter, it would not be uncommon for the attorney to recommend, subject to client acceptance or rejection, deleting language that would be deemed unlawful and replacing it with lawful language that makes the same point and recommending strategy, subject to acceptance or rejection, that would make the communication more effective. Under the proposed rule, which virtually eliminates the advice exemption, this would be deemed reportable persuasive activity. Thus, under the proposed rule, the employer and the attorney would be required to disclose the fact of representation and the subject matter of representation, even though the legal advice which deals with persuasive activities are inseparable and the attorney did not communicate directly with any employees or take any public position on behalf of the employer.

[92] NPRM 36183.

If the law were to permit the practical total elimination of the advice exemption, it would also remove from the protection of the privilege the fact of communication and the nature of the communication between an employer and its attorney while preparing for a public event, even though the employer's sole purpose for the retention was to obtain confidential advice to assist with its planning. This would be contrary to the privilege, which exists to foster open discussions between attorney and client without fear of disclosure. The subsequent dissemination of materials or activities taking place in public has no bearing on the privilege that applies to the communication between the employer and its attorney in preparation for that dissemination.

4. The NPRM Relies on Inapposite Cases to Quell Concerns Regarding Forced Violation of the Attorney-Client Privilege

In support of the principle that disclosure of advice pertaining to persuasive activities is not protected by the advice exemption or the attorney-client privilege, the proposed rule cites only cases in which attorneys communicated directly with employees regarding their rights under the NLRA.[93] As noted above, it has always been true that if an attorney communicates directly with employees regarding their rights under the NLRA, the attorney has directly engaged in persuasive activities that are not covered by the advice exemption and are, therefore, reportable. However, these cases are inapposite with regard to the questions, raised in this section, about the proposed rule's conflict with the attorney-client privilege in cases that meet the current appropriate definition of the advice exemption or are covered by the attorney-client privilege.

[93] See Humphreys v. Donovan, 755 F. 2d 1211 (6th Cir. 1985) (Court finds that nature of attorney communications to employees must be disclosed because they were not privileged).

5. The Proposed Rule Would Require the Disclosure of Confidential Client Information

Even in cases in which the attorney-client privilege does not protect the identity of the client, the subject matter of representation and the fees paid, that information constitutes a client confidence or secret under the rules governing attorney conduct.

The Model Rules of Professional Conduct (MRPC), created by the American Bar Association (ABA), are a set of rules that prescribe baseline standards of legal ethics and professional responsibility for lawyers practicing in the United States. Forty-nine states and the District of Columbia have adopted the MRPC, including Rule 1.6, which governs the mandatory obligations of attorneys to maintain the confidentiality of client information. In relevant part, MRPC Rule 1.6 states:

> ***(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives in1`formed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).***
>
> ***(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:***
>
> ***(6) to comply with other law or a court order.***

Comments to MPRC Rule 1.6 state that "in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation," and that the confidentiality rule "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." Model Rule 1.6 was

designed to encourage clients to trust their attorneys and to be candid with them.[94] Rule 1.6 goes beyond the traditional attorney client privilege and its exceptions and prevents the disclosure of information that is neither privileged nor work product.[95]

As such, "a lawyer's duty of confidentiality prevents her from revealing a client's identity, or facts that a client communicates to her, even though the attorney-client privilege and work product immunity do not protect them."[96] Commentators have noted that in the many jurisdictions that have adopted Model Rule 1.6, "a lawyer's duty of confidentiality attaches "not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source."[97] California, the one state that has not adopted the MRPC, has its own rules of professional conduct regarding confidential client information, which are even stricter than the MRPC.[98]

State bar associations have issued formal ethics opinions holding that confidential information about a client including the identity of a client, the fact of representation, and the fees paid as part of that representation are all the type of "confidential" information as defined by that state's rules of ethics.[99] Under the proposed rule, employers will no longer have assurances that their confidences and secrets will be maintained by their attorneys.

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[94] Douglas R. Richmond, "The Attorney Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era," available at: http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=16057.
[95] Id.
[96] Id.
[97] Id.
[98] See Fred C. Zacharias, "Fact and Fiction in the Restatement of the Law Governing Lawyers: Should the Confidentiality Provisions Restate the Law?," 6 Geo. J. Legal Ethics 903, (1993); Roger C. Cramton, "California Practicum: Proposed Legislation Concerning a Lawyer's Duty of Confidentiality," 22 Pepp. L. Rev. 1467 (1995); Fred C. Zacharias, "Privilege and Confidentiality in California," 28 U.C. Davis L. Rev. 367 (Winter 1995).
[99] California, Florida, Washington, Massachusetts, Illinois, New York, Georgia, Connecticut, Washington D.C., and Texas.

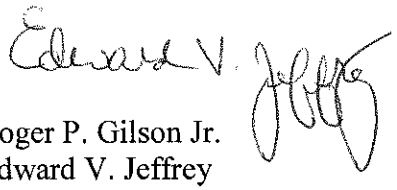
The application of the Department's proposed rule and its far-reaching reporting requirements impacting attorneys contravenes the public policy promoting candid and open conversations between client and attorney and undermines the fundamental right to effective legal representation. This new rule will create an immediate and irreconcilable conflict between the proposed rule's requirements and lawyers' important obligations to states' ethics and confidentiality rules.

CONCLUSION

By expanding the reporting and disclosure requirement, the proposed rule achieves what Congress sought to avoid, that is the reporting of"advice" by "attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations." The DOL should not ignore the clear and unambiguous meaning of the exemption and the will of Congress, but apply the law as written and as interpreted for the past 50 years. Unless the rule is withdrawn it will be a setback for senior living providers and any other employer wishing to obtain advice on best practices and labor relations matters.

Wherefore for all of the foregoing reasons, we urge that the Department withdraw the proposed rule in its entirety.

Very truly yours,
JACKSON LEWIS LLP



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