The Center on National Labor Policy, Inc.

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

Re: Comments Regarding Proposed Amendments to the Regulations Interpreting the "Advice" Exemption of Section 203 of the Labor Management Reporting and Disclosure Act (76 Fed. Reg. 36,178 (June 21, 2011), RIN 1245–AA03.)

Dear Mr. Davis:

The following are the comments of the Center on National Labor Policy, Inc. in opposition to the Department of Labor's Proposed Amendments to the Regulations Interpreting the "Advice" Exemption of § 203 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 433 (76 Fed. Reg. 36,178 (June 21, 2011), RIN 1245–AA03.)

The Center on National Labor Policy, Inc. is a public interest legal foundation chartered to provide legal assistance to individuals whose statutory and constitutional rights in the labor arena have been violated by powerful, organized interests such as labor unions and governmental entities.

As a public-interest organization, believes that the individual rights of consumers, taxpayers, workers, and public citizens are paramount to the collective rights of private organizations such as labor unions. The Center has filed briefs amicus curiae advocating the validity of this public policy interest in numerous cases before the Supreme Court and also

involving policies of the U.S. Department of Labor, including *Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322 (D.C. Cir. 1996); *Master Printers of America v. Donovan*, 751 F.2d 700 (4th Cir. 1984); *International Ladies' Garment Workers' Union v. Donovan*, 722 F.2d 795 (D.C. Cir. 1983).

The Center is a nonprofit, charitable organization providing free legal aid to employees, employers, and consumers whose rights have been violated by abuses from government regulation. The Center itself is not directly affected by the proposed rule, because it does not engage in activities that require reporting under § 203 either as currently interpreted or as misinterpreted under the proposed rule. However, the Center opposes the proposed rule because it will adversely affect employee and rights of small employers. Specifically, the proposed rule will wrongfully impair the ability of individual employees to fully educate themselves about the consequences of choosing unionization.

The Supreme Court recently recognized that employees enjoy an implicit "right to receive information opposing unionization" under the National Labor Relations Act. *Chamber of Commerce v. Brown*, 554 U.S. 60, 68 (2008). Congress intended that employers be a primary source for such information for employees. Under the NLRA, there is a "Congressional intent to encourage free debate on issues dividing labor and management" and to facilitate an "uninhibited, robust, and wide-open debate in labor disputes." *Id.* at 67-68. This free and uninhibited speech by employers benefits employees:

> The guaranty of freedom of speech and assembly to the employer and to the union goes to the heart of the contest over whether an employee wishes to join a union. It is the employee who is to make the choice and a free flow of information, the good and the bad, informs him as to the choices available.

Southwire Co. v. NLRB, 383 F.2d 235, 241 (5th Cir. 1967); *see NLRB v. Pratt & Whitney Air Craft Div*., 789 F.2d 121, 134 (2d Cir. 1986); *NLRB v. Lenkurt Elec. Co.*, 438 F.2d 1102, 1108 (9th Cir. 1971).

The proposed rule is a deliberate attempt by the Secretary of Labor to impair the ability of employees to receive information regarding unionization from their employer. The proposed rule imposes onerous reporting requirements on any employer that receives advice from lawyers or others regarding what they can and should say with respect to unionization during a union organizing campaign, and on lawyers and others who give such advice. The result is that many employers will choose not to solicit such needed advice, or will not be able to obtain it because lawyers will no longer provide such advice to avoid the onerous reporting requirements. Many employers, particularly small employers unfamiliar with union campaign tactics and unschooled in the irrational intricacies of modern labor law, therefore, will remain silent during union organizing campaigns in fear of being subjected to prosecution for unfair labor practices.

The silence that the Secretary seeks to coerce from employers will deprive employees of an important source of information regarding the drawbacks of unionization. This, in turn, will impair employees' ability to make a fully informed choice regarding unionization.

> It is difficult, if not impossible to see . . . how an employee could intelligently exercise such rights [to choose unionization or not], especially the right to decline union representation, if the employee only hears one side of the story–the union's. Plainly hindering an employer's ability to disseminate information opposing unionization "interferes directly" with the union organizing process which the NLRA recognizes.

Healthcare Ass'n v. Pataki, 388 F. Supp. 2d 6, 23 (N.D.N.Y. 2005), *rev'd on other grounds*, 471 F.3d 87 (2d Cir. 2006).

Despite Congress' clear intent to facilitate free speech regarding both the pros and cons of unionization so as to ensure informed employees, the Secretary's comments in support of the new rule bemoan that employers speak against unionization, and complain that this speech sometimes convinces employees to exercise their right to refrain from union representation, as if these are somehow terrible things that should be quashed by government. (76 Fed. Reg. 36,188-36,189). These are not grounds for imposing the proposed rule change.

In *Linn v. United Plant Guard Workers*, 383 U.S. 53, 62-63 (1966) (emphasis added), the Supreme Court stated that:

> We acknowledge that the enactment of § 8 (c) manifests a congressional intent to encourage free debate on issues dividing labor and management. n5 And, as we stated in another context, cases involving speech are to be considered "against the background of a profound . . . commitment to the principle that debate . . . **should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasant sharp attacks**." *New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).* Such considerations likewise weigh heavily here; the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth.

Without the commitment of the LMRDA to protect the right to a "robust" debate, employees would be unable to obtain a complete picture of what the important selection of representation really means to them.

Foremost, employee receipt of information from their employer about the disadvantages of unionization is something *favored* under federal law. *See, e.g., Brown*, 554 U.S. at 68-69. Indeed, the basic principles that underlie the First Amendment to the United States Constitution and our system of democratic government favor free and robust speech on both sides of contentious issues—and not just speech that a government official happens to favor. The

Secretary's ideological view that speech opposing unions is somehow undesirable, and thus should be suppressed by government, is a viewpoint common to left-wing dictatorships such as Hugo Chavez's Venezuela and Evo Morales' Bolivia, and not mainstream American thought.

Second, that informed employees tend to reject union representation is not grounds for re-writing regulations to ensure that employees are less-informed, and thus more apt to support a union. Contrary to the Secretary's belief, federal labor law does not exist to further the self-interests of union officials. Rather, it exists to effectuate the rights of employees. *See, e.g*, *Lechmere v. NLRB*, 502 U.S. 527, 532 (1992) ("By its plain terms . . . the NLRA confers rights only on *employees,* not on unions or their nonemployee organizers") (emphasis in original); *MGM Grand Hotel*, 329 N.L.R.B. 464, 475 (1999) (Member Brame, dissenting) ("Unions represent employees; employees do not exist to ensure the survival or success of unions"). "What the [NLRA] was enacted to accomplish was to protect not the rights of unions to obtain representation contracts but the rights of employees to be represented by a bargaining agent of their own choosing." *NLRB v. Red Arrow Freight Lines*, 193 F.2d 979, 981 (5th Cir. 1952). Although fostering ignorance amongst employees to make them more susceptible to unionization may be the Secretary's objective, it is not an objective of national labor policy.

An NLRB Administrative Law Judge recognized such as hypocrisy when the government chooses sides and denies employees the right of full freedom of association with each other and information from their employer: "Accordingly, they would apply the statutory scheme, under which the Board is charged with the duty to insure that collective bargaining and the voice of the employees is paramount, in such a fashion as to now deprive the employees of their right to

decertify or dismiss the Union; and that, therefore, instead of the employees getting rid of the Union, it should be the other way around so that the Union, with the assistance of the Board, may effectuate the termination of the employees." *Hope Electrical Corp.,* 339 NLRB 933, 839-40 (2003).

Considering the Secretary's disregard for the basic purposes of the NLRA, it should come as no surprise that her proposed rule also runs afoul of the LMRDA's plain language. The Secretary proposes to reinterpret § 203 of the Act to hold that any activity that constitutes "persuader" activity under §§ 203(a) or (b) does not fall within the "advice" exemption of § 203(c). In other words, the statute's "persuader" rule will trump its "advice" exemption.

This "interpretation" of § 203—if it can even be called that—is patently absurd. The very purpose of § 203(c) is to state an *exemption* to the persuader rules of §§ 203(a) or (b). *See* 29 U.S.C. § 433(c) ("Nothing in this section shall be construed . . ."). For the Secretary to propose that a rule should trump the exception-to-that-rule turns § 203 on its head.

Indeed, the advice exemption of § 203(c) is rendered superfluous under the Secretary's "interpretation," as it will exempt nothing covered by §§ 203(a) or (b). The statute would have the same meaning if the first clause of § 203(c) were erased from the statute. Of course, it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985).

Perhaps even more preposterous is the Secretary's contention that legislative history indicating an intent by Congress to impose reporting requirements on labor-consultant "middlemen" supports her plan to impose such requirements on those who only give advice to

employers. (76 Fed. Reg. 36,184). The phrase "middlemen" means persons acting in the *middle, i.e.*, between the employer and its employees, such as through faux employee committees. The Secretary's notion that "middlemen" means those who have no contact with employees, but provide only advice to an employer, makes a mockery of the phrase and the statute's legislative history.

Black's Law Dictionary (4th Ed. 1969)[1] provides a much different legal definition, one that Congress would have chosen: "MIDDLEMAN. One who merely brings parties together in order to enable them to make their own contracts" or "[a]n agent between two parties, an intermediary who performs the office of a broker or factor between seller and buyer, producer and consumer, land-owner and tenant, etc." An employer attorney who does not interface with employees is not a middleman, a union attorney who does not interface with employees, and an employee's attorney who does not interface with employees are *not* "middlemen."

As disturbing and disruptive of Congressional intent is the Secretary's observation that her "interpretation is firmly rooted in the plain meaning of the statutory text." 76 Fed. Reg. at 36182. Nothing could be farther from reality for three reasons.

First, the statute itself differentiates between persuader activity, advice, and attorney communications. 29 U.S.C. § 433(b) applies only to an agreement "with an employer" for an object to persuade employees in the exercise of rights or not, or to supply information

[1]It is important to recognize that words change in emphasis and meaning through the years. A dictionary. Use of Black's Law Dictionary in 2004 and Meriam-Webster's Collegiate Dictionary in 2002, are too far removed in time from 1958. The Third Edition of Black's Law Dictionary was published in 1933. The Fourth edition is closest in time to the enactment of the LMRDA.

"concerning activities of employees or employee organizations." An employer must be identified and the Act itself provides such a definition, 29 U.S.C. §402(e):

> (e) "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

By its very terms, the "employer" for whom a "persuader" performs functions must employ employees. The statute does not distinguish between any industry or services the "employer" provides. The statutory definition includes commonly understood employers who hire workers. The definition plainly covers labor organizations as an "employer" since they hire workers to perform employment duties covering legislative lobbying and internal administration affairs, for the purpose of organizing (business agents and organizers) unorganized workers and for extending representation to new employees.

Consequently, the Secretary's proposed interpretation of persuader activity encompasses activities by labor organizations and they must also report all their activities in the new detail proposed.

The Congress, however, provides a statutory distinction for "advice." In 29 U.S.C. §433(c), it specifically exempts "advice."

> (c) 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.

Here, "advice" is specifically exempted. Its usage in the text of the provision is further distinct from the more specific examples of litigation and collective bargaining activities also embedded in this section. In addition, the use of "advice" in this exemption is linked to "wages, hours, and working conditions." Surely, providing "advice" to an employer on how to conduct itself with respect to any pending or potential employee representational activities will relate to providing advice "with respect to wages, hours and working conditions." "Working conditions" includes whether to be represented by a labor organization or not. So, the exemption for "advice" applies precisely to the new coverage of activities the Secretary proposes.

Because the Secretary fails to not only define what the word "advice" means in the statute, but also fails to suggest what the Congress meant the word to mean when it chose not to define it. 76 Fed. Reg. 36183. The failure is purposeful; to ensure a broad application of the proposed rule is extended to the specific attorneys' exemption.

Again, Black's Law Dictionary, Fourth Edition, is a valuable aid here. It states:

> ADVICE. View; opinion; the counsel given by lawyers to their clients; an opinion expressed as wisdom of future conduct. Hughes v. Van Bruggen, 44 N.M. 534, 105 P.2d 494, 496.
>
> > The word has several different meanings, among others, as follows: Information or notice given: intelligence;—usually information communicated by letter:—Chiefly as to drafts or bills of exchange: as a lettter of advice.—Advice implies real or pretended knowlege, often professional or technical, on the part of

> one who gives it. Provident Trust Co. v. National Surety Co., D.C. Pa., 44 F. Supp. 514, 515.

The Secretary recognizes the accepted use of the term "advice" at 76 Fed. Reg. 36183, but it does no good for the Secretary to reject the broad meaning of the word as applicable to "future conduct" by adding gloss to its own 50 year interpretation of the LMRDA as if it "resulted in an overbroad interpretation of advice." 76 Fed. Reg. 36183.

The Congress added no limitation to the word "advice." The "advice" exemption therefore applies whether the employer or labor union receiving the advice accepts or rejects it.

The Secretary's attempt to reconcile the provision of Section 203(c) with Section 203(b) by turning exempt "advice" into reportable "persuader" activity because of its content, is not a choice for it to make. The "best approach" is the one enacted by Congress, not one "in the Secretary's view...appears to be quintessential persuader activity." 76 Fed. Reg. 36183.

Congress knew very well that employers and labor organizations needed to obtain the "advice" of consultants and attorneys to provide them with the tools needed for them to participate in the "robust" debate involving employee representation and to further enable them to abide by duties prescribed for them in the NLRA (employers) and LMRA (labor organizations). The Congress chose to exempt "advice," on whatever subject and manner it was conveyed to the client. Nothing in the congressional history is to the contrary. The Proposed Rule deliberately confuses the term "advice" (recommendations) with "conduct" (supply of materials that can be rejected). In that confusion arises the Secretary's error.

In no manner can the Secretary support her radical claim that the employer or labor organization is but a "conduit for persuasive communication." 76 Fed. Reg. 36183. It is the

employer or labor organization that chooses to accept, reject, or modify the advice and materials provided. The employer or labor organization agents deal directly with employees. To suggest a consultant or attorney who provides exempt advice and has no personal interaction (conduct) with employees is persuading them is preposterous because it remains exempt advice.

It is notable that the Secretary neither identifies nor suggests that there is an extensive cadre of consultants that she has found to be engaged in a pattern of conduct identified in the legislative history. She chooses to use studies that connect consulting activities with the outcome of union elections, but makes no effort to determine whether what in fact the consultants did that had any effect on the outcome.[2] All the Secretary knows, is that they were involved and that "[w]ith or without the advice of labor consultants, employers utilize aggressive and even unlawful tactics in opposing unions." 76 Fed. Reg. 36190. It proposes the Rule without any hard figures confirming how many consultants might engage in the persuader acts she intends to cover, and indeed how many even get to be involved.

There 1,309 elections in 2009 according to the BLS. Unions won 48%. The Secretary estimates that there may be "2,601 proposed LM-20 Filers, and 3,414 proposed LM10 filers." 76 Fed. Reg. 36198. Consequently, the math shows there were 2.61 proposed consultants vying for every election. Stated otherwise, 62% of the consultants that might exist have no work!

If labor consulting is the big, bad, and bustling service industry with bagmen flitting about the country as the Secretary thinks it is, even her own facts do not support the supposition.

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[2]The question of the broad nature of what is covered by the Secretary's proposed rule here is also in issue, because a sufficient number of bright line examples are not provided in the proposal. It remains vague.

Interestingly, the Secretary recognizes that a distinction still may be possible to cover by Section 203(a) "activities that go beyond 'advice.'" 76 Fed. Reg. 36183. To get herself to admit to this possibles distinction, the Secretary notes that the legislative history indicates a "potential for abuse" where "large sums of money are spent in organized campaigns,'" but fails to recognize that the statute Congress ultimately passed did not establish a dollar limit for reporting expenses on election campaigns or foreclose all provision of such "advice," which surely would have eliminated the said "potential for abuse." It is not in the Secretary's authority to abolish the evident distinctions made by the statutory language itself, but to recognize they were deliberately intended.

Whether the object of what could be persuader activity is to directly or indirectly to persuade employees still remains exempt if it "advice" under Section 203(b). A consultant who never steps foot into an employer's plant and only advises the employer that it has the right to post a labor organization's LM-2 Report on a bulletin board it should put up the NLRB's new employee rights poster, has not engaged in any persuader activity. Rather, the consultant has simply provided exempt "advice."

Again, when "advice" is provided, "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person." Section 203(b), 29 U.S.C. § 433(b). The Secretary's Rule conflicts with the exemption by making the provision of advice a cause to precipitate the duty to report. It is absolutely not reasonable for the Secretary to conclude from this Section that the provision of "advice in the ordinary sense would

trigger reporting." 76 Fed. Reg. 36184. It is not at all "fair to infer" that "advice" that is not accompanied by persuader "activity" is reportable.

Moreover, the Secretary has no authority to engage in a "fair to infer" rulemaking when Congress already made the choice. Congress determined that "advice" and "any information" from an attorney is not reportable. The Secretary cannot decide that the persuader rule set forth in Section 203(a) now extends to "advice" and "all information" from an attorney which Congress affirmatively stated shall not "be construed to require" a report.

Even the legislative history the Secretary relies upon shows it is wrong. 76 Fed. Reg. 36184. There, the Labor Committee reports it is concerned with consultant "activity...to provide the employer with information concerning the activities of employees or a union in connection with a labor dispute." That direct concern establishes that there was a legislative concern with spying and direct interaction with employees by the consultants the Committee was reviewing. This is a far cry from "advice" and "information" the Congress expressly determined to be exempt from reporting.

The Secretary further looks to Executive and Congressional hearings thirty years ago in 1980 and 1984. What arose out of those hearings led to no change in the law and no authority granted to the Secretary to implement further administrative changes. What events happened thirty years ago in America is no where reported as representative of the labor-management environment in the year 2011.

As for the purported research evidence, the data from the 1960s, the Dunlop Commission in 1984, and Professor Bronfenbrenner from Cornell, and the pro-union AFL-CIO funded

American Rights at Work, are not persuasive because these studies only show the use of consultants is necessary for employers to navigate the labor-management legal jungle, *e.g.*, Bronfenbrenner "No Holds Barred: The Intensification of Employer Opposition to Organizing," Econ. Pol Inst. 13 (2009), including the hidden terms in the LMRDA, working relationships that are absolutely not illegal. Employers have First Amendment rights to proclaim their opposition to unionization as much as labor organizations have the right to propose it to workers. Just like employees, employers need information in order to empower them to make choices about what to do and what positions might be taken with respect to employee organization.

The discussion about the expected rates of underreporting is insupportable. Guessing has no role to play in reasonable decisionmaking. Relying upon inartful studies and third-party anecdotes is arbitrary and capricious.

The Secretary's further suggestion that its proposed rule "enables workers to become more informed as they determine whether to exercise, and the manner of exercising, their protected rights to organize and bargain collectively" is dismissive of American workers. They have information widely available to them. Certainly, any labor organization will be providing reports to them on employer statements and activities.

Most importantly, the Secretary has no expertise to decide how "disclosure makes employees aware of the underlying source of information." 76 Fed. Reg. 36187. Research articles that it cites to which have not been subject to rigorous academic scrutiny or public comment on methods and procedures, is a slim reed to prop up the Secretary's sense of urgency.

The lack of treatment of studies to the contrary is an evidence shortcoming of the proposed rule, as well. In their historical study, Messrs. Getman and Goldberg questioned the basis for the Board's view that the individual worker's pro-union or pro-company vote is affected by the preelection conduct of the parties. The authors' results demonstrated that the overwhelming majority of workers, approximately 80%, decided on the basis of their own attitudes and their intent to vote, thus shattering the Board's paternalistic view that the worker's vote is "tenuous and easily altered by the campaign." Getman & Goldberg, *The Behavioral Assumption Underlying NLRB Regulation of Campaign Misrepresentation: An Empirical Evaluation*, 28 Stan. L . Rev. 263 , 274 (1976).

Another scholar further undermines the Board's protective posture towards voting workers when he states: "The worker voter is the same human being as the citizen-voter." Sarnoff, *NLRB Elections: Certainty and Uncertainty*, 117 U. Pa. L. Rev. 228, 231 (1968) [Sarnoff]. In a country now of over 300 million people, there are over 218 million citizen-voters eligible to vote in general elections. U.S. Election Project Election Rates (2010). Today, there are over 125 million worker-voters eligible to vote in Board-conducted elections. Bureau of Labor Statistics, Dept. of Labor, Employment and Earnings: January 2010 Table 1.

These groups are not mutually exclusive, and it would be facetious to assume that citizen-voters are metamorphosized into simple-minded worker-voters once the ballot box is moved within the factory and can be so easily manipulated. *See* Sarnoff at 246. Common sense further supports the view that the individual worker-voter is as capable as the citizen-voter in determining who can best represent his or her interests. As stated by Sarnoff:

> In NLRB elections, he [she] is subject to the same kinds of internal, and external influences as in political elections. He [she] is influenced by status, role, residence, religion, race, national origin, and reference groups; by relatives, fellow workers, and superiors; and by numerous incalculable and unperceived emotional and psychological pressures.

Sarnoff at 321.

Accordingly, the paternalistic treatment of a sophisticated electorate is unwarranted. Is the assumption that labor organizers are intellectually incapable of responding to the very consultant activity and "playbooks" the Secretary complains of by being unable to respond?

In fact, the lack of information on impact upon the workforce is cause for the Secretary to understand she has no expertise at all in this area where she seeks to intervene. What affect on the minds of workers from the effects of labor consultants is outside her legislative authority to do so. That expertise resides in the NLRB, not the Secretary of Labor.

How is it that the Secretary can state that "Employees are more informed in exercising their protected rights when they know the true source of those views and the methods used to disseminate them?" 76 Fed. Reg. 36187-88. Is that a guess or a fact. Or is the information even relevant to employees? The Secretary has no experience or expertise here. Nor does she attempt to describe what "union busting" is.

But the "acrimony" the Secretary describes as arising from the filing of lawful objections to elections before the NLRB out of a campaign is indeed part of the "robust" debate of ideas that the Supreme Court has ruled is protected employer and union conduct. Seeking redress of grievances from the government is a Constitution Right in the First Amendment. Any "long

periods of litigation" is part and parcel of this Nation's provision of due process and the Board's administrative process to ensure it.

The process itself is implemented in every campaign whether a consultant is utilized or not. And, the Secretary presents no data as to how many objections to the election involve consultants for management or labor. The Secretary simply does not have any experience or institutional understanding of the economic significance that the outcome of an election will have on the two combatants seeking to prevail with the employees. In essence, the Secretary seeks to further regulate election conduct that exclusively resides within the statutory jurisdiction of the NLRB. 29 U.S.C. § 160.

The Secretary recognizes that times have changed. She claims that today "employers will hide the activities of consultants, whereas in the 1950s it was more likely that consultants were hired to mask the anti-union sentiments of employers." If a change in the law is needed, then Congress should act, but it has not. How can the Secretary conclude that "[t]he current state of affairs is clearly contrary to Congressional intent in enacting section 203 of the LMRDA." 76 Fed. Reg. 36190. Congress wrote the statute and its exemptions and has left it untouched for over sixty years. If anything, the Congress' intent is reinforced by its refusal to make changes over time.

It simply cannot be suggested that the technical "advice" given by a consultant or lawyer on how an employer or labor union should comport itself when discussing unionization should be considered anything but exempt activity. By definition, a person providing "advice" is not an

actor or middleman between the employer and the employee. The proposed Rule's dismissal of this distinction between Section 203(A) & (b) would be arbitrary and capricious.

Third, the Congress specifically provided an exemption that it entitled: "Exemption of Attorney-Client Communication." 29 U.S.C. §434. It did not state this to be an exemption for some but not all information to a client.

This section states:

> 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.

Congress' words are to be given plain meaning by rules of statutory construction. Hence, "Nothing" means nothing. An attorney is exempt from reporting when he/she communicates "any information" during the course of an attorney-client relationship.

If the Secretary deems the word "any" to be a qualifier, Black's Law Dictionary comes to its aid and shows she is incorrect: "ANY. Some; one out of many; an indefinite number."

Therefore, "any" time an attorney communicates "information" to his/her client, the attorney is exempt from reporting because "Nothing contained in this Act shall be construed to require" him/her to do so.

It is impossible for the Secretary to fail to recognize this important exemption language and how it interfaces with 29 U.S.C. §433(b). Consequently, the suggestion that "drafting or implementing policies for the employer that have the object to directly persuade employees

would also trigger a reporting obligation," 76 Fed. Reg. at 36182, unless it "exclusively provide[s] advice to an employer," is preposterous.

Section 433(b)'s exemption for "advice to an employer" is in no way limited by a restrictive term. Clearly, the Congress did not ever suggest the conveyance of "advice" had to be exclusively related to compliance with the law or to concern only NLRB practices. The statute has no such limitation whatsoever. So, the Secretary's claim that her new interpretation over 50 years after the statute was enacted is not "firmly rooted in the plain meaning of the statutory text." *Id*. The statute itself reflects the Congress' intent. The Secretary has no authority to conclude that a "revised approach better reflects the congressional intent in enacting the LMRDA."

Relying upon a "body of research" and a few academics for considering the proposed rule is an empty ploy.[3] Such changes must be done legislatively, not by administrative fiat. Recall that the Secretary herself claims that the LMRDA was enacted by "a bipartisan Congress" in 1950. 76 Fed. Reg. 36178. Here, the Secretary seeks to undo that "bipartisan" enactment by implementing an administrative rule to obtain a partisan objective.

The Secretary was not delegated any authority to make a choice or determine the correct balance when exempt information should be reported under the LMRDA. She admits her political view is not the Congress':

> Indeed, in the Secretary's view, full disclosure of the participation of outside consultants will lead to a better informed electorate,

[3]For example, the Secretary claims there has been "extraordinary growth in the labor consultant industry. 76 Fed. Reg. 36182, but it does not describe how she came to this conclusion. The asserted fact is as much insupportable as it is simply conclusory.

> which in variable produces more reliable 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.

Here, first, the Secretary has no expertise in the process of labor-management relations or negotiations or representation elections. The National Labor Relations does.

Second, the Secretary has no empirical evidence that the disclosure she proposes will lead to a better informed electorate.

Third, she has no evidence for how or why the result she proposes is more reliable and acceptable. Clearly, Congress did not ban persuader activities. The results of NLRB elections are mandatory whether or not persuaders file reports or are involved. Acceptability of the outcome of NLRB elections is not discretionary. One side in the election will always fail to find the result acceptable. These outcomes are all predictable.

Fourth, the fact of NLRB charges and counter-charges has everything to do with acts amounting to restraint or coercion of employees or employers. Whether a person is a reporting "persuader" is no defense under the NLRA. So, this purported suggestion is but a partisan perception that persuaders are always in the midst of unfair labor practices..

Finally, since the Secretary well knows that her new Rule if implemented will preclude attorneys from providing common "advice" to their clients because the LM report, will cause them to breach their attorney-client confidences with other clients by identifying them. If attorneys are chilled by the rule as the rule intends, "employers" will be left without the aid of attorneys and consultants upon which to rely for their expertise regarding labor organizing activities.

Clearly, 93% of employers in the private sector have no experience with union activities. Now, the Secretary seeks to deprive labor organizations and businesses from seeking expert advice about the complexities of union organizing when they need it the most.

How can "advice" be covered when it is expressly exempted? The Secretary suggests it can wicker a difference with a "current interpretation of the LMRDA section 203(c)." 76 Fed. Reg. 36190. Once again, her presumption is not consistent with the statute.

The Secretary fails to address the impact of Section 603(b) of the LMRDA, 29 U.S.C. § 523(b). This section provides:

> (b) Nothing contained in titles I, II, III, IV, V, or VI of this Act shall be construed to supersede or impair or otherwise affect the provisions of the Railway Labor Act, as amended, or any of the obligations, rights, benefits, privileges, or immunities of any carrier, employee, organization, representative, or person subject thereto; nor shall anything contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, *or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended*. [Emphasis added].

Among the rights that the LMRDA address is "to impair or otherwise affect any person under the National Labor Relations Act." The Secretary's proposed rule will of course impair the right of an employer to obtain advice from any attorney or consultant of his/her choosing and/or maintain the continued representation of said attorney or consultant to be advised of its rights. Similarly, the provision of advice on how shut down or sell a business will effect employees. Under the proposal, such advice would trigger a reporting obligation. *See First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). The Center cannot imagine a topic that an attorney might provide advice to an employer on that would not indirectly affect employees.

There further exist associations of employers and labor organizations (employers of union organizers) that sponsor seminars and sessions on many topics including union elections, organizing, bargaining, and a myriad of other topics relevant to a modern human resources Secretary, such as the National Association of Manufacturers and the AFL-CIO. The Secretary's proposed rule would interfere with the Associations' First Amendment right to associate and to engage in the First Amendment right of free speech by burdening the Associations and any speakers they may hire to discuss any topic related to union organizing. The LMRDA has criminal provisions of Section 302, 29 U.S.C. §186, attached to it, to boot.

The proposed rule will clearly burden and chill the exercise of the First Amendment in these settings. "[R]egulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights." *Louisiana v. NAACP*, 366 U.S. 293, 297 (1961) (Douglas, J., unanimous decision). In the instant case, the Secretary's approach is overbroad and beyond its reach. *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940).

Economic activity of these associations, formal and informal are subject to the protection of the First Amendment. *Virginia State bd. Of Pharmacy v. Virginia Citizens Council*, 425 U.S. 748, 762 (1976). The United States Constitution further guarantees freedom of speech on both sides in labor controversies. *Thornhill v. Alabama*, 323 U,.S. 516, (1945). First Amendment rights are not dependent upon which side of a political issue one espouses.

Congressional purpose was to stop the use of a "bagman" to influence employees in order to halt the spread of unionization. I *Legislative History of the Labor-Management reporting and*

Disclosure Act, 406-07 (1959). Two examples are provided by the Committee. The first involves "middlemen flitting about the country...who work directly on employees or through committees...or set up company-dominated unions. These middlemen have been known to negotiate sweetheart contracts. They have been involved in bribery and corruption as well as unfair labor practices...." *Id*. at 406.

Second, "labor spies" have been used "to obtain information about employees and unions. Third, the proposed Act was to make "improper payments by management middlemen criminal offenses under Section 302...." *Id*. at 407.

Congress' intent was focused on corruption. It did not want money to be used to bribe individual employees or unions. It set up Section 302(a) to prevent that. It also did not want the middlemen intermingling "directly on employees or through committees to discourage legitimate organizing drives." *Id*. at 406.

The legislative history when viewed in the real language of the time reveals a Congressional purpose far different then the current Secretary's view of what the LMRDA persuader provisions were intended to regulate. Again, the LMRDA was meant to prevent corruption and bribery. *Master Printers of Amer. v. Donovan*, 751 F.2d 700, 706 (4th Cir. 1985). The proposed rule furthers neither purpose.

Since it appears from a website search that many associations with an intent of providing business information to members may include unionization as a minor topic will be covered by the proposed rule, the proposed rule is overbroad and substantially chills first amendment rights of speech and association.

Moreover, the Secretary's recognition that its new proposal will "alter the reportability of the speech as persuader activity," of an attorney regardless whether the advice is accepted or not or was undertaken as an academic review, intellectual pursuit or for a specific situation. In either event, the claim that the professional review of a speech script or review of activities relating to union organizing, active or prospective, is persuader activity is too vague to propose.

This is further evidenct since Section 209(a), 29 U.S.C. §439(a), provides for a $10,000 fine and one year imprisonment. The word "persuade" is not defined in the LMRDA. Due process requires that all "be informed as to what [the State] commands or forbids," *Lanzatta v. New Jersey*, 308 U.S. 451, 453 (1939), and that "men of common intelligence" not be forced to guess at the meaning of the criminal law." *Connally v. General Construction Co*., 269 U.S. 385, 391 (1926).

Because reasonable minds will differ on what is "persuader" activity under the proposed rule, it cannot pass constitutional muster. "It is axiomatic that [p]recision of regulation must be the touchstone in an areas so closely touching our most precious freedoms." *United States v. Robel*, 389 U.S. 258, 265 (1967).

The Secretary proposes that a consultant providing "advice" or an attorney providing "any information," materials or media to an employer or labor organization (which is an employer of union agents persuading employees), must now file a report even though the persons do interface with any employee. This also covers revision of materials submitted for "advice" because it could "enhance the persuasive message" even as it may serve to circumspect the message to comport with NLRB caselaw.

The Secretary goes even further. She states the proposed rule will cover the consultant and attorney who advise employers and their supervisors on what may lawfully be said during the course of an organizing drive, union counsel who advise local unions and their business agents and organizers during the course of an organizing drive, health insurance professionals who commonly advise employees with comparisons between Taft-Hartley trust fringe benefit plans and particular employer plans, and attorneys who are retained by decertification petitioners or representatives to advise them on how to go about filing a decertification petition with the NLRB and protecting them during their rights election process from union or employer excess.

Consultants and attorneys conduct training sessions for multiple purposes. Some include highlighting all areas in which the government regulates employer-employee relations. Others are more narrow and focus on collective bargaining. Union avoidance can also be covered.

The AFL-CIO at the George Meaney Center National Labor College in Maryland sponsored by the AFL-CIO trains numerous union personnel on organizing techniques and has certificate and degree programs on organizing. The National Law College's instructors will now be required to report under the Secretary's proposed rule.

There is no evidence that programs of this type are sponsored with the advance knowledge of the promoters that any materials or messages are being distributed specifically to any set of employees.

Since the Secretary well knows that attorneys for whom the Secretary would extend coverage now would be precluded from providing such information so as not to breach their attorney-client privileges with other clients, private sector employers and unions will be unable to

call upon legal counsel of choice for any information and materials that may relate to employee organizing. This is a direct impediment to the First Amendment right to counsel.

The Secretary would rather have the parties trip, stumble and fall in trying to abide by the detailed precedent of the NLRB and federal courts on election matters, then protect the right to "advice" and "information" the Congress expressly stated is exempt from reporting.

As a federal policy, this is not wise. The Secretary overstates the outcome of what she proposes from her proposal and neglects the important values and rights which her proposal fails to address.

Finally, the distinction the Secretary proposes between what might be called pure "advice" and advice that could be acted upon by the client was obvious to Congress at the time or to any one reviewing the legislative record. But, there is not a whit of a Congressional intent to cover activities other then the ones described in the legislative history, *i.e*, payoffs, spying, and infiltration. The activities the Secretary proposes today extend the reach of Section 203(a) to forms of conduct or communications Congress never intended to be covered.

In short, the proposed rule conflicts with the plain language of § 203. It has no support in the LMRDA's legislative history and will serve only to deny employees their "right to receive information opposing unionization" from their employer under the NLRA, *Brown*, 554 U.S. at 68, because they will no longer be able to receive the "advice" and "information" the Congress recognized would be the conduits of information and material for them to properly act under the various labor statutes.

Although the Secretary and union officials may welcome the last outcome, it is not the outcome Congress intended. The proposed rule must be rejected in its entirety.

Respectfully submitted,

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