September 21, 2011

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

Re: Comments on the Interpretation of the "Advice" Exemption under the Labor-Management Reporting and Disclosure Act

Dear Mr. Davis:

The Society of Chemical Manufacturers and Affiliates (SOCMA) respectfully submits the following comments in opposition to the rules proposed by the U.S. Department of Labor's Office of Labor-Management Standards regarding its interpretation of "persuader activities" and the "advice" exemption.[1]

SOCMA is the leading trade association representing batch and custom chemical manufacturers, a highly innovative, entrepreneurial and customer-driven sector of the chemical industry. Our member companies are located around the world and encompass every segment of the industry. In the United States, they manufacture 50,000 products annually that are valued at $60 billion dollars. They operate more than 2,000 manufacturing sites and employ more than 100,000 workers. More than eighty-nine percent of SOCMA's members qualify as small businesses. As an association that represents employers covered under Section 152 of the National Labor Relations Act (NLRA) and subject to 29 U.S.C. 433, the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), our member companies have a significant interest in the manner in which both Acts are administered by the Department of Labor (the Department or DOL).

The Department's proposed changes would expand the number of persons subject to the reporting requirements of the "persuader rule" in the LMRDA by reinterpreting the "advice" exemption to cover activities unrelated to traditional "persuader" activities. As a result, activities such as planning a response to a union campaign, providing draft language for an employer to use in communications with employees, and drafting or revising policies would all be subject to extensive reporting – unprecedented in the history of DOL's implementation of the LMRDA. This would undoubtedly impact the number of lawyers and firms that choose to provide labor counseling services and prevent employers from seeking critical guidance on how to comply with federal law. All of these changes could ultimately limit the nature and substance of an employer's communications with his workforce on the issue of union representation.

[1] 76 Fed. Reg. 36178 (June 21, 2011).

SOCMA believes that there is no demonstrable need for the proposed rule, and that the negative consequences of its promulgation will have a far-reaching effect on both employer and employee rights and relations – and disproportionately so in the case of small businesses.

I. THERE IS NO EVIDENCE THAT THE PROPOSED REINTERPRETATION OF THE "ADVICE" EXEMPTION IS NECESSARY OR WARRANTED.

The LMRDA already requires public disclosure of arrangements and agreements between an employer and any labor consultants during which the consultant engages in activities "persuade" employees "to exercise or not to exercise… the right to organize and bargain collectively through representatives of their own choosing."[2] The current exemption of consultants who give "advice" to an employer has been interpreted for the last 50 years to include advice that can be accepted or rejected by the employer, or information that is contained in a speech or other prepared written materials where the consultant has no direct contact with employees. [3]

The Department claims that the need for increased disclosure requirements is based upon the existence of "strong evidence… that the undisclosed activities of labor relations consultants are interfering with worker's protected rights." It also cites studies that claim that "accompanying the proliferation of employers' use of labor relations consultants is the substantial utilization of anti-union tactics that are unlawful under the NLRA." These studies cited by the Department in support of its proposed rulemaking lack credible, evidentiary support.

The current rules regarding persuader activity disclosures are common sense, straightforward, and have presented no public concerns for decades. There have been no new developments on the labor front in recent years that would prompt the Department to propose such changes. Furthermore, the Department has not built a case that a new rule reversing its long-standing interpretation of the "advice" exemption is at all necessary.

II. THE PROPOSED RULE WILL SIGNIFICANTLY IMPAIR BOTH THE RIGHTS AND ABILITIES OF EMPLOYERS TO COMMUNICATE THEIR POSITIONS TO EMPLOYEES UNDER SECTION 8(C) OF THE NLRA AND OF EMPLOYEES TO LEARN OF THOSE POSITIONS UNDER SECTION 7.

As SOCMA recently pointed out in comments to the National Labor Relations Board (NLRB) on their proposed changes to representation case procedures, the NLRA expressly guarantees employers the right to communicate with workers about union representation and other issues. It states: "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 the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." As a result of the Department's proposed rule, many small and mid-sized employers may simply avoid communicating with their employees on the issue of unionization because of the costs and

[2] 29 U.S.C. 433 (a).
[3] 29 U.S.C. 433 (c) and (d).

uncertainties involved in complying with the new reporting requirements or the risk of penalization for possible misinterpretation of those requirements. The consequence will be interference with employers' Section 8(c) rights to communicate with their employees. The lack of communication will also impair employees' exercise of their Section 7 right to make a free and informed choice in favor of or against unionization.[4]

In some cases, rather than deferring time and money costs or engaging in what will have become a reportable persuader activity, business owners may opt to communicate with their employees on the issue of unionization without the advice of a consultant or attorney. This could easily lead to an increase in the number of inadvertent or unintentional violations of the law, in turn resulting in elections being delayed, re-run or litigated and wasting the time and money of all parties involved.

III. THE PROPOSED RULE PLACES A DISPROPORTIONATE COMPLIANCE BURDEN ON SMALL TO MID-SIZED BUSINESSES.

Another point made by SOCMA in comments to the NLRB is that responding to a representation petition is already a challenge for large companies that maintain skilled in-house attorneys, let alone a small or mid-sized business that does not possess the knowledge and resources necessary to navigate the intricacies of federal labor law. Forcing smaller employers to comprehend the full consequences of union representation without specialists on labor issues will undermine their ability to communicate any potential concerns with their workforce and hinder their employees' ability to make an informed decision. Furthermore, the rules give no consideration to the disproportionate economic impact on employers struggling to stay in business or expand. Small businesses labor specialists on staff or in-house counsel would be at a significant disadvantage compared to their larger counterparts with respect to their ability to fully assess the impact of union elections on their business and to respond and communicate with their employees appropriately.[5]

The proposed rules would further place burdens on both employees and employers at small and mid-sized companies that are already tasked with overseeing compliance with numerous environmental, health, safety, and security (EHS&S) regulations. Within small facilities, such as those that make up the batch and specialty chemical manufacturing industry, often only one or two people manage regulatory compliance – including labor law as well as EHS&S requirements. Placing the burden of complying with the vast reporting and disclosure requirements of the proposed rule on these individuals, or tasking them with the responsibility of assessing the impacts of unionization without an outside consultant, threatens their ability to effectively manage their other regulatory responsibilities and could lead to inadvertent shortfalls in workplace safety and security.

[4] SOCMA comments to NLRB on Representation Case Procedures, Docket ID: NLRB-2011-0002 (http://www.socma.com/assets/File/socma1/PDFfiles/GR_PDF_files/SOCMA-Comments-on-NLRB-Representation-Case-Procedures-082211.pdf).

[5] SOCMA comments to NLRB on Representation Case Procedures.

The proposed rules are unnecessary, overbroad, restrictive and ambiguous. Moreover, they are excessively burdensome and punitive and will unnecessarily impair employer-employee relations as well as employer competitiveness. For all these reasons, SOCMA respectfully urges DOL to withdraw the proposed rules.

Sincerely,

Alexis Rudakewych
Manager, Government Relations
SOCMA