August 11, 2017

Andrew Davis, Chief
Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, N.W.
Washington, D.C. 20210

RE: Notice of Proposed Rulemaking, "Rescission of the Rule Interpreting 'Advice' Exemption in Section 2013(c) of the Labor-Management Reporting and Disclosure Act," RIN 1245-AA07, 82 Fed. Reg. 26877 (June 12, 2017)

Dear Mr. Davis:

This letter presents the comments of the International Foodservice Distributors Association ("IFDA") on the Notice of Proposed Rulemaking ("NPRM"), "Rescission of Rule Interpreting 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," RIN 1245-AA07, 82 *Fed. Reg.* 26877 (June 12, 2017).

By way of background, IFDA is the trade association representing foodservice distributors throughout the United States and internationally. Whether you are having dinner at your favorite restaurant with family or friends, or grabbing breakfast on the go, the food you eat away from home was delivered by a foodservice distributor. IFDA members include broadline, systems, and specialty foodservice distributors that supply food and related products to professional kitchens from restaurants, colleges and universities, to hospitals and care facilities, hotels and resorts, and other foodservice operations. Our 146 member companies operate more than 800 distribution facilities with more than $125 billion in annual sales.

IFDA provides research, educational opportunities, and business forums to its members to help foodservice distributors succeed. In addition, we provide important representation on Capitol Hill and with the Administration, sharing the perspective of leading foodservice distributors with policymakers to shape the legislative and regulatory process. For many years, the Association has assisted its members regarding the development of their programs to comply with the broad range of federal and state regulatory requirements applicable to their businesses, including their substantial and important employment law compliance obligations. For the reasons described below, IFDA strongly supports the OLMS' Notice of Proposed Rulemaking to rescind the "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act."

I. Background on the Proposed Rule

On March 24, 2016, the Department of Labor published the "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act" (the "Final Rule" or the "Persuader Rule"). This highly controversial Final Rule sought to overturn decades of precedent surrounding Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA) and, for the first time in more than fifty years, purported to narrow the "advice" exemption to the LMRDA. The practical effect of the Proposed Rule was to eliminate the statute's "advice" exemption and require employers and law firms to report their relationships and advice sought. As such the rule would interfere with the attorney-client relationship between employers and their attorneys, and otherwise hamper employers' receipt of certain types of important advice from business consultants.

The Final Rule was widely criticized by many interested parties, including the American Bar Association ("ABA"), the Association of Corporate Counsel ("ACC"), at least 14 state-level Attorneys General (in their capacity as regulators of their state bars), and the federal Courts. Indeed, the Final Rule was enjoined shortly after it was promulgated. Among other defects, the Final Rule posed an unlawful barrier between licensed, practicing lawyers and their clients. Indeed the Persuader Rule itself suggested that to avoid the disclosure requirement, attorneys could simply refuse to represent clients seeking legal advice, in essence proposing that attorneys should abandon their clients.

The Final Rule thus undermined one of the central pillars of the American legal system: the confidentiality of the attorney-client relationship, which is designed to encourage potential clients, such as IFDA and its members, to seek out and obtain needed legal advice. The Final Rule identified no reason to interfere with the attorney-client relationship after more than fifty years of recognizing a sound exemption for "advice" received from attorneys, and certain consultant advice consistent with the LMRDA's plain language. In fact with the increased regulation of the employment relationship that has developed over time, employers need access to legal advice and other experienced guidance now more than ever to ensure compliance.

On June 12, 2017, the Office of Labor-Management Standards (OLMS) published a Notice of Proposed Rulemaking that proposes rescinding the highly-controversial Final Rule and leaving in place the long-accepted, easily understood interpretation of the advice exemption in Section 203(c) of the LMRDA. As noted above, IFDA strongly supports this action for the reasons below and as set forth by the Court in *Nat'l Fedn. of Indep. Bus. v. Perez*, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016) (*"Perez*"), since the 2016 Final Rule is legally unsound and unworkable in practice in light of attorneys' duties to their clients and other legal precedent.

II. The Proposed Rule Should Be Adopted

A. The DOL Has The Authority To Reverse The Final Rule

Pursuant to the Administrative Procedure Act ("APA"), the DOL is authorized to reverse the Final Rule. As the U.S. Supreme Court recognized as recently as last year, "agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." Encino Motorcars, LLC v. Navarro, 136 S. Ct. 2117, 2125 (U.S. June 20, 2016). An agency seeking to undo an action must provide a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance, but the agency need not demonstrate that the reasons for the new policy are better than the reasons for the old one. Rather, the agency simply must show that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.

B. The DOL Should Return To Its Longstanding, Reasonable Pre-Final Rule Interpretation Of The Advice Exemption.

There are compelling reasons for the DOL to abandon the newly-proposed and strained interpretation of the advice exemption set forth in the Final Rule. Among these are the undeniable facts that the Final Rule is contradictory to the plain language of the LMRDA, and also constitutes an abrupt reversal of what had been the DOL's interpretation of the advice exemption since 1962, through both Democratic and Republican administrations. The statute provides that reporting is not to be required "covering the services of [the consultant] by reason of … giving or agreeing to give advice." 29 U.S.C. § 433(c). The legislative history of the LMRDA makes clear that Section 203(c) was crafted as a "broad" exemption from the requirements of Sections 203(a) and (b).

Considering the significant breadth of the advice exemption, the DOL held the position from 1962 until April 2016 that when advice is embedded in a speech or statement prepared by the advisor to persuade, it is nevertheless advice and must be treated as such. Accordingly, prior to the Final Rule, it was the consistent DOL enforcement position that no reporting obligation arises under Section 203 of the LMRDA if: (1) the consultant/attorney does not deliver or disseminate persuasive material directly to employees; (2) the employer has the ability to reject or modify persuasive material prepared and recommended to the employer by the consultant/attorney; and (3) there was no deceptive arrangement with the employer. This simple "bright line" exception was well understood by all parties.

Instead the Final Rule creates an unworkable distinction between advice and persuader activity that would wreak havoc in the field of labor relations, as advice and persuader activities

often are inextricably intertwined. There are countless examples of tactical advice that attorneys or labor consultants regularly provide to employers that include a persuasive object. For example, in the midst of an organizing campaign, lawyers who practice labor law often advise the employer involved in the campaign to communicate with its employees regarding the risks of strikes that they may incur in the event they decide to be represented by a union. Such advice is common, given that employers should not expect union organizers to educate employees on the risks associated with strikes. The Final Rule improperly finds such advice to be reportable persuader activity. It does so by artificially partitioning advice into two segments depending upon whether the advisor has an "object to persuade." It then limits the 203(c) exemption to advice lacking an object to persuade. However, advice lacking an object to persuade would not trigger reporting under 203(a) or (b). Hence, the Final Rule renders 203(c) meaningless.

In light of the plain language of the LMRDA, the DOL's consistent position regarding the meaning of the advice exemption up until the enjoined Final Rule and the reasoning of the *Perez* court reviewing the Final Rule, there can be no question that there are compelling reasons for the DOL to return to its longstanding pre-Final Rule interpretation of the advice exemption.

C. Rescinding The Final Rule Will Relieve Trade Associations, Such as IFDA, Of The Inevitable Harms Resulting From The Rule.

The DOL is correct to rescind the Final Rule in light of its numerous adverse effects. Not only was the Rule unauthorized under the LMRDA, as set forth above, but as the *Perez* decision found, it imposes a host of irreparable harms on numerous stakeholders. If the Rule had not been enjoined, it would have imposed extraordinary and unjustified burdens on employers, trade organizations, attorneys, labor consultants, and employees; none of these burdens were adequately considered by the DOL in promulgating the rule.

- The Final Rule Reduces Employers' Access To Legal Advice.

The Final Rule effectively discourages employers from seeking legal advice. Employers who receive a petition for representation filed with the NLRB would be stuck between a rock and a hard place if the Rule were enforced. Employers in that scenario would either have to: (1) seek legal counsel with the understanding that doing so will very likely, if not certainly, trigger reporting requirements under the LMRDA, which would subject the employer to potentially negative publicity; or (2) choose against seeking counsel due to concerns over triggering reporting obligations. The consequences of the latter course of action are problematic for both employers and employees because targeted employers who do not receive legal advice are far more likely to engage in objectionable conduct resulting in the expense and disruption of rerun elections. Indeed, securing unfettered access to legal advice helps clients stay on the right side of the law.

- The Final Rule Violates The First Amendment Rights Of Employers.

The practical impact of the Final Rule, had it been enforced, would have been to violate the First Amendment rights of employers. As explained above, the Rule created a chilling effect that would deter employers from seeking counsel. Without the assistance of counsel, many employers, fearful of violating the law or otherwise engaging in what could be perceived as objectionable behavior, would have been less likely to convey their opinions to employees about organizing. However, employers have a right under the First Amendment to express opinions regarding union organizing, and have the right to hire counsel and consult with an attorney. The Final Rule unlawfully burdened and chilled these First Amendment rights.

- The Final Rule Places An Undue Burden On Trade Associations.

The Final Rule negatively affects trade associations that represent employers and thus indirectly burdens employers and other members who rely on those associations for education, training, and other representation.

Under the final rule, trade associations are required to file Forms LM-20 and LM-21 if they provide any advice or suggestions to employer-members with respect to any of the so-called Persuader and Information Supplying Activities described on DOL's revised Form LM-20. Under the Rule, trade associations would also be required to complete and file Forms LM-20 and LM-21 if they provide an employer, including members, with any union avoidance materials other than what the Department describes as "'off-the-shelf' persuader materials . . . without any input by the [association] concerning the selection or dissemination of the materials." 81 FR 15940. Under the Rule, trade associations are required to complete and file Form LM-20 disclosing any arrangements and agreements relating to their sponsorship of union avoidance seminars and Form LM-21 listing the employers attending any such seminar in instances where an employee of the association serves as a presenter at the seminar. Id. Even if no employee of an association makes a presentation at a union avoidance seminar sponsored by the association, all consultants making a presentation at such a seminar are required under the Final Rule to complete and file Form LM-20 listing all employers who attend the seminar, including members of the association. 81 FR 16028.

National and local associations regularly provide seminars and materials for their members and prospective members, including employment law seminars that address unionization and other union-related topics. The Final Rule's new, greatly expanded disclosure requirements would have severely burdened trade associations and their members. The end result is that employers would have had substantially reduced access to information on

employment law and unionization matters, negatively impacting their ability to ensure legal compliance and to exercise their own free-speech rights on unionization issues.

- The Rule Creates Undue Burdens And Costs On Those Required To Submit Forms LM-20 and LM-21 Filings.

The NPRM correctly concludes that "the burden of the Form LM-20 may have been substantially increased by the Form LM-21's requirements, and the Department considers it prudent to consider the effects of those requirements together." 82 FR 26879. The NPRM also recognizes that the Final Rule purported to consider the LM-20 portion of this burden but not the LM-21 portion. 82 FR 26880. Nevertheless, the Final Rule threatened to impose significant burdens on those subject to Form LM-21 filing requirements. We agree with the premises stated in the NPRM, and submit that the Final Rule should be reversed for this reason, and due to the additional concerns discussed in this submission.

III. Conclusion

As an agency of the Executive Branch, the Department of Labor is bound by Executive Order 13771 ("Reducing Regulation and Controlling Regulatory Costs"). It provides that for every new regulation issued, at least two prior regulations must be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. Beyond that, the Executive Order directs the heads of all agencies that for this fiscal year, the net incremental cost of all new regulations, including repealed regulations, shall be no greater than zero.

In light of the Executive Order and the many reasons set forth above, the DOL should rescind the Final Rule. Consistent with the Executive Order's imperative to eliminate needless regulations, IFDA respectfully requests that the DOL repeal this ill-conceived rule and return to the well-reasoned and correct interpretation of the advice exemption that the Department maintained for over fifty years.

Respectfully submitted,

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