RILA
RETAIL INDUSTRY LEADERS ASSOCIATION
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Submitted via http://www.regulations.gov

August 10, 2017

Mr. Andrew 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: Notice of Proposed Rulemaking, Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the LMRDA; RIN 1245-AA07

Dear Mr. Davis:

On behalf of the Retail Industry Leaders Association (RILA), we support the Department of Labor's proposed rescission of revisions to its rule interpreting the advice exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA) that were finalized on March 24, 2016.[1]

By way of background, the Retail Industry Leaders Association is the trade association of the world's largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Our members include more than 200 retailers, product manufacturers and service suppliers, which together account for more that $1.5 trillion in annual sales, millions of American jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA and our members support the rescission for the same reasons we urged the Department to refrain from adopting the revisions initially: the rule effectively deprives employers of their right to counsel; interferes with employers' ability to communicate with employees; and increases the likelihood of inadvertent violations of the law due to employers' inability to obtain advice. The revisions should also be rescinded due to the inaccurate burden estimates made by the DOL in the rulemaking process as well as the needless adverse economic

[1] 81 Fed. Reg. 15,923 (March 24, 2016).

impact that would be imposed should the revisions be implemented. Finally, the rules both exceed DOL's statutory authority and are unconstitutional.

RILA expressed these and additional concerns in comments that we submitted in response to the NPRM that DOL published on June 21, 2011.[2] RILA's 2011 comments are equally valid today in supporting rescission of the 2016 revisions, and we have attached a copy of these comments for DOL's consideration. Below, we emphasize several of RILA's most significant concerns and highlight more recent developments that support rescission, such as federal court rulings related to the Department's 2016 revisions.[3]

DOL's Authority to Rescind the Revisions

Before turning to our substantive concerns with the 2016 revisions, it is important to emphasize that DOL clearly has the authority to rescind its revisions. As a general rule, the Administrative Procedure Act (APA) permits an agency to undo or revise a regulatory action under the same standards used for promulgating rule initially. As described by the Supreme Court, when proposing such a change, an agency must show that the new policy is permissible under the statue, that there are good reasons for it, and that the agency believes it to be better.[4] The Court has indicated that an agency may need to provide additional explanation where the factual basis for the change contradicts the basis for prior policy or where serious reliance interests must be taken into account,[5] but there is nothing to suggest that DOL cannot proceed with rescinding the 2016 revisions through the usual notice-and-comment process established by the APA.

In fact, notice-and-comment procedures may not be required as the district court's permanent injunction of the rule may well satisfy the APA's good cause exception to notice-and-comment requirements. This exception allows an agency to move forward with a final rule "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that the notice and comment procedure thereon are impracticable, unnecessary, or contrary to the public interest." [6] Because the rule is unlawful, it is likely that DOL could invoke this exception to return to the prior, long-standing rules. Nevertheless, we support the Department's use of notice-and-comment processes to allow the Department to consider the views of all interested stakeholders on this important matter.

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[2] 76 Fed. Reg. 36,178.
[3] RILA is a member of the Coalition for a Democratic Workplace. The Coalition has submitted comments on the proposed rescission that RILA supports.
[4] See, for example, F.C.C. v. Fox Television Stations, Inc., 556 U.S. 502, 514-15 (2009).
[5] *Id.*
[6] 5 U.S.C. 553(b)(3)(B).

The Revisions Deprive Employers of Their Right to Counsel, Interfere with Employers' Ability to Communicate with Employees, and Increase the Chance of Inadvertent Violations of the Law

As detailed in our 2011 comments, DOL's revisions to the regulations effectively eliminate the advice exemption and require disclosure of information that is properly considered privileged or confidential. If these revisions stand, fewer attorneys would offer the legal advice necessary for employers faced with a union campaign. In some jurisdictions, it simply may be impossible for attorneys to avoid the conflict between DOL's reporting requirements and state rules governing the attorney-client relationship, thus effectively eliminating the right to counsel for routine legal matters.

Denying effective assistance of counsel during a union campaign will significantly increase the chance of inadvertent violations of the law by well-intentioned employers. The National Labor Relations Act is a complicated law that cannot be navigated without an understanding of decades of decisions interpreting the Act by both the National Labor Relations Board and federal courts. Employers need counsel to ensure compliance and make lawful decisions about how to respond to union demands for recognition or rhetoric about the employer or its policies and practices that may be inaccurate or misleading.

Employees regularly have questions for employers during a union campaign. Employers have the right to communicate with employees, but must observe nuanced rules if they are to do so lawfully. If DOL's revisions go into effect, many well-intentioned employers may unknowingly violate these rules. Other employers, out of an abundance of caution, will limit or cease union-related communications with employees to ensure that they do not mistakenly violate the law. Creating a disincentive for employers to lawfully communicate with employees does a great disservice to employees, who naturally have questions about what they are hearing from the union, co-workers, and others regarding union campaigns. Employees should have the benefit of an open dialogue with employers, within lawful bounds, when making the important decision about whether to form a union.

The Tremendous Burdens Imposed by the Revisions Were Not Properly Calculated or Considered

DOL's calculations of the burdens imposed by its revisions did not change significantly between its proposal in 2011 and adoption of the final rule in 2016 and our 2011 comments apply equally today. In addition, new information suggests that the burdens may be higher than DOL estimated.

One issue that DOL did not properly consider is the development of systems necessary to track reportable activity. In its final rule, DOL assumed that "employers already keep business records necessary for reporting, such as agreements [with consultants]."[7] While it may be true that employers keep records of agreements with consultants under the previous regulations, the Department's revisions dramatically expand the reporting requirement to cover many more activities and routine legal advice. Companies will need to design complex systems to accurately track this activity, which create costs that have not been properly considered by DOL. This concern is exacerbated by the fact that employer disclosures must be signed by an employer's "president and treasurer or corresponding principal officers" under penalty of perjury. Yet, DOL has performed no analysis regarding what systems employers must develop to ensure their reports are comprehensive and accurate.

The Department also failed to account for costs for familiarization and annual pre-filing compliance review. In comments submitted by the U.S. Chamber of Commerce, first year costs for these activities were estimated to range between $910 million and nearly $2.2 billion, with recurring pre-filing costs between $285 million and $793 million. However, these estimates and the methodology on which they were based were largely dismissed in the Department's 2016 final rule, for example by assuming that report filers would not need to read and understand the Department's rule, but only its published instructions.[8]

Since the close of the public comment period in 2011, more detailed analysis of the Department's proposal has been performed. According to an analysis by former DOL chief economist Diana Furchtgott-Roth, which was published by the Manhattan Institute in 2013 and updated in 2016, DOL's proposed rule could impose burdens between $7.5 billion and $10.6 billion during the first year of implementation, with recurring annual costs between $4.3 and $6.5 billion.[9]

DOL's questionable analysis of the public comments submitted as part of the 2011 comment process in conjunction with the more recent analysis by the Manhattan Institute is significantly higher than the DOL's estimate of a mere $1.3 million in annual costs and provides further evidence that DOL's estimates are inaccurate and should be thoroughly reconsidered.

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[7] 81 Fed. Reg. at 16,003.
[8] Compare the Chamber's analysis on pages 19 and 20 of their comments, which are available at https://www.regulations.gov/document?D=LMSO-2011-0002-5949, with the Department's analysis at 81 Fed. Reg. at 16,007.
[9] The report is available at https://www.manhattan-institute.org/sites/default/files/ib_21_0.pdf.

The Revisions Are Inconsistent with the Law and Are Unconstitutional

In addition to the policy reasons that weigh in favor of rescinding the 2016 revisions, it should be emphasized that the revisions are unlawful and exceed DOL's authority under both the LMRDA and the Constitution. This is perhaps best summarized by the Federal District Court for the Eastern District of Texas that stated:

> DOL's New Rule is not merely fuzzy around the edges. **Rather, the New Rule is defective to its core because it entirely eliminates the LMRDA's Advice Exemption**. In whatever manner DOL defines "advice," it must do so consistent with the statute and therefore must actually exempt advice, *including advice that has an object to persuade*. The New Rule not only fails to do that, it does the exact opposite: it nullifies the exemption for advice that relates to persuasion.[10]

In this case, the district court preliminarily enjoined the DOL's revisions from going into effect, finding that the plaintiffs met their burden to show that the revisions

- Exceeded statutory authority under the LMRDA;
- Were arbitrary, capricious, and an abuse of discretion under the Administrative Procedure Act;
- Violated the First Amendments free speech and freedom of association provisions;
- Violated the Fifth Amendments due process provisions; and
- Violated the Regulatory Flexibility Act.

The court later converted its preliminary injunction to a permanent injunction[11] and is currently on appeal before the Fifth Circuit.

While the district court's opinion in this case is the most comprehensive judicial analysis of the rule's legal faults, the rule has also been questioned a federal district court in Minnesota[12] while no other federal court has come to the rule's defense. The DOL's proposed rescission states that DOL intends to "engage in further statutory analysis."[13] While we certainly respect DOL's stated intent to revisit its analysis, we urge it to recognize the faults pointed out by the Eastern District of Texas and acknowledge that the 2016 revisions exceeded DOL's statutory authority and were unconstitutional.

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[10] National Federation of Independent Business v. Perez, 2016 WL 3766121, *45 (N.D. Tx. Jun. 27, 2016) (first emphasis added).
[11] National Federation of Independent Business v. Perez, 2016 WL 8193279 (N.D. Tx. Nov. 16, 2016).
[12] Labnet, Inc. v. Dep't of Labor, 7 F. Supp. 3d 1159 (D. Minn. 2016).
[13] 82 Fed. Reg. at 26,879.

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Conclusion

Thank you for the opportunity to submit comments on DOL's proposed rescission of the 2016 revisions to its regulations under the LMRDA. For the legal and policy reasons outlined in this letter and our attached comments, we hope that you will rescind the revisions. Please do not hesitate to contact me if RILA may be of assistance to you as you consider this important matter.

Sincerely,

/s

Evan Armstrong
Vice President, Government Affairs

Attachment

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September 21, 2011

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Re: Notice of Proposed Rulemaking, LMRDA Persuader Reporting
RIN 1245—AA03

Dear Mr. Davis:

On behalf of the Retail Industry Leaders Association (RILA), we respectfully request that the Department of Labor (DOL) immediately withdraw the above-referenced Notice of Proposed Rulemaking (NPRM). [1] The proposed rule is unnecessary and would infringe on the rights of our members as employers; the rights of our members' employees; create further tension between labor and management; and, just as importantly, make it much harder for our members and other employers to create jobs.

By way of background, the Retail Industry Leaders Association is the trade association of the world's largest and most innovative retail companies. RILA promotes consumer choice and economic freedom through public policy and industry operational excellence. Its members include more than 200 retailers, product manufacturers and service suppliers, which together account for more than $1.5 trillion in annual sales, millions of American jobs and operate more than 100,000 stores, manufacturing facilities and distribution centers domestically and abroad.

RILA and its members are deeply concerned that the NPRM would deprive employers of their right to counsel; interfere with their ability to communicate with

[1] Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption, 76 Fed. Reg. 36178, June 21, 2011.

employees; deprive employees of their right to receive balanced information; and encourage inadvertent violations of the law due to employers' inability to obtain advice. The NPRM also could trigger burdensome and costly reporting and disclosure requirements for almost any use of third-parties by employers in establishing or revising employment policies; educating management through seminars and training; and conducting routine employee satisfaction surveys. Further, the unnecessary, vague and extremely broad expansion of what constitutes persuasion (through the virtual elimination of the advice exemption), with company presidents and treasurers required to sign reports under threat of criminal prosecution, will do immense harm to the economy by distracting job creators from what they really need to be doing: growing the economy and putting people to work.

Comments on the NPRM

DOL Has Not Demonstrated any Need to Abandon the Long-Standing Interpretation of the Advice Exemption.

Most basically, the NPRM constitutes an effort to fix a problem that simply does not exist. The current persuader rules have functioned well for fifty years, through a succession of Democratic and Republican Presidential administrations.

The NPRM essentially proposes to overturn an interpretation of the statutory "advice" exemption that has existed since February of 1962, when then Secretary of Labor Charles Donohue issued it. The consistency of this interpretation was interrupted only once, very briefly, in 2001.[2] Thus, beginning with the John F. Kennedy administration and, except for the brief deviation in 2001, under every Democratic and Republican administration over the course of five decades, the advice exemption has allowed lawyers and consultants to provide and revise communication documents with no reporting requirement.

In the NPRM, the DOL discusses allegedly rising use of persuaders and employer misconduct during union campaigns to justify restricting the advice exemption and increasing the kinds of information that must be reported. We will discuss in detail below the biased and flawed nature of the basis for such claims.

For present purposes, however, we think the most telling and reliable statistics are those relating to actual representation elections. While overall private sector union density has declined over the last several decades, under the current interpretation, the number of union elections increased from 2009 to 2010, and in

[2] On January 11, 2001, nine days before the inauguration of George W. Bush and nine days short of the end of Bill Clinton's eight years in office, the Clinton DOL issued a notice of statutory interpretation narrowing the "advice" exemption. 66 FR 2782, January 11, 2001. On April 11, 2001, the DOL returned to the current interpretation. 66 FR 18864, April 11, 2001.

both of those years the percentage of union election wins was nearly 70%.[3] Any perceived need to restrict employer communication and the use of consultants and lawyers to prepare and revise documents is clearly not supported by the rate of union wins. Moreover, the DOL has pointed to no evidence that the decline in union density can be linked to current reporting practices.

The DOL has failed to show any change in circumstances, which is generally required to for an administrative agency to justify revisions to a well-established statutory interpretation.[4] And although DOL extended the period for public comments, implementing the NPRM would violate President Obama's initiatives to streamline and minimize federal regulations, and his direction that agencies should do more than simply provide minimal due process when taking regulatory action.[5] The lack of any legitimate showing of need for the proposed changes and their inevitable burden on employers are plainly contrary to the President's stated regulatory goals.

The Proposed Changes far Exceed the Statutory Mandate of the LMRDA and far Exceed the Regulatory Authority Conferred on the DOL.

The Labor Management Reporting and Disclosure Act (LMRDA) only requires that employers file a basic report that focuses on the financial arrangement between the employer and the persuader. Section 203 of the LMRDA provides that an employer using a paid persuader must:

> file with the Secretary a report, in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such *payment*, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the *circumstances of all such payments*, including the *terms of any agreement or understanding pursuant to which they were made*. 29 U.S.C. § 433 (emphasis added).

While the statute does direct the Secretary of Labor to prepare the reporting form, it contains specific direction as to the information required to be reported, and the subject matter is limited to:

- Identifying the persuader.
- Disclosing the financial arrangement and payments made.

[3] Unions won 67.6% of elections in calendar year 2010. "Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year," Daily Lab. Rep. (BNA), No. 85, at B-1 May 3, 2011. Commentators cite in explanation of the drop in union density workplace legislation; manufacturing declines; failure of union industries; increased desire of workers to interact directly with their employers.

[4] See *FDA v. Brown & Williamson Tobacco,* 529 U.S. 120 (2000).

[5] See E.O. 13563, 76 FR 3821, 3821-23 (Jan. 21, 2011); Memorandum on Transparency and Open Government, 74 FR 4685, 4685-86 (Jan. 26, 2009).

The proposed new LM-10 (filed by employers) and LM-20 (filed by persuaders) forms and accompanying instructions, in addition to requiring reporting of this information, contain new and detailed questions about subject employees and about specific types of persuasion. The DOL proposes, among many other intrusive and burdensome types of information, to require identification of subject employees, "including a description of the department, job classification(s), work location, and/or shift(s) of the employees targeted,[6] as well as the location of their work."[7] The proposed LM-10 also covers revision of policies or practices; conducting supervisor training; conducting employee surveys; establishing employee committees; and conducting seminars.

Nothing in the law authorizes the DOL to require the disclosure of such information. And while the NPRM includes the qualifier "if the object [of such activity] was, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively,"[8] application of this qualifier to the vast array of activities that would need to be reported is anything but clear. Further, requiring disclosure in a public document of detailed information about employees, job titles, shifts and locations, and company policy revision and training programs causes grave concerns over privacy and confidentiality.

The overall effect of the NPRM would be to thwart communication between employers and their employees. As discussed below, it would also effectively deprive employers of the right to counsel in any organizing campaign and potentially in other labor and employment matters. Employers would be faced with a choice of either reporting volumes of information about activities that for fifty years have not been considered persuasion, or saying nothing.

Given that the NPRM was issued within one day of proposed rulemaking by the National Labor Relations Board (NLRB) that, if finalized, would rush elections in as little as ten days after the filing of a petition, as well as stripping employers of many due process rights,[9] it appears that both agencies are revising the rules in favor of union organizers rather than remaining a neutral stance. Such initiatives violate the long-recognized statutory goals of both the National Labor Relations Act (NLRA) and the LMRDA: to ensure, *in a neutral manner and favoring neither employers nor unions*, that employee rights are protected and that both employers and unions adhere to the law.[10] Since 1947 section 8(c)[11] of the

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[6] The term "targeted" with respect to employees carries offensive, violent connotations and indicates both an inherent bias against employers and an indication that the DOL presumes malicious intent in any persuasive activity.
[7] NPRM at 36226.
[8] *Id*. at 36218.
[9] 76 Fed. Reg. 36812, 36812; *see* comments of Member Brian E. Hayes at 36829 *et seq*.
[10] Indeed, the NLRB has long held that even the slightest showing of bias by a Board agent conducting an election is grounds for setting aside the election. *Sonoma Health Care Center*, 342 N.L.R.B. 933 (2004) (Board agent expressed pro-union views to observer during election);

NLRA has preserved employers' free speech rights, and it is well settled that the congressional intent behind the NLRA includes "encourage[ing] free debate on issues dividing labor and management," and that the NLRA favors "uninhibited, robust, and wide-open debate in labor disputes." [12] The NPRM is the polar opposite of these long-established principles, far outside the DOL's authority under the LMRDA, and in direct conflict with section 8(c) of the NLRA.

The NPRM Would Force Lawyers to Refuse any Representation that might Constitute Persuasion or Risk Violating Ethical Rules by Complying with the DOL's Reporting Requirements.

The law requires paid persuaders to report not only persuader activities, but also to identify and provide billing information with respect to all other labor clients.[13] Complying with the proposed reporting requirements would cause attorneys to disclose confidential client information in violation of ethics rules.

In order to avoid ethical violations, attorneys will inevitably refuse to provide any advice that could potentially constitute persuasion, making it virtually impossible for employers to find representation not only with respect to union campaigns, but potentially for any revision to personnel policies and practices.

The NPRM displays a fundamental lack of understanding of the attorney-client privilege and the distinction between privilege and confidentiality. In discussing the role of an attorney in drafting an employer's communication materials, the NPRM asserts that by ultimately communicating such materials to employees the employer has waived the attorney-client privilege.[14] Such an assertion is equivalent to a claim that the attorney-client privilege is lost when a lawyer files a brief or sends a letter on behalf of a client. A speech, like a letter, brief or any other communication with a third party, is a product produced by an attorney on behalf of the client. It is the communication between the attorney and client, together with the advice given by the attorney to the client, that is privileged, not the end product.

Further, ethical rules require attorneys to keep client information confidential, even when it is not privileged. While DOL cites a treatise for the general proposition that client identity, fees and the scope and nature of legal services are not privileged,[15] such information is considered confidential and as such may not be disclosed by lawyers without client consent. DOL's focus on privilege while ignoring confidentiality misses the real issue. Congress intended to address not just privilege, but the entire spectrum of attorney-client

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Athbro Precision Engineering Corp., 166 N.L.R.B. 966 (1967) (Board agent observed drinking beer with union official between morning and afternoon balloting).

[11] 29 U.S.C. § 158(c).

[12] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).

[13] 29 U.S.C. § 433(b).

[14] NPRM at 36183.

[15] NPRM at 36192 *citing* Restatement (Third) of the Law Governing Lawyers §69.

communications traditionally protected from disclosure. Section 204 of the LMRDA provides:

> Nothing contained in this chapter 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 chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.[16]

Thus, the statutory protection is not tied solely to privilege and must be read to exempt confidential client information as well. The current interpretation of the advice exemption is consistent with the law of attorney-client privilege and confidentiality, and with the LMRDA's protections; the NPRM is not.

The NPRM Would Harm both Employers and Employees by Denying the Right to Counsel.

In order to avoid the conflict explained above between the NPRM's reporting requirements and attorneys' ethical rules, even a lawyer willing to give any advice in the context of an organizing campaign would be limited to a bare declaration that a proposed communication or course of action is either lawful or unlawful. The NPRM therefore would effectively deny employers the right to legal counsel.

Denying employers the right to counsel will cause employers to choose between silence and risking inadvertent unfair labor practices. Choosing silence would deprive employers of their 8(c) rights under the NLRA and prevent the "uninhibited, robust, and wide-open debate" that the law contemplates.[17] Employees wanting to know what their employers think would be denied information crucial to their consideration of how to vote.

The NPRM also completely ignores the fact that, in addition to persuasion (that is, actually attempting to sway employees' opinions), employers and persuaders provide a great deal of other information essential to employees: explaining the legal effect of signing a union card and how the election process works; answering questions about current benefits or promises made by union organizers. The NPRM would effectively leave such questions either unanswered or answered without the benefit of expert advice.

Even more disturbingly, employers deciding to speak without the benefit of meaningful legal advice would be far more likely to commit inadvertent unfair labor practices (ULPs) or other violations of the law, harming their own interest as well as potentially violating their employees' rights. The result would be

[16] 29 U.S.C. §434.
[17] *Chamber of Commerce v. Brown*, 554 U.S. at 67-68.

increased ULP charges and litigation, challenges to election results and re-run elections.

Finally, as drafted, the NPRM would deter employers from conducting employee surveys intended to improve working conditions and other initiatives related to positive employee relations (for example, opinions on benefits) which is at odds with the purpose of the DOL – to ensure basic standards and positive working conditions. Many employers regularly survey their employees to assess overall job satisfaction, perceived effectiveness of management, and employees' attitudes toward current and potential new benefits. Based on the results of such surveys, employers often make operational changes, changes to management strategy, and changes to benefits and other working conditions. While we would certainly contend that these practices do not constitute persuasion, it seems possible under the NPRM that if the employer had as a general goal maintaining union-free status, the DOL could claim that any third-party involvement in these routine and far-reaching business practices would trigger reporting requirements.

The language used in the NPRM and the proposed new LM-10 adds to the concerns and confusion. For example, item 14a includes among check-off boxes for various types of persuader activity "Developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness."[18] Given a concept as vague as "union . . . proneness," almost any kind of survey could be characterized as persuasion. One might conclude that a generally unhappy employee or one dissatisfied with the fairness of a supervisor is prone to want a union, while many employers use such surveys for the obvious, innocent and useful purpose of simply finding out how happy their employees are and how supervision is perceived.

Beyond just employee surveys, common and important practices thrown into question would include leadership development programs; compliance programs; development of open-door policies, internal escalation and grievance adjustment policies and employee hotlines—all of which could potentially be characterized as persuasion when third parties are involved.

The proposed rule would at best cause confusion, at worst discourage many practices that benefit employees, and in every case drive a wedge between employers and employees. It is nonsensical for the DOL to produce regulations that would discourage improvement of working conditions and benefits.

The NPRM is Unconstitutional.

The LMRDA provides not only for civil enforcement, but for criminal sanctions in the form of fines of up to $10,000 and imprisonment for up to one year.[19]

[18] NPRM at 36218.
[19] 29 U.S.C. § 439.

It is a well-settled principle of criminal law that a law is unconstitutionally vague if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[20]

In many areas, most obviously in the expansion of the definition of persuasion to cover policy revisions, seminars and training, the NPRM is so unclear as to make compliance virtually impossible. In theory, a company that provides on-line employee surveys could be found to have engaged in persuasion without ever being aware of the purposes for which its customers used survey results, and without knowing whether an issue of union representation existed. Thus, both on the employer side and on the persuader side, the NPRM's requirements would almost certainly be struck down as unconstitutionally vague.

Additionally, by restricting employer speech and requiring the disclosure of otherwise protected confidential information, the NPRM almost certainly violates First Amendment free speech rights and Fourth Amendment protections against unlawful search and seizure. While the LMRDA's constitutionality has generally been upheld under the existing regulations, the proposed changes would trigger a new round of constitutional challenges, with a strong likelihood that they would be struck down.[21]

The NPRM Appears to be a Regulatory Step Toward the Employee Free Choice Act, Which Congress has Declined to Pass.

For years now, organized labor has pushed for the misleadingly-named Employee Free Choice Act (EFCA), under which the secret ballot election process would be scrapped in favor of unionization based on card-check. Congress has wisely recognized the harm EFCA would inflict on the economy, and the legislation has never gained traction. Unions have since pushed for establishing EFCA through regulations.

The NPRM would effectively strip employers of their right to communicate with employees about the realities of union representation. This appears to be a first step toward establishing EFCA by rule. It also must be recognized that while DOL is moving to restrict employer speech and the right to counsel, the NLRB is seeking to impose burdensome rules on employers and force elections in as little as ten days.[22] Taken together, the two agencies' proposed rules would produce the regulatory equivalent of EFCA.

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[20] *Papechristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).
[21] *See* dissenting opinions in *Master Printers Association v. Donovan*, 699 F.2d 370, 374 (7th Cir. 1983); *Price v. Wirtz*, 412 F.2d 647, 656 (5th Cir. 1969).
[22] Representation—Case Procedures, 76 Fed. Reg. 36812 (June 22, 2011).

DOL should respect the Congressional decision against enacting EFCA, recognize the damage the NPRM would do to the economy and the ability to create jobs, and withdraw the NPRM.

In the NPRM, the DOL Usurps the Role of the NLRB.

DOL's justification for the NPRM goes to great lengths, relying on outdated and biased research, to assert that employer misconduct in response to union campaigns happens more often than not. While the LMRDA clearly requires reporting of the use of persuaders and related payments, the law leaves to the NLRB the job of policing employer misconduct. By going into exhaustive detail about what persuaders do (including 13 separate types of "persuader activities" in item 14a of the new LM-10) and requiring precise identification of subject employees, the DOL ventures into the NLRB's domain, and far beyond the information required to be reported under the LMRDA.

The DOL's Basic Premises about
Employer Versus Persuader Views are Flawed.

The NPRM states that employers often point out to employees that unions are "third parties," in order to support the proposition that employees should be given information about "a third-party consultant[']s" input into the employer's communications.[23] The NPRM goes on to state, with respect to communications prepared with input from a consultant or lawyer, that employees would benefit from knowing "the true source of those views and the methods used to disseminate them."[24]

The most basic problem with the DOL's premise is its assumption that the "views" expressed in communications prepared with the help of a consultant are not those of the employer. It simply does not make sense to believe that employers hire lawyers and consultants to help them say things that the employers themselves do not support.

Perhaps more importantly, the DOL also clearly presumes some nefarious intent in an employer's use of a consultant or attorney. (If not, then why would an employee care whether the employer had help in writing a speech?) The fact is that the words an employer uses to communicate with employees can be more important in the context of a union campaign than in almost any other situation—regardless of the ultimate outcome of the campaign—because the law governing what an employer can say is so intricate and subtle that violations are likely without expert advice. And as recognized by the NLRB and courts for decades, employees have a vital interest in hearing what their employers have to say.[25] While some minority of employers might use consultants in ways that violate the

[23] NPRM at 36187-8.
[24] NPRM at 36188.
[25] *Chamber of Commerce v. Brown*, 554 U.S. at 67-68.

law, the NLRB provides a safeguard. Indeed, as the NPRM actually points out, there is a line of Board law holding employers liable for acts of third parties such as consultants.[26] In going beyond what Congress has directed (by virtually eliminating the advice exemption and attempting to obtain far more information than the LMRDA contemplates), the DOL unfairly and improperly casts all employers as scofflaws, much like the authors of the biased and unsound studies cited in the NPRM.

The DOL Grossly Overstates Employer Misconduct in Attempting to Justify a Need to Revise Persuader Reporting.

The basic assertion in support of the NPRM is that is that employer misconduct and the use of persuaders is pervasive and on the rise. To justify revising the persuader rules, the DOL discusses alleged "Effects on Contemporary Labor-Management Relations."

While the discussion does include one 2009 article, the "contemporary" picture is painted by discussing the 1959 legislative history of the LMRDA, and referring to academic publications from 1990, 2002 (citing 1994 and 1996 research) and 2006. Research ranging from five to 21 years old hardly sheds light on "contemporary" labor relations or justifies radically overhauling rules that have worked for five decades. Nor do the supposed confessions of former "union-busting" consultants cited in the NPRM—one a memoir from 1961 and another from 1993.[27] Two unscrupulous individuals concerned with their own book sales certainly do not represent the majority of law abiding lawyers and consultants.

The 2009 article referred to above, Kate Brofenbrenner's *No Holds Barred: The Intensification of Employer Opposition to Organizing* (Brofenbrenner, 2009), serves as the basis for much of the NPRM's assertions about employer misconduct, such as claims that in the course of NLRB elections "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."[28]

What the NPRM does not discuss is Brofenbrenner's clear bias or the source of her figures. The article was sponsored in part by the American Rights at Work Education Fund, described in the article's preface as "an educational and outreach organization dedicated to promoting the freedom of workers to form unions and bargain collectively."[29] In the article, Brofenbrenner lists among her

[26] NPRM a5t 36184, note 9.
[27] NPRM at 36184, *citing The Man in the Middle*, Nathan W. Shefferman, New York, Doubleday, 1961; NPRM at 36187 *citing Confessions of a Union Buster*, Marting Jay Levitt, New York, Crown Publishers, 1993.
[28] NPRM at 36190.
[29] Brofenbrenner, 2009 at preface.

agenda items answering the question of, "how does labor law need to be reformed in order to restore the promise embodied in Section 7 of the NLRA that works have the right to organize and bargain first agreements?"[30] She offers the Employee Free Choice Act as her answer.[31]

Brofenbrenner's claims of employer misconduct—and the figures stated as fact in the NPRM—are based not on any official findings by a prosecutorial or adjudicatory body, but on interviews of union organizers[32]. If one looks at NLRB statistics in the cases Brofenbrenner studied, actual findings of misconduct are a tiny fraction of the rates cited in the NPRM. Unfair labor practice charges were actually filed in only 40% of the elections Brofenbrenner studied.[33] Of the cases filed, the Board issued complaints in only 37%, with 49% either thrown out for lack of merit or withdrawn before a finding on merit, and 14% settled before a finding on merit (most Board settlement agreements contain non-admission clauses, so settling employers do not admit violating the law).[34] Only 10% of the ULPs (that is, 10% of the 40% of elections involving ULPs, or 4% of all elections) resulted in administrative law judge or Board decisions against the employer. And yet the NPRM cites the wildly inflated figures of employer misconduct resulting from surveying union organizers. It appears that for the DOL, as with Brofenbrenner, an accusation is as good as a conviction. The NPRM is a skyscraper built without a foundation.

The NPRM Would Harm the Economy and Hinder Job Creation by Imposing a Tremendous Burden on Corporate Officers.

The law requires that LM-10s be signed by an employer's "president and treasurer or corresponding principal officers."[35] For fifty years the reporting burden on companies' highest officers has been manageable because (a) the advice exemption has worked to require reports only in those rare circumstances when a true persuader has been used, and (b) the information required on the current LM-10 is limited to what the statute requires—identification of the employer, the persuader, and the payments made, with only a brief description of the activities provided.[36]

Under the proposal, the volume of reports would skyrocket with persuasion potentially including such far-reaching subjects as conducting employee surveys, seminars, training, revision of policies and almost any use of lawyers or consultants in relation to these subjects. Each report using the revised LM-10 would include greatly expanded (and statutorily unjustified) and detailed

[30] *Id.* at 5.
[31] *Id.* at 24-26.
[32] *Id.* at 5-6.
[33] Brofenbrenner, 2009 at 15.
[34] *Id.* at 17.
[35] 29 U.S.C. §203(a).
[36] As discussed earlier, one could argue that the law does not permit the requiring of even a brief description of the actual persuasion activities.

information on many specific acts of "persuasion" and detailed identification of subject employees.

At a time when the leaders of every employer need to be growing their businesses and creating jobs, among the most counterproductive things imaginable is dropping stacks of LM-10s on the desks of company presidents and treasurers, each to be signed under threat of criminal prosecution, each full of detailed information that would be provided from all reaches of the corporate environment. For the small employers that create the majority of American jobs, compliance would range from extremely burdensome to impossible, due primarily to lack of expertise and the resources to retain experts.

For large employers, the burden that the proposed rules would impose is staggering. Large companies commonly have many departments that would be involved with retaining persuaders and carrying out the required reporting, including labor relations; human resources; legal; compliance; finance and accounting. The presidents and treasurers of such organizations certainly would not be involved with the details of retaining persuaders. Faced with signatory requirements under threat of criminal prosecution, the only possible approach for the leaders of large companies would be to establish an elaborate system of information gathering and review. While an in-house lawyer would likely fill out an LM-10 with input from labor relations, accounting and potentially human resources, no company president or treasurer would sign such a document without review and verification by senior executives in the departments involved. The process would be time-consuming, unwieldy and expensive.

Like the NLRB's lawsuit seeking to shut down Boeing's non-union facility in South Carolina in favor of union facilities in the Northwest, and its initiative to overhaul union election procedures to facilitate union organizing, the DOL's proposed rule changes represent an obstacle to creating American jobs.

The NPRM's Regulatory Impact is Grossly Underestimated.

DOL estimates that completing the revised LM-10 will take two hours, while the revised LM-20 will take one hour. It also states that the forms will likely be filled out by attorneys, and estimates their per-hour compensation at $87.59. While this figure may be a reasonable estimate for the salary and benefits of some in-house lawyers, it is a fraction of the hourly rate charged by lawyers practicing in firms. More importantly, the estimate of two hours is completely unrealistic and fails to recognize how companies function.

The revised LM-10, at four pages, with 11 pages of single-spaced instructions, and requiring extensive detail about information that would have to be gathered from many different areas in any organization, would clearly take well over two hours to prepare. The analysis contains many unrealistic and seemingly arbitrary assumptions. For example, 30 seconds is allowed to complete each of the

following with respect to payments (each and every payment) to persuaders: the date; the amount; and the kind of payment ("specify if payment or loan, and if in cash or property.")[37] In almost any organization, large or small, answering these three items would require information found in different locations and with different individuals, particularly determining whether a given payment represents a payment or a loan.

Even more unrealistically, the estimate allows two minutes for "signature and verification," which of course requires signatures from both the president and the treasurer or corresponding principal officer. As discussed above it is difficult to imagine getting both the president and the treasurer of virtually any employer organization to sign a complex federal government form containing pages of detailed information, under penalty of criminal sanctions, in two hours let alone two minutes. In reality, large companies would be forced to create processes involving many departments and review by many layers of management before company leaders would be comfortable signing and LM-10.

While the actual paperwork burden of completing an LM-10 is vastly underestimated, the NPRM also fails to recognize or attempt to calculate the true practical cost of the proposed changes. A true consideration of cost must include the chilling of employer speech and denial of legal representation; the discouraging of workplace enhancement through employee surveys and benefit improvements; the discouraging of supervisor training and employee hotlines. Such effects of the proposed changes may appear intangible, but they would surely be felt and must be considered in assessing regulatory impact.

The NPRM is Certain to Bring about Extensive Litigation and Likely to be Declared Invalid.

Faced with a new regulation that strips employers of the rights of free speech and legal representation, accompanied by potential criminal sanctions, employers with the resources to do so will have little choice other than suing to have the new regulations declared invalid. Smaller employers will likely take the only safe approach: silence in the face of any organizing efforts. Not only is this unfair to the employer, which is intimidated out of the right to express its view, but it effectively deprives employees the opportunity to hear both sides of the story. It essence, it silences the debate Congress encouraged. [38]

Given the long list of problems discussed above, it seems likely that the courts would ultimately strike down DOL's proposed rules. In the interim, however, employers will operate in a haze of uncertainty and spend countless time and effort trying to run their businesses without running afoul of a set of rules that few will even understand.

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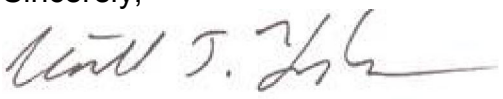
[37] NPRM at 36202, 36219 (items 15a-c of LM-10 form).
[38] *Chamber of Commerce v. Brown*, 554 U.S. at 67-68.

In today's economic climate, DOL's proposed rules will harm the economy, prevent job growth, and needlessly trample on the rights of employers and employees alike.

Conclusion

Thank you for this opportunity to submit comments. We hope you will recognize the lack of need for changing the persuader reporting rules and rescind the NPRM in its entirety.

Sincerely,



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