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

RE: RIN 1245-AA07; Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act

Dear Mr. Davis:

On behalf of the Society for Human Resource Management (SHRM), we are pleased to submit these comments in response to the Department of Labor's (Department's) proposal to rescind its recent rule interpreting the "advice" exemption in Section 203(c) of the Labor Management Reporting and Disclosure Act (LMRDA) (hereafter, "2016 Rule") as published in the Federal Register on June 12, 2017.[1]

On June 21, 2011, the Department first proposed changing its interpretation of the LMRDA's "advice" exemption.[2] In response, SHRM submitted comments on September 21, 2011 (hereafter, the "2011 Comments"), which opposed the proposal and urged the Department to withdraw it. (Please see Attachment A.)

As SHRM noted in 2011, the Department's proposed changes, which effectively eliminated the LMRDA's "advice" exemption, were contrary to the LMRDA's text, beyond the Department's statutory authority, and bad policy. Unfortunately, despite the opposition of SHRM, other trade associations, employers, lawyers, and legal ethics experts, the Department finalized its proposed revisions as the 2016 Rule. Before the 2016 Rule could take effect, however, a federal court enjoined it, holding that the 2016 Rule violated the Administrative Procedure Act (APA), infringed upon employers' free speech rights under the National Labor Relations Act (NLRA) and the First Amendment of the U.S. Constitution, was unconstitutionally vague, and violated the Regulatory Flexibility Act (RFA). *See Nat'l Fedn. of Indep. Bus.* (hereafter "*NFIB*") *v. Perez*, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016) (entering preliminary injunction against implementation of the 2016 Rule); *NFIB v. Perez*, 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016) (converting the preliminary injunction into a permanent one and setting aside the 2016 Rule under the APA, 5 U.S.C. § 706(2)).

[1] 82 Fed. Reg. 26,877.

[2] 76 Fed. Reg. 36,178.

SHRM strongly supports the Department's proposal to rescind the 2016 Rule. SHRM attaches its 2011 Comments hereto and re-submits them in support of that proposal. Those comments accurately set forth why the Department should not have adopted its 2011 proposal and why it should rescind the 2016 Rule now. SHRM also believes that the opinion and orders of the Northern District of Texas in the *NFIB* litigation, which are consistent with SHRM's 2011 Comments, comprehensively set forth the many grounds for rescinding the 2016 Rule and rejecting the policy preferences that apparently motivated its promulgation.[3] Finally, SHRM notes that many other comments submitted in opposition to the 2016 Rule—including those of the American Bar Association (ABA), which is primarily concerned with attorneys' professional responsibility—were wrongly discounted by the Department and should also be re-considered by the Department now.

I. Introduction

SHRM is the world's largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates. Visit us at shrm.org.

SHRM exists to develop and serve the HR professional and advance and lead the HR profession. To that end, SHRM provides education, thought leadership, certification, community, and advocacy to enhance the practice of human resource management and the effectiveness of HR professionals in the organizations and communities they serve. Through SHRM, members have access to trusted educational and training resources to enhance their skills and the largest global network of HR professionals.

A substantial number of SHRM's professionals work with employers that fall under the jurisdiction of the NLRA. SHRM has a strong interest in the administration of the NLRA, including the lawful and honest communication with employees with respect to their rights thereunder.

II. The 2016 Rule should be rescinded.

In its 2011 Comments, SHRM analyzed the LMRDA's text and history, including the relevant legislative history; pointed out flaws in the research cited by the Department, which failed to give an accurate view of the current labor-relations climate; and identified practical consequences of the Department's proposed new interpretation that would be devastating to businesses big and small. *See generally* 2011 Comments. SHRM stands by those comments, which experience and the *NFIB* court's decision have shown were correct. Those comments and criticisms of the 2011 proposal apply equally to the finalized 2016 Rule.

[3] In addition to rescinding the 2016, the Department should withdraw its appeal from the *NFIB* court's judgment setting aside the 2016 Rule. Indeed, in light of the APA's expressly authorizing courts to set aside agency rules that are invalid—as the *NFIB* court did with respect to the 2016 Rule—it arguably is unnecessary for the Department to take the further step of also rescinding the rule. *See* 5 U.S.C. § 706(2). However, since the Department proposes to take this further step, perhaps out of an abundance of caution, SHRM supports that effort.

In addition to reaffirming its 2011 Comments, SHRM draws the Department's attention to several other significant failings of the 2016 Rule that require its rescission as set forth below.

A. The 2016 Rule was premised on inaccurate and unfounded assumptions about the current state of labor and employment relations.

The 2016 Rule is based on a flawed view of labor and employment relations today. The rule appears premised on the assumption that employers are engaged in extensive unlawful and other inappropriate conduct to deprive employees of their collective bargaining rights. For example, in its 2011 proposal, the Department declared:

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

76 Fed. Reg. at 36,189. The Department continued:

> Studies also show 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. Since the rise of consultant industry in the 1970s and 1980s, 'no-holds-barred counter-organizing campaigns' have become the mainstream. Some consultants counsel the employer to fire union activists for reasons other than their union activity, or engage in other unfair labor practices, particularly because the penalties for unlawful conduct are typically delayed and may be insignificant, from the employer's viewpoint, compared to the longer-term obligation to deal with employee representatives. If not unlawful, consultant tactics may be merely offensive.

Id. at 36,190 (citations omitted).

In support of these claims, the Department relied almost entirely on a handful of academic studies that SHRM and other commenters pointed out display a pro-union bias and employ deeply flawed methodologies. *See, e.g.*, 2011 Comments at 15-17. To gain a more accurate view, SHRM's 2011 Comments urged the Department to "take appropriate evidence on the true state of affairs in the labor relations community." 2011 Comments at 2-3.

Regrettably, in finalizing the 2016 Rule, the Department failed to gain an accurate understanding of the true state of labor and employment relations. The Department instead continued to rely for its account of labor relations on the same disputed studies cited in its proposal and on anecdotes taken from union organizers' and other pro-union comments. As a result, the Department continued to wrongly suggest that employers generally use outside consultants to interfere with and undermine employees' collective bargaining rights as a matter of course. For example, the Department referred to the "disruptive effect consultants have on labor-management relations" and to commenters who "appear to view consultants as the root cause of most unlawful conduct by employers." The Department stated that it "cannot ignore the research that establishes that a significant number of tactics used in union avoidance and counter-organizing campaigns, whether lawful or unlawful, are disruptive of harmonious labor relations when not fully disclosed." The Department also cited a commenter who claimed that consultants engage in deceptive practices such as coaching employers "on how to facilitate the 'spontaneous'

formation of employee committees, which are used as fronts for the employer's anti-union activity," and it claimed that additional, similar comments from unions and organizers "confirm and buttress the research discussed in the NPRM and the preamble to this rule." 81 Fed. Reg. 15,967-15968. Disregarding SHRM's and others' criticism, the Department stated that it found "no persuasive reason to doubt the studies cited in the NPRM, insofar as they conclude that the proliferation of employers' use of labor relations consultants has been accompanied by the substantial utilization of unlawful tactics." 81 Fed. Reg. at 15,968.

SHRM, consistent with its 2011 Comments, strongly rejects the 2016 Rule's mischaracterization of the state of labor and employment relations today as unfounded and as based on flawed and biased studies.

B. Many employers today have adopted a culture of legal compliance.

Entirely missing from the Department's 2011 proposal or its 2016 Rule was any acknowledgment of the highly regulated state of today's labor and employment relations. By 2017, the amount of federal, state, and local employment regulation with which employers must comply is significant. The Department's own website notes that:

> The Department of Labor (DOL) administers and enforces more than *180* federal laws. These mandates and the regulations that implement them cover many workplace activities for about *10 million employers* and *125 million workers*.

Summary of the major laws of the Department of Labor (emphasis added), available at: www.dol.gov/general/aboutdol/majorlaws (Please see Attachment B.) The Department's website goes on to list the various federal statutes administered by the Department that affect employment, including:

- The Fair Labor Standards Act
- The Immigration and Nationality Act
- The Occupational Safety and Health Act
- The Employee Retirement Income Security Act
- The Labor Management Reporting and Disclosure Act
- The Uniformed Services Employment and Reemployment Rights Act
- The Worker Adjustment and Retraining Notification Act
- The Family and Medical Leave Act
- The Migrant and Seasonal Agricultural Worker Protection Act
- The Federal Mine Safety and Health Act
- The Consumer Credit Protection Act
- The Davis-Bacon Act
- The McNamara-O'Hara Service Contract Act, and
- The Walsh-Healey Public Contracts Act.

There are numerous additional federal employment statutes outside the Department's jurisdiction administered by other agencies such as the U.S. Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB).[4] These include:

- Title VII of the Civil Rights Act of 1964
- The Pregnancy Discrimination Act
- The Equal Pay Act of 1963
- The Age Discrimination in Employment Act of 1967
- Title I of the Americans with Disabilities Act of 1990
- Sections 102 and 103 of the Civil Rights Act of 1991
- The Genetic Information Nondiscrimination Act of 2008, and
- The National Labor Relations Act.

These various federal statutes are accompanied by thousands of regulations.[5] In addition to this extensive federal law, employers must also comply with hundreds of state and local employment laws throughout the nation's various jurisdictions.

The world in which today's employers operate is therefore very different from that of the 1950s and earlier. Employers must dedicate substantial time, effort, and resources to compliance and face a host of potential liabilities in the event of compliance lapses.

In light of this extensive regulation, HR professionals and employers of all sizes regularly rely on labor and employment attorneys to help them understand what the law requires, to develop compliant policies and practices, to counsel them on legal issues that arise on a daily basis in the workplace, and when necessary, to represent their businesses in responding to administrative investigations and defending private civil actions.

Labor and employment attorneys thus now do far more than simply help employers address traditional labor issues and respond to union organizing campaigns. From day to day, an employer may turn to its outside counsel for advice on how to handle a complicated leave issue under the Family and Medical Leave Act, how to ensure a new bonus program complies with the Fair Labor Standards Act's overtime pay requirements, how to confirm that its pay practices generally comply with the Equal Pay Act and Title VII, how to update its social media policy to be consistent with the NLRB's latest guidance, or how to develop an effective and lawful diversity and inclusion program. And these same lawyers and law firms may also provide advice from time to time to those employers regarding effective steps they might lawfully take under the NLRA to reduce the likelihood of unionization.

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[4] *See* www.eeoc.gov/laws/statutes/index.cfm (listing federal statutes administered by the EEOC) (Please see Attachment C); www.nlrb.gov/ (describing the NLRB's jurisdiction under the NLRA).

[5] SHRM provides resources for its members to help them understand and comply with these numerous laws. *See, e.g.*, SHRM, "Federal Statutes, Regulations, and Guidance," available at: https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/federal-statutes-regulations-and-guidance.aspx (noting "[t]he following federal law digest brings together the fundamentals of federal employment laws HR professionals working in the public or private sectors need to be familiar with" and listing dozens of federal statutes and regulations) (Please see Attachment D.)

The current labor and employment environment, as it has become steadily more regulated over the past five decades, has given rise to a highly trained HR profession and a labor and employment bar focused in large part on legal compliance. However, the Department ignored these developments in promulgating the 2016 Rule. Instead, the Department wrongly assumed that today's "labor consultants," including labor and employment attorneys, are largely twenty-first century versions of Nathan Shefferman, the notorious "middleman" of the 1950s who engaged in deceptive and illegal conduct to defeat union campaigns. *See* 81 Fed. Reg. at 15,992 ("[L]aw firms have engaged in the same kinds of activities as other consultant firms, providing services similar to practices advocated by Nathan Shefferman, the face of the 'middlemen,' mentioned in the McClellan hearings and the LMRDA's legislative history."). The 2016 Rule failed to provide an accurate account of the climate in which today's employers operate, the culture of compliance that is fostered within most employers, and the important role that labor and employment attorneys play in providing advice to employers on a wide variety of employment issues.

C. The Department ignored employers' right to oppose unionization lawfully.

The Department also failed to consider the many lawful and appropriate ways employers may oppose unionization. Indeed, the Department appeared to assume incorrectly that any opposition by an employer to unionization is harmful, wrongly interferes with employees' collective bargaining rights, and is "disruptive" of harmonious labor relations. Those assumptions are wrong both as a matter of law and fact.

1. Employers have the right to oppose unionization.

As an initial matter, the Department must recognize that the NLRA protects an employer's right to oppose unionization. Section 8(c) of the NLRA provides that "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. § 158(c).

The Supreme Court in *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), explained that the addition of Section 8(c) to the NLRA "manifested a 'congressional intent to encourage free debate on issues dividing labor and management.'" *Id*. at 67. Explaining the background of the NLRA's free speech provision, the Court recounted:

> Among the frequently litigated issues under the Wagner Act were charges that an employer's attempts to persuade employees not to join a union—or to join one favored by the employer rather than a rival—amounted to a form of coercion prohibited by § 8. The NLRB took the position that § 8 demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees. In 1941, this Court curtailed the NLRB's aggressive interpretation, clarifying that nothing in the NLRA prohibits an employer "from expressing its view on labor policies or problems" unless the employer's speech "in connection with other circumstances [amounts] to coercion within the meaning of the Act." We subsequently characterized *Virginia Electric* as recognizing the First Amendment right of employers to engage in noncoercive speech about unionization.

> Notwithstanding these decisions, the NLRB continued to regulate employer speech too restrictively in the eyes of Congress.

Id. at 66–67. Therefore, Congress, "[c]oncerned that the Wagner Act had pushed the labor relations balance too far in favor of unions," passed the Labor Management Relations Act, adding Section 8(c) to the NLRA and "protect[ing] speech by both unions and employers from regulation by the NLRB." *Id.*at 67.

The *Brown* Court characterized this "policy judgment, which [it noted] suffuses the NLRA as a whole, as 'favoring uninhibited, robust, and wide-open debate in labor disputes,' stressing that 'freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the NLRB.'" *Id*. at 68 (internal quotations omitted). Thus, the Court determined that "the addition of § 8(c) expressly precludes regulation of speech about unionization 'so long as the communications do not contain a 'threat of reprisal or force or promise of benefit.'" *Id.* (emphasis added).

In contrast to the Supreme Court's interpretation of Section 8(c) as encouraging free debate on issues dividing labor and management, the Department appeared to assume that employer speech expressing the employer's opposition to unionization generally interferes with employees' collective bargaining rights and disrupts labor relations. *See, e.g.*, 81 Fed. Reg. at 15,955-15,956 (recounting many instances in which employers communicated their views to employees in meetings, letters, leaflets, videos, and other means as if such communication was itself questionable conduct). Contrary to the assumptions that appear to underlie the 2016 Rule, the Department must recognize that employers have the right to communicate their views regarding unionization and that there is nothing improper about such communication. Indeed, Congress has made the policy judgment in Section 8(c) that free speech on labor issues is *beneficial*.

2. <u>Employers express their views on unionization in ways that do not interfere with employees' right to unionize.</u>

In addition, the Department must abandon the unfounded assumption underlying the 2016 Rule that employers who oppose unionization regularly engage in unlawful and other inappropriate conduct, often under the guidance of an attorney or other labor consultant.

Contrary to what union organizers and their allies may want to believe, there are good reasons why employees might reasonably choose not to unionize. Employers, often with the advice of experienced attorneys and other consultants, find that the most effective way to respond to a union campaign is to identify those reasons to employees so that they hear both sides of the issue –pro and con – and can make informed decisions when they vote. Rather than deception, sabotage, intimidation, and coercion as may have been practiced fifty years ago by some employers who employed "middlemen" and engaged in an "anything goes" opposition to unionization, contemporary employers generally act lawfully and focus their efforts on providing employees relevant information. The Department's rationale for the 2016 Rule failed to contain an accurate and objective description of employers' typical responses to union campaigns today and instead accepted without question long outdated accounts from the 1950s and studies and comments that plainly reflect a pro-union bias.

The Department also failed to recognize that employers who seek to avoid unionization often take steps prior to any formal campaign that may make employees' interest in a union less likely and that these steps typically benefit employees. For example, experienced attorneys and other consultants regularly advise employers who seek to avoid unionization to:

- ensure that managers and supervisors treat employees in a respectful manner;
- make sure that daily interactions among supervisors/managers and employees set the tone, affect the level of trust, and influence employees' perception of organizational integrity;
- ensure that managers and supervisors understand the importance of treating all employees with the same respect they themselves expect from peers and superiors;
- foster a sense of fairness, including potentially establishing a disciplinary review process and building a culture of fair treatment that helps employees feel secure;
- enhance the growth of individuals within the organization and increase teamwork and personal involvement;
- make sure employees feel that they are being heard and have a degree of input and participation in decisions that affect their working environment;
- provide employees relevant information on compensation, benefits, and organizational and business changes, and
- create opportunities for managers and employees to interact and engage, with managers having the ability to follow up and respond to employees rather than reflexively defend themselves or the company.

In stark contrast to the 2016 Rule's assumption that employers who oppose unionization regularly engage in unlawful and disruptive conduct harmful to employees' interests, many employers today – with the advice of experienced attorneys and other consultants – focus their union-avoidance activities on improving employee morale and the workplace. HR professionals, labor and employment attorneys and consultants, and employers generally find that the most effective union-avoidance strategies include developing employee-friendly policies and practices, ensuring that employees do not feel their employer engages in arbitrary and unfair employment practices, providing competitive wages and benefits, and creating an environment of mutual respect. The 2016 Rule omits any reference to or acknowledgement of these contemporary and typical employer approaches to union avoidance.

Indeed, contemporary employers' efforts to be attentive to employees' concerns and needs, along with employers' obligation to comply with dozens of laws that govern workplace relations, may largely explain why the overall rate of unionization has declined over the decades.[6] In short, today's employees, whose interests are often protected as a matter of law and

[6] The reasons for the decades-long decline in unionization appear to be many. *See, e.g.*, Allen Smith, J.D., *Union Membership Down; Experts Say HR's Responsiveness May Be A Reason*, SHRM (Feb. 10, 2017), available at: https://www.shrm.org/resourcesandtools/hr-topics/labor-relations/pages/labor-statistics-for-

who generally experience a greater degree of control and fairness in the workplace than their peers did in decades past, may often conclude that unionization is simply unnecessary.

D. The 2016 Rule would cause substantial harm by reducing employers' access to needed legal advice.

Finally, SHRM draws the Department's attention to the *NFIB* court's findings that the 2016 Rule would negatively affect employers' ability to obtain needed legal advice. *See NFIB*, 2016 WL 3766121, at *10 ("Overall, DOL's New Rule will decrease employers' access to advice from an attorney of one's choice.") and at *43 ("[A]n attorney can only avoid the New Rule's disclosure requirements by also declining to provide some legal services, which severely burdens those clients who need such services."). SHRM endorses that court's conclusions. The 2016 Rule would have negatively impacted SHRM's members' organizations in their ability to obtain legal advice, posing a substantial threat of irreparable harm.

In addition, SHRM or its presenters would likely have been required to file disclosure reports as a result of SHRM's own seminars that address union avoidance issues and, given the vastness of the final rule, other workplace issues not directly related to union issues. As the *NFIB* court correctly found, the 2016 Rule would have discouraged speakers, employers, and organizations such as SHRM from participating in, attending, and sponsoring educational seminars. Reducing employers' access to such training would have further interfered with their ability to access needed advice and guidance on labor and employment matters. The rule also would have unjustifiably burdened employers' free speech rights. *See NFIB*, 2016 WL 3766121, at *39 (finding that plaintiffs would be irreparably harmed by the 2016 Rule in part because it "[r]educ[ed] access to training, seminars, information, and other advice relating to unionization campaigns" and "[b]urden[ed] and chill[ed] First Amendment rights, including the right to express opinions on union organizing and to hire and consult with attorneys").

III. Conclusion

The 2016 Rule should be rescinded first and foremost because that rule is contrary to Congress's intention to exempt the giving and receiving of "advice" from triggering disclosure reporting under the LMRDA. The 2016 Rule is also "defective to its core," *NFIB*, 2016 WL 3766121, at *45, because it was based on flawed research, an inaccurate view of contemporary labor and employment relations, and a misrepresentation of HR professionals', labor and employment attorneys' and other consultants', and employers' current practices in seeking to avoid or respond to union organizing.

In its 2011 Comments, SHRM warned:

> [A] true inquiry into the state of affairs of the labor relations climate in the United States will disclose a factual picture far different than the one portrayed in the NPRM, where it is alleged untold millions of dollars are spent in the singular

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2016.aspx; Michael L. Wachter, *The Rise and Decline of Unions*, Regulation, Vol. 30, No. 2, pp. 23-29, Summer 2007, available at SSRN: https://ssrn.com/abstract=1001458 (theorizing that union membership has been in decline for 50 years in large part due to the change in the United States economy from a corporatist-regulated economy to one based on free competition; whereas unions are central to a corporatist regime, they are peripheral in a liberal pluralist regime).

purpose of eliminated organized labor. SHRM disputes the so-called contemporary research as not so contemporary; in some case it is marred by obvious bias as well as flaws in methodology.

2011 Comments at 3.

The 2016 Rule is premised on a highly inaccurate picture of current employers' typical response to union campaigns. Relying on outdated accounts from bygone eras, biased pro-union studies, and anecdotal accounts from union organizers, the 2016 Rule wrongly assumes that today's employers primarily respond to unionization efforts with unlawful or, at best, questionable conduct designed to "interfere" with employees' right to decide whether to unionize and to disrupt harmonious labor relations. The 2016 Rule assumes that employers, with the aid of hired "middlemen" persuaders, continue regularly to engage in intimidation, sabotage, and trickery similar to that of the employers in the 1950s whose practices prompted Congress to enact the LMRDA.

There is no credible evidence to support these views. Instead, the Department should recognize that modern HR practices take a far different approach to responding to potential unionization, an approach that often provides substantial *benefits* to employees. The 2016 Rule entirely failed to consider the heavily regulated environment in which today's employers and HR professionals operate. The Department's failure to acknowledge this regulated environment prevented it from having a full and accurate understanding of the vital role contemporary labor and employment attorneys and HR professionals play in advising employers on compliance issues and in creating pro-employee policies and practices that may reduce employees' need or desire for unionization. The Department also appeared to assume wrongly that the interests of employees and those of union organizers are the same, which is not the case.

For all of these reasons, as well as those given by the *NFIB* court, the 2016 Rule should be rescinded.

Sincerely,

Michael P. Aitken
Vice President, Government Affairs