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September 21, 2011

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

RE: RIN 1245—AA03; Labor-Management Reporting and Disclosure Act; Interpretation of the "Advice" Exemption; Notice of Proposed Rulemaking

Dear Mr. Davis:

We are pleased to submit these comments[1] on behalf of the U.S. Chamber of Commerce (Chamber) in response to the Department of Labor's (Department) proposal to change the interpretation of the "advice" exemption under the Labor Management Reporting and Disclosure Act (LMRDA) as published in the *Federal Register* on June 21, 2011.[2]

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. The vast majority of the Chamber's membership are employers as defined by the LMRDA and National Labor Relations Act (NLRA). The Chamber's membership also includes a significant number of law firms and trade associations.[3] The Department's proposal would have a significant impact on each of these groups.

I. Preliminary Statement

The Department's proposal seeks to significantly increase employer and consultant reporting under the LMRDA. These comments detail the many ways in which the Chamber disagrees with the Department's proposal as a matter of law and policy. It must be emphasized at the outset that the Department's proposal increases disclosure requirements vastly beyond anything ever contemplated by Congress.

[1] The Chamber is a member of the Coalition for a Democratic Workplace. The Coalition has submitted comments on the proposal and the Chamber has signed onto and supports the Coalition's comments. These comments do not seek to repeat each argument raised in the Coalition comments.
[2] 76 Fed. Reg. 36,178.
[3] Furthermore, as is relevant to the discussion section VIII.E, a number of the state and local chambers of commerce and trade associations that are members of the Chamber represent Native American tribes.

In 1947, Congress restored balance to the NLRA by passing the Taft-Hartley Amendments. Among the most important provisions of these amendments was the addition of section 8(c), the employer free speech provisions. Organized labor has long fought to delete the express recognition of employer free speech from the NLRA.[4] Failing in their efforts to repeal 8(c), organized labor has shifted to instead limit its effectiveness. The Employee Free Choice Act, organized labor's top legislative priority, would have codified a duty to bargain based on card check recognition. Because card check permits organizing to take place in secret, passage of EFCA would have significantly eroded an employer's opportunity to exercise its free speech rights and counter union falsehoods and rhetoric made as part of organizing campaigns.

As part of its campaign for radical amendments to American labor law, organized labor and its allies have fabricated a narrative that portrays the long decline in private sector union density in the United States as the result of flawed National Labor Relations Board (NLRB or Board) processes and employer campaigns. According to this narrative, employers have become increasingly aggressive in campaigning against unions and routinely employ coercive, illegal, and otherwise deplorable tactics in order to defeat union attempts to organize. Organized labor attempts to buttresses this narrative with numerous studies or reports of dubious credibility.

Thus far failing at legislative reforms, attention has now been turned to the adjudicatory and regulatory process in order to give organized labor the upper hand in union organizing campaigns. During the transition from the last Administration to the current Administration organized labor met with transition team officials and urged that the Department abandon its long held interpretation of "advice."[5] And now, in part relying on these same dubious arguments, the Department has made such a proposal.

Nor is this proposal made in isolation. Among the other policy initiatives taken by the Administration to chill or hinder the exercise of employer free speech are an Executive Order seeking to prevent federal contractors from being reimbursed for certain labor relations costs and a proposed rule by the NLRB to dramatically shorten the campaign period for union representation elections, among other things.[6]

As described below, the Department's proposal to abandon an interpretation followed for some 50 years is incorrect as a matter of law and policy. It also relies on studies and reports that are not credible. The Department has also failed to comply with numerous statutory and other requirements for promulgation of such regulations, not the least of which is the Regulatory Flexibility Act.

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[4] For example, the AFL-CIO's International Union Department included repeal of section 8(c) of the NLRA in its recommendations to the Commission on the Future of Worker-Management Relations. See *IUD Sets Bold Agenda for Workplace Rights: Economic Empowerment and 'Democracy on the Job,'* at 2 (1994), available at: http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1412&context=key_workplace&sei-redir=1#search=%22IUD%20Sets%20Bold%20Agenda%20Workplace%20Rights%3A%20Economic%20Empowerment%20%E2%80%98Democracy%20Job%2C%E2%80%99%22.

[5] See, e.g., *Meeting with AFL-CIO and Change to Win on Union Financial Reporting*, available at: http://otrans.3cdn.net/477184670463b202b9_ocm6iv5h3.pdf.

[6] See Executive Order 13494 (implementing regulations proposed in the *Federal Register* on April 14, 2010) and Notice of Proposed Rulemaking; Representation Procedures 76 Fed. Reg. 36,812 (June 22, 2011).

In addition, at a time when the Labor Department should be focusing on policies that will lead to economic growth and job creation, it is a travesty that instead the Department is investing resources in policy changes that will not create a single new job, but will instead create a further drag on job creation. Furthermore, we agree with President Obama's recent statement that "We should have no more regulation than the health, safety, and security of the American people require."[7] Unfortunately, this proposal fails that test.

For these and other reasons, the Chamber vigorously opposes the proposal and urges the Department to withdraw it.

II. The Proposal Radically Expands Reporting Obligations

The Department has significantly narrowed the advice exemption and has expanded reporting obligations vastly. If implemented, the proposed interpretation would be exceedingly difficult for employers and consultants to apply. This section summarizes the most significant aspects of the Department's proposal that will be referred to throughout these comments.

A. The Proposal Renders the Advice Exemption Nearly Meaningless

The Department has proposed to revise the definition of "advice" to reduce the scope of exemption from LMRDA reporting and disclosure requirements. Currently, the "advice" exemption excludes from reporting and disclosure requirements agreements between employers and their human resource management consultants, attorneys, and other services providers that do not involve direct communication to employees by the consultants, attorneys or other service providers regarding employee rights to collectively bargain.

The proposed revision of the "advice" exemption would remove the "bright-line" test of direct communication with employees and substitute a subjective test involving the intent of the agreement to assist employers to persuade employees directly or indirectly regarding their choice to collectively bargain. Even if the consultant, attorney or other service provider never directly communicates with employees, an agreement would trigger reporting and disclosure requirements by the employer (on OLMS Form10) and by the consultant, attorney or other service provider (on OLMS Form 20) if the agreement includes any services by the consultant, attorney, or other service provider

(1) to draft or edit potential employee communications materials on behalf of the employer that the employer would deliver to employees;
(2) to draft or edit potential employer policies regarding employee pay, benefits, or working conditions;
(3) to draft, edit, conduct or analyze employer surveys of employee opinions regarding pay, benefits, working conditions, or employee participation in workplace policy formation or implementation;
(4) to train the employer's managers, supervisors or administrative personnel regarding communication with employees; or
(5) to provide other services to the employer

[7] Cong. Rec. H6008 (daily ed. Sept. 8, 2011)(Statement by President Obama).

if the purpose of such drafting, editing, training or other services includes the intent by either the employer or the service provider to assist the employer to influence the decision of employees regarding their exercise of rights to organize for purposes of collective bargaining with the employer.

Nor is the proposed rule limited to labor-management relations consultants. The proposed rule is so far-reaching in its scope and implications that an interior decorator who is engaged by an employer to recommend office furnishings, arrangements, lighting and paint colors to create a pleasant and productive work environment, could trigger the proposed reporting and disclosure requirements if the intent in the mind of either the employer or the service provider involves the purpose of persuading employees in any way (for or against) regarding the exercise of their rights to organize and to bargain collectively (e.g., the employer directs the decorator to make his shop a more pleasant workplace than the union shop down the street).

B. The Detailed Checklist Demonstrates the Extraordinary Overreach of the Proposal

The proposed LM-10 form includes a detailed checklist of 16 activities to specify the type of persuader or information supplying activity that a consultant has been engaged to perform. To demonstrate the breadth of the Department's proposal, we highlight the following from the checklist: Developing personnel policies or practices and conducting a seminar for supervisors or employer representatives.

It would appear that this provision related to development of personnel policies is designed to force disclosure of those instances where a law firm is engaged to assist an employer in drafting a policy stating its preference to deal directly with its employees, rather than through a third party representative. However, it would also appear to apply to the development of any employment policy if one of the employer's objectives in developing that policy was to remain union free. Consider an employer, outside of any union organizing activity, engaging a human resource consultant to develop more generous compensation and benefits packages for employees. If the employer is motivated to retain the consultant simply by a desire to attract and retain the best people, then reporting does not appear to be triggered. But what if the employer is also motivated to hire the consultant because it believes that in offering better pay and benefits its employees will be less likely to unionize? In such a case it would appear that reporting would be required.

Directly on point is a seminar recently scheduled by the District of Columbia Bar Association (DC Bar). The DC Bar has announced that it will host a seminar on October 3, 2011, regarding the drafting of employee handbooks. The following is a description of the seminar:

> *Description: The employee handbook may be one of the most valuable business documents that you help create for your business client. When drafting the employee handbook, it is crucial to consider the company's size, its locations, the nature of its business, the composition of its workforce, whether its employees are unionized, applicable employment laws, workplace problems that it routinely faces, and the overall corporate culture. You will learn:*
>
> *1) Issues to cover in the handbook*

2) Matters not to address in the handbook
3) Language that should never appear in the handbook
4) How to draft an effective disclaimer
5) How to guard against inadvertently creating contractual obligations

The course also will cover the following topics: disclaimers; employment at will statement; equal employment opportunity (EEO) policy on discrimination, harassment, and retaliation; EEO policy on the Family and Medical Leave Act; EEO policy on reasonable accommodation; company confidential and proprietary information; employee privacy (e-mail/Internet/computer/phone-usage and monitoring); performance evaluations; open door policy; personnel files; references; safety rules; code of conduct; exempt versus non-exempt employees; salary and how it is paid; timesheets and time reporting; salary adjustments; use of best efforts/avoiding conflicts of interest; hours of operation; leave accrual and holiday list; scheduling leave time; conversion of accrued leave to cash at separation; authorization for overtime; closings for inclement weather; performance reviews; absences and tardiness; drug- and alcohol-free workplace policy; general work rules; lunch breaks; and personal calls. Sample clauses will be provided.[8]

Would attending the seminar be reportable activity for an employer? Would it be reportable for the speakers and the law firms to which they are affiliated? Would it be reportable for the DC Bar? Clearly, the seminar address subjects that may be protected activity under the NLRA (addressed below). Would the determination about reporting obligations depend on the subjective purpose of the attendees and whether they attended with even an indirect purpose of influencing employees with respect to protected concerted activity? Would the answer change if an attendee's admission fee was paid for by his or her employer or whether he or she paid with his or her own funds? Note that at the seminar attendees will receive sample policies. How would the attorneys who drafted these policies be treated under the proposal as compared to attorneys retained directly by an employer in the course of a labor dispute? What language can practitioners rely on to avoid what appear to be absurd results?

C. The Proposal Applies to Protected Concerted Activity

While most of the attention regarding the proposal has been on its narrowing of the advice exemption, the proposal would also increase the scope of covered "persuader" activity. The proposed instructions for the new LM-10 Form state that disclosure would be triggered by

> activities that have as a direct or indirect object to, explicitly or implicitly, influence the decisions of employees with respect to forming, joining or assisting a union, collective bargaining, or any protected concerted activity (such as a strike) in the workplace.[9]

The inclusion of any protected concerted activity is stunning in its breadth. The NLRB and the courts have found many actions by employees to constitute protected concerted

[8] Available at: http://www.dcbar.org/for_lawyers/events/details.cfm?eventCD=C851014&emc=lm&m=144566&l=9&v=34692110.
[9] 76 Fed. Reg. at 36,192.

activities, including some that have no bearing on the employment relationship. Consider the following examples:

1. Development of Employment Policies

In *Timekeeping Systems Inc.*,[10] the Board found that an employee's email to coworkers about a new vacation policy was protected concerted activity and that an employer violated the NLRA when it terminated the employee for his email. Under the Board's new proposal would the employer be required to disclose the arrangement with the consultant who developed the vacation policy? What if part of the consultant's deliverables had been preparing communications to employees about the new vacation policy? If the employer had asked for communications materials in part to limit the chance that employees would complain, would this attempt to influence employees about protected concerted activity be sufficient to trigger the reporting requirements?

2. Lobbying on Immigration Policy

In *Kaiser Engineers*,[11] the Board found that employees who wrote a series of letters to legislators opposing their employer's position with respect to obtaining non-immigrant worker visas for prospective employees. In affirming the Board, the Ninth Circuit stated that "the concerted activity of employees, lobbying legislators regarding changes in national policy which affect their job security, can be action taken for 'mutual aid or protection' within the meaning of §7."[12] If the lobbying by the employees was protected concerted activity, would the employer trigger the disclosure requirements if it engaged a public relations firm to help it explain its need for non-immigrant workers to its employees? Would it trigger the same disclosure requirements if it paid for television or other advertisements adverse to the employee's views?

These examples may seem extreme—they certainly do to us—however, we are not sure how we could explain that they are not covered given the broad language used by the Department.

III. The Department's Rationale for the Proposal Is Arbitrary, Capricious, and an Abuse of Discretion

The Labor Department's rationale for the proposed changes is the stunning assertion that

> as was true in the 1950s, the undisclosed use of labor relations consultants by employers interferes with employees' exercise of their protected rights to organize and bargain collectively and disrupts labor-management relations.[13]

Congress has never stated that the undisclosed use of labor relations consultants by employers interferes with employees' exercise of their protected rights to organize and bargain

[10] 323 NLRB 244 (1997).
[11] 213 NLRB 752 (1974).
[12] 538 F.2d 1379, 1385 (9th Cir. 1976).
[13] 76 Fed. Reg. at 36,190.

collectively or disrupts labor-management relations. It is a sad truth that some labor unions, some academics, and some advocates are of the view that employers should play no role in union organizing and that any employer action, other than capitulation, should be barred or highly regulated. This is the position of John Logan, Kate Bronfenbrenner, and others on whom the Department relies for its change in policy. Sadly, the Department has shown that it has adopted this position as well. But this is not the law Congress enacted in the NLRA or LMRDA.

A. The Department's Summary of Legislative History is Biased and Misleading

In the preamble of its proposal, the Department includes a section entitled "Legislative History Supports Narrowing the Interpretation of 'Advice'" that, among other things, states that the existing interpretation of the advice exemption "seems inconsistent with the legislative history of section 203 of the LMRDA."[14] The proposal then makes a handful of references to legislative history that the Department suggests support its proposed interpretation.

However, the Department's summary of legislative history is highly misleading. The legislative history of the LMRDA is extensive, consisting of numerous bills, committee reports, and hundreds of pages of debate in the Congressional Record. Yet, the Department only cites to a single document in the legislative history to support its position—the Report issued by the Senate Committee on Labor and Public Welfare to accompany S. 1555.[15] This Report was filed by the Committee on April 14, 1959. The Department cites to absolutely no legislative history in support of its position that is more recent and makes no reference to the legislative history that stands in stark contrast to its interpretation.

For starters, it should be noted that the vast majority of the LMRDA and its legislative history address union corruption not questionable tactics by employers or their consultants. Furthermore, and in contrast to the Department's assertion that the undisclosed use of consultants somehow interferes with employee rights or disrupts labor-management relations, there is no evidence that Congress ever intended to cast such dispersions on the consultant industry generally. In fact, there is ample legislative history suggesting just the opposite. Indeed, this is even true in the scant legislative history referenced by the Department, as the Senate Committee distinguished between "middlemen" and "legitimate labor consultants."[16]

This distinction arises time and again in the legislative history, for example, during the McClellan Committee hearings, the Chairman remarked:

> I am compelled to observe that I see nothing wrong in seeking counsel and employing legal counsel, and employing even experts in labor-management relations … but it looks to me like we are developing a pattern of what amounts to a payoff to union officials to have them disregard the rights of workingmen or to be reluctant, if not refuse, to press any drive for unionization.[17]

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[14] 76 Fed. Reg. at 36,184.
[15] *Id.* Note that the Department only cites to five pages of this report, pages 2, 10, 11, 12, 39, and 40.
[16] 76 Fed. Reg. at 36,184. Citing S. Rpt. 187 at 39-40, LMRDA Leg. Hist. at 436-36.
[17] ROBERT F. KENNEDY, THE ENEMY WITHIN: THE MCCLELLAN COMMITTEE'S CRUSADE AGAINST JIMMY HOFFA AND CORRUPT LABOR UNIONS 222 (Da Capo Press 1994).

An additional early comment came from former Labor Secretary James P. Mitchell, who stated:

> In its report, the select committee concludes that employers had violated the rights of their employees under the Taft-Hartley Act by interfering with their organization activities and their right to bargain collectively. … Companies made substantial payments to this middleman and his agents which were used in establishing employee committees to oppose unions' organizational campaigns or in creating company unions. ... All these activities would appear to be unfair labor practices under the Taft-Hartley Act. However, the procedures provided by that act must be bolstered against these employer payments to middlemen for activities such as those found by the committee in this case.[18]

During debate on the legislation that eventually became the LMRDA, time and again Members of Congress called out the practices that they wanted to ensure were subject to disclosure. Senator John Kennedy referred to employers "interfering" with protected rights,[19] while Senator McGovern put the spotlight on "middlemen, racketeers, and unscrupulous antiunion employers" as distinguished from "an otherwise honest labor-management field."[20]

In addition, the Department neglects to include any reference to legislative history offering a contrary view, such as the Conference Report on the bill that was adopted on an overwhelmingly bipartisan basis that describes the advice exemption as "broad."[21]

The point here is that in the voluminous legislative history of the LMRDA, the overwhelming reference to employer-consultant activities that Congress sought disclosure of are of employer payments to consultants serving to establish unlawful committees, or even company unions, or payments to corrupt union officials. The legislative history is devoid of any indication that Congress sough disclosure of the sorts of activities that the Department seeks to compel disclosure of today—no reference is made to "unscrupulous" lawyers drafting materials or even speeches for management to use, no reference is made to "nefarious" lawyers drafting employee handbooks, and no one accused local bar associations or law firms for "interfering" with protected rights by holding seminars so that lawyers, clients, or others could learn about the law of labor-management relations. Accordingly, the Department's selective reading of legislative history provides no basis for its proposed policy change.

B. The Department's View of Contemporary Labor-Management Relations Rests on Deeply Flawed Research

The Department's proposal asserts that there has been a proliferation of the consultant industry and that this is one reason why the Department must adopt policy to mandate more reporting by employers and consultants. As will be made clear after examining the studies on which the Department relies, this is circular reasoning for the principle reason that the types of

[18] LMRDA Leg. Hist. at 994.
[19] *Id*. at 1260.
[20] *Id*. at 1413-14.
[21] H.R. Rep. No. 1147, 86th Cong., 1st Sess. 33 (1959), LMRDA Leg. Hist. 937.

conduct and activities that the studies refer to are the type that the Department now seeks to disclose, and are NOT the type contemplated by Congress in enacting the LMRDA. The studies also suffer from other various flaws, a few of which are described in more detail below.

1. Overview

Supporters of the Board's proposal have relied on numerous studies and reports that, unfortunately, suffer from very serious flaws. It is important that the Department recognize these flaws before it considers relying on the conclusions that some have drawn from these studies. Before reviewing the individual studies and reports, it is crucial to note that the arguments by rule supporters appear to be following a familiar script. With private sector union density now below seven percent, organized labor has pushed for policy changes that will make union organizing easier, regardless of whether American workers desire union representation or not. A principal part of their campaign is demonizing employers as well as the NLRA and now the LMRDA.

In support of their policy agenda, allies of organized labor frequently cite various studies to support the claim that employer coercion, flawed labor law, and flawed Board processes stifle a considerable but unrealized demand for union representation. In this section of our comments we examine several of the studies most often relied upon to support the proposed rule and other policy changes organized labor seeks, such as effectively doing away with Board supervised elections through the Employee Free Choice Act. The conclusion that we draw is that these studies lack sufficient credibility and analytical rigor to justify any labor policy changes.[22]

II. Bronfenbrenner

Among the most frequently cited papers are those produced by Cornell professor Kate Bronfenbrenner, including the 2000 report *Uneasy Terrain: The Impact of Capital Mobility on Workers, Wages, and Union Organizing*, and the 2009 report *No Holds Barred-The Intensification of Employer Opposition to Organizing*.

No Holds Barred concludes that a "coercive and punitive climate for organizing" undermines employee free choice in choosing union representation and necessarily dictates "serious labor law reform."[23] According to Bronfenbrenner:

> Our findings suggest that the aspirations for representation are being thwarted by a coercive and punitive climate for organizing that goes unrestrained due to a fundamentally flawed regulatory regime that neither protects [workers'] rights nor provides any disincentives for employers to continue disregarding the law. Moreover, many of the employer tactics that create a punitive and coercive atmosphere are, in fact,

[22] For a more detailed analysis, see *Union Studies of Employer Coercion Lack Credibility and Integrity*, a white paper produced as part of the U.S. Chamber's series *Responding to Union Rhetoric: The Reality of the American Workplace*, published in 2009 during the debate over the Employee Free Choice Act and available at: http://www.uschamber.com/reports/responding-union-rhetoric-reality-american-workplace.

[23] Kate Bronfenbrenner, *No Holds Barred-The Intensification of Employer Opposition to Organizing*, May 20, 2009 at 1, Economic Policy Institute Briefing Paper #235, *available at* http://www.epi.org/publications/entry/bp235/.

> legal. Unless serious labor law reform with real penalties is enacted, only a fraction of the workers who seek representation under the National Labor Relations Act will be successful. If recent trends continue, then there will no longer be a functioning legal mechanism to effectively protect the right of private-sector workers to organize and collectively bargain.[24]

Although *No Holds Barred* claims to be a "comprehensive analysis" based on "unique and highly credible information," the methodologies and analytical framework of Bronfenbrenner's piece are inherently flawed. For example, the primary source of the anecdotal "evidence" Bronfenbrenner used to support her conclusions comes from "in depth surveys with the lead organizers" involved in the organizing campaigns included in the "NLRB election sample" of approximately 1000 NLRB elections conducted between 1999 and 2003.[25] Using the lead union organizers involved in these campaigns can hardly be considered using unbiased sources. To the contrary, the lead organizers would have every incentive to exaggerate and falsify the data provided to Bronfenbrenner in order either to provide excuses for their failure to win the underlying election or to promote the goals of organized labor to secure labor law reforms designed to make organizing easier. Yet, Bronfenbrenner fails to even consider the possible bias of lead union organizers as a primary source.

Although she relies without reservation on union organizers as a primary source, Bronfenbrenner abruptly dismisses employers as a countervailing source—claiming employers would likely falsify any information provided because "the overwhelming majority of employers are engaging in at least one or more illegal behaviors."[26] According to Bronfenbrenner:

> Not only would it be next to impossible to get employers to complete surveys in which they honestly reported on illegal activity, but that kind of question would not be permitted by university institutional review boards since it might put the subjects at risk of legal action.[27]

Bronfenbrenner immediately ascribes dilatory motives to employers and conveniently dismisses any information employers could provide to contradict the presumptions and anecdotal evidence provided by the supposedly unbiased union organizers. Such open and unfounded hostility and bias discredits any analysis and conclusions that flow from the data. Nevertheless, in response to critics who question the reliability of using union organizers as a data source, Bronfenbrenner claims the data they provide is supported by "NLRB decisions and transcripts, primary campaign documents, first contracts, and newspaper reports"—the likely sources of which are the very union organizers themselves.[28] Such circular reasoning hardly rehabilitates her study's credibility.

3. Union Attacks on Employer Consultants

Most critics of employers' use of consultants cite to the work of John Logan, currently affiliated with San Francisco State University and the University of California-Berkeley Labor

[24] *Id.* at 3.
[25] *Id.* at tbl. 1.
[26] *Id.* at 5-6.
[27] *Id.* at 6.
[28] *Id.* at 5.

Center and previously affiliated with the London School of Economics, who has written extensively on this issue. Representative of his writings are two papers, *Consultants, lawyers, and the 'union free' movement in the USA since the 1970s*[29] and *The Union Avoidance Industry in the United States*.[30] Logan's work describes the growth of the use of consultants by employers faced with organizing campaigns and describes numerous tactics that these consultants have reportedly used over the last four decades.

To be sure, Logan describes some tactics that are illegal and reprehensible. For example, he claims that "[s]ome consultants tell employers to fire a few union activists … and teach them how to make these terminations appear legitimate."[31] However, many of the tactics Logan describes are perfectly legal and are tactics that most neutral observes would likely agree are perfectly legitimate. For example, he describes as consultant "propaganda" information about what is in a union's constitution and information related to union dues requirements.[32] Likewise, he is critical of employers informing employees about some of the basic legal consequences of unionization, such as surrendering the right to deal directly with management.[33]

The credibility of Logan's, and similar work, is significantly damaged by its failure to distinguish between legal and illegal conduct, perhaps because many within organized labor believe employers should have no role in union organizing campaigns[34] and that employer free speech should be abolished.[35] It appears that the Department has adopted the same logic in its proposed interpretation, contrary to the weight of legislative history.

C. Alleged Underreporting Problem

The Department also bases the need for a new interpretation on its conclusion that there is a significant underreporting problem.[36] However, this conclusion is based not by reference to current law, but based on the beliefs of the pro-union academics whose alleged vast catalogue of unreported activity includes largely legal activity that no one is presently under an obligation to disclose. In other words, the Department is not asserting that there is an underreporting problem under the current interpretation, only that there is an underreporting problem based on what it proposes the law should be. This is a significant difference, and should not be used as a rationale for such a radical departure from the current, well understood standard.

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[29] John Logan, *Consultants, lawyers, and the 'union free' movement in the USA since the 1970s*, 33 INDUS. REL. J. 197 (2002), *available at* http://www.americanrightsatwork.org/dmdocuments/OtherResources/Logan-Consultants.pdf.

[30] John Logan, *The Union Avoidance Industry in the United States*, 44 BRIT. J. INDUS. REL. 651 (2006), *available at* http://www.americanrightsatwork.org/dmdocuments/OtherResources/JohnLogan12_2006UnionAvoidance.pdf.

[31] Logan, *supra* note 28, at 207.

[32] *Id.* at 203.

[33] *Id.*

[34] *See, e.g.*, Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L.REV. 495, 585-87 (1993).

[35] For example, the AFL-CIO's International Union Department included repeal of section 8(c) of the NLRA in its recommendations to the Commission on the Future of Worker-Management Relations. *See IUD Sets Bold Agenda for Workplace Rights: Economic Empowerment and 'Democracy on the Job'*, at 2 (1994), *available at* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1412&context=key_workplace.

[36] 76 Fed. Reg. at 36,186-87.

IV. The Proposal Is Inconsistent with the Free Speech Provisions of the NLRA and LMRDA

Section 8(c) of the National Labor Relations Act explicitly recognizes the free speech rights of employers in union organizing campaigns, among other things. It was necessary for Congress to include 8(c) as part of the 1947 Taft-Hartley Amendments because the Board had sought to impose dramatic restrictions on employer speech in the context of union campaigns.[37] The LMRDA also expressly recognizes the importance of this provision by including section 203(f) that states that "Nothing in this section shall be construed as an amendment to, or modification of, the rights protected by section 8(c) of the National Labor Relations Act, as amended."

The Department may claim that it is not making a direct assault on the free speech rights of employers, but this assertion would be without merit. The NLRA and the interpretations of it by the NLRB and the Courts are not easy to navigate without the assistance of counsel. An employer has the right to oppose (or support) unionization of its workforce, and has the right to express that opinion, but must be very careful in exercising that right, lest it inadvertently cross the line and be subject to unfair labor practice proceedings. Access to counsel is therefore critical in a union campaign. But as the Department knows, most management lawyers do not wish to engage in any activity that is arguably reportable persuader activity because it will force them to disclose client confidences, not just for clients for whom persuader work is performed, but for any labor relations client. The result of the Department's proposal will be that many attorneys and law firms will cease offering labor relations advice altogether. Others who wish to avoid the disclosure requirements will be severely constrained in how they may advise an employer who genuinely seeks guidance in how to express its views in the face of an organizing campaign. The bottom line is that the effect, whether stated or not, of the proposal will be to chill employer free speech expressly contrary to the NLRA and LMRDA.

V. The Proposal Is Inconsistent with the LMRDA's Statutory Advice Exemption

At its most basic level, section 203(c) of the LMRDA contains a simple exemption from the reporting requirements of section 203(a) and (b). While sections 203(a) and (b) require disclosure of certain arrangements undertaken where the purpose is, directly or indirectly, persuasion of employees, section 203(c) exempts arrangements where a consultant provides "advice."

In its discussion of the textual basis for the current and proposed interpretation, the Department creates a false dichotomy between "advice" and "persuader activity." It is this false dichotomy on which the Department bases its new interpretation.

This test would arguably be appropriate if Congress had not included section 203(c) in the LMRDA. In such a case, the test would simply be whether the activity in question was designed to persuade—essentially what the Department has proposed in its NPRM. However, section 203(c) does exist and the statute must not be read in such a way as to make the provision meaningless. Sections 203(a) and (b) require reporting for certain persuader activity. Section

[37] See, e.g., *Schult Trailers*, 28 NLRB 975 (1941).

203(c) exempts from those requirements the provision of advice. It matters not if the purpose of the advice is persuasion—in fact, Congress assumed a direct or indirect purpose of the advice would be persuasion, otherwise there would be no need for the advice exemption whatsoever.

VI. The Proposal Ignores Attorney-Client Privilege and Confidences

The Department's proposal is bad public policy for a number of reasons. Not the least of which are its failure to respect attorney-client privilege and client confidences. For example, consider the Supreme Court's statement in *Upjohn Co. v. United States*,[38] where the Court emphasized that the attorney-client privilege "recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."

The proposal would seek disclosure of significant information related to the relationship between attorney and client. Among these are client names, fees, and types of services provided. Indeed, in all but one Federal Circuit, employers may be compelled to disclose such information not just for clients to whom they provide "persuader" services, but for all labor relations clients.

However, the Department has paid almost no attention to how its proposal would impact the attorney-client relationship and strong public policy arguments favoring attorney-client privilege and policy protecting client confidences. Indeed, the proposal very quickly summarizes its interpretation of common law as generally not considering client identity, fees, and scope and nature of work as proper subjects of attorney-client privilege, citing to section 69 of the Restatement (Third) of the Law Governing Lawyers. Regardless of the merits of this argument, we find it shocking that the Department says nothing about the strong public policy favoring the protection of client confidences, including client name, fees, and the nature of work performed for the client. Indeed, the same Restatement cited by the Department cites these principles just prior to the provision cited by the Department. This public policy argument is so strong that under section 63 of the Restatement attorneys are generally not able to make disclosures compelled by law without first raising all reasonable objections prior to making such a disclosure.

The Model Rules of Professional Conduct also recognize this duty in Rule 1.6. Comment 2 of Rule 1.6 states:

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. … This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based

[38] 449 U.S. 383 (1981).

upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.[39]

Yet nowhere in the Department's proposal are these strong public policy reasons addressed. The Model Rules, as well as many state laws, strongly favors encouraging employers to seek legal assistance and counsel, and when doing so, to communicate freely. But the Department's proposal ignores this, instead seeking to bully and intimidate employers from seeking counsel. The Department cannot seriously believe that its proposal will survive a challenge under the arbitrary and capricious test without addressing this important issue.[40]

VII. The Proposal Violates the Administrative Procedure Act

The Department maintains that its proposal is a mere interpretive rule, and as such is not subject to the notice and comment requirements of the Administrative Procedure Act (APA).[41] However, given the dramatic new burdens the proposal would place on employers and consultants, the Department cannot hide behind the APA's interpretive rule exception. While a comprehensive discussion of this matter is beyond the scope of these comments, there are ample directives and case law on point demonstrating that the proposed change is in fact a regulation subject to the Administrative Procedure Act's notice and comment provisions.[42]

As has been demonstrated above, the Department's proposal fails to satisfy the Administrative Procedure Act as it is arbitrary, capricious, and an abuse of discretion, and because it is in excess of statutory jurisdiction, authority, or limitations or short of statutory right, among other reasons.

VIII. Regulatory Procedures

The Department originally announced a 60-day comment period on the proposal. On July 13, 2011, the Chamber requested that the Department extend the comment period for an additional 90 days past the original deadline of August 22, 2011. Among the reasons we sought a 90 day extension of time to file comments was because it was clear to us that the Department's analysis of the costs imposed by the proposal were deficient in a number of important respects and that since the Department had failed in its duty to perform a proper analysis, stakeholders

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[39] Available at: http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html.

[40] As the Chamber was preparing to submit these comments, we learned that the American Bar Association had submitted comments raising this and similar points. While we are still reviewing the ABA's comments, we certainly agree with their interpretation that the proposal will undermine the confidential lawyer-client relationship and the employer's right to counsel.

[41] 76 Fed. Reg. at 36,182 & n.5.

[42] See FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES at 6 (Jan. 18, 2007), available at: http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf; *Gen. Elec. Co. v. EPA*, 290 F.3d 377 (D.C. Cir. 2002)(striking down PCB risk assessment guidance as legislative rule requiring notice and comment); *Appalachian Power Co. v. EPA*, 208 F.3d 1015 (D.C. Cir. 2000)(striking down emissions monitoring guidance as legislative rule requiring notice and comment); *Chamber of Commerce v. Dep't of Labor*, 174 F.3d 206 (D.C. Cir. 1999)(striking down OSHA Directive as legislative rule requiring notice and comment).

would need significant time to complete comprehensive analyses. The Department did grant an extension of time to file, but only for 30 days, not the 90 days requested.

We appreciate the fact that the Department extended the deadline to file comments, though the short extension has not provided us with enough time to conduct a full analysis of the burdens that would be imposed should the proposal be enacted. Therefore, the following discussion represents a partial analysis, with some costs identified with more specificity than others. We urge the Department to carefully consider re-opening of the comment period so that it may have the benefit of a more complete analysis.

A. Partial Analysis of Pre-Filing Costs

Importantly, nothing in the proposed rule predicates the triggering of reporting and disclosure requirements upon the existence of a real and immediate union organizing campaign or organizing election petition filing with respect to the subject workplace. Any employer who retains consultants to assist in effectuating pro-employee and positive workplace policies will trigger the requirement that the employer report and disclose such service agreements on OLMS Form 10 and that the engaged service providers report their services on OLMS Form 20. Even employers who never find the need to file the OLMS Form 10 will incur compliance costs associated with the proposed rule because of the need to conduct more careful and thorough reviews of their service arrangements than is necessary under the current "bright line" standard.

To avoid possibly triggering Form 10 reporting requirements or to avoid the time and trouble of defending themselves from OLMS enforcement claims that they failed to file required reports and disclosures, some employers can reasonably be expected to curtail their use of the services of attorneys and human resource management consultants. Such response to the proposed rule is one that can be reasonably expected by a prudent employer, and such response which is induced by the proposed rule will have an adverse economic impact on the demand for services and on employment in the legal and human resource management consulting services sectors.

Misunderstandings between client employers and service providers will likely result in significant confusion as some arrangements and services may be identified on Form 10s but matching Form 20 reports may not be filed because the service provider did not share the client's perspective regarding the engagement. Similarly, some arrangements and services provided to employers identified by service providers on Form 20s may not correspond to Form 10 filings because the client employer did not perceive the arrangement in the same way. Such mismatches between Form 10 and Form 20 filings may trigger OLMS enforcement investigations that create needless litigation and costs for all parties involved. To avoid such confusions client employers and service providers will incur significant cross-communication costs to inform one another regarding Form 10 and Form 20 filing actions.

The legal liability of service providers to report and disclose their service agreements with the employer clients will be triggered regardless of their own direct knowledge of the intentions of their clients. The proposed rule puts service providers in the legally awkward position of having to guess at their clients' motives. Service providers, especially human resource management consultants and attorneys who provide labor law advice, will need to carefully scrutinize the content and potential motivations associated with each of their client engagements. Service providers will need to institute new business protocols, modify contracts, and institute new internal records systems and work product monitoring systems to ensure that

they are able to identify situations where their OLMS Form 20 reporting requirements are triggered. Human resource management consultants, attorneys, and other potentially affected service providers will incur costs because of the proposed rule even if they are never required to actually file a Form 20. The proposed broadening of the triggers for Form 20 filing requirements are so ambiguous and subjective that significant care, time and expense will be required by every potentially affected service provider to ensure whether they do or do not have a filing obligation. To avoid charges of violating the regulation, service providers may be driven by prudence to report arrangements where they even suspect that a client may have had a "persuader" motivation in relation to the advice or service requested.

The Department of Labor's assertions that the proposed regulation is not a major regulation as defined by the Unfunded Mandates Act and not an economically significant regulation as defined by Executive Order 12866 are clearly wrong. The Department's estimate that the proposed rule will have an economic cost burden of $825,866 is based on the following errors and omissions (among others).

1. The Department economic analysis ignored the vast majority of firms impacted by the proposed rule

The Department based its estimates of numbers of employers and service providers who would experience cost burdens under the proposed rule only on an estimate of the number of employers and service providers who would actually have the obligation to file Form's 10 and 20. The Department estimated 2,484 additional Form 10 filers and 2,410 additional Form 20 filers. The Department based its estimate on data regarding the number of union organizing petitions filed each year, which in itself underestimates the number of employers who would actually need to file Form 10 or the number of service providers who would need to file Form 20, because filing obligations arise under broader conditions than the filing of an election petition.

While an estimate of the number of actual Form 10 or Form 20 filers may have been appropriate for purposes of estimating the reporting burden under the Paperwork Reduction Act, that estimate limited to actual filers does not provide the correct basis for estimating the economic impact for purposes of Executive Order 12688, the Unfunded Mandates Act or for analysis of small business impacts under the Regulatory Flexibility Act. As noted above, many businesses (both employers and service providers) will be required because of the expanded definition of reportable arrangements to devote additional time and resources to the task of determining each year whether or not they have any obligation to file a Form 10 or Form 20 report.

This results in a real and significant cost burden on private employers in the aggregate. In 2008, according to U.S. Census, Statistics of U.S. Business data there were a total of 5,930,132 private business firms in the U.S., and each of these may be affected in some way by the increased time and expense necessary to determine their compliance obligations under the proposed rule. Of these businesses, 2,536,606 firms had five or more employees, 236,012 had 50 or more employees, and 18,469 had 500 or more employees.

Even if the average cost burden were a relatively small amount of $175.18 that the Department estimated as the average cost of form 10 compliance, and were only applied to the 2.5 million firms with five or more employees, the aggregate cost on private business would be

over $444 million per year and clearly in excess of the amount required to define the proposed rule as a major rule under the Unfunded Mandates Act.

The Chamber's own more detailed analysis that takes into account realistic time requirements for different size categories of business found that the cost of annual reviews to determine whether or not Form 10 must be filed would cost businesses with five or more employees between $204 million and $408 million per year (see Table 1). The range covers just the cost of making the determination of whether or not the form must be filed and does not include the cost of actually completing and filing the form for those who are required to do so.

For Form 20 filing obligations, the Department's estimate of 2,410 additional Form 20 filers ignores the fact that the proposed rule will impose additional annual cost burdens for review of their client services to determine whether or not Form 20 filing is required on all of the 5,806 Human Resource Management Consultant services firms (NAICCS code 541612) and 166296 Offices of Lawyers firms (NAICS code 541110). The Chamber estimates that these costs for determination of Form 20 filing requirement status will cost these firms between $82.1 million and $385.5 million per year (see Table 1).

Table 1, below, summarizes the various components and ranges of compliance cost estimated by the Chamber. Additional details regarding the Chamber's assumptions underlying these calculations are provided in notes following Table 1.

2. The Department underestimated the initial cost of familiarization with the new regulation

Even if many businesses will arguably have small ongoing annual costs to review their service agreements and determine annually whether or not they have a reporting obligation, it will still be the case that *every* business will need to be informed about the content of the new rule in order to assess whether or not it imposes requirements that would require on-going compliance review and monitoring. Familiarization involves at a minimum the time that it takes a business senior manager to read and understand the regulation and the instructions accompanying the form, but in larger firms it may be necessary for more than one person to become familiar with the regulation and it may be necessary to seek legal counsel to fully understand the implications and obligations imposed by the regulation.

The Department grossly underestimated the labor time needed to read the proposed regulation. The Department's estimates of 20 minutes reading time for the instructions to Form 10 and 10 minutes reading time for the instructions to Form 20 is not based on any empirical data or experiment, and it is an arbitrary and unreasonable conjecture. To fully comprehend the proposed rule it is reasonable to presume that a prudent business executive will read the entire 52 pages of fine print published in the Federal Register, including the important explanatory material in the preamble, the regulatory text itself, and the attached forms and instructions. This is a task that will require at least two hours of time, and in larger firms many more labor hours as multiple reviewers read the rule. The cost of legal counsel would push the initial familiarization cost even higher.

Again, the Department's error seems to be related to its confusion about the distinction between Paperwork Reduction Act reporting time burden computations and full analysis of the economic impact of the proposed rule. The initial familiarization cost of a complex and broadly applicable rule necessarily involves more time and attention by senior management than does the routine completion of reporting forms in subsequent years once the requirements are familiar.

The Chamber estimates that the initial year familiarization costs associated with the proposed rule will be between $549.6 million and $1.1 billion for potential Form 10 filers and between $74.6 million and $298.3 million for potential Form 20 filers. Table 1, below summarizes the Chamber's estimated cost burdens for the initial familiarization component.

For just the initial familiarization costs and the pre-filing annual monitoring and review costs to determine filing requirement status (whether required to file or not) for private firms with five or more employees, the Chamber estimates that the proposed rule will impose a first year cost burden on the economy of $910.1 million to $2.2 billion and subsequent annual costs of $285.9 million to $793.1 million. The costs, summarized in Table 1, below, are costs broadly applicable across the range of businesses with five or more employees for familiarization with the regulation and for annual review to determine whether or not Forms 10 and 20 must be filed. These are all pre-filing costs that will accrue regardless of whether an employer or service provider ultimately must file either Form 10 or Form 20.

The Chamber's estimates are based on informed estimates of the amount of labor time required for firms to become initially familiar with the new requirements should the proposed rule be promulgated. Estimates are presented as ranges to illustrate the sensitivity of costs to these important time parameters. The estimates below do not represent all of the potential compliance cost burdens associated with the proposed rule, but only two readily identifiable elements of the cost burdens.

Our estimates of time requirements were based on input from individuals knowledgeable about businesses' regulatory compliance processes, but do not represent the results of a large-scale survey of actual practices or of controlled experiments because the permitted public comment time was too limited. We urge the Department to conduct further research, including surveys of potentially affected firms to ascertain the extent to which they purchase or provide services that could trigger LMRD obligations and to determine the extent to which businesses will need to implement additional monitoring and review activities to determine their compliance obligations. We also urge the Department to conduct controlled experiments to determine realistic time parameters for reading and comprehending the proposed LMRD requirements.

We also note that the Department did not present any monetized estimate of the benefits that might accrue to workers or society from the proposed rule. In light of the large potential costs that the proposed rule may impose, the Department should seriously revisit the question of monetizing benefits. A useful approach might be to issue a public Request for Information to solicit advice and proposals from knowledgeable researchers and practitioners regarding ways to estimate the benefits in monetary terms.

Table 1 Summary of Estimated Compliance Costs for Initial Familiarization and for Annual Pre-filing Compliance Review		
	Low time scenario	**Higher time scenario**
Initial familiarization cost		
Form 10 Potential Filers	$549,641,934.50	$1,099,283,869
Form 20 Potential Filers	$74,583,499.54	$298,333,998
Annual compliance review cost		
Form 10 potential filers	$203,779,059	$407,558,119
Form 20 potential filers	$82,131,903	$385,498,171
Total Pre-filing costs first year	$910,136,396.75	$2,190,674,157
Total Pre-filing costs each subsequent year	$285,910,963	$793,056,289

3. Notes for Table 1:

For all of the calculations shown in Table 1, time was valued at $108.34 per hour which is the latest (2011 Q1) hourly wage for private chief executive officers ($80.34 per hour) as reported by the Bureau of Labor Statistics' Occupational Employment Statistics program plus 30% to add average non-wage compensation as reported by the BLS Employer Cost of Employee Compensation program.

The computation of costs for initial familiarization costs for potential Form 10 filers are based on 2,536,606 firms with five or more employees and a range of familiarization time of 2 hours to 4 hours labor hours for the average firm. In arriving at this range we considered actual reading time for the 52 page Federal Register notice, additional information retrieval and reading from other relevant sources (such as online commentaries). These costs do not account for the additional costs of legal counsel.

The computation of costs for potential Form 20 filers are based on 172,102 potentially affected firms (5,806 Human Resource Management Consulting firms plus 166,296 Lawyer Offices) and a range of 4 to 16 hours per firm on average for the initial familiarization process. The familiarization time for potential Form 20 filers is reasonably expected to average more than for potential Form 10 filers because of the complexity and diversity of the business activities and client relationships involved for these firms.

The computation annual compliance review costs for potential Form 10 filers was based on 2,536,600 firms with 5 or more establishments and an estimated one-half hour to one hour additional annual monitoring, recordkeeping and review time than is required under the existing regulation. In addition, for the 236,012 firms with 50 or more employees, it was assumed that an additional 1.5 to 3 hours of annual compliance review time would be needed. For the 18,469 firms with 500 or more employees a further addition of 14 to 28 annual labor hours of for compliance monitoring, recordkeeping and review was added. These increments of compliance review time for the larger firms reflect the larger number of potential transactions that must be tracked and analyzed and the greater complexity of operations. The numbers of firms by

employment size categories were obtained from the most recent (2008) data provided at www.census.gov/econ/ssub/.

The computation of annual compliance review costs for potential Form 20 filers reflected 5,806 firms in the NAICS code 541612 category for Human Resource Management Consulting and the 166,296 firms in the NAICS code 541110 category for Offices of Lawyers. For the human resources management firms the time estimated for conducting the annual compliance review process ranged from 16 to 40 hours. For Officers of Lawyers the estimated time for conducting the annual compliance review ranged from 4 to 20 hours. The higher estimates for the human resource management consulting firms reflects observations regarding the diversity and complexity of their services and the numerous ways in which the motivations underlying their service relationships may be construed. The resulting annual cost for Human Resource Management Consulting firms was $10,064,538 to $25,161,346, and the resulting annual cost for lawyer offices was $74,067,385 to $360,336,825. The relatively large upper range for lawyers (20 hours on average and $360.3 million in aggregate annual cost) reflects uncertainty regarding the extent to which non-specialist lawyers venture into the area of providing advice or services to clients regarding labor law issues. This uncertainty is particularly relevant for the large number of small law firms that serve predominantly small business clients. DOL could address this uncertainty by conducting a random survey of law firms regarding the extent to which they engage in advice or other services that may be construed to trigger the proposed LMDR obligations. The sum across the two categories of potential Form 20 filers is shown in Table 1.

The 5,806 Human Resource Consulting service providers and the 166,296 Offices of Lawyers included in the estimates associated with Form 20 filers were not deducted from the 2,536, 606 firms with five or more employees for whom costs associated with Form 10 potential filing burden were estimated because potential Form 20 filers could also have potential to be Form 10 filers. They will need to monitor and review their own service purchase arrangements to identify whether or not there are any that could be construed as triggering reporting requirement for activities related to their own employees.

B. Additional Obvious Flaws with Burden Estimates

The above discussion has only examined flaws with the Department's methodology occurring prior to the time of filing. As noted, we have not had time for a comprehensive analysis of additional flaws in the Department's methodology. However, we have identified further flaws that warrant a detailed analysis.

1. Dramatic Underestimation of Number of Filers

The Department has largely derived its estimates on the number of filers of both the LM-20 and LM-10 forms on two data points. The first is the total number of representation and decertification elections supervised by the NLRB and the NMB. The second is an assumption that in 75% of such cases, the employer will utilize a consultant who will engage in reportable activity. Both of these assumptions are deeply flawed.

The Department admits that "there is no ready proxy for estimating the use of employer consultants in contexts other than election cases, such as employer efforts to persuade employees

during collective bargaining, a strike, or other labor dispute."[43] However, the Department believes that the number of representation and decertification elections conducted by the NLRB and NMB represent "an appropriate benchmark."[44] There are several reasons why this is not an appropriate benchmark.

First, given the narrow view the Department intends to take with respect to the advice exemption and the broad view of reporting obligations, it is likely that the vast majority of reportable activity will not involve representation or decertification campaigns at all. The Department's failure to make any estimate of reportable activity occurring outside of representation or decertification campaigns is, at best, arbitrary and capricious.

In fact, as the Department well knows, most labor unions are moving away from NLRB supervised secret ballot elections and instead prefer to mount campaigns based on card check recognition. In 2008, former NLRB Member and Chairman, Wilma Liebman, observed that unions "have already made a dramatic turn away from using the NLRB's election machinery, in favor of winning voluntary recognition directly from employers." [45] This is buttressed by the comments of several labor leaders, such as a 2005 comment from Stewart Acuff, national organizing director for the AFL-CIO, who said, "Most of the unions that have large-scale organizing capacity are moving as much as they can away from the NLRB organizing process."[46] Similarly, Mike Fishman, president of Local 32BJ of SEIU, stated "we don't do elections."[47] And, perhaps most famously, Bruce Raynor, then-president of Unite, told the New York Times "There's no reason to subject the workers to an election."[48] Clearly, some significant percentage of employers facing union card check campaigns will likely engage law firms and consultants to provide them with counsel of the type that the Department now seeks disclosure of. This will be especially true where the union or organizations involved are waging a corporate campaign against the employer.

Likewise, many employers attend seminars hosted by law firms or consultants whether or not there is an ongoing union campaign. In fact, in an informal survey the Chamber conducted of large law firms that conduct such seminars, there was a consensus view that a majority of attendees are not facing any current campaign. Yet, the Department's proposal would force disclosure by both the law firm and the employer in such circumstances.

We are not aware of any reliable existing database to determine the number of card check or corporate campaigns underway at any one time. Nor are we aware of any existing data on the

[43] 76 Fed. Reg. at 36,199.
[44] *Id*.
[45] *Leibman Says Next Board Can Only Make 'Incremental Improvements' in Labor Law*, DAILY LABOR REPORT (BNA), Nov. 24, 2008.
[46] Timothy Aeppel, *The Outlook: Not-So-Big Labor Enlists New Methods for Greater Leverage*, THE WALL STREET JOURNAL A2 (August 29, 2005).
[47] *Id*.
[48] Steven Greenhouse, *Labor Turns to a Pivitol Organizing Drive*, THE NEW YORK TIMES (May 31, 2003).

number of union avoidance and similar seminars sponsored each year by law firms. Nevertheless, it is incumbent upon the Department to at least make some reasonable attempt at discerning the number. Simply assuming that there are no such employers or consultants is again, arbitrary and capricious at best.

Furthermore, we again note that the Department here seems to misunderstand the breadth of its proposal. As noted above, the Department has admitted that it does not have a proxy for arriving at data representing "employer effort to persuade employees during collective bargaining, a strike, or other labor dispute."[49] However, the Department's proposal is not limited to such circumstances as it applies to "any concerted activity" whether or not there is a labor dispute.[50] Again, we are not aware of any reasonable way to estimate the number of employees who engage in concerted activity of any kind or how many employers seek to influence that activity. But simply assuming it is nonexistent does not do justice to the Regulatory Flexibility Act and other important regulatory processes established by law and executive order.

2. Improper Comparison to LM-30 Form

In determining the time needed to fill out and submit the LM-20 and LM-10 form, the Department relied on "similar estimates utilized in the recent LM-30 Labor Organization Officer and Employee Report rulemaking."[51] As the Department notes, there are differences between the union officers who must complete the LM-30 and attorneys who complete the LM-20 and LM-10 forms and there are differences in the information that must be disclosed. However, the Department believes the comparison is appropriate due to "similarities in the forms, particularly the information items and length of the instructions."[52]

However, what the Department does not consider is the fact that LM-30 filers are individuals while LM-10 and LM-20 filers will largely be organizations. It stands to reason that it will be relatively easier for an individual to be aware of the activities that he or she has undertaken and, if sufficiently aware of the reporting requirements, determine whether disclosure is necessary. On the other hand, reports for organizations are likely to take considerably more time and resources as multiple people and processes may be involved to ensure that the activities of all employees are properly accounted for. The Department should consider the increased burdens that reporting by organizations will incur over reporting by individuals.

3. Incorrect Assumption that Employers and Consultants Have Necessary Records

The Department assumes that "consultants retain more of the records needed to complete the form in the normal course of their business"[53] and that "employers retain most of the records

[49] 76 Fed. Reg. at 36,199.
[50] 76 Fed. Reg. at 36,192.
[51] 76 Fed. Reg. at 36,199.
[52] *Id*.
[53] 76 Fed. Reg. at 36,200.

needed to complete the form in the ordinary course of their business."[54] Given the dramatic decrease in the advice exemption and the dramatic increase in disclosure that would be required under the proposal, this is highly questionable.

In some cases law firms and consultants may have appropriate records. Though clearly, there will be significant new costs associated with searching those records and properly classifying various expenses as either persuader costs, other labor advice that must be disclosed, and non-disclosable activities for LMRDA purposes. The Department has made no effort to quantify or identify these costs.

In other cases, there may well be no sufficient record that exists. A firm may provide a seminar at which attendance records are only loosely kept, or are not at all kept. Alternatively, a consultant or lawyer may speak at an event hosted by another organization. Consider, for example, a lawyer speaking at a bar association event – the attorney may have no knowledge of the attendees in the room and may view the event as business development, not persuasion. But if one of the attendees intends to use comments he hears to directly or indirectly persuader employees related to concerted activity, then the Department's broad reporting requirements would appear to be triggered. Yet the Department has made no estimate on what expenses would incur to calculate and track such expenses.

Similarly, employers do not regularly track which law firm conferences, seminars, webinars or other gatherings that employees attend and certainly no effort is made to classify those meetings that may involve "persuader" activity and those that do not. Yet the Department has made no effort to account for these costs.

C. The Proposal Violates the Regulatory Flexibility Act

The Department has certified that the proposal will not have a significant economic impact on a substantial number of small entities.[55] However, as demonstrated above, the Department has vastly underestimated the costs associated with the proposal. Consequently, it cannot base its certification on the analysis that it has conducted.

D. The Proposal Violates the Paperwork Reduction Act

As demonstrated by the discussion above, the proposal violates the Paperwork Reduction Act. Among other things, the Department vastly underestimated the number of entities that would be required to file and the time it would take to compile reports. In addition, it is clear that the Department's proposal, by abandoning a bright-line test in favor of a vastly broader subjective test, does not "reduce to the extent practicable and appropriate the burden on employers, labor relations consultants, and others persons who must provide the information" as the Department claims.[56] In addition, the Department cannot maintain that the requirement is

[54] 76 Fed. Reg. at 36,201.
[55] 76 Fed. Reg. at 36,206.
[56] 76 Fed. Reg. at 36,197.

necessary for the proper performance of the functions of the agency, since the proposal is contrary to statute, legislative history, and strong public policy goals.

E. The Proposal Violates Executive Order 13175

The Chamber represents many hundreds of state and local chambers of commerce and other trade associations. In turn, some of these chambers and associations represent Native American tribes and tribal operations. It does not appear that the Department has in any way considered how its proposal will impact tribes and it has not included any discussion in the *Federal Register* regarding this impact.

The National Labor Relations Board has taken a broad view of the application of the NLRA to tribal enterprises. For example, in *San Manuel Indian Bingo*, 341 NLRB 1055 (2004), the Board took the position that nothing in the NLRA was intended to exempt tribal operations from its coverage, even if the enterprise operated on tribal land. Under current law, the Board asserts jurisdiction over a wide array of tribal enterprises where the tribe itself may be the employer. Consequently, the Department, by broadening its persuader disclosure requirements, is seeking to impose far greater mandates upon tribes and tribal organizations than currently exist.

Executive Order 13175 addresses consultation and coordination with Indian tribal governments. Section 5 of the Executive Order imposes numerous consultation requirements on federal agencies before issuing regulations with "tribal implications," including printing in the *Federal Register* a "tribal summary impact statement, which consists of a description of the extent of the agency's prior consultation with tribal officials, a summary of the nature of their concerns and the agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of tribal officials have been met."

The Department's proposal contains no such tribal impact summary statement and it is not at all clear that the Department made any effort to consult with any tribes prior to promulgation of the proposed rule.

Given the very significant impact that the new regulation could have on tribes that will raise very real questions of cost, management, and sovereignty, it is incumbent upon the Department to withdraw its proposal until such time as such consultations have been successfully concluded and the appropriate steps taken.

IX. Conclusion

The Department's proposal is a dramatic narrowing of the advice exemption and a dramatic increase in what will be considered reportable persuader activity. It also replaces an easily understandable objective test with a confusing subjective test. These changes are contrary to the LMRDA and its legislative history and cannot be justified. Furthermore, the proposal drastically underestimates costs and fails to satisfy the numerous regulatory process requirements not the least of which are the Administrative Procedure Act and the Regulatory Flexibility Act.

At a time when every government agency should be focusing on creating an environment for economic growth and job creation, it is particularly disturbing that the Department would propose a policy that will not create a single new job, but instead will have the impact of favoring union organizing at the expense of employees and employers. The U.S. Chamber of Commerce strongly opposes the Department's proposal and urges its immediate withdrawal.

Sincerely,

Randel K. Johnson
Senior Vice President
Labor, Immigration & Employee Benefits

Michael J. Eastman
Executive Director
Labor Law Policy