COALITION FOR A
DEMOCRATIC WORKPLACE

COMMENTS ON DEPARTMENT OF LABOR'S PROPOSED RULEMAKING UNDER THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT, INTERPRETATION OF THE "ADVICE" EXEMPTION (RIN 1215-AB79; RIN 1245-AA03)

Submitted by

THE COALITION FOR A DEMOCRATIC WORKPLACE

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Submitted to

OFFICE OF LABOR MANAGEMENT STANDARDS, U.S. DEPARTMENT OF LABOR

September 21, 2011

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

RE: Labor-Management Reporting and Disclosure Act, Interpretation of the "Advice" Exemption RIN 1215-AB79; RIN 1245-AA03

Dear Mr. Davis:

Thank you for the opportunity to submit the following comments by the Coalition for a Democratic Workplace in response to the above referenced June 21, 2011 Notice of Proposed Rulemaking.

The Coalition for a Democratic Workplace ("CDW") represents millions of businesses of all sizes from every industry and every region of the country. Its membership includes hundreds of employer associations as well as individual employers and other organizations. As a representative of employers that are subject to the Labor-Management Reporting and Disclosure Act ("LMRDA") under the jurisdiction of the U.S. Department of Labor ("Department"), as well as the National Labor Relations Act ("NLRA") under the jurisdiction of the National Labor Relations Board ("NLRB"), CDW has a profound interest in the Department's administration of the "advice" exemption to the LMRDA Persuader Activity Regulations within the confines of its statutory authority and as related to the NLRA.

Appendix 1 identifies the CDW member organizations that join in the filing of these comments.[1]

I. PRELIMINARY STATEMENT.

CDW strongly opposes the Department's proposed narrowing of the exemption of "advice" from the "persuader activity" reporting requirements under section 203 of the LMRDA. Primarily at issue is the Department's stated intent to radically change the long accepted definition of advice, which for more than 50 years has consistently been held to refer to a

[1] Some of the CDW members identified in Appendix 1 have filed separate comments. All of the listed organizations support the positions expressed in these comments and join in their submission.

[2] *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*

consultant's activity that "is submitted orally or in written form to the employer for his use, [where] the employer is free to accept or reject the oral or written material submitted to him."[2]

> The Department's Notice proposes to redefine the term "advice" as follows:
>
> > With respect to persuader agreements or arrangements, "advice" means an oral or written recommendation regarding a decision or a course of conduct. In contrast to advice, "persuader activity" refers to a consultant's providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively. Reporting is thus required in any case in which the agreement or arrangement, in whole or part, calls for the consultant to engage in persuader activities, regardless of whether or not advice is also given.

76 Fed. Reg. at 36191. Most significantly, the proposal declares that reporting will henceforth be required "regardless of whether the employer is free to accept or reject the oral or written communication." *Id*.

As the proposed rules make clear, the new definition is intended to eliminate the previously well accepted distinction between non-reportable advice and reportable persuader activity, specifically with regard to the preparation of or revision to persuasive materials by labor relations consultants and other persons, as follows:

> Under the proposed interpretation, when such a person prepares or provides a persuasive script, letter, videotape, or other material or communication, including electronic and digital media for use by an employer in communicating with employees, the "advice" exemption does not apply and the duty to report is triggered.
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> [P]ersuader activities may additionally include: Training or directing supervisors and other management representatives to engage in persuader activity; establishing anti-union committees composed of employees; planning employee meetings; deciding which employees to target for persuader activity or discipline; creating employer policies and practices designed to prevent organizing; and determining the timing and sequencing of persuader tactics and strategies.

76 Fed. Reg. at 36191. The Department further proposes to increase the types of disclosures required on Form LM-20 by employer advisors who engage in the above

[2] *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole* (hereafter *UAW v. Dole*), 869 F. 2d 616, 617 (D.C. Cir. 1989), *citing inter alia* Section 265.005 LMRDA Interpretive Manual (USDOL 1962).

referenced activities, forcing them to disclose new details regarding the specific nature of any alleged persuader activity.[3]

The Labor Department's proposed rules are anti-employer, especially anti-small business, and, perhaps most significantly, anti-employee. Indeed, the proposal, when taken in concert with the NLRB's proposed "ambush" election procedures,[4] amounts to a radical attempt by the Executive Branch to shift the balance of private sector labor relations, in defiance of the neutral policies established by Congress over many decades.

The Department's proposal is contrary to the plain language and congressional purpose of the LMRDA, conflicts with the National Labor Relations Act ("NLRA"), and is unconstitutionally vague. Moreover, the Department has failed to provide reasoned justification for its sweeping changes, which depart from more than 50 years of uninterrupted precedent both within the Department and in the courts. The proposed rules will interfere impermissibly with the attorney-client relationship, will interfere with the right of trade associations to communicate with their employer members, and will interfere with the ability of employers to obtain much needed advice from their peers, their lawyers and experienced labor relations consultants.

Furthermore, the proposed rules do not comply with the requirements of the regulatory rulemaking process. Indeed, the proposed changes go beyond the legitimate scope of administrative rulemaking, and are so significant and substantive that only Congress could properly enact them. Coming on the heels of the failure of unions to obtain passage of the Employee Free Choice Act ("EFCA"), this proposed "no advice" regulation, combined with the NLRB's nearly simultaneous proposal for "ambush" Representation-Case rules,[5] is but a thinly veiled attempt to circumvent Congress and implement "back door" EFCA.

Finally, the Department's proposal threatens to impose significant regulatory burdens on employers, particularly on small businesses who do not typically employ experienced in–house labor relations advisors. Indeed, the proposed rules are designed to ensure that employers—especially small business employers—are effectively denied critical legal counsel and entirely legitimate management training by associations and other consultants. The proposed rules will have this negative impact not only in the face of union organizing campaigns, but also in contract negotiations, contract ratification procedures, and strike situations. In fact, the proposed regulations are so broad, they would apparently cover numerous activities that have nothing to do with traditional "persuader" activities, such as employee surveys, supervisor training, seminars, handbook drafting and similar policy recommendations. Not only is this an unwarranted expansion of LMRDA coverage, it intrudes on and threatens to complicate a host of

[3] Though unchanged by the Department's proposed rulemaking, the impact of the Department's proposal is magnified by the continuing enforcement of the requirement that those found to be persuaders must file Forms LM-21, which require disclosure of all fees received from *all* clients for whom the alleged persuader performs even *non*-persuader labor relations advice or services during the entire year.

[4] Representation Case Procedures, 76 Fed. Reg. 36812 (June 22, 2011).

[5] *Id*.

business functions unrelated to persuader activities that are designed to improve employee and customer satisfaction, productivity, efficiency, and compliance with other laws.

The Department's attempt to rush the proposed rule through the rulemaking process is also arbitrary and creates the appearance of a concerted effort to placate organized labor and curry their political support in the 2012 elections. While the Department granted a 30-day extension to the originally unacceptable 60-day comment period, additional time for the public to consider such sweeping changes is necessary and consistent with past LMRDA rulemaking.[6] Accordingly, CDW renews its request to extend the comment period for an additional 90 days so these radical changes can be more adequately considered, and commented upon, by stakeholders and the public at large.[7]

II. DISCUSSION

A. The Proposed Rules Are Contrary To The Legislative History, Plain Language, and Longstanding Interpretation of the LMRDA.

Since 1959, Section 203(a) of the LMRDA has required employers to disclose:

> "Any agreement or arrangement with a labor relations consultant or any other independent contractor or organization pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing…."

[6] In 2005, the Department granted a 90-day extension of the original 60-day comment period regarding proposed revisions to the LM-30 reporting obligations for labor organization officers and employees under the LMRDA. *See* 70 FR 61,400 (Oct. 24, 2005). The 90-day extension was granted pursuant to the requests of the AFL-CIO and the United Brotherhood of Carpenters and Joiners of America. The current proposed rulemaking is far more significant than the LM-30 rule. Therefore, a 90-day extension is likewise appropriate for the Department's proposed rule concerning the interpretation of the LMRDA's advice exemption.

[7] Alternatively, upon receipt of these and other comments that are being filed this date by the employer and consultant community, the Department should follow the model recently adopted by the Department's Employee Benefits Security Administration (EBSA) in case number 1210-AB32. In that case, the EBSA on September 19 declared that it is *withdrawing* and *re-proposing* a definitional rule in order to comply more fully with Presidential Executive Order 13563 by obtaining additional input, review and consideration. *See* EBSA News Release: US Labor Department's ABSA to Re-Propose Rule On Definition of A Fiduciary ("Additional time ensures strongest possible protections for retirement savers, business owners"), available at www.dol.gov/opa/media/press/ebsa. Sept. 19, 2011.

29 U.S.C. 433(a). To the same effect is Section 203(b), which requires consultants who engage in the above described "persuader" activity to file reports as well.[8]

When Congress enacted these provisions, however, it expressly included a broad exemption from reporting "advice" in Section 203(c), as follows:

> Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder."

29 U.S.C. §433(c).[9]

Finally, Congress added an additional exemption from reporting specifically for lawyers in Section 204 of the LMRDA, as follows:

> Nothing contained in this chapter shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this chapter any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

29 U.S.C. § 434.

Contrary to the Proposed Rule, it is clear from the plain language of these provisions and from the legislative history of their enactment that Congress intended to grant broad scope to the term "advice." The Congressional Conference Report clearly stated as much, as follows: "Subsection (c) of section 203 … grants a broad exemption from the [reporting] requirements of the section with respect to the giving of advice."[10]

In testimony before the Senate Subcommittee in support of the bill that became the LRMDA , Professor Archibald Cox, a supporter of the bill, noted only the following types of

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[8] As noted above, in addition to requiring employers and third-party persuaders to file a report of their agreement/arrangement within thirty days, the persuaders are required to file annual reports showing "receipts of any kind from employers on account of labor relations advice or services…." *Id*.

[9] Congress further limited the scope of the reporting requirements of Section 203 by including subsection (f), which states that "nothing contained 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." Section 8(c) of the NLRA, in turn, protects the right of employers to speak freely to their employees on the subject of union organizing.

[10] H.R. CONF. REP. No. 1147, 86th Cong., 1st Sess. 33 (1959), *reprinted in* 1 National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act* 937, 1959 U.S. CODE CONG. & ADMIN. NEWS 2503, 2505, cited in *UAW v. Dole, supra,* 869 F. 2d at 618.

expenditures that the reporting requirement was intended to publicize: "Expenditures to a labor relations consultant or similar middle man in exchange for his undertaking to influence employees in the exercise of the rights of self-organization and collective bargaining or to furnish information concerning their activities."[11] Cox further declared that "payments for advice are proper" even though "if the employer acts on the advice it may influence the employees." Only when "an employer hires an independent firm to *exert the influence*," according to Cox, could it be said that the "likelihood of coercion, bribery, espionage, and other forms of interference is so great that the furnishing of a factual report showing the character of the expenditure may fairly be required."[12]

The Department's new claim that the longstanding definition of advice under the LMRDA "seems inconsistent with the legislative history" of the Act[13] is completely unsupported by the Congressional record. Indeed, the very Congressional testimony cited by the Department as supposed justification for the proposed rules[14] in fact shows that Congress did *not* intend to impose reporting requirements on the type of legal and advisory conduct which the Department is now targeting in its proposal. To the contrary, the testimony makes clear that Congress sought to expose labor consultants acting as "middlemen", *i.e*., engaging in direct communications with employees on behalf of management, without revealing their true connection to the employer. Congress thus sought to expose persuaders who acted as "fronts for the employer's anti-union activity," or who otherwise engaged in "unethical" acts and/or served as "middlemen" employed to spy on organizing activity while "masquerading as legitimate labor consultants."[15] Congress did *not* highlight or target lawyers or consultants who merely advised employers on ways in which the *employers themselves* could lawfully campaign against union organizing. Certainly, the Department has failed to cite any such language or legislative history that supports the unprecedented narrowing of the advice exemption that the Department is now proposing.[16]

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[11] Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on Labor-Management Legislation, 86th Cong., 1st Sess. 128 (1959).

[12] *Id*.

[13] 76 Fed. Reg. at 36184.

[14] 76 Fed. Reg. at 36178-9, 36184.

[15] S. Rep. No. 85-1417 at 255-300 (1958); S. Rep. 187 at 10-11, LMRDA Leg. Hist. at 406-S. Rep. 187 at 10-11, LMRDA Leg. Hist. at 406-407, LMRDA Leg. Hist. at 435-436. By way of example, the Department refers to the much discussed 1950's labor consultant Nathan Sheffernan, 76 Fed. Reg. at 36184, without acknowledging that Sheffernan's referenced tactics of "organizing vote no committees," weeding out pro-union workers, and negotiating improper sweetheart contracts with union officials bear no resemblance to the types of advice offered by legitimate labor lawyers, consultants and trade associations, which the proposed rules now are targeting. Sheffernan plainly interacted directly with employees and did not confine himself to recommending a course of action to his employer clients that they were free to accept or reject, and that they themselves were responsible for implementing.

[16] Equally unsupported is the Department's reversal of the longstanding treatment of conduct that is partly advice and partly persuader activity, which the Department now proposes to treat entirely as the latter, ignoring the exemption of the former under Section 203(c). 76 Fed. Reg. 36182.

In 1962, then Solicitor of Labor Charles Donahue interpreted the "advice" exemption in the context of the above legislative history and held that "reviewed in the context of Congressional intent" there was "no apparent attempt to curb labor relations in whatever setting it might be couched."[17] Solicitor Donahue appropriately recognized that expert advice was always needed by employers, and that "even when this advice is embedded in a speech or statement prepared by the advisor to persuade, it is nevertheless advice and must be treated as advice."[18] Contrary to statements in the Department's Notice, Solicitor Donahue's opinion has remained the consistent position of the Department of Labor with regard to the meaning of "advice" under the LMRDA from 1962 until today. [19]

Even the Department's Notice concedes that Section 265.005 of the current LMRDA Interpretative Manual ("IM") has remained unchanged for the past five decades. The IM states, in relevant part, "it is equally plain that where an employer drafts a speech, letter or document which he intends to deliver or disseminate to his employees for the purpose of persuading them in the exercise of their rights, and asks a lawyer or other person for advice concerning its legality, the giving of such advice, whether in written or oral form, is not in itself sufficient to require a report."[20] Even where an employer's advisor prepares an entire speech or document, the IM states that such activity constitutes advice rather than persuasion, as long as "the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer…."[21] In other words, where an employer is free to leave out or change anything the drafter has included in the text, the sentiments communicated truly are those of the employer, not the consultant or attorney. Again, this interpretation is fully consistent with, and indeed is compelled by the legislative history of the advice exemption.

In the absence of any support for the Department's new position in the LMRDA's legislative history, the Department wrongly asserts that the above referenced longstanding understanding as to the meaning of "advice" in the text of the LMRDA "is not grounded in the common or ordinary understanding of the term…."[22] As support for this novel assertion, the Department cites to dictionary definitions of "advice." But the definitions referred to in the

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[17] Charles Donahue, "Some Problems under Landrum Griffin" American Bar Association, Section of Labor Relations Law, in Proceedings 49 (1962).

[18] *Id.*

[19] The Department's Notice creates the false impression that the Department changed its interpretation of the advice exemption for a "brief period" in 2001. See 76 Fed. Reg. at 36180-81. In reality, no such change ever went into effect, although the Department of Labor announced its intent to effectuate such a change on January 11, 2001 (less than two weeks before the end of the Clinton administration). The incoming Bush administration first delayed the effective date of the reinterpretation and then rescinded the reinterpretation before it ever took effect.

[20] Section 265.005 LMRDA Interpretative Manual.

[21] Id.

[22] 76 Fed. Reg. at 36183.

Notice actually support the Department's previous longstanding interpretation, while undercutting and contradicting the Department's proposed redefinition of the term.

Thus, the Department specifically claims that "advice ordinarily is understood to mean a recommendation regarding a decision or a course of conduct," and cites various dictionaries to this effect.[23] The Department ignores, however, the common understanding of the word "recommendation," which is that the recipient of a recommendation is free to reject it.[24] The Department's resulting claim that the "common" definition of advice is somehow distinct from the advisee's ability to accept or reject it is both arbitrary and capricious. Contrary to the Department's understanding, even its own preferred dictionary definitions show that the commonly understood meaning of advice intrinsically includes and is defined by the advisee's ability to act or not to act on the advisor's recommendation.[25]

That the Department's new proposal relies on a fundamental misapprehension of the plain language meaning of advice is confirmed by reference to court decisions defining the term over many years, both within and outside the framework of the LMRDA. Thus, contrary to the Department's claim that the current longstanding definition of advice is "overbroad," the Court of Appeals for the D.C. Circuit held in *UAW v. Dole, supra*, 869 F. 2d at 619-620 that the Department's previous application of the term was reasonable. Also directly supportive of the longstanding definition of advice is the case of *Martin v. Power, Inc*., No. 92-385J, 1992 WL 252264, *2 (W.D. Pa. Sept. 28, 1992), where the court concluded that "the Secretary does not allege direct contact with employees by [the attorney] during this period. [The attorney's] actions in advising [the employer] concerning purchases of anti-union propaganda or in the contents of letters sent by the company to its employees do not constitute persuader activity." *See also Wirtz v. Fowler*, 372 F. 2d 315, 330-331, n. 32 (5th Cir. 1966), *overruled in part on other grounds, Price v. Wirtz*, 412 F. 2d 647 (5th Cir. 1969) (observing that "a reasonable construction of advice would hold it applicable to all activities of the lawyer in which it is contemplated that the client will be the ultimate implementing actor and in which the client retains the power to accept or reject the activities of the lawyer.").

These rulings, like the longstanding Department interpretation itself, are fully grounded in and consistent with the consistent usage of the term "advice" in court decisions over the past century of common law. Thus, in the common law case of *Commonwealth ex rel. Howley v. Mercer*, 190 Pa. 134, 137, 42 A. 525, 526 (1899), the court declared: "Advice is optional with him to whom it is directed; that is, he can accept or decline it." Courts have repeated this common understanding in numerous decisions over many decades. *See,, e.g., Hughes v. Van Bruggen*, 44 N.M. 534, 105 P. 2d 494, 496-97 (1940) ("Advice" means it is optional with the person addressed whether he will act on such advice or not. *** It is different in meaning from instruct or persuade."); *State v. Downing*, 23 Idaho 540, 130 P. 461, 462 (1913) ([With reference

[23] *Id*.

[24] See definitions of "recommend" appearing at http://dictionary.reference.com/browse/recommend ("to advise, as an alternative; suggest a choice, course of action, etc."); and http://dictioniary.cambridge.org/dictionarybritish/recommend ("to suggest that a particular action should be done).

[25] *Id.*

to legislation] "the meaning given to the word "advise," it is left optional with the person advised as to whether he will act on such advice or not.").

Equally misguided is the Department's apparent new theory, again unsupported, that advice can only be given in the form of answers to employer questions.[26] In reality, advice takes many forms, both in the legal profession and in other forms of management training, such as seminars for employers legitimately conducted by trade associations and other third parties. Third-party advisors frequently give their employer clients advice in the form of fully drafted documents that are used by the employers in their day-to-day dealings with employees, the government, and other companies. For instance, attorneys routinely draft employment applications, employment contracts, releases, sales contracts, affirmative action plans, immigration-related documents - a myriad of documents - to enable their clients to be compliant with the law.

For the same reasons, there is nothing improper in treating as advice the drafting of talking points, letters, flyers or similar documents discussing labor unions, in order to explain to employers what is legal and effective for them to communicate with their employees in light of complex and constantly shifting interpretations of the law of union organizing.[27] In the same manner, many trade associations properly exercise their lawful right to advise their employer members regarding union campaign tactics and communications tools in order to enable their members to respond lawfully to union organizing. Nothing in the LMRDA condemns or restricts such conduct, and nothing requires such advice to be reported and posted on the internet. The creating and drafting of all these and other similar types of documents now targeted by the Department's proposal is clearly exempt advice, and such advice is often the most comprehensive, efficient and quickest method for advising clients on how to respond to union organizing within the confines of the law.[28]

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[26] *See, e.g.,* the Department's attempt to distinguish for the first time between a lawyer/consultant's "review of drafts of persuasive material at the employer's request" (which the Department apparently concedes to be advice), as opposed to a lawyer/consultant's preparation of persuasive material to be disseminated to employees (which the Department now believes to be non-exempt even if prepared and given only in an advisory capacity to an employer). 76 Fed. Reg. at 36183.

[27] As one of many possible examples, where an employer drafts a speech and an advisor pronounces it unlawfully coercive, the client will naturally and legitimately ask what needs to be changed in order to fix the problem. Under the Department's new interpretation, if an attorney or other advisor suggests new, non-coercive language, this could be deemed a revision of the speech and therefore trigger the reporting requirements. The Department would limit the lawyer who wished to avoid reporting and preserve attorney-client protections, essentially to saying, "I can't tell you how to change it; go try again." Under the Department's arbitrary proposal, the employer would apparently be reduced to playing the game of "Twenty Questions" with the advisor, making stabs in the dark until the lawyer or consultant finally pronounces the speech lawful. No court has ever limited the meaning of advice in this manner.

[28] Nor is such advice limited to active union organizing campaigns. Employers have every right to communicate with their employees on the subject of labor relations without any notice that any petition is threatened or has been filed. At such times as well, employers have the right to seek and receive advice from experts in the field in oral or written form, without being subject to any reporting requirement so long as the employer retains the right to accept or reject the advisory materials.

Thus, contrary to the Department's erroneous interpretation of the Act's language and history, the previous and longstanding interpretation of the advice exemption was (and remains) *compelled* by the plain language of the LMRDA, as well as its legislative history. So long as a lawyer or consultant does not interact with employees but merely advises an employer on how the *employer* should engage in such interaction for the purpose of persuading them, and where the employer as the actual persuader is free to accept or reject the advisor's advice, the Act does not authorize the Department to require reports. Instead, the LMRDA *protects* the right of employers to receive such advice on how to campaign against unions, both orally and in writing, including examples of such communications and advice as to how best to campaign, so long as the advisor does not himself communicate with the employer's employees, and so long as the employer is free to accept or reject the advice given. By ignoring or, worse yet, misstating the plain language of the Act, its legislative history, and the common usage of words, the Department has engaged in arbitrary and capricious rulemaking which must be withdrawn or set aside.

B. The Department's Additional Stated Grounds For Changing The Definition Of Advice Are Disingenuous, Arbitrary and Capricious.

Apart from the erroneous claim that a change in the definition of advice is somehow authorized by the LMRDA's language or legislative history, refuted above, the Department's proposal contains no rational explanation for its departure from longstanding precedent. Put another way, the Department's stated reasons are so inadequate as to give rise to an inference of pretext, *i.e.*, that the Department's true intent is to chill employers' exercise of their rights to obtain the expert advice necessary to communicate effectively with their employees during union organizing campaigns.

First, the Department contends that post-LMRDA Congressional and Executive branch observations regarding labor consultant activity somehow justify the proposed radical change. The Department specifically recites House Subcommittee Reports from 1980 and 1984 which purported to find inadequate enforcement of the LMRDA's consultant reporting provisions.[29] Unstated in the Department's Notice is that both the House and the Senate as a whole took no action in response to the Subcommittee Reports, leading inescapably to the conclusion that a majority of the Congress was satisfied with the Department's enforcement of the LMRDA and *disagreed* with the Subcommittees' findings. The 1990 Report of the Dunlop Commission, which is also cited in the Department's Notice,[30] met with a similar lack of interest in Congress. Congressional silence over a period of decades in response to a settled position by a government agency has been held to constitute ratification thereof and constitutes a further indication of Congressional intent. *See FDA v. Brown & Williamson Tobacco Co.*[31] Thus, far from justifying the Department's change of position, the House Subcommittee and Dunlop Reports, and more particularly Congress's decision to ignore those reports and to leave in place for 50 years the

[29] 76 Fed. Reg. at 36185.

[30] *Id*.

[31] 529 U.S. 120 (2000), applying *Chevron U.S.A. Inc., v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 863 (1984).

Department's previous longstanding enforcement of the "advice" exemption, refute the Department's claimed justification for its proposed rulemaking.

Next, the Department contends in its Notice that "current industrial relations research evidences proliferation of consultant industry and substantial use by employers of labor relations consultants."[32] In this regard, the Department reveals again its misunderstanding of the purpose of the LMRDA and an apparent bias against consultants who engage in lawful advice activity. As demonstrated above, the LMRDA was not enacted to outlaw or reduce employer reliance on labor relations advisors. The sole purpose of the Act was to expose and require reporting of specific consulting activities, *i.e*., those by which such consultants, as opposed to employers themselves, persuade employees. It is clear from the Department's discussion of the supposed research into the consulting industry, however, that the Department erroneously believes that its mission should be to somehow reduce the number of consultants, no matter how legitimately they conduct themselves.

Contrary to the Department's Notice, it should be irrelevant to the Department's analysis that a majority of employers have continued to hire consultants as advisors during union organizing campaigns, as supposedly reported by some studies, inasmuch as Congress never intended to discourage such hiring.[33] None of the studies relied on by the Department identify the extent to which any consultants have *violated* either the NLRA or the LMRDA. Most importantly, none of the cited studies indicates that the failure to report consultant activity which is now considered to be exempt advice has in any way resulted in violations of either Act. Nor do the studies measure the extent to which consultant advisors – lawyers, associations, and other third party experts – have *reduced* the number of employer violations by educating clients and association members as to what the legal prohibitions are. Without such measurements and comparisons, the Department's reliance on the cited studies as justification for the proposed rulemaking is utterly arbitrary.

In any event, the studies relied on by the Department have been refuted by counter-studies, arbitrarily ignored by the Department, and the pro-union studies have been shown not to be credible with regard to the influence of labor relations consultants on union organizing campaigns.[34] By relying on such discredited studies, the Department reveals a strong bias in favor of union organizing and against the right of employers to obtain lawful and legitimate advice from experts in the field of labor relations.[35]

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[32] 76 Fed. Reg. at 36185-86.

[33] 76 Fed. Reg. at 36186.

[34] *See* U.S. Chamber of Commerce*, Responding to Union Rhetoric: The Reality of the American Workplace – Union Studies on Employer Coercion Lack Credibility and Integrity (*U.S. Chamber of Commerce White Paper 2009).

[35] Further evidence of the Department's bias is the claim in the Notice that the studies relied on are "contemporary." As can be seen from a review of the dates on the studies listed in the Notice, they are on average more than a decade old, and the data they rely on is older still. 76 Fed. Reg. at 36186.

Equally suspect is the Department's contention that there is an "underreporting problem" among consultants under the LMRDA. This claim is based on the false connection, described above, between the number of consultants and the number of reports that such consultants should be filing. Again, the fact that consultants supposedly are hired in a majority of union organizing campaigns does not mean that such consultants are hired to engage in persuader activity. The Department cites no justification at all for the claim that the number of reports filed is "7.4% of those expected."[36] It is just as likely that most of the consultants who have been hired have been careful to comply with the law by providing only exempt advice; and that the Department's "expectations" are grossly inflated.

Also unsupported and disingenuous is the Department's claim that changing the advice interpretation would "enable employees to make a more informed choice regarding the exercise of their rights to organize and bargain collectively."[37] This claim reflects a policy choice which can only be made, and has already been made, by Congress, and it is beyond the scope of the Department's authority to disregard Congressional intent. Certainly, it is impermissible for the Department to base its changed definition of advice on a misguided desire to add to the burdens of disclosures that small businesses already face during union organizing campaigns. In any event, there is no evidence that the disclosure of the advice received by employers will accomplish anything other than to chill employers from seeking to obtain such advice and/or chill lawyers and trade associations from providing it.

For much the same reasons, the Department's claim that changing the definition of advice is needed to redress the balance of "contemporary labor relations"[38] is arbitrary and capricious and contrary to Congressional intent. Particularly misguided is the Department's unsupported claim that use by employers of labor relations consultants "interferes with employees' exercise of their protected rights to organize and bargaining collectively and disrupts labor-management relations."[39] Not only is there no support for that claim, but it is not the issue that the proposed rules supposedly address. The Department's unwarranted attacks on labor relations advisors – lawyers, associations, and other third parties – demonstrate that the Department's true agenda is not to enforce the Act as written but to prevent employers from exercising their right of free speech under Section 8(c) of the National Labor Relations Act. As is next discussed, that apparent agenda constitutes another violation of law that compels the withdrawal or setting aside of the proposed rules.

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[36] 76 Fed. Reg. at 36186.

[37] *Id*. at 36187-88.

[38] *Id*. at 36189-90.

[39] *Id*. at 36190.

C. The Proposed Rules Conflict with the National Labor Relations Act and LMRDA Section 203(f).

As noted above, by effectively denying employers the right to counsel, the proposal conflicts with section 8(c) of the NLRA and, by extension, section 203(f) of the LMRDA, which obligates the Department to uphold employers' section 8(c) rights.[40] NLRA section 8(c) states:

> The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act [subchapter], if such expression contains no threat of reprisal or force or promise of benefit. 29 USC §158 (c).

LMRDA section 203(f) specifically preserves for employers the rights under section 8(c) of the NLRA (quoted above).[41] The Supreme Court has recently reaffirmed that Section 8(c) expresses a Congressional policy of "favoring uninhibited, robust, and wide-open debate" on matters relating to unionization, so long as that does not include unlawful speech or conduct.[42]

The Labor Department's proposal would deny employers their rights under section 8(c) by effectively preventing an employer from receiving legal counsel related to communications with employees regarding an upcoming election. As discussed above, the LMRDA reporting requirements would apply not only to an outside advisor's direct communications and interaction with employees, but to all indirect communications stemming from advice from a lawyer, consultant or association in drafting or reviewing speeches, letters, or other written materials. Consequently, the only "advice" that would not be reportable would be a declaration by the lawyer as to whether the materials an employer prepares are unlawful or not.

This would be of little help to an employer attempting to navigate the complexities of labor law and NLRB rulings so it can lawfully communicate with its employees within the limited time frame of a representation election (the median time for an election is approximately 38 days under current NLRB procedures, but could be reduced to as few as 10 days under the NLRB's proposed "ambush" election rules). In fact, in many cases, this would amount to a complete denial of legal advice.

The practical implications are that employers will face the Hobson's choice of either saying nothing, or going it alone without meaningful access to labor relations advice in the hope that they can steer clear of unlawful interaction with their employees. In this manner, the Department's proposal clearly chills employer speech. Moreover, the inescapable consequence will be a significant rise in unfair labor practice charges, especially for smaller businesses

[40] 29 U.S.C. §§158(c), 433(f).
[41] 29 U.S.C. §433(f).
[42] *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).

without access to in-house labor relations expertise, and a related increase in election delays, re-run elections and bargaining orders.

The true victims of the proposed rule would be employees, who would be forced into union elections without the benefit of the full and open debate the Supreme Court has called for, or be exposed to inadvertent violations of their rights by well-intentioned employers deprived of expert advice. This, of course, runs counter to the primary goal of the NLRA and the LMRDA and benefits only union organizers.

The chilling effect of the Department's proposed rulemaking is magnified by the lack of detailed guidance as to what constitutes "indirect" persuasion. Once the longstanding meaning of advice is changed to remove the "firewall" of employer acceptance or rejection of advice, neither employers or consultants will have any way to know whether their communications will be deemed indirectly persuasive of employees by a pro-union Department investigator. The scenarios listed in the Department's proposal are so broad as to cover every conceivable communication by a third party to an employer, or even to a *group* of employers, on the subject of employees and unions.[43] As further discussed below in the discussion of unconstitutional vagueness, it is incumbent on the Department to give much more detailed guidance as to what types of communications will be deemed to be persuader activity.

D. The Proposed Rules Violate The Provisions Of The LMRDA That Specifically Protect The Lawyer-Client Relationship.

As discussed above, law firm advice is protected from disclosure under the LMRDA, not only by Section 203(c) but also by Section 204 of the Act. The NPRM acknowledges that by enacting section 204, "Congress intended to afford to attorneys the same protection as that provided in the common-law attorney-client privilege, which protects from disclosure communications made in confidence between a client seeking legal counsel and an attorney."[44]

In addition, the proposed rules must be considered in conjunction with the requirements of the annual LM-21 report forms, which require disclosure of **all** fees and other arrangements for **all** labor relations services (even non-persuader services) for **all** labor relations clients, if there is a single instance of reportable persuader activity involving a single client.[45] An inadvertent action by a lawyer whose advice is found to have the "object" of indirect persuasion,

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[43] Particularly outrageous is the Department's assertion that even advisory seminars for groups of employers on how to effectively communicate with their employees during organizing are reportable, even where the teacher of the seminar has no familiarity with any individual employer and no knowledge of that employer's employees. 76 Fed. Reg. at 36191. There is no textual or historical support for such a position. By labeling such seminars to be "persuader" in nature merely because their end result is to better educate employers in effective techniques for opposing union organizing, conclusively shows that the Department's true goal is not to enforce the Congressional exemption for advice but to chill employer speech in opposition to union organizing.

[44] 76 Fed. Reg. at 36192.

[45] *See Humphreys, Hutcheson and Moseley v. Donovan*, 755 F. 2d 1211, 1214 (6th Cir. 1985) ("The annual report requires the persuader to disclose all receipts from all employers on account of labor relations advice or services, and the persuader must designate the source of these receipts.")

could thus lead to the compelled filing of reports that may seriously injure a law firm's attorney-client relationships with its *non*-persuader clients and would violate ethical rules. Lawyers would have little choice but to avoid such results by declining any representation that could conceivably trigger persuader reporting requirements.

The threat to the attorney-client relationship is further exacerbated by the new LM-20 reports being proposed by the Department, which for the first time will require itemized details regarding the *substance* of the communications between lawyer and client.[46] No longer can the department claim, as it has in past cases, that the persuader reports to do not compel disclosure of attorney-client communications.[47] The new forms do just that.

Finally, it should be noted that while section 204 clearly protects the attorney-client privilege, the word "privilege" does not appear in the statute. This suggests strongly that section 204 protects confidential information as well, even if non-privileged. Section 204 thus provides a broad, over-arching protection from disclosure, suggesting that Congress worked diligently to protect all traditional aspects of the sanctity of the attorney-client relationship. The Department's proposal would eviscerate LMRDA section 204's protection of the attorney-client privilege; improperly restrict the definition of advice; blur the line defining what constitutes persuasion; and conflict with attorney ethics rules. For these reasons as well, the proposal should be withdrawn or set aside.

E. The Proposed Rules Violate the U.S. Constitution.

1. The Proposed Rules are Unconstitutionally Vague.

The LMRDA provides not only for civil enforcement, but also for criminal sanctions in the form of fines of up to $10,000 and imprisonment for up to one year.[48] Because the failure to file persuader reports invokes criminal sanctions, the Department's proposed change to the advice exemption is unconstitutional under the Fifth Amendment's due process clause unless the proposed rule satisfies a higher standard of clarity than civil regulations without criminal implications.[49] Courts have consistently struck down criminal laws as unconstitutionally vague if

[46] *See, e.g*., section 14 of the proposed new LM-20 which requires attorneys to disclose by categories the substance of their communications to employer clients.

[47] *Id*. at 1219.

[48] 29 U.S.C. § 439.

[49] *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (regulations with criminal sanctions "must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement"). *See also Forbes v. Napolitano*, 236 F.3d 1009, 1011 (9th Cir. 2000) ("[i]f statute subjects transgressors to criminal penalties . . . vagueness review is even more exacting"); *Chatin v. Coombe,* 186 F.3d 82, 86-87 (2d Cir.1999) (scrutinizing "closely" regulation because its penalties were more like criminal penalties); The regulations must "clearly define" all prohibited acts such that the regulated class is given "fair notice that [its] contemplated conduct is forbidden." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); "The absence of specificity . . . invites abuse on the part of prosecuting

they "fail[] to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute."[50]

To withstand Fifth Amendment scrutiny, the Department's proposed new rule must provide "explicit standards for those who apply them" so that "arbitrary and discriminatory enforcement" is avoided. If "'men of common intelligence'" are "left to guess at [the law's] meaning," then the law is unconstitutionally vague under the Fifth Amendment.[51] It is also well settled that agency actions that are "contrary to constitutional right, power, privilege, or immunity" violate the Administrative Procedure Act (APA).[52] Thus agency regulations that are void for vagueness also violate the APA. Such is the case with the Department's proposed redefinition of the advice exemption.

Once the Department's longstanding "bright line" test for advice based upon employers' ability to accept or reject consultant recommendations is removed, employers and their consultant advisors will inevitably be left to guess at the meaning of the LMRDA's reporting requirement. As discussed above, under the new standard any consultant recommendations apparently may invoke the reporting requirements if the "object" of such recommendations, even indirectly, is to persuade employees, regardless of whether it is only the *employer* who engages in any employee communications. The newly proposed standard is so broad and open-ended with regard to potential persuasion – and so narrow and closed off with regard to advice – that employers and their advisors will have no way to tell, except through the Department's *ad hoc* enforcement, which recommendations that have for the past 50 years been thought to be "advice" will henceforth be found to be persuader activity.

Employers who are members of trade associations, and the associations themselves, are particularly at risk under the Department's open ended and overbroad proposed reporting standard. It is not uncommon for employers to meet to discuss labor relations issues and to receive updates and advice from association staff and guest speakers regarding employment policies. It is widely believed that sound employment policies, fair treatment of employees, and positive employee communications are important factors in making unions unnecessary in many workplaces. According to a possible reading of the Department's proposal, information on these subjects communicated at association meetings could lead to the compelled filing of persuader reports by both the association and any of its members who happen to attend a meeting where such matters are discussed. As noted above, the Department's position on the reportable nature of management training seminars is equally chilling on associations who are expected to provide educational information on labor relations issues to their members.

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officials, who are left free to harass any individuals or groups who may be the object of official displeasure." *Parker v. Levy*, 417 U.S. 733, 775 (1974); *see also Papachristou et al. v. City of Jacksonville*, 405 U.S. 156, 162 (1972). A rule is void if it "impermissibly delegates basic policy matters to [enforcement officers] for resolution on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108-09.

[50] *Papechristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

[51] *See Grayned*, 408 U.S. at 108; *Connally v. General Construction Co.,* 269 U.S. 385, 391 (1926).

[52] 5 U.S.C. 706(2)(B); *e.g., Porter v. Califano,* 592 F.2d 770 (5th Cir. 1979) (reviewing action suspending agency employee in violation of due process rights).

By changing the focus of the advice exemption to the so-called "objective" of the advice rather than whether an employer is free to accept or reject it, the Department would make it virtually impossible for employers and their advisors – lawyers, associations, or other consultants – to know what they are permitted and are not permitted to say in order to avoid filing the burdensome reports. Such vagueness cannot be tolerated in a statute that includes criminal penalties. The Department's proposal must therefore be withdrawn or set aside.

2. The Proposed Rules Abridge Employers' Freedom of Speech, Expression, and Association Rights.

If the Department implements the proposed rules and drastically narrows the section exempting advice from the LMRDA's reporting requirement, the Constitutional protection that has historically accompanied the reporting requirement would certainly be lost. There is no doubt that the Constitutionality of the LMRDA, as *currently* interpreted, has been upheld in a number of court decisions.[53] But *none* of these decisions can be relied upon by the Department of Labor to support the Constitutionality of the proposed rules. The proposed changes would so alter the impact of the LMRDA that all future Constitutional challenges would have to be analyzed anew.

When the reporting obligation sweeps up traditional attorney-client relationships and trade association communications in such a wholesale manner, as would be the case under the proposed rule, it runs afoul of constitutional protections. The end result, if these new persuader rules are adopted, would be a reluctance on the part of employers, lawyers, and other organizations to give and/or obtain advice in the labor relations area. Although one would think that the Department of Labor would want to encourage employers to seek competent legal advice regarding such a complex area of the law, the proposed regulations do the exact opposite.

The chilling of First Amendment rights may be permitted only if it is justified by a sufficiently compelling purpose behind the legislation.[54] Whatever the balance of rights versus governmental needs may have been when "advice" was given a reasonable interpretation, that balance would be drastically altered if the proposed regulations are adopted. Further, the Department has not demonstrated *any* harm flowing from the longstanding interpretation of advice that would justify the reporting contemplated by the proposed regulation. Therefore, what may have been a constitutional statute under the current interpretation of the advice exemption would almost certainly become unconstitutional when "advice" is interpreted to exclude traditional attorney-client communications.

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[53] *Humphreys, Hutcheson and Mosley v. Donovan*, 755 F.2d 1211 (1985); *Wirtz v. Fowler*, 372 F.2d 315, overruled on other grounds, *Price v. Wirtz,* 412 F.2d 6473 (5th Cir. 1966) (*en banc*). Even with this broader interpretation of advice, there were a number of dissenting opinions by respected jurists that cast doubt upon the constitutionality of the LMRDA. *Master Printers Association v. Donovan*, 699 F.2d 370, 374 (7th Cir. 1983) (Pell, Circuit Judge dissenting); *Price v. Wirtz*, 412 F.2d 647, 656 (5th Cir. 1969) (Dyer, Circuit Judge, with whom Gewin, Coleman, Ainsworth, and Godbold, Circuit Judges, join, dissenting).

[54] *Buckley v. Valeo*, 424 U.S, 1 (1975) (per curiam).

3. The Proposed Rules Constitute an Unreasonable Search and Seizure.

In addition to the unwarranted intrusion on the First Amendment rights of employers, attorneys, and other organizations, the proposed rules would also clearly violate Fourth Amendment protections against unreasonable search and seizure. As demonstrated above, the Department of Labor has not given any justification for the proposed infringement upon the attorney-client relationship. Additionally, such an infringement has not taken place in any other area of legal representation. Simply put, there is no state interest which justifies the contemplated intrusion. For these reasons, the proposed regulations would subject employers, their counsel, and possibly other associated organizations to an unreasonable search and seizure in violation of the Fourth Amendment.[55]

F. The Proposed Rules Fail to Satisfy the Procedural Requirements for Rulemaking.

1. The Department has Demonstrated no Changed Circumstances to Justify Radically Changing Persuader Reporting.

The ability of an agency to reverse a longstanding interpretation of a statute is limited.[56] There must be some "changing circumstance" justifying a change in the agency's interpretation.[57] In this matter, however, there are no changed circumstances justifying the Department's drastic departure from an interpretation that has functioned consistently and effectively for five decades. Absent such evidence of "changed circumstances," the Department's rulemaking is beyond the Department's powers and must be suspended.

2. The Proposed Rules Violate Executive Order 13563.

On January 11, 2011, President Obama issued Executive Order 13563 entitled "Improving Regulation and Regulatory Review" in which he called upon all Executive Branch agencies, such as the Department of Labor, to ensure that regulations:

> "must allow for public participation and an open exchange of ideas. . . must promote predictability and reduce uncertainty. . . must identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends. . . must take into account benefits and costs, both quantitative and qualitative. . .

[55] *See Marshall v. Barlow's Inc.,* 436 U.S. 307 (1978); *California Bankers Association v. Schultz*, 416 U.S. 21 (1974); and *United States v. Morton Salt Co.,* 338 U.S. 632 (1950).
[56] *FDA v. Brown & Williamson Tobacco,* 529 U.S. 120 (2000) (FDA's tobacco regulations struck down).

[57] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.,* 463 U.S. 29. 42 (1983) (NHTSA's regulatory change was arbitrary and capricious).

> must ensure that regulations are accessible, consistent, written in plain language, and easy to understand. . . and must measure, and seek to improve, the actual results of regulatory requirements."

The Department's proposed rule on the LMRDA "advice" exemption violates both the spirit and the letter of the Executive Order. The Department has failed to give adequate time for public participation or an open exchange of ideas, and the newly proposed rule certainly does not promote predictability or reduce uncertainty, but instead creates uncertainty where there has previously been a bright line test for compliance. The proposal does not adequately measure the true costs of compliance with the new standard and the new proposal is in no sense written in plain language that is easy to understand. To the contrary, the Department's proposed new definition of advice is contrary to the plain English usage intended by Congress as interpreted by the courts and the Department itself over many decades.

Faced with similar concerns, as noted above at p. 4, the Department's Employee Benefits Security Administration (EBSA) recently cited Executive Order 13563 as the basis for its decision to withdraw and re-propose a rule on the definition of a fiduciary under ERISA.[58] The CDW strongly urges the Department to follow suit in the present case.

3. The Proposed Rules Violate the Regulatory Flexibility Act and Executive Order 13272.

The Regulatory Flexibility Act of 1960 ("RFA")[59] requires agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make initial analyses available for public comment.[60] Executive Orders 13563 (see discussion above) and 12866 require agencies to assess all costs and benefits of available regulatory alternatives.

The NPRM concedes that the rules have been designated as a "significant regulatory action," but denies, wrongly, that it has a significant economic impact.[61] Among other omissions, the Department has failed to measure the economic impact of the proposal on employers who are now more likely to commit violations of the complicated laws relating to union organizing due to their inability to obtain advice from lawyers and other third party experts.

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[58] *See* EBSA News Release: US Labor Department's ABSA to Re-Propose Rule On Definition of A Fiduciary ("Additional time ensures strongest possible protections for retirement savers, business owners"), available at www.dol.gov/opa/media/press/ebsa. Sept. 19, 2011.

[59] 5 U.S.C. 601 *et seq*.

[60] 5. U.S.C. at §§ 603, 604.

[61] 76 FR 119 at 36,206.

4. The Proposed Rules Violate the Small Business Regulatory Enforcement Fairness Act and Underestimate the Regulatory Impact.

The Small Business Regulatory Enforcement Fairness Act of 1996 ("SBREFA") applies an analysis to proposed rules which result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

Here, the NPRM simply announces, wrongly, that the proposed rules "will not result in (these) annual effect(s) on the economy" and therefore the SBREFA analysis need not be undertaken. The NPRM thus violates the SBREFA.

The Department also ignores the true effects of the proposal on small business and therefore grossly underestimated the likely costs of the proposed rules. Instead, it narrowly focuses only on the paperwork burden and costs of completing Forms LM-10 and LM-20 (which analysis grossly underestimates the time and costs of completing the forms).

Again, the true costs must include some estimate or economic projection regarding the effect of denying small employers legal counsel and the likely result of unfair labor practice trials and administrative litigation. CDW recognizes that this is hard to project, but the Department may not simply ignore or dismiss the likely costs.

For the above reasons, CDW requests that the NPRM be withdrawn, and that a true analysis be completed under the above-mentioned rulemaking standards.

III. CONCLUSION.

For the foregoing reasons, CDW strongly objects to the Department's proposed rules, which virtually eliminate the "advice" exemption under section 203(c) of the Labor-Management Reporting and Disclosure Act, thus denying employers the needed legal advice to communicate with employees both before and during periods of union organizing, collective bargaining and strikes. The radical narrowing of the advice exemption violates the plain language and history of the LMRDA and is patently intended to serve an unauthorized agenda of promoting union organizing by chilling the right of employers to obtain lawful and legitimate advice from experts in labor relations.

Further, the regulatory burden and impact on all business, but most particularly small businesses, would be far greater than the Department has estimated. The true costs in time and money simply to fill out forms are vastly understated in the NPRM. The greater costs, though, are not even acknowledged, namely, the burdens imposed on job creators and the resulting negative effects on the economy; the effects of increased agency and judicial litigation that would follow implementation of the proposed changes; and the chilling effect on free speech and

the denial of the right to counsel—with effects on employers and on employees through destruction of the robust debate called for in the union organizing process.

Finally, this "no advice" approach, taken together with the NLRB's proposed "ambush election" election rules, could effectively result in a back-door Employee Free Choice Act which would subject employees to election coercion and intimidation by unions, and a rushed vote (or possibly even no vote) without an opportunity to become fully informed by employers and other employees. The debating field would be left virtually entirely to unions. This one-sided debate, coupled with the likelihood of increased acrimony, or at least increased litigation and challenges to the activities of un-counseled employers, surely run counter to the underlying principles of the NLRA and LMRDA.

Respectfully submitted,

THE COALITION FOR A DEMOCRATIC WORKPLACE

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Appendix 1

Participants – The Coalition for a Democratic Workplace

The Coalition for a Democratic Workplace

The Coalition for a Democratic Workplace encompasses hundreds of employer associations, individual employers and other organizations that collectively represent millions of businesses of all sizes. They employ tens of millions of individuals working in every industry and every region of the United States. The following CDW member organizations join in the filing of these comments.[62]

National Organizations (113)
Aeronautical Repair Station Association
Agricultural Retailers Association
Air Conditioning Contractors of America
American Apparel & Footwear Association (AAFA)
American Bakers Association
American Feed Industry Association
American Fire Sprinkler Association
American Foundry Society
American Frozen Food Institute
American Hotel and Lodging Association
American Meat Institute
American Moving & Storage Association
American Pipeline Contractors Association
American Rental Association
American Seniors Housing Association
American Staffing Association
American Supply Association
American Trucking Associations
American Wholesale Marketers Association
AMT-The Association For Manufacturing Technology
Asian American Hotel Owners Association
Assisted Living Federation of America
Associated Builders and Contractors, Inc.
Associated Equipment Distributors
Associated General Contractors of America
Association of Equipment Manufacturers
Automotive Aftermarket Industry Association
Brick Industry Association
Building Owners and Managers Association (BOMA) International
Center for the Defense of Free Enterprise Action Fund

[62] Some of the CDW members identified in this Appendix 1 have filed separate comments. All of the listed organizations support the positions expressed in these comments and join in their submission.

College and University Professional Association for Human Resources
Competitive Enterprise Institute
Consumer Electronics Association
Custom Electronic Design & Installation Association
Electronic Security Association (ESA)
Equipment Marketing & Distribution Association (EMDA)
Fashion Accessories Shippers Association (FASA)
Federation of American Hospitals
Food Marketing Institute
Forging Industry Association
FPDA, Motion and Control Network
Heating, Airconditioning & Refrigeration Distributors International (HARDI)
HR Policy Association
INDA, Association of the Nonwoven Fabrics Industry
Independent Electrical Contractors, Inc.
Independent Women's Voice
Industrial Fasteners Institute
International Association of Refrigerated Warehouses
International Council of Shopping Centers
International Foodservice Distributors Association
International Franchise Association
International Sealing Distribution Association
International Warehouse Logistics Association
Kitchen Cabinet Manufacturers Association
Metals Service Center Institute
Modular Building Institute
Motor & Equipment Manufacturers Association
NAHAD - The Association for Hose and Accessories Distribution
National Apartment Association
National Armored Car Association
National Association of Chemical Distributors
National Association of Electrical Distributors
National Association of Home Builders
National Association of Manufacturers
National Association of Theatre Owners
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Club Association
National Council of Chain Restaurants
National Council of Farmer Cooperatives
National Council of Textile Organizations
National Electrical Manufacturers Association (NEMA)
National Federation of Independent Business
National Franchisee Association
National Grocers Association

National Lumber and Building Material Dealers Association
National Multi Housing Council
National Pest Management Association
National Precast Concrete Association
National Ready Mixed Concrete Association
National Restaurant Association
National Retail Federation
National Roofing Contractors Association
National School Transportation Association
National Small Business Association
National Systems Contractors Association
National Tooling and Machining Association
NATSO, Representing America's Travel Plazas and Truckstops
North American Die Casting Association
North American Equipment Dealers Association
NUCA, Representing Utility and Excavation Contractors
Portland Cement Association
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Public Service Research Foundation
Retail Industry Leaders Association
Snack Food Association
Society for Human Resource Management
Society of American Florists
SPI: The Plastics Industry Trade Association
Steel Manufacturers Association
Textile Care Allied Trades Association
Textile Rental Services Association
The Real Estate Roundtable
The United Motorcoach Association
Travel Goods Association (TGA)
Truck Renting and Leasing Association
U.S. Chamber of Commerce
United Fresh Produce Association
Western Growers Association
Wholesale Florists & Florists Supplier Association (WF&FSA)

State and Local Organizations (152)

Advance Student Transportation, Inc. (DE)
American Rental Association of Connecticut
American Rental Association of Massachusetts
American Society of Employers (Michigan)
Arkansas Hospitality Association
Arkansas State Chamber of Commerce/Associated Industries of Arkansas

Associated Builders and Contractors, Inc. Carolinas Chapter
Associated Builders and Contractors, Inc. Central Florida Chapter
Associated Builders and Contractors, Inc. Delaware Chapter
Associated Builders and Contractors, Inc. Florida East Coast Chapter
Associated Builders and Contractors, Inc. Florida Gulf Coast Chapter
Associated Builders and Contractors, Inc. Georgia Chapter
Associated Builders and Contractors, Inc. Greater Houston Chapter
Associated Builders and Contractors, Inc. Hawaii Chapter
Associated Builders and Contractors, Inc. Heart of America Chapter
Associated Builders and Contractors, Inc. Indiana Chapter
Associated Builders and Contractors, Inc. Inland Pacific Chapter
Associated Builders and Contractors, Inc. Keystone Chapter
Associated Builders and Contractors, Inc. Massachusetts Chapter
Associated Builders and Contractors, Inc. Mid-Tennessee Chapter
Associated Builders and Contractors, Inc. Mississippi Chapter
Associated Builders and Contractors, Inc. New Mexico Chapter
Associated Builders and Contractors, Inc. New Orleans/Bayou Chapter
Associated Builders and Contractors, Inc. Pacific Northwest Chapter
Associated Builders and Contractors, Inc. Pelican Chapter
Associated Builders and Contractors, Inc. Rhode Island Chapter
Associated Builders and Contractors, Inc. Rocky Mountain Chapter
Associated Builders and Contractors, Inc. South East Texas Chapter
Associated Builders and Contractors, Inc. South Texas Chapter
Associated Builders and Contractors, Inc. Virginia Chapter
Associated Builders and Contractors, Inc. Western Michigan Chapter
Associated Builders and Contractors, Inc. Western Washington Chapter
Associated Industries of Massachusetts
CA/NV/AZ Automotive Wholesalers Association (CAWA)
Capital Associated Industries Inc. (Raleigh and Greensboro, NC)
CenTex Chapter IEC
Central Alabama Chapter IEC
Central Indiana IEC
Central Missouri IEC
Central Ohio AEC/IEC
Central Pennsylvania Chapter IEC
Central Washington IEC
Centre County IEC
Charleston Metro Chamber of Commerce
Chattanooga Area Chamber of Commerce
Colorado Restaurant Association
Delaware Restaurant Association
Eastern Washington Chapter, IEC
El Paso Chapter IEC, Inc.
Employers Coalition of North Carolina (Raleigh, NC)
Fairfax County Chamber of Commerce
Far West Equipment Dealers Association

Florida Restaurant & Lodging Association
George Krapf Jr. & Sons, Inc. (PA)
Georgia Restaurant Association
Greater Montana IEC
Gregg Bus Services (DE)
IEC Atlanta Chapter
IEC Chesapeake
IEC Dakotas, Inc.
IEC Dallas Chapter
IEC Florida West Coast
IEC Fort Worth/Tarrant County
IEC Georgia Chapter
IEC Greater St. Louis
IEC Hampton Roads Chapter
IEC Kentucky and Southern Indiana
IEC NCAEC
IEC New England
IEC of Arkansas
IEC of East Texas
IEC of Greater Cincinnati
IEC of Idaho
IEC of Illinois
IEC of Kansas City
IEC of Northwest Pennsylvania
IEC of Oregon
IEC of Southeast Missouri
IEC of Texoma
IEC of the Bluegrass
IEC of the Texas Panhandle
IEC of Utah
IEC of Washington ETF
IEC Southern Arizona
IEC Southern Colorado Chapter
IEC Southern Indiana Chapter-Evansville
IEC Texas Gulf Coast Chapter
IEC Western Reserve Chapter
IECA of Arizona
IECA of Nashville
IECA of Southern California, Inc.
IEC-OKC, Inc.
Indian River County Chamber of Commerce
Indiana Restaurant Association
Iowa Restaurant Association
Kansas Chamber of Commerce
Kansas Restaurant & Hospitality Association
Kentucky Restaurant Association

Krapf Coaches, Inc. (PA)
Little Rock Regional Chamber of Commerce
Louisiana Restaurant Association
Lubbock Chapter IEC, Inc.
Maryland Chamber of Commerce
MEC IEC of Dayton
Mid-Oregon Chapter IEC
Mid-South Chapter IEC
Midwest IEC
Minnesota Grocer Association
Missouri Restaurant Association
Montana Chamber of Commerce
Montana IEC
Mountain Valley Transportation, Inc. (VA)
Nebraska Chamber of Commerce & Industry
Nevada Manufacturers Association
New Jersey IEC
New Jersey Motor Truck Association
New Jersey Food Council
New Mexico Restaurant Association
New York State Restaurant Association
NFIB Colorado-Wyoming
North Carolina Chamber
North Dakota Chamber of Commerce
Northern New Mexico IEC
Northern Ohio ECA
NW Washington IEC
Oklahoma Restaurant Association
Oregon Restaurant & Lodging Association
Pennsylvania Restaurant Association
Puget Sound Washington Chapter of IEC
Red Lion Bus, Inc. (PA)
Restaurant Association of Maryland
Rio Grande Valley IEC, Inc.
Rocky Mountain Chapter IEC
Rogers-Lowell Chamber of Commerce (Arkansas)
Rover Community Transportation (PA)
San Antonio Chapter IEC, Inc.
Septran, Inc. (IL)
Southern New Mexico IEC
Stafursky Transportation, Inc. (PA)
Texas Hospital Association
Texas State IEC
The Management Association of Illinois
The State Chamber of Oklahoma
Tri State IEC

Utah Restaurant Association
Virginia Manufacturers Association
Virginia Trucking Association
Washington Restaurant Association
West Virginia Chamber of Commerce
Western Colorado IEC
Western Electrical Contractors Association
Wichita Chapter IEC