

OFFICE OF GENERAL COUNSEL

September 21, 2011

Submitted Electronically

The Hon. Hilda L. Solis
Secretary
U.S. Department of Labor
Office of Labor-Management Standards
Division of Interpretations and Standards
200 Constitution Avenue, N.W.
Room N-5609
Washington, D.C. 20210

Re: RIN 1215-AB79 and 1245-AA03; Labor-Management Reporting and Disclosure Act; Interpretation of the “Advice” Exemption; Notice of Proposed Rulemaking, 76 Fed. Reg. 36178 (June 21, 2011).

Dear Secretary Solis:

On behalf of the American Council on Education (ACE) and the other higher education associations identified below, I submit the following comments in response to the Notice of Proposed Rulemaking (NPRM) issued by the Office of Labor-Management Standards (OLMS) of the Department of Labor (DoL or the Department) in the June 21 *Federal Register*. In the NPRM, OLMS proposes to revise its interpretation of the “advice” exemption to persuader reporting under section 203 of the *Labor-Management Reporting and Disclosure Act* of 1959 (LMRDA), 29 U.S.C. § 433, by narrowing the definition of “advice” and thus expanding the circumstances under which reporting is required of employer-consultant persuader agreements. ACE opposes the revised interpretation of the advice exemption and requests that the Department decline to adopt the NPRM.

I. STATEMENT OF INTEREST

A. Overview

Founded in 1918, ACE is the major coordinating body for all the nation's higher education institutions, representing more than 1,600 college and university presidents, and more than 200 related associations, nationwide. It provides leadership on key higher education issues and influences public policy through advocacy.

B. Higher Education’s Interests in Commenting on the NPRM

ACE and its members have substantial interests in this rulemaking. ACE members range from large universities to small community colleges. Many of ACE’s members are covered by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* (NLRA). ACE’s member institutions are

focused on educating students and creating a positive and peaceful learning environment and often are unfamiliar with the specific and complex rules regarding the NLRA, collective bargaining and union organizing. Accordingly, when such issues arise, ACE members frequently seek labor relations advice from outside labor counsel and, on occasion, ACE itself. The Department's revised interpretation of the advice exemption would interfere with the ability of educational institutions to receive labor relations advice needed to ensure proper compliance with all applicable laws, resulting in a potential increase in unfair labor charges and a contentiousness disruptive to academic institutions due to the unique intermingling of college and university "customers" and employees that occurs on campuses. For these reasons, ACE and its members have a particular interest in having the Department address their concerns about this proposed rulemaking.

II. COMMENTS ON THE PROPOSED REGULATION

There are several, independent grounds for the Department to decline adoption of the proposed reinterpretation of the advice exemption. *First*, the proposed standard fails to distinguish between "advice" and "persuader activity" and creates an impracticable standard that would result in ambiguity and uncertainty with regard to whether many lawful and appropriate activities must be reported. *Second*, the proposed reinterpretation of the advice exemption would impinge upon the attorney-client privilege and disclose attorney-client confidences. *Third*, there is no basis for the Department's reinterpretation of the advice exemption in either the text or legislative history of Section 203 of the LMRDA. *Fourth*, the proposed interpretation's underlying policy of employer neutrality conflicts with statutory policy of robust debate expressed in the NLRA. *Fifth*, the Department's proposed reinterpretation of the advice exemption is an unconstitutionally vague content-based regulation. *Sixth*, the frequency of reporting "persuader activity" should be evaluated not under the proposed, overly broad definition, but rather consistently with the current view of what is reportable "persuader activity," that reflects more accurately the type of activity Congress had intended to regulate. To the extent the Department is concerned about underreporting of the types of activities Congress did intend to regulate, primarily middlemen surreptitiously acting as agents of the employer, the appropriate response is increased enforcement of the current regulation.

Each of these reasons independently constitutes a sufficient ground for the Department to decline adoption of the NPRM; each will be discussed in turn.

1. **The Proposed Standard Fails to Distinguish Between "Advice" and "Persuader Activity" and Creates an Unworkable Standard That Would Result in Ambiguity and Uncertainty with Regard to Whether Many Lawful Legitimate and Appropriate Activities Must Be Reported.**

The Department's proposed standard for distinguishing between "advice" and "persuader activity" is impractical and would necessarily create uncertainty as to what is reportable activity. The current, long-established standard draws a clear, content-neutral distinction between "advice" and reportable "persuader activity." However, the proposed new standard—whether "a particular consultant activity has among its purposes an object, direct or indirect, to persuade

employees” (76 Fed. Reg. at 36,191)—infuses subjectivity into the analysis, which would necessarily result in inconsistent and arbitrary outcomes.

Pursuant to the NPRM, communications are “persuasive” if they “explicitly or implicitly encourage employees to vote for or against union representation, to take a certain position with respect to collective bargaining proposals, or to refrain from concerted activity (such as a strike) in the workplace” (*id.* at 36,191). “Persuader activity” includes, for example, “[t]raining or directing supervisors and other management representatives to engage in persuader activity;” “creating employer policies and practices designed to prevent organizing;” and holding “seminars, webinars, or conferences” at which “guidance is offered to attendees, who represent multiple employers on labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights” (*id.*). However, supplying employers with training, guidance, and/or policies about the obligations of the NLRA and other labor relations issues is a legitimate and appropriate activity routinely offered by consultants and lawyers. Such activities are not the type of persuader activity Congress intended to regulate.

Under the Department’s new, proposed definition of “persuader activity,” many legitimate and appropriate activities by a lawyer or consultant—none of which are reportable under the current requirements—may constitute reportable activity. For example, are revising a client’s solicitation and distribution policy and supplying a client with a draft policy that restricts off-duty employee and/or union organizer access to property now reportable as they are, by definition, restrictions upon where, when and how a union may organize? Creating, revising and updating employer personnel and access policies are important to ensuring compliance with sometimes rapidly evolving legal standards applicable not only to the NLRA but to a host of other employment laws (*see, e.g., New York New York Hotel & Casino*, 356 NLRB No. 119 (Mar. 25, 2011)).

Colleges and universities are primarily concerned with educating students. Smaller institutions in particular cannot reasonably be expected to continuously monitor legal standards and draft policies compliant with NLRA regulations, as well as anti-discrimination, wage and hour, and other relevant regulations. Institutions of all sizes, therefore, routinely turn to lawyers and consultants for assistance. However, the NPRM’s sweeping definition of “persuader activity” may prevent these institutions from seeking and obtaining the guidance they need and give a lawyer pause before providing lawful and important advice to the client on significant issues. For example, in reviewing a client’s employee handbook to ensure policies are in compliance with anti-discrimination laws and regulations, a lawyer may notice the provisions that prohibit solicitation and distribution under certain circumstances are outdated and no longer comply with current law. The NPRM puts that lawyer in the untenable position of having to choose between turning a blind eye to the issue, which is clearly not in the client’s best interest, or running the risk of providing advice that may be reportable and creating myriad reporting obligations for the client, as well as the attorney.

These obligations include not only reporting the agreement or arrangement between the employer and lawyer or consultant, and the fees involved, but also an attorney’s obligation to report all fees charged to all labor relations clients. If a reportable incident has indeed occurred, and the attorney is required to file a Form LM-20, the Department and several courts have held

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that the annual Form LM-21 filed by the attorney must include all receipts and disbursements from all of the consultant's clients for whom he has rendered labor relations services and advice during the fiscal year. See LMRDA Interpretive Manual § 260.300; *Douglas v. Wirtz*, 353 F.2d 30 (4th Cir. 1965) (holding same); *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969); *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F.2d 1211 (6th Cir. 1985); *Donovan v. Master Printer's Ass'n*, 532 F. Supp. 1140 (N.D. Ill. 1981), *aff'd* 69 F.2d 370 (7th Cir. 1983); but see also *Donovan v. Rose Law Firm*, 768 F.2d 964 (8th Cir. 1985) (holding that receipts or disbursements for otherwise exempt labor relations services and advice rendered do not need to be disclosed on the annual report). This includes providing receipts for activities which were otherwise exempt from reporting on an Form LM-20. (*Id.*)

The disclosure of fees paid by clients who are in no way involved with the reported "persuader activity" is a serious intrusion into the private and confidential affairs of "innocent persons who chanced to receive advice or services in the area of 'labor relations', whatever that is, during the 'fiscal year', whenever that is, from an attorney who happened extracurricularly to engage in 'persuader activities', whatever they are." (*Price*, 412 F.2d at 652 (J. Dyer, dissenting).) Furthermore, although the Department asserts that the reporting and recordkeeping burden for each Form LM-20 will be 60 minutes (increased from 22 minutes under the current reporting requirements) (76 Fed. Reg. 36,200-36,201), the actual time incurred to complete a Form LM-20 would likely be significantly higher were the NPRM implemented, especially in light of the vagueness and uncertainty of the proposed standard (discussed *infra* in this section and in section 5 of these comments). Moreover, even if the Department's time estimates with regard to the Form LM-20 are correct, the reporting burden on attorneys would increase substantially, as once a Form LM-20 is filed, an attorney must (as discussed *supra*) report on a Form LM-21 all receipts and disbursements from all other labor relations clients, potentially a massive undertaking depending on the size of the involved law firm or attorney practice. Under the proposed regime, not only would colleges and universities likely be reluctant to seek the advice they need, but lawyers and consultants would likely be reluctant to provide it.

The NPRM also fails to provide adequate guidance as to (a) when particular communications might be deemed "persuader activity;" (b) whether activities that may not be reportable during one phase of the union/employer relationship may be reportable during a different phase; and (c) the extent to which activities that implicitly or indirectly influence employees are reportable "persuader activities." Specifically, it is not clear whether activities may be "persuasive" after the union has been certified or in the absence of any union organizing. For example, although clearly far beyond what Congress intended in the LMRDA, could a lawyer's providing advice regarding the use of replacement workers during a strike constitute reportable "persuader activity" because the use of replacements may affect the employees' decision to participate in the strike? Could it be reportable for a consultant or lawyer to advise its client on the process of decertification of a union or in response to a rumored employee decertification petition? Although there is, at best, a tenuous connection between such activities and the possibility of employee persuasion, these activities may, under the proposed reinterpretation, be considered indirect attempts to persuade.

Furthermore, the Department provides little guidance regarding the type of advice that falls within the collective bargaining exclusion set forth on the Form LM-20. For example, is it reportable for a consultant or lawyer to advise to its client as to how to communicate with employees about collective bargaining negotiations in response to a union's collective bargaining proposals? If a lawyer provides advice in connection with negotiating a collective bargaining agreement that may directly or indirectly affect the ability of employees at another employer facility to organize, is that reportable? These few examples—while clearly not “persuader activity” within the meaning of the statute—illustrate how adoption of the NPRM would result in ambiguity, uncertainty, and arbitrary outcomes.

2. The Proposed Reinterpretation of the Advice Exemption and Standard for “Persuader Activity” Would Invade the Attorney-Client Privilege and Disclose Attorney-Client Confidences.

The proposed new definition of “advice” would supplant the well-established, bright-line rule that a lawyer who has no direct contact with any of the client's rank-and-file employees need not report labor relations advice where the employer was free to accept or reject that advice. If under the proposed standard, a complaint is filed against an employer for failing to report “persuader activity” conducted by a lawyer, any ensuing Department investigation would undoubtedly lead to violations of the attorney-client privilege and confidences. In order to determine whether “a particular consultant activity has among its purposes an object, direct or indirect, to persuade employees” (76 Fed. Reg. at 36,191), thereby rendering it reportable, the Department would be required to thoroughly investigate not only the relationship between the lawyer and the client, but also the lawyer's communications with the client. The client or its lawyer would likely be compelled to disclose the content of these privileged and confidential communications both to prove the nature and object of the communications and possibly defend themselves against any criminal prosecution brought pursuant to 29 U.S.C. § 439. From this fact-specific, case-by-case inquiry, the Department would be required to draw inferences as to the lawyer's intent in providing the advice at issue. The possibility of such investigation and analysis is likely to inhibit free and candid communications between a client and attorney, and may impair many colleges and universities from obtaining the legal advice and representation that they need, effectively denying them their fundamental right to counsel.

Even in the absence of a complaint and investigation, the reporting requirements of section 203 would, under the proposed advice exemption, require attorneys to reveal attorney-client confidences. Pursuant to the NPRM, an attorney engaged in “persuader activity” must file a Form LM-20 “which may require information about the fact of the agreement with an employer involving persuader activity, the client's identity, the fees involved and the scope and nature of the employment” (*id.*). According to the Department, although Section 204 of the LMRDA (29 U.S.C. § 434) exempts such an attorney from disclosing the content of communications protected by the attorney-client privilege (*see* 76 Fed. Reg. at 36,192), “the fact of legal consultation, clients' identities, attorney's fees and the scope and nature of the employment are not deemed privileged” (*id.*).

This reasoning is inconsistent with section 204 of the LMRDA, which exempts “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 (emphasis added)). There is no statutory basis for the Department’s proposed limitation of the phrase “any information” to only those communications protected by the attorney-client privilege, or, those “communications made in confidence between a client seeking legal counsel and an attorney.” (76 Fed. Reg. 36,192.) Although in *Humphreys, Hutcheson and Moseley v. Donovan* (755 F.2d 1211 (6th Cir. 1985)), cited in the NPRM, the Sixth Circuit found section 204 and the attorney-client privilege to be coextensive, the Court failed to give effect to the plain language of the statute, relying instead on inconclusive excerpts from the legislative history in reaching its holding. (*See id.* at 1216-19; *cf. Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 254 (1992) (“When the words of a statute are unambiguous, then, this first canon [of construction] is also the last: ‘judicial inquiry is complete.’”). The plain language of section 204 unambiguously exempts from reporting requirements “any information” communicated by the client during the representation, including the client’s identity, the terms and scope of engagement, and fees. Had Congress intended a narrower exemption, it would have exempted “confidential communications” or “communications protected by the attorney-client privilege” and not used the broad phrase “any information.” (*See id.* at 253-54 (reaffirming the well-established principle that “courts must presume that a legislature says in a statute what it means and means in a statute what it says there”).)

Furthermore, as previously discussed in section 1, an attorney involved in “persuader activity” on behalf of a client must not only report on the Form LM-21 all receipts and disbursements from that client (including for non-persuader advice and activity), but also all receipts and disbursements from all labor relations clients, thereby violating the confidences of innocent clients who are in no way involved with any persuader activity. Where an attorney reports one instance of persuader activity, a sort of “automatic discovery” is triggered, and he must reveal the identities and fees of other uninvolved clients. (*Price*, 412 F.2d at 654 (J. Dyer, dissenting).) It is difficult to see what interests are served by such disclosures, especially with respect to employers who have engaged attorneys or consultants for labor law advice that has nothing to do with persuader activity, or what might justify the government’s violation of the confidences of these “innocent” employers. (*See Donovan*, 768 F.2d at 975 (“In particular, we have difficulty perceiving the compelling governmental interest to be served by the reporting of all receipts and disbursements related to any labor relations advice given to or services performed for clients for whom a consultant has not performed any persuader activity.”).)

The NPRM also conflicts with the ABA Model Rule of Professional Conduct 1.6, titled “Confidentiality of Information,” a version of which can be found in virtually all state bar ethics rules.¹ In the NPRM, the Department makes no mention of the rule, which prohibits lawyers

¹ All 50 states and the District of Columbia have in force an ethical rule that tracks Model Rule 1.6. *See* Ala. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); Alaska Rules of Prof’l Conduct R. 1.6; Ariz. Rules of Prof’l Conduct R. 1.6; Ark. Rules of Prof’l Conduct R. 1.6; Cal. Bus. & Prof. Code § 6068(e); Colo. Rules of Prof’l Conduct R. 1.6; Conn. Rules of Prof’l Conduct R. 1.6; Del. Lawyers’ Rules of Prof’l Conduct R. 1.6; D.C. Rules of Prof’l Conduct R. 1.6; Fla. Rules of Prof’l Conduct R. 4-1.6 (no exception for compliance with

from “reveal[ing] information relating to the representation of a client,” including non-privileged information such as the identity of the client, the nature of the representation, and the amount of legal fees paid by the client to the lawyer (*see* Model Rules of Prof’l Conduct R. 1.6 cmt. 3 (“The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to *all information* relating to the representation, whatever its source.”) (emphasis added)). The import of this rule is made clear in the ABA’s comment: The requirement that a “lawyer must not reveal information relating to the representation . . . contributes to the trust that is the hallmark of the client-lawyer relationship.” (*Id.* at cmt. 2.)

The ABA model rule allows for disclosure of confidential client information “to comply with other law or a court order,” (*id.* at R. 1.6(b)(6)). However, the plain language of Section 204’s broad exemption of “any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship” suggests that Congress did not intend for the LMRDA to supersede the model rule, thereby requiring disclosure of non-privileged yet confidential client information. To the contrary, the plain language of section 204 more closely resembles the confidentiality rule’s protection of “all information relating to the representation” than the attorney-client privilege’s narrower protection of “confidential communications.” Thus, the NPRM could require attorneys to violate their state ethical duties.

3. There Is No Basis for the Department’s Reinterpretation of the Advice Exemption in Either the Text or Legislative History of Section 203 of the LMRDA.

Section 203(c) of the LMRDA, titled “Advisory or representative services exempt from filing requirements,” provides that:

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 agreeing to represent such employer[.]

(continued...)

other law); Ga. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); Haw. Rules of Prof’l Conduct R. 1.6; Idaho Rules of Prof’l Conduct R. 1.6; Ill. Rules of Prof’l Conduct R. 1.6; Ind. Rules of Prof’l Conduct R. 1.6; Iowa Rules of Prof’l Conduct R. 32:1.6; Kan. Rules of Prof’l Conduct R. 1.6; Ky. Rules of Prof’l Conduct R. 1.6; La. Rules of Prof’l Conduct R. 1.6; Me. Rules of Prof’l Conduct R. 1.6; Md. Lawyer’s Rules of Prof’l Conduct R. 1.6; Mass. Rules of Prof’l Conduct R. 1.6; Mich. Rules of Prof’l Conduct R. 1.6; Minn. Rules of Prof’l Conduct R. 1.6; Miss. Rules of Prof’l Conduct R. 1.6; Mo. Rules of Prof’l Conduct R. 4-1.6; Mont. Rules of Prof’l conduct R. 1.6; Neb. Rules of Prof’l Conduct R. 3-501.6; Nev. Rules of Prof’l Conduct R. 1.6; N.H. Rules of Prof’l Conduct R. 1.6; N.J. Rules of Prof’l Conduct R. 1.6; N.M. Rules of Prof’l Conduct R. 16-106; N.Y. Rules of Prof’l Conduct R. 1.6; N.C. Rules of Prof’l Conduct R. 1.6; N.D. Rules of Prof’l Conduct R. 1.6; Ohio Rules of Prof’l Conduct R. 1.6; Okla. Rules of Prof’l Conduct R. 1.6; Or. Rules of Prof’l Conduct R. 1.6; Pa. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); R.I. Rules of Prof’l Conduct R. 1.6; S.C. Rules of Prof’l Conduct R. 1.6; S.D. Rules of Prof’l Conduct R. 1.6; Tenn. Rules of Prof’l Conduct R. 1.6; Tex. Disciplinary Rules of Prof’l Conduct R. 1.05; Utah Rules of Prof’l Conduct R. 1.6; Vt. Rules of Prof’l Conduct R. 1.6; Va. Rules of Prof’l Conduct R. 1.6; Wash. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); W.V. Rules of Prof’l Conduct R. 1.6 (no exception for compliance with other law); Wis. Rules of Prof’l Conduct SCR. 20:1.6; Wyo. Rules of Prof’l Conduct R. 1.6.

29 U.S.C. § 433(c).

This exemption, on its face, covers, without limitation, all “advisory or representative services,” including “giving or agreeing to give advice.” The term “advice” is no way qualified, however the proposed standard set forth in the NPRM rewrites the advice exemption by limiting the types of advice that are unreportable (*see* 76 Fed. Reg. at 36,191 (“A lawyer or other consultant who exclusively counsels employer representatives on what they may *lawfully* say to employees, ensures a client’s *compliance with the law*, or provides *guidance on NLRB practice or precedent*, is providing ‘advice.’”)) (emphasis added)). There is no textual basis for such a limitation.

As the Department acknowledges, “[a]dvice’ ordinarily is understood to mean a recommendation regarding a decision or a course of conduct.” (76 Fed. Reg. at 36,183 (citations omitted).) The Department suggests that its current interpretation of ‘advice’ “does not provide the best analytical framework for ensuring necessary disclosure” because the “common construction of advice does not rely on the advisee’s acceptance or rejection of the guidance obtained from the advisor.” (*Id.*) However, the current interpretation relies not on whether an employer ultimately accepts or rejects the advice, but rather on whether the employer is free to accept or reject the advice. (*UAW v. Dole* (869 F.2d 616, 620 (D.C. Cir. 1989)), LMRDA Interpretative Manual § 265.005.) This freedom is inherent in the terms “advice” and “recommend,” defined “to present as worthy of acceptance” (Merriam-Webster’s Dictionary (online)). Any “advice” may be accepted or rejected by the recipient. The current interpretation of the term advice—which includes oral or written submissions to the employer that the employer is free to accept or reject, (LMRDA Interpretative Manual § 265.005)—is consistent with the plain text of the statute. As previously discussed, there is a well-established presumption “that a legislature says in a statute what it means and means in a statute what it says there[.]” (*Connecticut Nat. Bank*, 503 U.S. 253-54.)

By proposing a narrowed advice exemption, the Department necessarily proposes a broad, all-inclusive interpretation of “persuader activity” which essentially eviscerates the advice exemption. In *UAW v. Dole* (869 F.2d 616 (D.C. Cir. 1989)), the Court rejected a similarly broad interpretation of an analogous exemption found in Section 203(e) of the LMRDA, which provides that no employer shall “be required to file a report covering expenses made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer” (29 U.S.C. § 433(e)). Writing for the panel, Justice Ginsburg rejected the district court’s view that “all persuader activities in which supervisors engage, even entirely lawful activities, must be reported, because section 203(e) ‘exempts from the reporting requirement only compensation for regular services, not for persuader activities.’” Such an interpretation, the Court opined, “appears to have no office. The LMRDA’s domain is persuader activities. No exemption is needed for activities that fall outside the Act’s domain.” (*Id.*)

The Department’s reinterpretation of Section 203(c) is equally unavailing. According to the Department, the proposed reinterpretation of the advice exemption encompasses counseling “employer representatives on what they may lawfully say to employees, ensur[ing] a client’s compliance with the law, ... provid[ing] guidance on NLRB practice or precedent[.]” “representing the layers before any court, administrative agency, or tribunal of arbitration” and

“engaging in collective bargaining on the employer’s behalf[.]” (76 Fed. Reg. at 36,191, 36,192). However, because these activities are not “persuader activities,” they fall outside the LMRDA’s domain; no exemption is necessary as they are already excluded from the LMRDA’s reporting requirements. But, by definition, the advice exemption must exclude from the statute’s reporting requirements “certain activity that otherwise would have been reportable” persuader activity (*Dole*, 869 F.2d at 618). In particular, where the activity “might be characterized both as advice to an employer and as persuasion of employees” (*id.*), the exemption must control. Were this not the case, the advice exemption would, in effect, be a nullity. It cannot be read to apply solely to a lawyer’s provision of advice to the client, as such a reading would render the exemption duplicative of and encompassed by section 204 of the LMRDA which, according to the Department, “exempts attorney-client communications from reporting[.]” (76 Fed. Reg. 36,179; see 29 U.S.C. § 434.)

In the Department’s view, “a lawyer or consultant’s preparation of persuasive material to be disseminated or distributed to employees” is an example of “quintessential persuader activity” which, the Department maintains, is the kind of “advice” that should be reportable. (*Id.* at 36,183). But the Department fails to explain how the preparation of such material “is itself more than a recommendation regarding a course of conduct in the ordinary sense” (76 Fed. Reg. 36,183), particularly where an employer is free to accept or reject the advice by, for example, adopting and distributing the materials on its own behalf or discarding the materials. (*See Dole*, 869 F.2d at 619, n.4, suggesting that “scripting an employer’s anti-union campaign could constitute “advice,” and noting that “the term ‘advice,’ in lawyer’s parlance, may encompass, e.g., the preparation of a client’s answers to interrogatories, the scripting of a closing or an annual meeting[.]”) Only by imposing a content-specific limitation that has no basis in the text of section 204 is the Department able to transform previously exempt “advice” into “persuader activity” that must be reported.

The Department’s proposed reinterpretation of the advice exemption is also contrary to its legislative history, which the D.C. Circuit found expresses an intent “to grant a broad scope to the term ‘advice’” (*id.* 618, *see also* H.R. Conf. Rep. No. 86-1147, at 33 (1959), *reprinted in* 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 937 (“Subsection (c) of section 203 of the conference substitute grants a *broad exemption* from the requirements of the section with respect to the giving of advice.”) (emphasis added)). As recognized by the Department, section 203 of the LMRDA is aimed at preventing employee deception,² and exposing consultants acting as clandestine “agents of management” or undercover “middlemen” between management and employees (S. Rep. No. 86-187, at 10 (1959) *reprinted in* 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 406)).

² In the NPRM, the Department recognizes Congress’s concern about “deceptive consultant activity” including inducing employees “to form or join company unions through such deceptive devices as ‘spontaneous’ employee committees, essentially fronts for the employer’s anti-union activity.” (*see* 76 Fed. Reg. at 36,184.)

The current interpretation of the “advice” exemption, which includes oral or written submissions to the employer that the employer is free to accept or reject, (LMRDA Interpretative Manual § 265.005), is consistent with the history and purpose of the reporting requirement. Where the employer accepts advice and applies it on its own behalf, it adopts that advice as its own and itself delivers the message recommended by or embodied in the advice. This is not the type of conduct that Congress intended to regulate. Rather, “a prime congressional concern to uncover employer-expenditures for anti-union persuasion carried out, often surreptitiously, not by employers or supervisors, but by consultants or middlemen.” *Dole*, 869 F.2d at n.5 (citing e.g., S. Rep. No. 86-187, at 10 (1959), *reprinted in* 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 406-07.) Where a consultant or middleman undertakes activities meant to directly or indirectly persuade employees through direct contact with rank-and-file employees, those employees may not be aware that the source of the message being delivered to them is their employer. It is these middlemen acting, unbeknownst to employees, “as agents of management” with whom Congress was concerned when it enacted section 203. (S. Rep. No. 86-187, at 10, *reprinted in* 1 NATIONAL LABOR RELATIONS BOARD, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT 406.) (*Compare* 29 U.S.C. § 433(a)(2) (no requirement to report payments made to employees to persuade other employees if the payments were disclosed to the other employees); *id.* § 433(e) (no requirement to report “expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer”).) The purpose of the LMRDA makes clear reporting is not required in instances where a labor relations consultant is not interacting directly with employees as a middleman for the employer.

The NPRM goes beyond the intended purpose of section 203’s reporting requirement by asserting employees have a general right “to know whether employers are using consultants to run anti-union campaigns” or to know “the underlying source of the information directed at them” (76 Fed. Reg. at 36,190). The legislative history confirms that Congress was concerned with employee deception, not whether their employer had consulted with a labor relations consultant or lawyer. The Department reasons that the disclosure of an employer’s arrangement with a consultant or lawyer would help employees “better evaluate the merits of the employer’s views,” and better position them to “make choices regarding their protected rights.” (76 Fed. Reg. 36,187.) However difficult it is to see how knowledge that their employer consulted with a labor relations consultant or lawyer affects employees’ section 7 rights,³ such a legislative judgment is in the province of Congress and not the Department.

³ The Department’s comparison of the LMRDA’s disclosure provisions to disclosure provisions under Federal election campaign law, as discussed in *Buckley v. Valeo*, 424 U.S. 1, 66-67 (1976), is weakened by the proposed narrowing of the advice exemption. The purpose of Federal campaign disclosure is “to provide the electorate with information as to where political campaign money comes from and how it is spent by the candidates” as well as to “alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.” (*Id.* (citation and quotations omitted).) Similarly, where a middleman acting as agent of the employer has direct contact with employees, requiring disclosure of “persuader activities” will ensure that employees understand on whose behalf the middleman is acting and the true source of the message being relayed. However, the analogy is strained as to disclosure of instances where the labor consultant or attorney does *not* interact with employees. When the message being delivered is delivered by the employer on its own behalf,

4. The Proposed Interpretation's Underlying Policy of Employer Neutrality Conflicts With Statutory Policy of Robust Debate Expressed in the NLRA.

In the NPRM, the Department explains that communications are “persuasive” if they explicitly or implicitly encourage employees to vote for or against union representation, to take a certain position with respect to collective bargaining proposals, or refrain from concerted activity (such as a strike) in the workplace.” (76 Fed. Reg. 36,191). By requiring disclosure of such activities, the Department intends to eliminate the supposed “deleterious effect of labor consultant activity on industrial relations” (76 Fed. Reg. 36,190). But the speech the Department proposes to regulate is affirmatively encouraged by federal labor policy and expressly protected by section 8(c) of the NLRA, 29 U.S.C. § 158(c). The enactment of this section “manifested a ‘congressional intent to encourage free debate on issues dividing labor and management.’” (*Chamber of Commerce*, 554 U.S. at 67 (quoting *Linn v. Plant Guard Workers*, 383 U.S. 53, 62 (1966).) The policy expressed in section 8(c) “suffuses the NLRA as a whole,” and favors “uninhibited, robust, and wide-open debate in labor disputes[.]” (*Id.* at 68 (quoting *Letter Carriers v. Austin*, 418 U.S. 264, 273-274 (1974).) Section 203(f) of the LMRDA expressly preserves this policy, providing that “[n]othing contained in this section shall be construed as an amendment to or modification of the rights protected by section 8(c) of the [NLRA.]” 29 U.S.C. § 433(f). If adopted, the NPRM would impermissibly stand “as an obstacle to the accomplishment and execution of the full purposes and objectives of the NLRA.” (*Chamber of Commerce v. Brown*, 554 U.S. 60, 73 (2008) (citations and quotations omitted).)

As originally enacted, the NLRA, or Wagner Act, did not include a provision addressing employer speech rights. (*See Chamber of Commerce*, 554 U.S. at 66.) In litigating allegations that an employer’s persuasive activities constituted unfair labor practices under the NLRA, the NLRB took the position that the statute “demanded complete employer neutrality during organizing campaigns, reasoning that any partisan employer speech about unions would interfere with the § 7 rights of employees” (*id.* at 66; *see, e.g., Letz Mfg. Co.*, 32 NLRB 563 (1941)). In *NLRB v. Virginia Electric & Power Co.* (314 U.S. 469 (1941)), the Supreme Court rejected that position, holding that the NLRA does not prohibit an employer “from expressing its views on labor policies or problems” unless the speech amounts “to coercion within the meaning of the Act” (*id.* at 477). There, the Court recognized “the First Amendment right of employers to engage in noncoercive speech about unionization” (*Chamber of Commerce*, 554 U.S. at 67). Notwithstanding *Virginia Electric* and its progeny, “the NLRB continued to regulate employer speech too restrictively in the eyes of Congress” (*id.*).

In order to ensure “free debate,” “Congress amended the NLRA rather than leaving to the courts the task of correcting the NLRB’s decisions on a case-by-case basis” (*id.* at 67-68). Congress

(continued...)

there is no danger that the employees are being deceived with regard to the interests of the messenger or the risk that the messenger is somehow beholden to an undisclosed interest. The interests of the labor consultant or attorney in this latter scenario are irrelevant since they exercise no power over the employee.

enacted the Taft-Hartley Act out of a “[c]oncern[] that the Wagner Act had pushed the labor relations balance too far in favor of unions” (*id.*). In particular, Congress added Section 8(c) to the NLRA for the purpose of ensuring that employers have “full freedom to express their views to employees on labor matters” (S. Rep. No. 80-105, at 23-24 (1947) (emphasis added)). Specifically, under section 8(c), an employer is free to express non-coercively its views of a particular union or the merits of a particular union’s organizing campaign or bargaining objectives. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)). Accordingly, Section 8(c) constitutes an “explicit direction from Congress to leave noncoercive speech unregulated” in order to effectuate employees’ Section 7 right “to receive information opposing unionization” (*Chamber of Commerce*, 554 U.S. at 68.). By attempting to regulate non-coercive employer speech, the NPRM advances “the same policy judgment that the NLRB advanced under the Wagner Act, and that Congress renounced in the Taft-Hartley Act” (*Chamber of Commerce*, 554 U.S. at 69).

Little, if any, consideration appears to have been given to the chilling effect the NPRM would likely have on employer free speech or the resulting effect on employees’ section 7 rights. The Department infers, then emphasizes, a congressional intent that “employees be permitted to know whether employers are using consultants to run anti-union campaigns or otherwise engage in persuader activities.” (76 Fed. Reg. 36,190.) According to the Department, such information assists employees “in developing independent and well-informed conclusions regarding union representation.” (*Id.*) However, the NPRM does not address its affect on an employee’s “right to receive information opposing unionization.” (*Chamber of Commerce*, 554 U.S. at 68.) If the NPRM is adopted, it seems likely that some consultants or lawyers will decline to give advice out of fear of triggering a reporting obligation, especially given the Department’s position that the scope of the reporting obligation extends to all labor relations advice or services, not just persuader activities (*see* LMRDA Interpretative Manual § 260.300). Such decisions may result in significantly fewer employers choosing to take part in the “free debate” that Congress and the Supreme Court have found to be crucial to ensuring a well-informed union electorate.

Colleges and universities strive to preserve peace on campus and maintain a positive learning environment for students. In furtherance of such efforts, many educational institutions may choose not to oppose union organizing. However, those who may wish to exercise their statutorily protected right to speak to employees may feel compelled to refrain from doing so, resulting in employees being less informed about the important choice they face. Although the NPRM does allow for minimal, unregulated employer counseling regarding what they may lawfully say to employees (*see* 76 Fed. Reg. at 36,182), it is unreasonable to expect employers such as colleges and universities will be able to translate such advice into lawful action in response to labor relations matters, including a union organizing campaign. Colleges and universities are focused on educating students, and many need training and guidance on how to effectively communicate their views about unionization. If the NPRM is adopted, consultants and lawyers may be reluctant to provide clients with guidance regarding policies or training, and, as a result, colleges and universities may be reluctant to communicate any views or information in response to an organizing campaign. Not only would their neutrality frustrate federal labor policy, but it would deprive employees of their only opportunity to discover their employer’s views on unionization generally, the particular union or unions involved in organizing, and the

reasons for these views. Colleges and universities, as marketplaces of ideas, are particularly sensitive to such inhibition of expression.

5. The Department's Proposed Reinterpretation of the Advice Exemption Is an Unconstitutionally Vague Content-Based Regulation.

The First Amendment protects the right “to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them” (*Thomas v. Collins*, 323 U.S. 516, 532 (1945)). Indeed, “employers’ attempts to persuade to action with respect to joining or not joining unions are within the First Amendment’s guaranty.” (*Id.* at 537.) The Department’s proposed reinterpretations of the advice exemption and persuader activity infringe these First Amendment freedoms because they are unconstitutionally vague.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” (*Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).) In *Grayned*, the Supreme Court articulated the several vices of vague laws, including their failure to provide fair warning to the public with regard to what is prohibited and guidance to those who enforce the laws, posing a risk of arbitrary outcomes. (*Id.*) Relatedly, “where a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone ... than if the boundaries of the forbidden areas were clearly marked.” (*Id.* (footnotes and quotations omitted).) Problems of vagueness are “particularly treacherous where, as here, the violation . . . carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights” (*Buckley v. Valeo*, 424 U.S. 1, 76-77 (1976); see 29 U.S.C. § 439 (providing for criminal penalties for willful violations of Section 203)). Accordingly, in such circumstances “an even greater degree of specificity is required” (*Buckley*, 424 U.S. at 77).

The Department’s proposed definition of “persuader activity” (76 Fed. Reg. at 36,192) as communications that “in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively,” is, we believe, unconstitutionally vague. See *Buckley*, 424 U.S. 76-82 (narrowly construing an analogous disclosure law applicable to expenditures spent “for the purpose of influencing” an election in order to avoid unconstitutional vagueness). In *Thomas v. Collins* (323 U.S. 516 (1945)), the Supreme Court elaborated on the practical effect of an unconstitutionally vague statute restricting speech. There, the Court struck down a Texas law that required labor organizers to apply for an organizer’s card “before soliciting any members for his organization” (*id.* at 519 n.1). The Court found that there was “no doubt” that the statute restricted free speech and addressed the statute’s vague use of the term “solicit”:

[W]hether words intended and designed to fall short of invitation would miss that mark is a question both of intent and of effect. No speaker, in such circumstances, safely could assume that anything he might say upon the general subject would not be understood by some as an invitation. In short, the supposedly clear-cut distinction between discussion, laudation, general advocacy, and solicitation puts the speaker in these circumstances wholly at the mercy of the varied

understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning. Such a distinction offers no security for free discussion. In these conditions it blankets with uncertainty whatever may be said. It compels the speaker to hedge and trim. He must take care in every word to create no impression that he means, in advocating unionism's most central principle, namely, that workingmen should unite for collective bargaining, to urge those present to do so. The vice is not merely that invitation, in the circumstances shown here, is speech. It is also that its prohibition forbids or restrains discussion which is not or may not be invitation. The sharp line cannot be drawn surely or securely.

(*Id.* at 535.)

Here, as in *Thomas*, there is no meaningful distinction between those communications that have a direct or indirect objective to persuade employees and those that do not. Under the NPRM's reinterpretation of "persuader activity," the speaker is "wholly at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning;" no speaker "safely could assume that anything he might say upon the general subject would not be understood by some as" persuasion (*id.*). As a result, the speaker must unconstitutionally "hedge and trim" his speech. (*Id.*) And because the LMRDA "carries criminal penalties and fear of incurring these sanctions may deter those who seek to exercise protected First Amendment rights[.]" the vagueness of the distinction at issue is of significant consequence, and the Department is required to draw a sharper distinction than the one proposed (*Buckley*, 424 U.S. at 76-77; see 29 U.S.C. § 439 (providing for criminal penalties for willful violations of Section 203)). In order "to avoid the shoals of vagueness" "where the constitutional requirement of definitiveness is at stake," a statute must be interpreted consistently with the legislature's purpose in enacting the statute. (*Buckley*, 424 U.S. at 78.) As previously discussed, the Department's overly broad definition of persuader activity is inconsistent with legislative purpose in enacting section 203 of the LMRDA.

In addition to being unconstitutionally vague, the Department's proposed reinterpretation of the advice exemption is contrary to well-settled law that under the First Amendment, the government is prohibited from drawing a distinction between permissible and impermissible protected speech based on its message, content or subject matter. (See *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991).) Because "the government's ability to place content-based burdens on speech raises the specter that the government may effectively drive certain ideas or viewpoints from the marketplace[,] ... [t]he First Amendment presumptively places this sort of discrimination beyond the power of the government" (*id.* at 116.). (See, e.g., *Police Department of the City of Chicago v. Mosley* 408 U.S. 92, 95 (1972) (striking down ordinance restricting picketing "based on the message on a picket sign"); *Carey v. Brown*, 447 U.S. 455, (1980) (unconstitutional for government to use "the content of the speech" to determine "whether it is within or without" government regulation); *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984) ("Regulations which permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment.")) "Any restriction on expressive activity because of its content would completely undercut the profound

national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open” (*Mosley*, 408 U.S. at 96).

The policy that underlies section 8(c) of the NLRA encourages the type of “uninhibited, robust, and wide-open” debate that is protected from unconstitutional content-based restriction by the government, and the Department’s reinterpretation of the advice exemption impermissibly encroaches upon the freedom of that debate. The proposed new instructions to Form LM-20 provide that “advice” “means an oral or written recommendation regarding a decision or course of conduct” *unless* the recommendation “in whole or in part” has “the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively,” in which case the recommendation somehow ceases to be a “recommendation” and becomes “persuader activity” (76 Fed. Reg. at 36,182). This instruction imposes a content or subject matter distinction on protected speech, singling out certain types of advice for unfavorable treatment based solely on the message contained therein. Such content-based discrimination is prohibited by the Constitution.

Institutions of higher education are especially sensitive to the strictures that would be imposed by the NPRM. As noted above, not only is non-coercive communication between employers and employees precisely the type of free speech encouraged by section 8(c) of the NLRA, but colleges and universities have a particular obligation to ensure that academic freedom as well as freedom of expression are protected for all members of the campus community. As the Supreme Court has long recognized, “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). To impose vague, content-based regulation on such communication necessarily would chill employers’ right to free speech, thereby limiting the information available to employees. This is contrary to what should happen—indeed, contrary to what should be encouraged—on college and university campuses. They are after all, a “market place of ideas,” *Healy v. James*, 408 U.S. 169, 180 (1972).

6. The Department Has Not Demonstrated Underreporting or any Other Justification for Narrowing the Advice Exemption.

In the NPRM, the Department asserts that “the clarification of the distinction between advice and persuader activity is intended to correct” an underreporting problem with regard to persuader activity. From 2005 to 2009, the Department expected that 2,601 Form LM-20s would be filed; however it received an average of 192.4 LM-20s annually, only 7.4 percent of those expected (*id.* at 36,186). Based on these statistics, the Department concludes that “only a small fraction of the organizing campaigns in which consultants were utilized resulted in the filing of a Form LM-20” (*id.*). This conclusion assumes that “only a small proportion of persuader consulting activity is reported[.]” (*Id.*). However, this assumption is inconsistent with the plain meaning of the statute, and is instead based on the Department’s proposed sweeping reinterpretation of “advice.” As previously stated, the purpose of section 203’s disclosure requirements is to reveal the middlemen acting surreptitiously on behalf of employers, not to create a general rule that requires reporting each time a consultant or lawyer is retained to engage in “indirect persuader

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activity by directing their activities to the employer's supervisors" (*id.* at 36,187). That is not the type of activity Congress intended to be regulated.

If the Department is concerned about underreporting of the types of activities Congress did intend to regulate—primarily middlemen surreptitiously acting as agents of the employer—the appropriate response is increased enforcement of the current regulation. Rather than imposing wholesale changes to the well-established, content-neutral interpretation of the advice exemption, which is consistent with the plain meaning and legislative purpose of the statute as well as the protections afforded to confidential client information, the Department should increase enforcement efforts under existing law and regulations. ACE submits that until the Department attempts to use the enforcement tools at its disposal, and those tools prove to be insufficient to increase the incidence of reporting, there is little justification to narrow the advice exemption to remedy the alleged underreporting problem.

For all of the foregoing reasons, ACE requests that the Department decline to adopt the NPRM.

Sincerely,



Ada Meloy
General Counsel

AM/mjm

On behalf of:

American Council on Education
Association of American Universities
College and University Professional Association for Human Resources
National Association of Independent Colleges and Universities