September 21, 2011

The Honorable Hilda L. Solis
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue, NW
Washington, D.C. 20210

RE: RIN 1245-AA03: Interpretation of the "Advice" Exception; Notice of Proposed Rulemaking

Dear Secretary Solis:

I write in opposition to the Department of Labor's Office of Labor-Management Standards' (OLMS) proposed change to the interpretation of the "advice" exception. Fundamentally, this proposed rule is part of the administration's ongoing effort to increase the regulatory burden on employers, while tilting the balance of power toward union interests. It moves our nation's workforce policy in the wrong direction, and it should be withdrawn.

Sections 203(a) and (b) of the Labor-Management Reporting and Disclosure Act (LMRDA) require employers and labor relations consultants to report to the Department of Labor any agreement or arrangement to engage in activity that has a direct or indirect object of persuading employees with respect to the exercise of their rights to organize or bargain collectively. Employers must report this information on the Form LM-10, and consultants report on Forms LM-20 and LM-21. However, section 203(c) of the LMRDA creates an exception to the general reporting requirements where the consultant merely provides "advice." On June 21, 2011, OLMS proposed a significant change to the court-approved definition of "advice" which has been in place almost continuously since 1962.[1]

For almost 50 years, absent some deceptive arrangement, OLMS, pursuant to the "advice" exception, has exempted employer and employer consultant reports in which the employer is free to accept or reject written material prepared for him. The department is now seeking to discard this standard and replace it with a new definition of "advice"[2] in order to provide employees with what it perceives to be "essential information regarding the underlying source of the views and materials being directed at them."[3] Despite

[1] *International Union v. Secretary of Labor*, 678 F. Supp. 4 (D.D.C. 1988).
[2] With respect to persuader agreements or arrangements, "advice" means an oral or written recommendation regarding a decision or 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.
[3] Notice of Proposed Rulemaking, Labor-Management Reporting and Disclosure Act, Interpretation of the "Adivce" Exception, RIN 1245-AA03, page 25.

efforts to portray this as a reasonable change to labor policy, it is unfortunately just another example of the Obama administration's culture of union favoritism.

As recognized in 1962, at the heart of "advice" is the ability to accept or reject. In a true consultant and employer situation, a consultant can encourage an employer, but he cannot force the employer to do anything. The employer is ultimately responsible for statements, written and oral, he or she makes to employees. While I recognize there are always opportunities for bad actors, the use of consultants within the labor management arena should be encouraged. Employers, particularly small employers who lack the knowledge and experience to navigate the complexities of federal labor law, depend upon the expertise of trained consultants to avoid unfair labor practices while educating employees as to their position on unionization. Once employers disperse material or deliver speeches, employees know the employer stands by the material; the identity of the writer is irrelevant.

In addition to being irrelevant, this proposal is hypocritical. It forces employers and employer consultants to disclose additional information, but exempts union consultants and "salts" from the same degree of scrutiny.[4] As noted above, the department states the purpose of this change is to provide workers with what it believes is "essential information" regarding the views and materials being directed at them. However, a labor organization is not required to disclose similar information if it "would expose the reporting union's prospective organizing strategy."[5] While the fact that a labor organization is paying a co-worker to organize a workplace seems to be "essential information" for workers to know, the department has not proposed a rescission of that confidentiality exception.

These efforts to increase the regulatory burden on employers stand in stark contrast to the administration's efforts to dismantle commonsense measures that promote union transparency and accountability. Workers deserve to know how their hard-earned dollars are being spent by union officials. Yet this administration continues to promote policies that hang a dark veil over union finances. The recent alleged scandal in New Jersey makes the need for strong standards for union transparency even more urgent.

Remarkably, the administration has moved in a different direction, one that has systematically undermined union transparency and accountability. On October 13, 2009, the department rescinded changes to the annual report filed by the largest labor organizations (Form LM-2), changes which would have provided union members with unprecedented information about their union's finances.[6] On August 10, 2010, the

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[4] Salt: union member, consultant or employee who joins a nonunionized organization as an employee for the purpose of organizing its membership.

[5] Instructions for Form LM-2 Labor Organization Annual Report, page 22 (11/2010). Available at http://www.dol.gov/olms/regs/compliance/EFS/LM-2InstructionsEFS.pdf.

[6] The 2009 Form LM-2 final rule made the following improvements to the Form LM-2: (1) required union officer and employee benefits to be reported next to the officer and employee's name; (2) required officers and employees to report indirect disbursements; (3) created nine new receipt itemization schedules requiring the same level of information as the six itemization schedules created in the 2003 Form LM-2 final rule; and (4) added identification information on individuals who bought from or sold to the union.

department also began advancing a proposal that rescinds changes to how union officers and employees report a conflict of interest (Form LM-30), which would remove enhanced protections for workers. On December 1, 2010, the department rescinded the annual report disclosing financial information on trusts controlled or financially dominated by unions (Form T-1).

Not only is the department withdrawing commonsense efforts to provide transparency over union finances, it is also crippling its own enforcement programs. OLMS admits compliance audits are an important tool for uncovering embezzlements and other criminal and civil violations. Yet it has eliminated the international union compliance audit program and significantly reduced the number of compliance audits, from 754 in FY 2009 to 541 in FY 2010.[7] By dismantling reporting requirements and other safeguards meant to stop embezzlement and other illegal activities, the department is depriving more than 8 million U.S. workers[8] of the means to effectively and independently monitor their labor organizations.

While significant on their own, these steps taken by the Department of Labor should not be considered in a vacuum. Just one day after OLMS introduced its "advice" proposal, the National Labor Relations Board (NLRB) issued a proposed rule that will substantially shorten the time between the filing of a union election petition and the election date. The NLRB's proposal will leave employers just seven days to find legal representation and prepare a case to present before a pre-election hearing and provide workers as little as 10 days to consider all the consequences of joining a union before casting a ballot in a union election.

The relationship between the two proposed rules is clear. The OLMS proposed rule will complicate the employer and consultant relationship, and the NLRB proposed rule will restrict an employer's ability to communicate with his or her employees. In turn, they will impede an employer's opportunity to educate his employees so they can make an informed decision, crippling an employee's right to choose whether or not to be represented by a labor organization.

Taken as a whole, the actions by this administration suggest a startling commitment to advancing a culture of union favoritism, despite the costs to workers and job creators. The administration has failed to present any rational basis for changing the definition of "advice" or for rolling back commonsense rules to strengthen union transparency and accountability. I urge the administration to withdraw this proposed rulemaking and dedicate its resources to efforts that promote the best interests of the nation's workers.

Respectfully submitted,

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[7] FY 2012 Congressional Budget Justification, Office of Labor-Management Standards, 20, available at http://www.dol.gov/dol/budget/2012/PDF/CBJ-2012-V2-05.pdf (last visited on September 20, 2011).
[8] Bureau of Labor Statistics, *Household Data Annual Averages*. Available at http://www.bls.gov/cps/cpsaat42.pdf.

JOHN KLINE
Chairman
Education and the Workforce Committee

cc: The Honorable George Miller, Senior Democratic Member, Education and the Workforce Committee