February 19, 2014

The Honorable Thomas Perez
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue NW
Washington DC 20210

Re: Request To Consolidate The Proposed Persuader Advice Exemption Rule With The Impending Proposal To Change Form LM-21

Dear Secretary Perez:

The undersigned represent millions of employers who employ many millions of employees throughout the United States. Nearly all of the undersigned submitted comments to the Office of Labor-Management Standards ("OLMS") during the comment period following the DOL's Notice of Proposed Rulemaking ("NPRM") in the summer of 2011 requesting that the proposed persuader rule be withdrawn. We reiterate that position now, but write to highlight additional issues.

In particular, we wish to advise you of our concerns regarding the Department of Labor's Current Regulatory Agenda (most recently published in Fall 2013). That agenda indicates that the DOL is considering publication of a final rule in March 2014 revising its interpretation of Section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), more commonly referred to as the "advice exemption" to the LMRDA, without first addressing likely significant changes to the Form LM-21, a major component of the persuader reporting process. We are writing to ask that in the event that the proposed rule is not withdrawn in its entirety, that these two closely related rulemakings be consolidated, and that the "advice exemption" rule not be issued until the LM-21 rule is finalized also.

Unfortunately, although the Department's proposed rule states that offering "seminars, webinars, or conferences" in certain circumstances could trigger the reporting requirements, it is devoid of any instruction as to what information must be reported on Form LM-21. Would an organization holding a seminar, webinar, or conference be required to disclose everyone who attends the seminar, webinar, or conference, or everyone who downloads or otherwise gets access to the materials? Potentially subjecting millions of organizations and individuals to such disclosure obligations without clarifying what, exactly, must be included in such a report is illogical.

As more fully explained below, the two proposed rule changes are so closely intertwined as to foreclose issuance of one without the other. Moreover, the full cost impact of the proposed change to the advice exemption cannot accurately be measured without knowledge of the scope of the proposed changes to the LM-21 rule. Finally, the very serious concerns over the impact of the changes to the advice exemption may be magnified or mitigated by the as yet unknown changes to the Form LM-21. For each of these reasons, we request that the DOL postpone further consideration of the advice exemption rulemaking and/or re-open the NPRM to allow consolidation of that rule with any proposed changes to the Form LM-21, as the latter rule

impacts the cost of compliance and the impact of both rules on the ethical obligations that attorneys owe to their clients.[1]

The DOL's Fall 2013 Regulatory Agenda

The Fall 2013 Regulatory Agenda provided estimated dates for the DOL's publication of the final rule regarding the interpretation of the advice exemption and the issuance of a NPRM regarding changes to Form LM-21, the "Receipts and Disbursements Report" that persuaders with reporting obligations under the LMRDA are required to submit annually. These timelines are included, respectively, in Regulation Identification Numbers ("RIN") 1245-AA03 and 1245-AA05.

The DOL aims to publish the final rule regarding the DOL's revised interpretation of the advice exemption in March 2014. The final rule, if it is published in a manner consistent with the June 2011 NPRM, will result in significant changes to the manner in which the LMRDA is construed and enforced. Three of the significant changes are as follows:

- The DOL's revised interpretation of the advice exemption will expand the scope of reporting obligations under the LMRDA by narrowing the scope of the advice exemption. Since 1962, the DOL has interpreted the advice exemption to exclude from the LMRDA's reporting requirements circumstances in which a person or entity provides advice to an employer regardless of whether the content of that advice also had a persuasive component. Under the revised interpretation, an employer's duty to report will be triggered if "persuading employees is an object, direct or indirect, of the person's activity pursuant to an agreement or an arrangement with an employer." NPRM at 36191.

- The pending rule will define "persuasion" to cover activities that influence the decisions of employees with respect to any "protected, concerted activity in the workplace." NPRM at 36191, 36192.

- The rule will include changes to Forms LM-10 and LM-20, which employers and persuaders who engage in reportable activity under the LMRDA, respectively, are required to submit to OLMS.[2]

[1] There is recent and relevant precedent for delaying certain employer reporting requirements when integral components of the process remain unfinalized. In drafting the regulations implementing employer and insurer reporting requirements under Sections 6055 and 6056 of the Affordable Care Act, the Administration recognized that it made little sense to institute a reporting obligation without first clarifying what was to be reported. Consequently, the Administration has delayed the employer mandate until it can issue regulations which implement the employer and insurer reporting obligations. Similarly, DOL should do the same with the NRPM regarding the "advice exemption" and the yet to be initiated Form LM-21 rule making process. It makes little sense to advise "persuaders" they must track and report "other labor relations services" without first telling those "persuaders" what that phrase actually means.

[2] An employer must submit its Form LM-10 within ninety days of the conclusion of the employer's fiscal year. A persuader must submit the Form LM-20 within thirty days of the persuader's agreement with an employer to perform reportable activity.

According to the Fall 2013 Regulatory Agenda, the DOL also "intends to a publish a notice and comment rulemaking seeking consideration of the Form LM-21." That rulemaking "will propose mandatory electronic filing for Form LM-21 filers, and it will review the layout of Form LM-21 and its instructions, including the detail required to be reported." (Emphasis added.) According to the Regulatory Agenda, the DOL will not issue the NPRM regarding the proposed changes to the Form LM-21 until October 2014 – seven months after the DOL's scheduled publication of the final rule regarding the advice exemption.

The DOL Should Postpone Implementing Its Final Rule Regarding Its Revised Interpretation Of The Advice Exemption Until The Department Implements Its Final Rule Regarding Any Proposed Changes To The Form LM-21.

We respectfully request that the DOL consolidate these two closely related and intertwined rules. The DOL should refrain from publishing its final rule regarding the DOL's revised interpretation of the advice exemption until the DOL publishes its final rule regarding the Form LM-21. Given the significant impact of the DOL's revised interpretation of the advice exemption, and the DOL's reversal of an interpretation that has been in effect for over fifty years, it is imperative that the DOL refrain from publishing the final rule until it publishes its changes to the Form LM-21.

The DOL requires a person or entity that enters into a reportable persuader agreement with an employer to submit a Form LM-21 within ninety days after the completion of the persuader's fiscal year. In the Form LM-21, the persuader must disclose, among other things, "all receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services" and all disbursements made "in connection with labor relations advice or services rendered to [those employers]." Accordingly, it is critical that a persuader diligently track the nature and scope of services provided in each fiscal year, as well as the persuader's receipts from employers and disbursements.

The DOL has not provided any guidance or suggestion as to the "detail required to be reported" on the revised Form LM-21.[3] In the absence of direction from the DOL regarding the information that persuaders will need to report on the new Form LM-21, "persuaders" who incur reporting obligations will be required to speculate regarding the information they must track in order to comply with the new Form LM-21's requirements. This uncertainty is even more problematic for the persons or entities that previously were exempted from filing Form LM-21s, but will incur a reporting obligation under the LMRDA's revised interpretation of the advice exemption.

There are several pending issues regarding the Form LM-21 that will require clarity, especially in light of the upcoming rule regarding the advice exemption. For example, there has been a longstanding split among the federal appellate courts regarding the propriety of the existing Form LM-21's requirement that a persuader disclose all activities that the persuader performed on behalf of all the employers it had a relationship with during the fiscal year, including employers to which the persuader did not provide any persuader services. Some circuits have

[3] In the NPRM, the DOL submitted proposed Forms LM-10 and LM-20 in light of the planned revised interpretation of the advice exemption. The DOL did not submit any proposed revisions to the Form LM-21.

upheld the DOL's position. *See, e.g., Humphreys, Hutcheson and Moseley v. Donovan,* 755 F.2d 1211 (6th Cir. 1985)*; Master Printers Association v. Donovan,* 699 F.2d 370 (7th Cir. 1983); *Douglas v. Wirtz,* 353 F.2d 30, 32 (4th Cir. 1965); *Price v. Wirtz,* 412 F.2d 647, 651 (5th Cir. 1969). However, the Eighth Circuit Court of Appeals has reached a different conclusion and held that a persuader's LM-21 report need not disclose the services the persuader provided to employers to which the persuader did not provide any persuader services. *Donovan v. Rose Law Firm*, 768 F.2d 964, 975 (8th Cir. 1985). Given that the putative rule regarding the advice exemption will unquestionably broaden reporting requirements, it is inevitable that this legal issue will be revisited after the final rule is published. Accordingly, it is essential that all issues regarding the scope and propriety of the new Form LM-21's requirements be resolved prior to the publication of the final rule regarding the advice exemption.

The lack of clarity regarding specific Form LM-21 reporting obligations will create a tremendous burden on employers and labor law and human resources professionals. Parties entering into arguably reportable "persuader" relationships will need to implement new processes to ensure that all time and expenses relating to the persuader's services are properly recorded. Labor lawyers and human resources professionals will be required to inform their employer-clients regarding the new reporting obligations and the employers' obligation to gather and provide specific information to the DOL. Employers, in turn, will then need to inform and train their employees regarding the information that must be recorded and maintained for submission to the DOL. Without definitive direction or instruction from the DOL regarding the new Form LM-21, employers and labor relations professionals will have no choice but to speculate regarding what information will need to be recorded disclosed on a Form LM-21. This creates an unmanageable burden for employers and their consultants and lawyers.

Moreover, issuing a final rule on the advice exemption and then subsequently modifying the Form LM-21, an integral form for consultants who engage in any reportable persuasion activity in a given year, will cause duplicative and unnecessary costs. If the final rule on the advice exemption is published before any rule regarding the requirements of the Form LM-21, affected persons will have to modify their information systems to comply in the context of the existing form. Issuing a revised form later will result in another costly round of review, analysis and information systems modifications by affected companies or persons. If the DOL issues the Form LM-21 NPRM before it issues the final rule regarding the advice exemption, then the DOL can consider comments on the Form LM-21 that may also be relevant to its consideration regarding the final rule on the advice exemption.

In light of the foregoing, the DOL should refrain from publishing its final rule regarding the advice exemption until the DOL publishes its final rule regarding the Form LM-21. Employers and consultants that will incur reporting obligations under the new interpretation of the advice exemption should not be required to wait several months, if not years, for the DOL to provide clarity regarding the information that they will need to disclose as a result of the revised Form LM-21.

Any Changes To The Form LM-21 Will Directly Impact The Cost Analysis Underlying the Advice Exemption Rule As Well As The Impact Of Both Rules On The Ethical Obligations of Attorneys.

As has been argued in many previous comments, the June 2011 NPRM on the advice exemption failed to provide sufficient consideration and analysis regarding the costs that will be imposed by the significant change encompassed by that rule. Moreover, the NPRM failed adequately to consider the impact of the revised interpretation on the ethical obligations that attorneys owe to their clients. Each of these defects will be greatly exacerbated by subsequent publication of changes to the LM-21 whose scope is not yet known. Indeed, absent publication of the final rule on changes to the LM-21, the DOL cannot properly calculate the costs of the advice exemption rule change nor can it properly analyze the impact of the advice exemption change on the attorney-client ethical obligations.

The June 2011 NPRM's Cost Analysis Regarding The Pending Change In The DOL's Advice Exemption Is Inadequate, In Light Of The Planned Changes To The LM-21.

In the June 2011 NPRM, the DOL provided an analysis regarding its estimate of the costs that will result due to change in the DOL's interpretation of the advice exemption. The DOL's analysis is insufficient, and it severely underestimates the true costs of the pending rule change.

The gist of the DOL's regulatory cost-benefit analysis is that the proposed change in the advice interpretation will burden the economy in an amount just over $826,000 annually. The DOL reached this conclusion based on its assumption that only employers that retain consultants during union representation election campaigns retain persuaders in a manner that would incur reporting obligations under the new rule. As at least some comments have noted, this estimate is woefully inadequate and the initial annual cost of the proposed rule may be as high as $2 billion.[4]

Indeed, the NPRM failed to take into consideration the fact that the new rule will impose reporting obligations on a broader population. As explained above, the rule significantly narrows the advice exemption. Moreover, the pending rule expands reporting requirements to encompass any persuasion regarding "any protected concerted activity . . . in the workplace." NPRM at 36178, 36192, 36211. As such, the pending rule will significantly increase the number of employers and consultants that will incur reporting obligations.

Furthermore, the June 2011 NPRM significantly underestimated the number of employers that will be affected by the rule. The DOL's estimated number of employers subject to reporting requirements under the pending rule – 3,414 – represents *less than 1.5 percent* of the number of employers with 50 or more employees, many of which are likely to incur reporting obligations under the new rule.[5]

[4] *See* Letter from Randel K. Johnson, Senior Vice President, U.S. Chamber of Commerce to Andrew R. Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor (September 21, 2011).

[5] *See id*., at pg. 8 (noting 2008 U.S. Census data shows 236,012 private business firms had 50 or more employees).

The NPRM also grossly underestimated the number of persons or firms that will incur reporting obligations under the new rule, as well as the time and costs employers and persuaders will incur in order to comply with the new rule. The DOL estimates that employers will spend only two hours each year completing the Form LM-10, with the assistance of counsel, and persuaders will only spend one hour on the Form LM-20. This estimate is insufficient because it fails to account for the fact that employers will need first to research and determine whether they are required to submit a Form LM-10 based on any activities during the year before they spend any time and/or resources completing and submitting a Form LM-10.

The NPRM also grossly underestimated the time that labor relations consultants, human resources professionals, and labor lawyers will need to spend to ensure compliance with the new rule. The NPRM assumes that "persuaders" will only need to devote one hour each year on compliance with the LMRDA, but presented no factual basis for the time needed to compile information, to determine what activities may be reportable and to actually complete and submit the required forms. In short, there is no evidence presented that the NPRM's time estimates have any basis in fact or reality.

All of the foregoing problems with the cost analysis of the advice exemption rule will be exacerbated by any changes to the Form LM-21. Without knowing the scope of those changes, neither employers nor their consultants can ascertain the full burden of compliance with the annual reporting requirement, which directly impacts the burden of filing the LM-10 and LM-20 reports. The DOL's failure to consider the likely changes to the Form LM-21 together with the other forms is a serious flaw in the regulatory analysis which can only be redressed by consolidating the two rules and analyzing their impact jointly.

The June 2011 NPRM Failed To Account For The Impact Of The Planned LM-21 Rule Change On Attorneys' Ethical Obligations.

The DOL should also reopen the NPRM because the pending rule compels attorneys who practice labor and employment law to violate their ethical responsibilities to their clients. The planned changes to the LM-21 exacerbate this problem also.

The LM-21, in combination with the proposed change to the advice exemption, will require an attorney who provides advice that will for the first time be deemed to be reportable persuader "advice" activity to report the existence of all attorney-client relationships, the identities of all clients, the general nature of all legal representations, and the legal fees and disbursements billed by the attorney for all labor relations activities for an entire year for all of the attorney's employer clients—regardless of whether the attorney engaged in any persuader activities for such clients.[6]

In combination with the foregoing LM-21 requirements, the proposed advice exemption rule requires lawyers who incur reporting obligations as a result of their provision of advice regarding matters of persuasion to disclose the identities of their clients, the nature of their representation of clients, the fees received from those clients, and other confidential information. Attorneys

[6]As explained above, there is a split among the federal circuit courts regarding whether the DOL's Form LM-21 instruction in this regard.

who make these disclosures of confidential client information will be in direct conflict with Rule 1.6(a) of the Model Rules of Professional Conduct, which provides that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."

Recognizing this ethical dilemma, the American Bar Association opposed the rule after the DOL issued the June 2011 NPRM, explaining that the rule is "clearly inconsistent with lawyers' existing duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule." The ABA stated that it was "defending the confidential client-lawyer relationship and urging the [DOL] not to impose an unjustified and intrusive burden on lawyers and law firms and their clients." As the ABA further explained:

> The range of client information that lawyers are not permitted to disclose under ABA Model Rule 1.6 is broader than that covered by the attorney-client privilege. Although ABA Model Rule 1.6 prohibits lawyers from disclosing information protected by the attorney-client privilege and the work product doctrine, the Rule also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential. This category of non-privileged, confidential information includes the identity of the client as well as other information related to the legal representation, including, for example, the nature of the representation and the amount of legal fees paid by the client to the lawyer.

See Letter from Wm. T. (Bill) Robinson III, President of the American Bar Association, to the Office of Labor-Management Standards, U.S. Department of Labor (September 21, 2011).

All 50 states and the District of Columbia follow the ABA's Model Rule 1.6 (or a similar rule) and maintain ethical restrictions against disclosing client identity or fees paid by the client without the client's permission. There is a direct conflict between the ethical restrictions imposed by these state laws and the obligations imposed by the DOL's new Rule as outlined above. Recognizing this conflict, the State Bar Associations of Arizona, Florida, Georgia, Illinois, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, and Tennessee submitted letters to OLMS endorsing the ABA's position and requesting the withdrawal of the rule. Moreover, the Attorney Generals for the states of Michigan, Texas and Idaho have written letters to OLMS requesting that the rule be withdrawn because of the impact it will have on attorneys' ethical obligations.

As noted in the ABA's letter, by forcing attorneys to disclose confidential information regarding their employer clients, the proposed rule could chill and undermine the confidential attorney-client relationship. The rule could discourage employers, who do not wish to have such confidential information disclosed, from seeking any legal advice that relates in any manner to persuasion. Accordingly, the rule could effectively deprive employers of their right to counsel.

In the June 2011 NPRM, the DOL failed to address these issues in an adequate manner. Instead, the DOL simply cited Section 204 of the LMRDA for the proposition that ". . . privileged matters

are protected from disclosure." NPRM 36192. The DOL also did not address the fact that the rule requires disclosure of legal advice to the extent the legal advice became "intertwined" with advice as to persuasion. Most importantly, the 2011 NPRM did not address the issue of the Form LM-21's required disclosure by counsel of confidential information of clients that were not engaged in persuasion.

Because the planned changes to the Form LM-21, whatever they may be, will directly impact the scope of attorneys disclosures of confidential information in conjunction with the changed interpretation of advice, the two rules must be considered together. Particularly in light of the June 2011 NPRM's inadequate consideration of the effect of the rule on attorneys' ethical obligations, it is imperative that the DOL reopen the NPRM and consolidate it with the planned change to the Form LM-21.

Conclusion

For the foregoing reasons, we believe it is essential that the DOL consolidate the advice exemption rule change with the planned change to the Form LM-21. The DOL should therefore postpone its publication of any final rule regarding the revised interpretation of the advice exemption until the proposed rule on Form LM-21 is published for notice and comment and finalized together with the advice exemption rule. Given the significant issues that remain outstanding with regard to both rules, it is imperative that the DOL give further consideration to them in a consolidated proceeding.

Thank you for your consideration of this necessary request. Should you need any further information regarding these matters, please do not hesitate to contact us.

Sincerely,

Agricultural Retailers Association
Air Conditioning Contractors of America
American Apparel & Footwear Association
American Bakers Association
American Fire Sprinkler Association
American Meat Institute
American Rental Association
American Staffing Association
American Trucking Associations
Assisted Living Federation of America
Associated Builders and Contractors
Associated General Contractors
American Hotel & Lodging Association
Asian American Hotel Owners Association
Association of Equipment Manufacturers
Association for Manufacturing Technology
Automotive Aftermarket Industry Association
Building Owners and Managers Association International

Food Marketing Institute
Forging Industry Association
HR Policy Association
Industrial Fasteners Institute
International Franchise Association
Independent Electrical Contractors
International Foodservice Distributors Association
International Warehouse Logistics Association
Metal Service Center Institute
Motor & Equipment Manufacturers Association
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Club Association
National Council of Chain Restaurants
National Council of Textile Organizations
National Federation of Independent Business
National Grocers Association
National Lumber and Building Material Dealers Association
National Ready Mixed Concrete Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand and Gravel Association
National Tooling and Machining Association
North American Die Casting Association
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Retail Industry Leaders Association
Snack Food Association
SPI: The Plastics Industry Trade Association
Society for Human Resource Management
Truck Renting and Leasing Association
U.S. Chamber of Commerce

CC: Rep. John Kline, Chairman, House Committee on Education and the Workforce

Rep. George Miller, Ranking Member, House Committee on Education and the Workforce

Rep. Jack Kingston, Chairman, House Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Rep. Rosa DeLauro, Ranking Member, House Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Sen. Tom Harkin, Chairman, Senate Committee on Health, Education, Labor and Pensions; Chairman, Senate Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Sen. Lamar Alexander, Ranking Member, Senate Committee on Health, Education, Labor and Pensions

Sen. Jerry Moran, Ranking Member, Senate Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Sen. Ron Johnson

Cecilia Munoz, Assistant to the President and Director of the Domestic Policy Council

Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

Bill Schuette, Attorney General of Michigan

Greg Abbott, Attorney General of Texas

Lawrence Wasden, Attorney General of Idaho