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

Re: RIN 1245-AA07 – Notice of proposed rulemaking: Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act

Dear Mr. Davis:

The Association of Corporate Counsel (ACC)[1] and its Employment and Labor Law Committee fully support the proposed rescission of the March 24, 2016 Rule Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (hereinafter "2016 Rule"). In 2011, we strongly objected to the proposed interpretation change because it would negatively impact the attorney-client relationship and organizations' ability to seek legal counsel.[2] We continue to have those objections to the 2016 Rule and therefore urge its rescission. To the extent the Department of Labor foresees issuing a new interpretation of the advice exemption, it must carefully consider how such a reporting requirement would affect the relationship between attorneys and the businesses they advise on labor organizing issues.

The 2016 Rule would have negatively impacted attorney-client relationships

In-house counsel are often responsible for retaining outside lawyers to advise on labor organizing issues. As we noted in 2011, the 2016 Rule's requirement that attorneys publicly disclose their clients' identities, the types of services performed for their clients, and the amounts paid for those services is a violation of attorneys' ethical duty of confidentiality under attorney ethics rules in all 50 U.S. states. Requiring such reporting

[1] The Association of Corporate Counsel (ACC) is a global bar association for in-house counsel with more than 40,000 members working for more than 10,000 organizations in over 85 countries. ACC's Employment and Labor Law Committee has more than 6,600 members, many of whom are responsible for their organizations' compliance with labor laws and are the individuals who would be retaining outside lawyers and consultants if their organizations were faced with a request from employees to unionize.

[2] ACC comments to Department of Labor (September 21, 2011), available at http://www.regulations.gov, Docket ID No. LMSO-2011-0002, Tracking No. 80f2676d.

could have caused many labor lawyers to stop offering services that would trigger the reporting. Additionally, requiring businesses to publicly disclose when they have retained legal counsel and the purpose for that counsel can discourage businesses from seeking legal counsel in the first place.[3] Our members and the organizations they work for have a constitutionally protected right to retain and consult with counsel in the course of conducting their businesses, and the 2016 Rule interfered with that right.[4]

For this reason, ACC was heartened by the U.S. District Court for the Northern District of Texas decision that permanently enjoined enforcement of the 2016 Rule. Judge Cummings' rebuke of the Department's assertion that the 2016 Rule did not impact communications covered by the attorney-client privilege as "plainly incorrect" was especially important in our view.[5] Judge Cummings also acknowledged that disclosure of the information requested by the 2016 Rule violated attorneys' ethical duties of confidentiality under state law. These findings from the Court reinforce ACC's position that the 2016 Rule was an impermissible infringement on attorney-client relationships and further support the Department's decision to rescind the 2016 Rule.

Any further changes to the advice exemption must carefully consider attorney-client confidentiality and related issues

In laying out the reasons for rescission, the Department does not foreclose the possibility of future changes to the interpretation of "advice" under the Labor-Management Reporting and Disclosure Act (LMRDA). Given the strong pronouncements from the Court and the record developed during the 2011 rulemaking process, it is clear that any reworking of the definition of advice and triggering of reporting under the LMRDA must respect the confidentiality of the attorney-client relationship. Indeed, the LMRDA includes a specific exemption in Section 204 for communications that are part of a "legitimate attorney-client relationship." Any future definition of "advice" must respect this exemption and not swallow it as the 2016 Rule did.

The Notice of Proposed Rulemaking states that the Department has concluded that a "more detailed consideration of attorneys' activities is warranted." If the Department determines to issue a new interpretation, we agree that careful consideration of these issues must be made. The activities listed as "indirect persuasion" in the 2016 Rule are core activities within an attorney-client relationship and are inseparable from the act of providing competent legal advice in this context. And as we noted in our 2011 letter, there is no evidence of congressional intent to require reporting by attorneys giving

[3] Both of these facts were also established as part of the evidentiary record in *Nat'l Fed'n of Indep. Bus. v. Perez*, 2016 U.S. Dist. LEXIS 89694 at *20-26 (N.D. Tex. June 27, 2016).

[4] Although our members work for businesses that employ in-house lawyers, many in-house counsel lack the specialized legal experience necessary to offer effective legal advice to their employers on issues of labor organizing. They routinely rely on outside counsel to successfully navigate these issues. If the 2016 Rule had been implemented, the ability of in-house counsel to obtain legal counsel when their organizations were facing union organizing activities would have been severely curtailed.

[5] *Nat'l Fed'n of Indep. Bus. v. Perez*, 2016 U.S. Dist. LEXIS 89694, at *83.

advice to employers regarding union organizing activities. We urge the Department to conclude that these indirect persuader activities are not the type of activities intended to be reported under the LMRDA. Finally, we believe any consideration of attorneys' activities should take into account their unique status as regulated professionals with ethical obligations and potential disciplinary ramifications for violating those ethical obligations.

* * *

ACC appreciates the opportunity to support the Department's proposal to rescind the 2016 Rule. Rescission is necessary to protect the sanctity of the attorney-client relationship in our legal system. We strongly urge the Department to return to the pre-2016 interpretation of "advice," which provided a bright-line rule for required disclosures under LMRDA, did not infringe on the attorney-client relationship, and was consistent with the LMRDA's legislative history.

Sincerely,

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Chair, Employment and Labor Law Committee
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