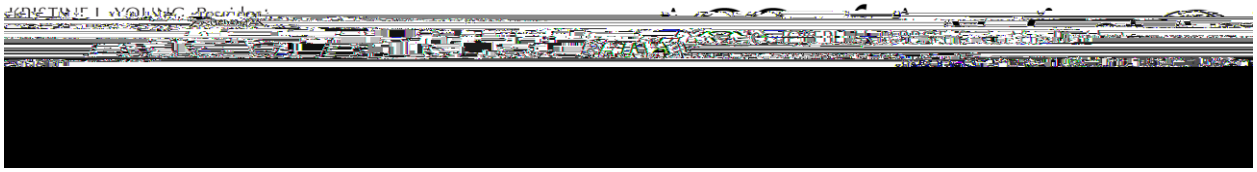

September 21, 2011

Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210
Submitted online at http://www.regulations.gov

RE: Labor-
Exemption; RIN 1215-AB79; RIN 1245-AA03

Dear Mr. Davis:

and the AGC Labor and Employment Law Cou , I thank you for the opportunity to submit comments on the -Management Standards, as published in the Federal Register on June 21, 2011, that proposes revisions to the Form LM-10 Employer Report and to the Form LM-20 Agreements and Activities Report. AGC maintains that the proposed rule is unwarranted primarily because it would have the unintended effect of denying to employers access to important advice on how to conduct themselves lawfully in dealing with employees.

AGC is the leading association in the construction industry. Founded in 1918 at the express request ion in the commercial construction industry, representing more than 33,000 firms in nearly 100 chapters throughout the United States. AGC members include approximately 7,500 of general contractors, 12,500 specialty contractors, and 13,000 suppliers and service providers working in the building, highway, heavy, industrial, municipal utility, and virtually all other sectors of the construction industry. The LELC is a network of attorneys who regularly assist and represent AGC chapters and members on labor and employment matters. AGC and the LELC proudly represent both union and open shop companies.

r andfoet the const

The Proposed Rule Appears to Inappropriately Include Association-Provided Advice and Education

AGC has 95 chapters. There is an AGC chapter in all 50 states and in the District of Columbia and Puerto Rico. Each AGC chapter has its own chapter manager and staff whose job is to supply local members with a wide array of construction services. Those services include educating contractor-

labor disputes. Over a third of AGC chapters negotiate or administer collective-bargaining agreements. Clearly, employers, employees, and the legal system all benefit from the unfettered availability of information regarding the rights, obligations, and restrictions under the National

AGC and AGC chapter staff do not engage in direct communications with employees of their contractor members. However, AGC chapter staff might engage in activities that could trigger the obligation to report by both the chapter and the contractor member under the proposed rule. The following is a general description of the types of activities in which association staff might engage: providing oral or written guidance to a contractor member in the preparation of lawful personnel policies and guidelines; holding in-seat seminars, webinars, and videos for training owners, managers and supervisors of member firms on what is permissible conduct during a labor dispute or organizing drive, or with regard to other employment practices

Another example is whether a reporting obligation is triggered when a chapter manger advises an

temporary or permanent replacements during a labor dispute. While ordinarily providing such information would not trigger a reporting obligation, the proposed rule fosters litigation over whether the manner in which such advice is communicated to employees was to enhance its persuasive message so as to deter employees from engaging in a strike or other protected activity.

We believe it is unfair and inappropriate for trade associations, such as AGC and AGC chapters, to be so burdened in their receipt of advice or in their providing of advice from consultants and attorneys to its members. If the proposed rule becomes final, AGC national and chapter staff are likely to cease dispensing guidance on these and other potentially reportable issues; they will simply refrain from putting themselves in a position where their advice could be construed after the fact as persuader activity under the vague and amorphous rule. We are confident that the advice and planning assistance that such associations provide are beneficial for labor relations in the industry, and we think that the effect of the proposed rule would be to simply create more bad decisions as construction employers rely only on - in the decision-making process in these areas.

The Proposed Rule Would Have a Particularly Damaging Impact on the Construction Industry

The construction industry is the only industry (other than healthcare) covered by numerous specialized legal provisions and case law determinations under the NLRA. These include the - al

provisions and case law determinations. All of these relate largely to the construction industry,

Not left to guess, however, is the Department's stated intention to generally cover drafting and revision of written materials for communication to employees, presentations and training (for employees and managers), website content, developing personnel policies or practices, seminars and "other" reportable activities. The Department's interpretation is simply so overbroad as to arguably cover the majority of advice and counsel that lawyers or consultants would provide even in the absence of any active organizing campaign. The fact that a lawyer who drafts an open door policy for a client's employee handbook would somehow be required to report the relationship, activity, income and all other required information is surely not a result intended by Congress.

Moreover, the proposed interpretation swallows even the barest concept of an exemption. For example, in drawing a distinction between the *review* of persuasive material prepared by an employer and the *drafting* of persuasive material for consideration by the employer, the Department concludes that *because* the latter is "quintessential persuader activity" the conduct should be reportable. *See* 76 Fed. Reg. at 36183. However, because the Department cannot logically separate the two activities (Where does *review* end and *drafting* begin?), it ultimately concludes that *both* situations constitute reportable activity. By the same reasoning, the Department finds itself slipping and sliding down the proverbial slope, accumulating activity after activity...when it should have logically recognized what its predecessors 50 years ago decided a line has to be drawn between material that an employer is free to accept or reject and pleas made directly to employees.

The Department's interpretation also ignores the entire concept that the advice exemption is just that an *exemption* from what would otherwise be reportable conduct. In enacting the LMRDA, Congress determined that "advice" given to employers, which the employer then utilizes even advice with persuasive content should not be reportable. Otherwise, what would be the point of having an exemption? That is, stated differently, an advice *exemption* would not be required unless the advice would otherwise be *reportable*. The Department's logic fails at its inception with the false premise that because the purpose is persuasion, the conduct must be reportable.

Finally, it is important to note that the seriousness of the proposed rule's ambiguity and overbreadth is compounded by the fact that the LMRDA provides that "individuals are subject to criminal penalties for willful failure to report" covered activities. *See Instructions for Form LM-20,* at section VII (Responsibilities and Penalties). No person should be subject to criminal penalties when the underlying conduct cannot be strictly and easily determined, yet the proposed rules are far from clear in their application. Moreover, there is some question as to whether a reverse onus could be created by a lawyer's or consultant's mere association with an employer and/or campaign. Some counsel have in the past received unsolicited reporting forms from government agencies. Would the new rules increase the likelihood of counsel being required to prove that there has been no reportable persuader activity? Would such an inquiry require divulgence of privileged information even in the absence of reportable conduct (see below)? The breadth of the proposed rule begs these and other questions regarding its basic legitimacy.

2. <u>The Proposed Rule Violates the Attorney-Client Privilege</u>

One of the more troubling aspects of the proposed reporting requirements is the violation of the attorney-client privilege. Such a result is clearly prohibited by the LMRDA.

Section 204 of the LMRDA (29 USC § 434) states:

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

with unlawful practices, it is looking in the wrong place. Unlawful labor practices are not prohibited by the reporting requirements of the LMRDA but under the remedial provisions of the NLRA the province of the NLRB, not the Department of Labor.

Moreover, if the Department's misplaced concern is with *reducing* unfair labor practices, the proposed interpretation could have the opposite consequence. As indicated above, we submit that the chilling effect of the proposed interpretations will result in less informed employers and employees and more unfair labor practices. The proposed rules will greatly reduce any incentive for employers to engage experienced counsel on labor relations issues because of the burdensome and invasive reporting requirements leaving them to their own devices for determining the best and legal course of conduct. As a result, they will be less informed about the consequences of union representation good, bad or other meaning that their employees will also be less informed. For these reasons, the Department should promote rules that *encourage*, not discourage, the confidential and routine assistance of counsel.

Conclusion

For all of the foregoing reasons as well as those set forth in comments submitted by the CDW, AGC urges the Department to withdraw its proposed rule governing representation-case proceedings. We thank the Department for considering our views and are available to provide additional information on the issues presented should the Department desire any.

Sincerely,

Denise S. Gold
Associate General Counsel, Associated General Contractors of America
Staff Associate, AGC Labor and Employment Law Council

Ryan McCabe Poor
Chairman, AGC Labor and Employment Law Council