COMMITTEE ON EDUCATION
AND THE WORKFORCE
U.S. HOUSE OF REPRESENTATIVES
2176 RAYBURN HOUSE OFFICE BUILDING
WASHINGTON, DC 20515–6100

August 10, 2017

The Honorable R. Alexander Acosta
Secretary
U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue NW, Room N-1519
Washington, DC 20210

Re: Interpretation of Advice Exemption in Labor-Management Reporting and Disclosure Act (RIN 1245-AA07)

Dear Secretary Acosta:

We write today regarding the Department of Labor's (the "Department") proposed rescission of its final rule titled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act" (the "Persuader Rule").[1]

We urge the Department not to rescind the Persuader Rule, because the Rule helps level the playing field for workers who want to join together to negotiate with their employer for better working conditions. By requiring employers to disclose the identity of and amounts paid to outside consultants who are responsible for crafting their anti-union messages, employees will be better informed when making decisions during union elections and during collective bargaining. The arguments below explain how the Department's proposal to rescind the Persuader Rule undermines transparency in union elections and collective bargaining.

Studies show that employers hire union avoidance "persuaders" to consult them in up to 87 percent of union elections.[2] These persuaders orchestrate time-tested anti-union campaign tactics such as producing anti-union literature and materials, writing speeches and anti-union statements to be communicated by supervisors and management, and identifying pro-union employees for discipline or reward. However, employees often do not know that their employer has retained a third-party consultant in its campaign against the union.[3] Given that persuaders often advise employers to portray the union as an outside "third party," employees might weigh this "third-party union" argument somewhat differently if they knew that the employer in fact hired an outside party in its campaign against the union.

---

[1] 81 Fed. Reg. 15924 (Mar. 24, 2016).
[2] 81 Fed. Reg. at 15933 n.10.
[3] 81 Fed. Reg. at 15992.

The Persuader Rule closes a massive loophole that has allowed employers and consultants to evade reporting on persuader activities in anti-union campaigns, including employers' agreements with consultants, a description of the consultants' services, and the amount employers paid for these services. Closing this loophole furthers the aims of Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), which requires employers to disclose their agreements in which a consultant:

> "undertakes activities where an object thereof, *directly or indirectly*, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing."[4]

However, the LMRDA exempts employers and consultants from reporting when consultants merely give employers "advice." Although the statute does not define the term "advice,"[5] the statute provides the Department with the authority to issue regulations, including those "necessary to prevent the circumvention or evasion of [the Act's] reporting requirements."[6]

As a result of this ambiguity, the Department has read the advice exemption so broadly that it effectively includes all indirect persuader activities.[7] This loophole interprets indirect persuader activities out of the statute, and as a result the Department received zero indirect persuader reports. In 1979 and 1980, the House Committee on Education and Labor conducted nine days of hearings entitled "Pressures in Today's Workplace," and issued a report on the evidence it gathered. The report stated in part that "the current interpretation of [Section 203] has enabled employers and consultants to shield their arrangements and activities."[8]

The Persuader Rule took the plain text of the LMRDA into consideration by requiring that employers and consultants report *both* direct and indirect persuader activity. As explained in the Department's final rule, "[t]he prior interpretation failed to achieve the very purpose for which [LMRDA] was enacted—to disclose to workers, the public, and the Government activities undertaken by labor relations consultants to persuade employees—directly or indirectly, as to how to exercise their rights to union representation and collective bargaining."[9]

Despite the Persuader Rule's benefits and its reasonable distinction between indirect persuader activity and advice, the Department lists four reasons for rescinding the rule. However, these concerns are misplaced and do not justify undermining the integrity of union elections and collective bargaining.

---

[4] 29 U.S.C. § 433(a) (emphasis added). Section 203(b) contains a similar reporting requirement for consultants.
[5] 29 U.S.C. § 433(c).
[6] 29 U.S.C. § 438.
[7] Memorandum from Charles Donohue, Solicitor of Labor regarding "modification of Position Regarding 'Advice' under Section 203(c)" of the LMRDA, February 19, 1962.
[8] *Pressures in Today's Workplace: Report of the Subcommittee on Labor-Management Relations of the Committee on Education and Labor*, U.S. House of Representatives 27, 44 (1980).
[9] 81 Fed. Reg. 15935, 15926 (Mar. 26, 2016).

The Department's first reason, that rescission would allow it to engage in further statutory analysis, overlooks the Department's meticulous examination when it promulgated the Persuader Rule. The Department issued its notice of proposed rulemaking on June 12, 2011, and its final Rule almost five years later on March 24, 2016. During that time, the Department considered approximately 9,000 comments before publishing almost 130 pages of analysis detailing its final rule.[10] Although the Department now claims that a Texas district court's injunction merits further statutory analysis,[11] two other district courts declined to issue similar injunctions.[12] Further, the Texas district court's decision is currently on appeal before the U.S. Court of Appeals for the Fifth Circuit. A single district court decision should not be enough to justify rescinding a rule under the Administrative Procedures Act, and the Department should await the results of the appeal.

The Department's second stated reason for rescinding the Persuader Rule is to allow more time to consider the interaction between the Form LM-20, reporting consultants' agreements and activities, and the Form LM-21, reporting consultants' receipts and disbursements. The Department notes that the Persuader Rule only impacted the LM-10, reporting employers' agreements, and the LM-20, and that the requirements for reporting receipts and disbursements in the LM-21 need to be revised. However, the Department was already addressing this concern. In 2015, the Department announced a rulemaking to revise the LM-21, and issued a special non-enforcement policy for Form LM-21 while the rulemaking was pending.[13] If the Department is concerned about updating the LM-21, it can simply maintain the Persuader Rule and pursue the rulemaking to update the LM-21.

The Department claims as its third reason for rescinding the Persuader Rule that it must further consider the Rule's effect on attorneys' activities. This is unnecessary because courts have long established that an attorney has nothing to report by limiting his or her activities to rendering legal advice and representing a client in legal proceedings or bargaining, but that the attorney need only report if he or she "crosses the boundary between the practice of labor law and persuasion."[14] Further, the American Bar Association's (ABA) Model Rule of Professional Conduct §1.6 states that attorneys should not reveal "information relating to the representation of a client" *but makes an exception* for disclosure "to comply with other law"—such as the LMRDA.[15]

In a letter submitted to the Committee, law professors from across the country have affirmed that the LMRDA's reporting requirements and the Department's final Persuader Rule are consistent

---

[10] 81 Fed. Reg. at 15945.
[11] *Nat'l Fed'n of Indep. Bus. v. Perez*, Civil Action No. 5:16-cv-00066, LEXIS 89694 (N.D. Tex. Jun. 27, 2016).
[12] *Associated Builders and Contractors of Ark. v. Perez*, Case No. 4:16-CV-169 (E.D. Ark. Dec. 13, 2016); *Labnet Inc. v. U.S. Dep't of Labor*, 197 F. Supp. 3d 1159 (D. Minn. 2016).
[13] Special Enforcement Policy for Certain Form LM-21 Requirements, *available at* https://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm (last updated Apr. 13, 2016).
[14] *Humphreys v. Donovan*, 755 F.2d 1211, 1216 (6th Cir. 1985); *accord Price v. Wirtz*, 412 F.2d at 651.
[15] Forty-nine states and the District of Columbia have adopted professional conduct rules patterned on the ABA Model Rules, and California has a substantially similar rule.

with an attorney's responsibility to maintain confidentiality.[16] Although the President of the ABA expressed opposition to the Persuader Rule, over 500 attorneys—including 244 ABA members—submitted a letter supporting the Persuader Rule and voicing their concern about the ABA "taking sides in a labor-management issue contrary to the views of its members who represent workers and unions."[17] These two letters are enclosed with this Comment.

The Department's fourth reason to rescind the rule is because of "its limited resources and competing priorities."[18] However, this reason does not account for the discrepancy between unions' broad disclosure requirements and employers' meager obligations. The Form LM-2 that unions must file often consumes hundreds of pages, whereas employers' LM-10, LM-20 and LM-21 are four, two and two pages, respectively. As explained in the final rule, "'if unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who' use consultants."[19]

In closing, a primary goal of the LMRDA is to ensure transparency by requiring employers and consultants who engage in direct or indirect persuader activities to publically disclose their agreements. However, enabling employers to keep their anti-union consulting arrangements secret frustrates workplace democracy. This has consequences for our entire economy: as union membership has declined in the past 40 years, the middle class has shrunk because real wages have not caught up to gains in productivity.[20] Strengthening workers' rights to organize and form unions is essential to reversing this country's widening income inequality. Accordingly, we urge the Department not to rescind the Persuader Rule and to protect transparency in union elections and collective bargaining.

Sincerely,

ROBERT C. "BOBBY" SCOTT
Ranking Member

GREGORIO KILILI CAMACHO SABLAN
Ranking Member
Subcommittee on Health, Employment,
Labor, and Pensions

Encl: Letter from Law Professors to Chairman Kline and Ranking Member Scott (May 16, 2016)
Letter from Labor Attorneys to Chairman Kline and Ranking Member Scott (May 17, 2016)

---

[16] Letter from Law Professors to Chairman Kline and Ranking Member Scott, May 16, 2016, *available at*, http://democrats-edworkforce.creative.house.gov/imo/media/doc/34%20Law%20Professors%20Letter%20to%20HEW%20Committee%20%28003%291.pdf

[17] Letter from Labor Attorneys to Chairman Kline and Ranking Member Scott, May 17, 2016, *available at,* http://democrats-edworkforce.creative.house.gov/imo/media/doc/5.17.16LaborLawyerPersuaderLetter.pdf

[18] 82 Fed. Reg. 26877, 26881 (Jun. 12, 2017).

[19] 81 Fed. Reg. at 15932 (quoting S. Rep. No. 86-187 at 39-40,1 LMRDA Leg. Hist., at 435-36).

[20] *As Unions Decline, Inequality Rises*, Ross Eisenbrey and Colin Gordon, Economic Policy Institute, June 6, 2012 http://www.epi.org/news/union-membership-declines-inequality-rises/.