COMMENTS OF NORTH AMERICA'S BUILDING TRADES UNIONS

North America's Building Trades Unions ("NABTU") hereby submits these comments in response to the Department of Labor's proposed rescission of the final rule interpreting the "advice" exemption to the reporting requirements set forth in Section 203 of the Labor-Management Reporting and Disclosure Act ("LMRDA" or "Act"), 29 U.S.C. § 433, which became effective on April 25, 2016. *See* 81 Fed. Reg. 15924 (March 24, 2016). That rule is known as the "Persuader Rule." NABTU strongly opposes the rescission of the Persuader Rule.

NABTU is a labor organization composed of fourteen national and international labor unions representing over two million craft workers in the construction industry. There are approximately 300 local building trades councils affiliated with NABTU. Like every labor organization that has helped employees organize, NABTU and its affiliates have extensive experience with anti-union campaigns run for employers by anti-union consultants.

NABTU adopts and incorporates the comments submitted on behalf of the IBEW and the AFL-CIO, both of which also oppose the rescission of the Persuader Rule. Rather than repeat those, NABTU will comment briefly in opposition to the proposed rule.

The Persuader Rule is a transparency rule. It does not limit or prohibit the activities of labor consultants, but instead ensures that, consistent with the LMRDA, indirect as well as direct persuader activity is reported and transparent. As Justice Brandeis famously said, "sunlight is said to be the best of disinfectants; electric light the most efficient policeman." *Buckley v. Valeo*, 424 U.S. 1, 67, and n. 80 (1976) (quoting L. BRANDEIS, OTHER PEOPLE'S MONEY 62 (1933)); *see also Master Printers of America v. Donovan*, 751 F.2d 700, 707-08 (D.C. Cir. 1984) (upholding constitutionality of Section 203(b) of the LMRDA).

In a typical anti-union campaign run by a labor consultant, the consultant will prepare: written campaign materials; scripts for supervisory personnel to use when talking to employees; anti-union videos; and speeches for upper-level management to deliver in closed door captive audience

meetings that employees are required to attend. Among the common tactics used by consultants is to have the employer's supervisors portray the company as "a family" from the top executive down to the lowest level employee, and assert that the union is an outside third-party interloper seeking to disrupt the family's harmonious relationship. The labor consultant may also design a campaign that claims that if the employees choose union representation, the employer would incur increased costs, damaging its ability to compete. These types of activities and claims are a routine part of the consultant's anti-union campaign playbook.

The Persuader Rule would, consistent with the intent of the LMRDA, make transparent the consultant's relationship. Employees may learn that the employer has, for example, itself retained a "third-party" to orchestrate its campaign and that perhaps the message from the employees' supervisors is not a reflection of the supervisors' views, but instead is being directed by that third-party. Moreover, the Persuader Rule would enable employees to evaluate an employer's claim of the alleged costs associated with union representation against the employer's expenditures to retain a consultant to persuade employees to vote against union representation. In short, the transparency mandated by the Persuader Rule will enable employees to make a more informed choice about union representation.

Congress enacted the LMRDA in 1959 "to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives . . . ." 29 U.S.C. § 401. In Title II of the LMRDA, Congress set forth reporting and transparency requirements for labor organizations, union officers, employees of unions, employers, and labor relations consultants. The Persuader Rule concerns the disclosure requirements set forth in Title II for employers and consultants.

Section 203 broadly requires employers and labor relations consultants to report on "any agreement or arrangement . . . pursuant to which [the consultant] undertakes activities where an object thereof, ***directly or indirectly***, is to persuade employees to exercise or not exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively." 29 U.S.C. §§ 433(a)(4) and (b)(1) (emphasis added). At the same time, Section 203(c) also states that this broad reporting requirement does not require "any employer or other person to file a report covering the

services of such person by reason of his giving or agreeing to give advice to such employer . . . ." 29 U.S.C. § 433(c). Section 203 is "something less than a model of statutory clarity." *Wirz v. Fowler*, 372 F.2d 315, 325 (5th Cir. 1966). Therefore, it is the Department of Labor's responsibility to reasonably interpret the advice exemption.

Prior to the enactment of the Persuader Rule in 2016, the Department of Labor's interpretation of the advice exemption ignored the statute's requirement that not only direct, but also indirect, persuader activity must be subject to transparency and reported. The prior interpretation exempted from reporting any type of activity by the labor consultant, so long as the consultant had no direct contact with employees. 81 Fed. Reg. at 15933. That loophole resulted in vast underreporting of persuader activities, and did not go unnoticed by the consultant community.

> The law states that management consultants only have to file financial disclosures if they engage in certain kinds of activities, essentially attempting to persuade employees not to join a union or supplying the employer with information regarding the activities of employees or a union in connection with a labor relations matter. Of course, that is precisely what anti-union consultants do, have always done. Yet, I never filed with [the Department of Labor] in my life, and few union busters do . . . As long as [the consultant] deals directly only with supervisors and management, [the consultant] can easily slide out from under the scrutiny of the Department of Labor which collects the [LMRDA] reports.

MARTIN JAY LEVITT (WITH TERRY CONROW), CONFESSIONS OF A UNION BUSTER 41-42 (New York: Crown Publishers, Inc. 1993); 81 Fed Reg. at 15933.

The Persuader Rule would close that loophole and interpret the advice exemption in a manner that ensures that, while a consultant's advice remains exempt from reporting, that consultant's indirect persuader activity is transparent. The Persuader Rule relies on the plain meaning of the term "advice" and exempts from reporting the giving of advice, *i.e.*, an oral or written recommendation regarding a decision or course of conduct. Therefore, for example, the Persuader Rule is clear that "an attorney or labor

relations consultant does not need to report . . . when he counsels a business about its plans to undertake a particular action or course of action, advises the business about its legal vulnerabilities and how to minimize those vulnerabilities, identifies unsettled areas of the law, and represents the business in any disputes and negotiations that may arise." 81 Fed. Reg. at 15926.

Where, however, labor consultants or attorneys cross over and "manage or direct the business's campaign to sway workers against choosing a union – that must be reported." 81 Fed. Reg. at 15926. The Persuader Rule and the revised reporting forms provide clear instructions and examples with respect to what constitutes reportable persuader activity and what does not. For example, if an attorney confines him or herself to the traditional role of providing advice and counsel, or represents the employer in litigation, that attorney need not file a report under the Persuader Rule. If, however, the attorney chooses not only to provide legal counsel, but also to serve as a labor consultant by "developing and implementing the company's anti-union strategy and campaign tactics," that attorney has chosen not just to engage in the traditional practice of law, but also to provide the same services as non-lawyer labor consultants. In so doing, the attorney has the same reporting obligation as a consultant. 81 Fed. Reg. at 15931; John Logan, The Union Avoidance Industry in the U.S.A., 44 BRITISH JOURNAL OF INDUSTRIAL RELATIONS 651, 658-61 (2006) (describing the growth of law firms engaging in persuader activities that had often been performed exclusively by consultants); *see also Humphreys, Hutcheson and Mosely v. Donovan*, 755 F.2d 1211, 1216 (6th Cir. 1985) (explaining that only when an attorney chooses to cross "the boundary between law and persuasion, [is he] subject to extensive reporting requirements").

NABTU acknowledges, as the proposed rescission states, that the Persuader Rule has been criticized by two district courts. 82 Fed. Reg. at 26879-80. Rather than propose a rule that addresses those criticisms, however, the Department of Labor simply takes a cleaver to the Persuader Rule and proposes its rescission and a return to a regulatory structure that contradicts the language of §203 of the LMRDA by exempting from reporting all indirect persuader activity, include that which does not constitute advice. Indeed, in one of the decisions critical of the Persuader Rule, the court nonetheless acknowledged that the rescission of the Persuader Rule and a return to the Department of Labor's prior interpretation, would result in under reporting contrary to the statute.

> As a general matter, the Court agrees with DOL that its previous interpretation of § 203(b) and § 203(c) was underinclusive. In other words, the Court agrees that an act can constitute persuader activity — and not constitute advice — even though the act does not involve direct contact with employees. Under DOL's longstanding interpretation of the LMRDA, some persuader activity that was reportable under § 203(b), and not exempt under § 203(c), nevertheless went unreported.

Labnet, Inc. v. U.S. Department of Labor, 197 F. Supp.3d 1159, 1168 (D. Minn. 2016). By rescinding the Persuader Rule, the Department of Labor would violate its statutory duty to promulgate rules that "prevent the circumvention or evasion of [§203's] reporting requirements." 29 U.S.C. § 438. Instead, as noted by the court in *Labnet*, the Department of Labor would return to an interpretation that evades the reporting requirements of §203 of the Act.

In short, the Persuader Rule ensures proper transparency in organizing campaigns, as mandated by the language of §203. By rescinding it, the Department of Labor would instead ensure that employees are kept in the dark about their employers' efforts to influence their vote and defeat their drive to organize. For these reasons, NABTU strongly opposes the proposed rule.

Respectfully submitted,

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President