Comments on the Rescission of the Rule Interpreting the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act

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Submitted to

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SUMMARY OF COMMENTS

The Labor-Management Reporting Disclosure Act of 1959, 29 U.S.C. § 433, ("LMRDA") was intended to address unethical, improper and surreptitious activities by "middlemen" hired by employers to persuade employees in their rights to organize and bargain collectively. LMRDA imposed a reporting obligation on such "activities where an object thereof is, directly or indirectly . . . to persuade employees" regarding unionization. At the same time, LMRDA expressly exempted the giving of "advice," engaging in collective bargaining on behalf of an employer, and representing the employer before courts and other tribunals. Indeed, the Senate report accompanying the bill stated that "[t]he committee did not intend to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations . . . ." For decades, the Department of Labor ("DOL") had limited the reporting obligations to the "middlemen" targeted by the LMRDA, while allowing employers to obtain legal advice.

The Department of Labor ("DOL") March 24, 2016 Rule broadly increases the range and number of activities that constitute reportable "persuader activity" and limits the activities that constitute non-reportable "advice." The Rule requires reporting of a wide variety of legitimate activities, even absent direct contact with employees, if an object of the agreement is to persuade employees in exercising their rights. The Rule also overhauls the Department's interpretation of what must be reported on employer's annual report form LM-10 and labor relations consultant's per-engagement report form LM-20, raising serious constitutional questions regarding employers' rights to seek advice on how to communicate with their employees.

Under the Rule, many legitimate communications between employers and their counsel are subject to the intrusive reporting obligations on the ground that they involve "indirect[]" persuasion of employees, 29 U.S.C. § 433(b)(1), and do not constitute "giv[ing] advice," *id.* § 433(c). Most significantly, advice on collective bargaining matters, as well as union representation matters, is now subject to the reporting requirements. These activities are not the evils that Congress intended to address by passing the LMRDA, and this interpretation cannot be reconciled with the statute, Congressional intent or DOL's own longstanding interpretation of the statute.

In its order issuing an injunction preventing the implementation of the Rule, the U.S. District Court for the Northern District of Texas held that the Rule was "defective to its core." As discussed in the court's opinion and as explained in detail below, the Rule should be rescinded because it is contrary to the plain language of the statute and Congressional intent, it raises serious constitutional questions, and it is contrary to public policy. It inhibits employers' right to seek advice and representation, it chills communications between employers and employees, and it exposes lawyers and law firms to potential criminal liability for failing to abide by the DOL's irrational and vague interpretation of the statutory exemption. For these reasons, Proskauer Rose LLP ("Proskauer") supports the rescission of the DOL's Rule.

PROSKAUER ROSE LLP

Proskauer is a leading international law firm. Our roots go back to 1875, when we were founded in New York City. We have represented hundreds of employers, including employers in collective bargaining in industries and sectors spanning our economy, from professional sports leagues and teams, television, live theater, manufacturing, newspapers, health care, construction, hospitality and many others.

EXPLANATION OF PROSKAUER'S COMMENTS

I. Background

The LMRDA was enacted in September 1959 following an investigation by the Senate Select Committee on Improper Activities in the Labor or Management Field, known after its chairman as the McClellan Committee. Though the Committee focused its efforts on investigating illegal and unethical activities on the part of labor organizations, it also investigated employers' use of consultants known as "middlemen" during union organizing campaigns. The Committee discovered that some employers hired these middlemen "to organize 'no-union committees' and engage in other activities to prevent union organization among their employees." S. Rep. No. 187, at 6 (1959); *see id.* ("[E]mployers have often cooperated with and even aided crooks and racketeers in the labor movement at the expense of their own employees."). Based on the results of the investigation, both Houses of Congress introduced a series of labor-management reform bills containing provisions intended "to curb activities of middlemen in labor-management disputes," *see, e.g.*, S. Rep. 1684, at 1 (1958), and "to prevent, discourage, and make unprofitable improper conduct on the part of union officials, employers, and their representatives by requiring reporting of arrangements, actions, and interests which are questionable." S. Rep. No. 187, at 5 (1959). The Senate Report accompanying the bill which was ultimately passed by Congress acknowledged that although not all of the activities required to be reported were illegal, "most of them are disruptive of harmonious labor relations and fall into a gray area." *Id.* The Report also stated that "[t]he committee did not intend to have the reporting requirements of the bill apply to attorneys and labor relations consultants who perform an important and useful function in contemporary labor relations . . . ." *Id.* at 40; *see also* S. Rep. No. 85-1684 at 8-9 (1958) ("[s]ince attorneys at law and other *responsible* labor-relations advisers do not themselves engage in influencing or affecting employees in the exercise of their rights under the National Labor Relations Act, an attorney or other consultant who confined himself to giving advice [would not] be required to report") (emphasis added).

Consistent with legislative intent, the LMRDA requires employers to report to the DOL any agreement or arrangement to engage in activity that has a direct or indirect object of (1) persuading employees with respect to the exercise of their right to organize and bargain collectively; or (2) supplying an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer. 29 U.S.C. § 433(a)(4).

The LMRDA contains an exemption from disclosure and reporting requirements of Sections 203(a) and (b) for advisory or representative services. Known as the "advice exemption," Section 203(c) provides:

> Nothing in this section shall be construed to 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 or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

29 U.S.C. § 433(c). The exemption expressly excludes: (i) giving "advice" to an employer; (ii) representing an employer in legal proceedings; and (iii) engaging in collective bargaining.

For fifty-four years (with the exception of a brief period in 2001[1]), the DOL interpreted the advice exemption broadly to exempt virtually any advice given to employers, so long as the lawyer or labor consultant did not communicate directly with employees. *See* Charles Donahue, *Some Problems Under Landrum Griffin*, Am. Bar Assoc., Section of Labor Relations Law, Proceedings 49 (1962); 76 Fed. Reg. 36,180 (citing Memorandum from Charles Donahue, Solicitor of Labor, to John L. Holcombe, Commissioner, Bureau of Labor-Management Reports, at 1 (Feb. 19, 1962)). Reporting was required only if the consultant or attorney talked or dealt directly with employees. This interpretation has been upheld by the courts. *See Int'l Union v. Dole,* 869 F.2d 616, 620 (D.C. Cir. 1989) (R.B. Ginsburg, J.) (finding not "arbitrary" the DOL's interpretation of the advice exemption removing from the reporting requirements "certain activity that otherwise would have been reportable"); *Martin v. Power, Inc.*, 141 LRRM 2663 (W.D. Pa. 1992) (finding attorney consultant's preparation of letters and related materials covered by the advice exemption because consultant had no direct contact with employees).

The DOL's March 24, 2016 Rule abandoned this long-standing interpretation and changed the focus to the intent of the agreement. The Rule defines "persuader activities" as "any actions, conduct, or communications that are undertaken with *an object*, explicitly or implicitly, directly or indirectly, *to affect* an employee's decisions regarding his or her representation or collective bargaining rights." *Id.* at 15,947 (emphases added). "Exempt 'advice' activities are limited under the Rule to those activities that meet the plain meaning of the term: an oral or written recommendation regarding a decision or course of conduct." *Id.* at 15,926.

The Rule further states that "[i]f any reportable activities are undertaken, or agreed to be undertaken, pursuant to the agreement or arrangement, the exemptions do not apply and information must be reported for the entire agreement or arrangement." *Id.* at 15,927-28.

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[1] On January 11, 2001, DOL published a notice of a revised statutory interpretation regarding the advice exemption, without requesting public comment. This notice was rescinded on April 11, 2001.

Similarly, "if the consultant engages in both advice and persuader activities, the entire agreement or arrangement must be reported." *Id.* at 15,937. Accordingly, the advice exemption does not apply where it is impossible to separate advice from activity that goes beyond advice. It also does not apply if "advice" is intertwined with direct or indirect persuader activities.

If it were allowed to take effect, the Rule would have a significant impact not only on the right of employers to receive advice and counsel relating to issues arising during representation campaigns, but also on the process of collective bargaining. *See id.* at 15,935 ("[D]isclosure [of an employer's use of consultants] also is important when an employer has engaged the persuader services of a consultant following a union's certification while the parties are negotiating a first contract."); *see id.* at 15,939 ("While many reports will be triggered by persuader activities related to the filing of representation petitions, others will result from activities related to collective bargaining. . . ."). Under the Rule, when a lawyer or other outside consultant prepares communications for delivery to the employees in the bargaining unit at large, away from the bargaining table, such communications would trigger reporting:

> An activity . . . that involves the persuasion of employees would be reportable. For example, a communication for employees, drafted by the consultant, about the parties' progress in negotiations, arguing the union's proposals are unacceptable to the employer, encouraging employees to participate in a union ratification vote or support the union committee's recommendations, or concerning the possible ramifications of striking, would trigger reporting.

81 Fed. Reg. at 15,971.

As explained in detail below, by subjecting legitimate activities, including advice on collective bargaining matters and union representation matters, to the LMRDA's reporting obligations, the Rule discourages employers from seeking advice from outside counsel and provides a strong disincentive for lawyers to provide such advice. This interpretation is unsupported by the statute and is contrary to the expressed intent of Congress.

II. The Proposed Rule Conflicts with the Plain Language of the LMRDA and the Legislative History.

A. The Rule Is Inconsistent with Section 203's Exemption of Collective Bargaining

As reflected in the legislative history of the LMRDA, Congress added the specific exemptions of 203(c) to address, among other things, concerns regarding disclosure of attorney-client confidences and to avoid impeding legitimate activities undertaken by labor relations consultants. The statute makes clear that giving "advice" **or** engaging in collective bargaining on behalf of an employer are exempt from the reporting requirements. Under the DOL's Rule, when a lawyer or other outside consultant is engaged in collective bargaining, communications in support of the employer's bargaining proposals that are prepared for delivery to employees at the bargaining table are exempt from reporting. But the same or similar entirely lawful communications lose their exempt status if they are prepared for delivery to the employees in the bargaining unit at large, away from the table.

In effect, the DOL's Rule artificially parses the unitary collective bargaining process in a way that nullifies the exemption. The job of an advocate or consultant "engaged in collective bargaining" is not only to make arguments at the table, but also advise their clients on how to "sell the deal" to the workforce as a whole. The Rule, however, precludes lawyers from assisting their clients away from the bargaining table without incurring an obligation to report as "persuaders."

To illustrate the irrational results of the Rule, under the Rule, there would be no reporting obligation if an employer hires an attorney-consultant to develop bargaining proposals, deliver those proposals at the bargaining table, explain the proposals at the table, and even work collaboratively with the union and its counsel to draft the collective bargaining agreement. However, although that attorney-consultant may be the most knowledgeable person about the proposals and about the collective bargaining agreement, s/he cannot then help the employer write a letter to the employees explaining the basis for the proposals or urging ratification, nor can s/he assist in drafting talking points to be used when speaking to employees about what happens in the event of a work stoppage without becoming a "persuader" subject to reporting. In effect, the Rule deprives unionized employers of their choice of counsel during the collective bargaining process. This result is not only irrational and unprecedented, it is completely inconsistent with the statute.

This critical flaw was pointed out in comments made in response to the DOL's 2011 Notice of Proposed Rulemaking. Regrettably, the DOL dismissed those comments in a single paragraph:

> One law firm questioned the reportability of communications in connection with the collective bargaining process. The Department emphasizes that the presence of a labor dispute is not a prerequisite for reporting of persuader agreements, although it may provide important context to determine if the consultant engaged in persuader activities. Section 203 exempts from reporting activities involved in negotiating an agreement, or resolving any questions arising from the agreement. *An activity, however that involves the persuasion of employees would be reportable. For example, a communication for employees, drafted by the consultant, about the parties' progress in negotiations, arguing the union's proposals are unacceptable to the employer, encouraging employees to participate in a union ratification vote or support the union committee's recommendations, or concerning the possible ramifications of striking, would trigger reporting.*

81 Fed. Reg. at 15971 (emphasis added); *see id.* at 15939 ("While many reports will be triggered by persuader activities related to the filing of representation petitions, *others will result from activities related to collective bargaining. . . .*") (Emphasis added).

The DOL's attempt to distinguish collective bargaining, on the one hand, from "persuasion of employees," on the other hand, finds no basis in the statute or in common sense. At its core, collective bargaining involves the art of persuasion and this art is practiced not just at the bargaining table. Section 101 of the NLRA refers to "the practice and procedure of

collective bargaining" for a reason. 29 U.S.C. § 151. In every collective bargaining negotiation it is the employees themselves who ultimately decide to make or not make the agreement with the employer. That is what the ratification process is for. It is also the employees who decide whether or not to authorize a work stoppage. That is what a strike vote is for.

That collective bargaining encompasses much more than negotiations and communications at the table is not a new or controversial concept. One of this country's largest labor organizations, the International Brotherhood of Teamsters, defines "collective bargaining" as follows:

> Collective bargaining (also called contract negotiations) is the heart and soul of the labor movement. It is when workers band together to negotiate workplace matters with their employer. The end result is a **collective bargaining agreement** or **contract** that spells out in black and white all of the terms both parties agree to, from pay rates and benefits, to a grievance procedure, time off and more. The employees, or **bargaining unit**, generally nominate a few of their coworkers to represent them, along with expert negotiators from the union. Once the negotiating team reaches a **tentative agreement** with management, the bargaining unit meets to vote the contract terms up or down. This is called the ratification process. The contract only goes into effect if a majority of the employees approve the tentative agreement.

IBT, Frequently Asked Questions (*available at* https://teamster.org/about/frequently-asked-questions-faq) (last accessed July 7, 2016). The IBT clearly considers the ratification process part of collective bargaining. Thus, a management lawyer who provides content for his/her client to communicate with the bargaining unit about ratification is, by the IBT's own definition, "engaged in collective bargaining."

Likewise, the Second Circuit Court of Appeals recognized over thirty years ago that "labor negotiations do not occur in a vacuum. While the actual bargaining is between employer and union, the employees are naturally interested parties. During a labor dispute the employees are like voters whom both sides seek to persuade . . . ." *NLRB v. Pratt & Whitney Air Craft Div.*, 789 F.2d 121, 134 (2d Cir. 1986) (citations omitted). Accordingly, "*granting an employer the opportunity to communicate with its employees does more than affirm its right to freedom of speech; it also aids the workers by allowing them to make informed decisions while also permitting them a reasoned critique of their unions' performance.*" *Id.* (emphasis added).

Both Congress and the Supreme Court have also stressed the special importance of "encourage[ing] free debate on issues dividing labor and management" in the workplace." *Chamber of Commerce of United States v. Brown*, 554 U.S. 60, 67 (2008). Similarly, the NLRB recognized that:

> The goal of the Federal labor policy has always been to create a favorable climate in which a healthy and stable bargaining process can be established and maintained. We believe that *permitting the fullest freedom of expression by each party to that process* offers the best hope of nurturing that environment. Ideas

> which are tested in the marketplace of free debate provide the foundation of a sound labor relations framework. We recognize that there may be some risk that direct communication between an employer and its employees which bears on the bargaining process may be perceived by some as an attempt to undermine the statutory collective-bargaining representative. However, we are convinced that the benefits to be derived from free, noncoercive expression far outweigh such speculative concerns.

United Technologies Corp., 274 NLRB No. 87 (1985) (emphasis added); *see Adolph Coors Co.*, 235 NLRB 271, 277 (1978) (employer lawfully sent letters setting forth certain proposed contract terms which had been presented to the union and thereafter implemented when impasse was reached in negotiations); *Stokely-Van Camp, Inc.*, 186 NLRB 440, 449-50 (1970) (employer that conducted meetings with its employees for the purpose of discussing and clarifying its bargaining proposals acted lawfully and did not engage in improper "direct dealing").

The DOL's Rule will, without doubt, result in many consultants and lawyers declining to give advice to employers, which would then lead to employers – especially small businesses with no in-house counsel – deciding to forego expressing opinions regarding a union or a union's proposals. By thus chilling employer's free speech, the Rule will preclude employees from hearing the "other side" of the story – an alternative view and information that a union would not present. As a result, the employees will be deprived of an opportunity to discover their employer's views, and they will be less informed about the important choices they face – be it during union organizing or during the ratification process.

It is of no moment that the Rule does not prohibit employers and consultants from engaging in any kind of activity but merely requires that the activity be reported. Given the DOL's position that the scope of the reporting obligation extends to all labor relations advice or services, not just persuader activities, many lawyers will simply decline to provide services which could conceivably be deemed "persuader activity" out of fear of triggering the reporting obligation as to all of their clients. *See NFIB v. Perez*, 2016 WL 3766121, ¶¶ 53, 167, 175 (N.D. Tex. June 27, 2016). Conversely, employers may eschew seeking counsel for these types of communications (even when using the attorney for other work relating to bargaining) if they have to report their agreements with counsel, as well as the fees and the details of such agreements – clearly chilling the free flow of communications necessary between a client and his attorney. This is critical – as the National Labor Relations Board has strict guidelines on the scope and nature of communications to employees during the bargaining process. Without counsel to assist in the drafting of these communications, it could only lead to entirely unintended unlawful behavior by employers that, in fact, interferes with the bargaining process – an entirely perverse result from a statute that is intended to promote the process.

The reporting requirements of the LMRDA were intended to ensure that employees are aware of who is behind messages regarding a union (or a union's proposals) when they receive such messages from someone who cannot readily be identified as an agent of the employer. The application of the Rule to work done in collective bargaining does not advance that goal in any way. When a lawyer participates in collective bargaining negotiations everyone knows that he or she is a representative of management. There can be no confusion as to the source of the

messages. The Rule's application to collective bargaining is simply not an outcome that Congress intended.

B. The Rule Is Inconsistent with Section 203's Exemption of "Advice"

The DOL's revised treatment of what constitutes "advice" exempted by § 203(c) is similarly unsupported by the statute, its legislative history or the DOL's longstanding interpretation of the advice exemption, as recognized by the U.S. District Court for the Northern District of Texas. *NFIB v. Perez*, 2016 WL 3766121, ¶ 175 (N.D. Tex. June 27, 2016). For over fifty years, the Department administered the advice exemption in a manner that was consistent with the plain meaning of the statute and that had the added, and critical, benefit of giving employers and their counsel a bright-line test that was easy to administer. So long as outside counsel or consultant was not communicating directly with employees but rather providing or editing content for their employer client, which the employer client was free to accept or reject, the work did not give rise to a reporting obligation. This interpretation was fully consistent with legislative history and it made sense. After all, "advice" is defined as a "recommendation regarding a decision or course of conduct: counsel." *Merriam-Webster's Collegiate Dictionary*, (10th ed. 2002).

Consistent with the dictionary definition of "advice," if a lawyer recommends that a client take a more – or less – conciliatory tone about a union or its bargaining proposals or record, that is a recommendation. It is advice. The character of that recommendation is no less "advice" when the communication that is being considered is intended to persuade employees than it would be if it were for the purpose of persuading newspaper editorial writers, or company shareholders, or, for that matter, legislators. The language of § 203(c) does not distinguish among the potential audiences for the communications that are the subject of the lawyer's (or other consultant's) advice. Yet, the DOL's Rule would irrationally make the question of reportability turn on that question.

At the same time, the Rule would constrict the term "advice" so that it applies purely to advising a client as to the legality of a communication or course of action. But lawyers do much more than that: lawyers are advocates and an inherent part of their job is to persuade. That is why lawyers are asked by clients to help script meetings; to help draft prospectuses; to engage in lobbying; and to prepare comments to the media on behalf of their clients' positions. To suggest that "advice" is no longer "advice" because there is a persuasive element to the subject matter is nonsensical. Moreover, it is simply an impossible line to draw. Any statement given to the client or edit made to a document by a lawyer could potentially be construed as "persuasive" even where the attorney's sole intent was to ensure the lawfulness of the communication

C. The Rule Is Inconsistent with Section 204

The Rule would also invade on the attorney-client relationship, specifically, the lawyers' ethical obligations and the attorney-client privilege. An attorney is obligated by the laws of virtually every state to maintain in confidence communications made to him or her by a client in confidence. That obligation is sacrosanct. No attorney can or will risk his or her license and professional reputation by reporting matters clients demand not be reported. And no attorney

will perform work that is required to be reported if they cannot in fact comply with that requirement. It is for that reason that § 204 of the LMRDA exempts from reporting "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." 29 U.S.C. § 434.

Under the Rule, there will be a variety of circumstances in which lawyers may be required to report the activities they have performed for clients in ways that would require the disclosure of information conveyed to them in confidence by a client. This is, in fact, precisely what the DOL would require in the revised LM-20, which would require employers to report exactly what kinds of services they have been asked to provide for purposes of "persuasion." Moreover, depending on the requirements of the LM-21 report, a lawyer who performs "persuader" work for even a single client could conceivably be required to report its receipts and disbursements for labor relations work performed on behalf of all its clients, even those for whom no persuader work was performed and even if those other clients considered that such information was confidential and subject to attorney-client privilege.

The result will be a loss of services, and the loss of services will impact most acutely the small businesses that have limited funds and little or no in-house experience to guide them in what they can and cannot say to their employees. *See NFIB v. Perez*, 2016 WL 3766121, ¶ 74 ("The New Rule will deprive small business owners of such competent representation. . . ."). By dramatically increasing the cost and consequences of securing advice, the Rule would result in fewer firms seeking advice and, again, will have the perverse effect of causing more unfair labor practices by employers who are deprived of the services of responsible counsel. Alternatively, employers may refrain from saying anything at all, leaving unrebutted whatever message is being disseminated by the union. Employees will be left with no countervailing voice. This is not an outcome that Congress intended.

III. The Rule Is Unduly Vague.

The Rule extends the reporting obligation to activities that bear no resemblance to the abuses which led to the enactment of the LMRDA and it does so in a way that requires a subjective determination of intent that is both unrealistic and unworkable. For the first time, a lawyer (or other consultant) who develops employer personnel policies may be required to report, even in the absence of any evidence that the employees have even considered a union. Specifically, under the Rule, reporting is required if the personnel policies that the lawyer has been asked to prepare are "designed to persuade." In determining whether an object of the activities is to persuade employees, the DOL intends to look at "the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking."

In essence, under the new Rule, the reporting obligation of employer (LM-10) and its counsel (LM-20 and LM-21) will turn on the subjective determination of each – and, ultimately, on the DOL's subjective view of their intent – as to whether the policies that the lawyer developed were for the purpose of persuading employees whether or how to exercise their right to unionize and bargain collectively. If "an object" of the agreement is to persuade employees with respect to their right to unionize or bargain collectively, it is persuader activity. A lawyer

may, for example, advise an employer regarding promulgation of an internal grievance process, without incurring an obligation to report. But the same action may be deemed to be "persuader" work if the DOL were to conclude later – based on "circumstances relevant to the undertaking" – that the policy had a purpose, in whole or in part, of discouraging employees from unionizing.

In reality, there is no way to make this determination with any degree of confidence – particularly where both the employer and the lawyer/consultant have to make their own independent determination as to whether the work performed is reportable. *See NFIB v. Perez*, 2016 WL 3766121, ¶¶ 126, 175. There are multiple people involved; and the objectives may change after the work has begun but before it is concluded. The lawyer may not be certain about the client's objective and may, in the interest of being conservative, file an LM-20 report, and by doing would arguably violate a duty of confidentiality. The lawyer may not report because s/he believes in good faith that the work was not reportable – but the client may file an LM-10 because it actually did request the policy be developed with an object to persuade. This is not how the attorney-client relationship should function.

The difficulty of applying this new Rule is exacerbated by the fact that the DOL intends to revise Form LM-21, the annual report that consultants must file. 81 Fed. Reg. 15,992 n.88. The current form requires consultants to report receipts received from any client for whom it has provided labor relations advice or services – even if such work did not involve labor relations advice or services. The LM-21 also requires a statement of disbursements to employees of the consultant in connection with labor relations advice and services. Though the DOL has indicated that it intends to revise the form, no revised form has been proposed or adopted.

The rules governing what must be reported on the LM-10 and LM-20, on the one hand, and what must be reported on the LM-21, on the other hand, are closely related and intertwined. It is for this reason that several commenters requested that the DOL should refrain from publishing its final rule regarding the "advice" exemption until the DOL was also ready to publish its final rule regarding the LM-21, and that the proposed advice exemption rule be consolidated with the impending proposal to change the LM-21. Without clarity on what will be required to be reported in the LM-21, a consultant cannot diligently track the nature and scope of services provided in each fiscal year or the receipts from employers and disbursements associated with such services. Nor can he give appropriate advice to his clients regarding its reporting obligations.

Despite the requests, the DOL issued the Rule with no clarity at all around changes to the LM-21. Accordingly, nobody who is or may become a "persuader" under the Rule knows exactly what they will need to track in order to be able to report on the LM-21. Though the DOL has issued a Special Enforcement Policy stating that it will not take enforcement action based on a failure to complete the Statement of Receipts and Statement of Disbursements sections (Parts B and C) of the LM-21, it is unclear how long the policy will remain in effect, or what the DOL intends to do with the LM-21 generally. The "DOL has structured its decision making in such a way that it 'entirely failed to consider an important aspect of the problem.'" *NFIB v. Perez*, 2016 WL 3766121, ¶ 136.

For all of the foregoing reasons, Proskauer urges DOL to rescind the Rule and return to its longstanding interpretation of the advice exemption.

Respectfully submitted,

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