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August 10, 2017

The Honorable R. Alexander Acosta
Secretary of Labor
Attn: Mr. Andrew R. Davis
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

RE: RIN 1245-AA07; Proposed Rulemaking to Rescind the Regulations Established in the Final Rule Entitled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," Effective April 15, 2016

Dear Mr. Secretary,

This letter presents comments of Associated Builders and Contractors of Arkansas ("ABC Arkansas"), the Arkansas State Chamber of Commerce/Associated Industries of Arkansas (the "Chamber/AIA"), the Arkansas Hospitality Association, Inc. ("AHA"), and Cross, Gunter, Witherspoon & Galchus, P.C. (CGWG) (ABC Arkansas, the Chamber/AIA, AHA, and CGWG are collectively referred to as the "Commenters"), on the Notice of Proposed Rulemaking (NPRM), "Rescission of Rule Interpreting 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," RIN 1245-AA07, 82 Fed. Reg. 26877 (June 12, 2017). The Commenters were party-Plaintiffs in one of the three lawsuits filed against the U.S. Department of Labor (DOL) to enjoin the Final Rule entitled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act" in the action captioned as follows: *Associated Builders and Contractors of Arkansas et al. v. Thomas E. Perez et al.*, Case No. 4:16-CV-169 (KGB) (E.D. Ark. 2016). That matter is presently stayed pending the outcome of DOL's proposed rescission of the New Rule.

BACKGROUND OF THE COMMENTERS

ABC Arkansas, which is located at 22 Collins Industrial Place, North Little Rock, AR 72113, is a trade association representing hundreds of construction contractors and related employers in Arkansas who share the view that construction work should be awarded and performed based upon merit, regardless of labor affiliation. ABC Arkansas has, for many years, on occasion, advised its members with regard to labor relations issues, including advising members as to lawful responses to union organizing efforts under the National Labor Relations Act ("NLRA") and provided access to services conducted by member firms on such topics. These entities also include in their membership law firms, human resource consulting firms, labor relations consulting firms, public relations consulting firms, and benefits consulting firms who regularly advise employers on labor relations matters, including advice on how such employers can best communicate with their employees on the subject of union organizing.

The Chamber/AIA, located at 1200 West Capitol Avenue, Little Rock, AR 72201, is the leading voice for business at the Arkansas State Capitol and serves as the primary business advocate on all issues affecting Arkansas employers. Its mission is to promote a pro-business, free-enterprise agenda and to prevent anti-business legislation, regulations, and rules. Many members of the Chamber/AIA consist of law firms and consulting firms that regularly advise employers on labor relations matters in a manner previously treated as exempt from reporting under the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA).

AHA, located at 603 S. Pulaski Street, Little Rock, AR 72201, represents numerous Arkansas employers and trade associations in the hospitality industry, including hotels, lodges, resorts, restaurants, and bars. AHA's membership includes hundreds of employers, law firms, and consulting firms that regularly advise employers on labor relations matters in a manner previously treated as exempt from reporting under the LMRDA.

CGWG, located at 500 President Clinton Avenue, Suite 200, Little Rock, AR 72201, is a law firm representing many employers in a variety of industries. CGWG is regularly called upon to give advice to its clients on labor relations matters, including advice regarding lawful responses to union organizing attempts. CGWG does not and never has engaged in persuader activity as that term has been consistently enforced over the last 50 years. However, CGWG does provide lawful advice to employers of the types that the new Rule, discussed below, has improperly identified for the first time as potentially "persuader" activity. Such advice includes seminars for employer executives and other forms of management training, assistance in developing policies for employee handbooks, assistance in developing employee attitude surveys, training supervisors in the lawful conduct of conversations and meetings with employees on labor relations issues, and drafting, revising, or otherwise recommending written materials to employers in order to advise such employers regarding the lawful presentation of their views on labor issues to their employees. The Rule stood to severely hamper CGWG in its ability to provide such lawful labor relations advice to employer clients due to the unavoidable risk of being compelled to file burdensome and intrusive public reports regarding the nature and cost of the advice provided.

For the reasons that follow, the Commenters support the proposal to rescind the New Rule, returning to the previously undisturbed status quo that existed for over fifty years.

DISCUSSION

1. Statutory Overview

Section 203(a) of the LMRDA, 29 U.S.C. § 433, which is entitled, "Filing and contents of report of payments, loans, promises, agreements, or arrangements," provides in relevant part as follows:

> Every employer who in any fiscal year made-
> [...]
> (4) any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person 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, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; or
>
> (5) any payment (including reimbursed expenses) pursuant to an agreement or arrangement described in subdivision (4);
>
> shall file with the Secretary a report, in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

29 U.S.C. § 433(a). Pursuant to Section 203(a), DOL requires that employers complete and file a Form LM-10 (Employer Report) disclosing all payments made to unions and union officials, persuader payments made to employees and employee committees, and persuader agreements/arrangements made with labor relations consultants (including attorneys) along with the amount and dates of payments made and expenditures made to interfere with, restrain or coerce employees, or otherwise to obtain information concerning employees or a labor organization. Employers required to file Form LM-10 must do so within ninety days of the completion of the employer's fiscal year.

Section 203(b) of the LMRDA states:

> Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly –
>
> (1) 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; or
>
> (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;
>
> shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

29 U.S.C. § 433(b). Pursuant to Section 203(b), DOL requires that labor relations consultants (including attorneys) complete and file a Form LM-20 (Agreement & Activities Report) specifying, among other things, information relating to all persuader agreements and the nature of persuader activities undertaken by the consultant. Form LM-20 must be completed and filed by the consultant within thirty days of the consultant agreeing to engage in reportable activity. Also pursuant to Section 203(b), DOL further requires the completion and filing of Form LM-21 (Receipts and Disbursements Report) by consultants (including attorneys) who engage in Persuader Activities. Form LM-21 must be filed within ninety days after the completion of the consultant's fiscal year. Using Form LM-21, consultants must report "receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services." They must also report "all disbursements [to their officers and employees] . . . in connection with labor relations advice or services rendered to employers." The LMRDA does not define the phrase "labor relations advice or services" utilized in Form LM-21.

Importantly, Section 203(c) of the LMRDA expressly limits the scope of the reporting and disclosure requirements established by the Act under the so-called "Advice Exemption," to wit:

> **(c) Advisory or representative services exempt from filing requirements**
> 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). Relatedly, Section 204 of the LMRDA—entitled "Exemption of Attorney-Client Communications"—provides that "[n]othing contained in [the LMRDA] shall be construed to require an attorney . . . to include in any report . . . 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. Thus, where a consultant, including attorneys, provides only advice to the employer, no reporting obligation is triggered and nothing must be filed with, or submitted to DOL.

Importantly, Section 209 of the LMRDA provides criminal penalties for willful violations, knowingly false reports, and knowing omissions with respect to the statute's reporting and disclosure requirements, which are punishable with fines up to $10,000.00 and/or imprisonment up to one year. 29 U.S.C. § 439(b) and (c). Section 209 further provides that individuals required to sign reports under Section 203 are deemed personally responsible for them. 29 U.S.C. § 439(d).

For over five decades, from 1962 through 2016, DOL interpreted the Advice Exemption in Section 203(c)[1] to exclude from the LMRDA's reporting requirements an employer's engagement of a consultant (including an attorney) to assist the employer in responding to a union organizing campaign so long as the consultant (including an attorney) had no direct

[1] In fact, the House Conference Committee Report describes Section 203(c) as "broad," stating that Section 203(c) "grants a broad exemption from the requirements of this section with respect to giving advice." H.R. Rep. No. 1147 on S. 1555 (Sept. 3, 1959) (emphasis added). The Committee Report makes no distinction between legal and persuasive advice. Indeed, nowhere in the lengthy legislative history of the LMRDA is there even the slightest suggestion that the drafting and revision of employer communications by consultants or labor lawyers was a problem to be addressed by public reporting. Rather, Congress was concerned only with what the Fourth and Sixth Circuits later termed "extracurricular" activities of certain attorneys and consultants who communicated face-to-face with an employer's workforce. *See Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965); *Humphreys, Hutcheson and Mosely v. Donovan*, 755 F.2d 1211, 1215–16 (6th Cir. 1985).

contact with employees and the employer was free to accept or reject the consultant's (including an attorney's) recommendations. Among the many activities considered to fall within the Advice Exemption was a lawyer's preparation of documents and speeches for an employer's use during union organizing, the training of managers and supervisors through seminars and otherwise, and the development of personnel policies and practices, all of which the employer is always free to accept or reject, or to revise as it sees fit.

DOL's longstanding interpretation of the Advice Exemption was derived from a 1962 memorandum by President John F. Kennedy's Solicitor of Labor, Charles Donahue ("the Donahue Memo"), which declared consultant, including attorney, communications to be advice within the meaning of the Advice Exemption if:

> (1) the consultant did not communicate directly with non-management/ supervisory employees; and
>
> (2) the employer was free to accept or reject the consultant's advice.

See LMRDA Interpretative Manual Entry § 265.005; *see also* 76 Fed. Reg. 36,178, 36,180 (June 21, 2016); 81 Fed. Reg. 15,931; *International Union, United Auto., etc. ("UAW") v. Dole*, 869 F.2d 616, 618 (D.C. Cir. 1989) (Ginsburg, J.); *Wirtz v. Fowler*, 372 F.2d 315, 330 & n.32 (5th Cir. 1966) (noting authorities reasoning that the Advice Exemption should be applicable to "all activities of the lawyer in which it is contemplated that the client will be the ultimate implementing actor and in which the client retains the power to accept or reject the activities of the lawyer" and "not include activities in which the lawyer or his agent implement the activity by interposition between the client and his employees").[2]

Section 265.005 of DOL's LMRDA Interpretative Manual, incorporating the Donahue Memo, states:

> We have concluded that such an activity can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer. Consequently, such activity in itself will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. **In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.**

LMRDA Interpretative Manual Entry § 265.005 (Jan. 19, 1962) (emphasis added).

[2] *Price v. Wirtz*, 412 F.2d 647, 648 & n. 3 (5th Cir. 1969) (en banc) overruled only Part VII of *Fowler*, which otherwise remains binding precedent.

Under DOL's prior, longstanding interpretation of the LMRDA, an attorney or consultant hired by an employer to provide advice with respect to union organizing and/or collective bargaining would be exempt from the LMRDA reporting requirements pursuant to the Advice Exemption so long as the consultant did not engage directly with employees with respect to an employer's persuader activities. Thus, for over five decades, DOL and the courts have long interpreted the LMRDA's Advice Exemption as exempting from reporting all advice, including advice that had an object to persuade and would, absent the exemption, otherwise trigger reporting.

2. DOL's New Rule Interpreting the Advice Exemption

On June 21, 2011, DOL published a Notice of Proposed Rulemaking in the Federal Register regarding the LMRDA's Advice Exemption. 76 Fed. Reg. 36,178 (June 21, 2011). DOL proposed a new interpretation of the Advice Exemption Rule. This New Rule substantially revised DOL's prior longstanding interpretation of the Advice Exemption contained in LMRDA, 29 U.S.C. § 433(c). In pertinent part, the New Rule no longer protected closed-door, confidential communications between attorney and client. To the contrary, under the New Rule, an attorney who communicates confidentially with only his or her employer-client, advising the client about a unionization matter, would have been required to disclose to DOL, and thus the world, confidential information.

DOL published its new Advice Exemption Interpretation as a final rule on March 24, 2016, and had an anticipated effective date of July 1, 2016. 81 Fed. Reg. 15,924. DOL's new Advice Exemption Interpretation (A) changes the instructions and contents of Forms LM-10 and LM-20 to accord with DOL's new interpretation of the Advice Exemption; and (B) expands the reporting detail required by Forms LM-10 and LM-20 with respect to reportable agreements and arrangements. The revised instructions[3] accompanying DOL's revised Forms LM-10 and LM-20 define advice that is exempted under the new rule from DOL's reporting requirements as follows: "No report is required covering the services of a labor relations consultant by reason of the consultant's giving or agreeing to give advice to an employee. **"Advice" means an oral or written recommendation regarding a decision or a course of conduct . . ..**" 81 Fed. Reg. 16,028 (emphasis added). Accordingly, DOL's New Rule purports to make "advice" and activities with an object to persuade mutually exclusive concepts. For example, the Final Rule provides:

> "Advice" does not include persuader activities, *i.e.*, actions, conduct, or communications by a consultant on behalf of an employer that are undertaken with an object, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively.
> . . .
> If the consultant engages in both advice and persuader activities, however, the entire agreement or arrangement must be reported.
> . . .

[3] DOL backed off final implementation of the forms concurrently with the Rule's effective date. Needless to say, the intent of DOL was crystal clear.

> DOL reiterates the rule in effect for 50 years requiring direct contact with an employee to establish an engagement in Persuader Activity **and four new instances which DOL asserts establish participation by a consultant in Persuader Activity without direct employee contact under the new rule.** There are five general scenarios in which the underlying test for persuasion is to be applied, one in which the consultant engages in direct contact with employees and four in which the consultant does not engage in direct contact:
>
> Reporting of an agreement or arrangement is triggered when:
> (1) A consultant engages in *direct* contact or communication with any employee with an object to persuade such employee; or
> (2) A consultant who has no direct contact with employees undertakes the following activities with an object to persuade employee;
> (a) Plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;
> (b) Provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;
> (c) Conducts a seminar for supervisors or other employer representatives; or
> (d) Develops or implements personnel policies, practices, or actions for the employer;
> The activity that triggers the consultant's requirement to file the Form LM-20 also triggers the employer's obligation to report the agreement on the Form LM-10[.]

81 Fed. Reg. 15,937, 15,938. Revised Forms LM-10 and LM-20 are attached to DOL's new Advice Exemption Interpretation. Among the new "Persuader Activities" specifically described in DOL's revised Forms LM-10 and LM-20 which trigger reporting obligations are the following:

A. Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees;

B. Drafting, revising, or providing a speech for presentation to employees;

C. Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees;

D. Drafting, revising, or providing website content for employees;

E. Planning or conducting individual or group employee meetings;

F. Planning or conducting group employee meetings;

G. Training supervisors or employer representatives to conduct individual or group employee meetings;

H. Coordinating or directing the activities of supervisors or employer representatives;

I. Establishing or facilitating employee committees;

J. Developing personnel policies or practices;

K. Identifying employees for disciplinary action, reward, or other targeting action;

L. Speaking with or otherwise communicating directly with employees;

M. Other.

81 Fed. Reg. 16,038. The LM-20 Form adds an additional category of conducting seminars. 81 Fed. Reg. 16,051. DOL's new Advice Exemption Interpretation requires all consultants (including attorneys, law firms, and associations) who engage in these newly defined persuader activities to complete and file the revised Form LM-20 (Agreement & Activities Report) likely containing the information described above.

3. The Rule's Many Infirmities

a. *The Rule is Contrary to the LMRDA's Plain Language.*

The Rule marked a radical change in the well-settled application of Section 203(c) of the LMRDA, which states: "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." 29 USC § 433(c), The Rule effectively repealed the statutory advice exemption by sweeping aside more than fifty (50) years of consistent, judicially approved enforcement of the LMRDA's reporting requirements applicable to millions of employers, both in Arkansas and nationally, and their advisors, including trade associations, lawyers, and other consultants.

More specifically, the Rule eliminated the previously well-accepted distinction between non-reportable "advice" and reportable "persuader" activity described in DOL's 1962 LMRDA Interpretive Manual and reaffirmed by the U.S. Court of Appeals for the District of Columbia Circuit in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole*, 869 F.2d 616, 617 (D.C. Cir. 1989). Since 1962, DOL has consistently held that non-reportable advice includes any communication that is "submitted orally or in written form to the employer for his use, [where] the employer is free to accept or reject the oral or written material submitted to him." *Id.* But the new Rule for the first time declared that reporting was required of all communications to employers from advisors whose object is to "indirectly persuade" employees regarding their right to organize and bargain collectively, and that "an employer's ability to 'accept or reject' materials provided, or other actions undertaken, by a consultant, . . . no longer shields indirect persuader activities from

disclosure." 81 Fed. Reg. at 15926. Similarly, the Rule states that "if the consultant engages in both advice and persuader activities [newly defined to include previously exempt advice], the entire agreement or arrangement must be reported." *Id*. at 15937. Thus, under DOL's new and significantly limited interpretation of "advice," the advice exemption does not apply in any situation where it is impossible to separate advice from activity that goes beyond advice, and it does not apply even if activities constituting "pure" advice are performed or intertwined with what DOL deems to be "indirect persuader" activities." 81 Fed. Reg. at 15937. The reporting requirement would even attach where it is possible to differentiate between advice and alleged persuader activities.

Consequently, under the Rule, employers who receive previously exempt guidance from outside counsel, trade associations, or other advisors on how to communicate lawfully with their employees on labor issues, are required—under threat of criminal penalty—to file public reports with DOL regarding the arrangement with their advisor(s), the nature of the advice provided to them, and the fees paid for such advice (the LM-10 report). The lawyers, associations, and other advisors who provide such previously exempt advice to employers are also required for the first time to file public reports with DOL, under threat of criminal penalty, disclosing the nature of their advice to employers that DOL has newly characterized as "persuader" activity (the LM-20 report). As a further consequence of DOL's Rule, advisors who are deemed to be "persuaders" must also file a greatly-expanded number of reports of non-persuader "labor relations advice and services" provided to employers (the LM-21 report).

Importantly, the new Rule redefines the following non-exclusive categories of advice that have previously been found to be exempt for reporting as now constituting forms of "indirect persuasion" that are <u>not</u> exempt from reporting, even if such activity consists solely of recommendations to an employer:

> (1) "Planning, directing, or coordinating activities undertaken by supervisors or other employer representatives;"
>
> (2) "Providing - with an object to persuade – material or communications to the employer, in oral, electronic,… or written form, for dissemination or distribution to employees;"
>
> (3) "Conducting a seminar for supervisors or other employer representatives … if the consultant develops or assists the attending employers in developing anti-union tactics and strategies;" or
>
> (4) "Developing or implementing personnel policies or actions for the employer … with an object to persuade employees."

Id. at 15938.

The foregoing redefinitions of "indirect persuasion" are riddled with exceptions whose logic is difficult to follow, but are summarized below:

REPORTABLE MATERIALS	NON-REPORTABLE MATERIALS
Drafting, revising or selecting persuader materials for the employer to disseminate or distribute.	Lawyers who exclusively counsel employers may provide examples or descriptions of statements found by the NLRB to be lawful..
If the revision is intended to increase the persuasiveness of the material, then the reporting requirement is triggered.	Consultant's revision of employer-created materials, including edits, correcting typographical or grammatical errors, additions, and translations, if the object of the revision is to ensure legality, as opposed to persuasion.
REPORTABLE SEMINARS	**NON-REPORTABLE SEMINARS**
Seminar agreements must be reported if the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employer.	Trade associations are required to report only if they organize and conduct the seminars themselves, rather than subcontract their presentation to a law firm or other consultant. Employers need not report their attendance at seminars.
REPORTABLE PERSONNEL POLICY GUIDANCE	**NON-REPORTABLE PERSONNEL POLICY GUIDANCE**
Reporting is required if the consultant develops or implements personnel policies or actions with the object to persuade employees. This indirect persuasion encompasses two types of activities: (1) creating persuasive personnel policies, and (2) identifying particular employees for personnel action with an object to persuade employees about how they should exercise their rights to support or not support union representation.	Development of personnel policies and actions that "merely" improve the pay, benefits, or working conditions of employees, even where they could "subtly" affect or influence the attitudes or views of the employees.
TRADE ASSOCIATIONS REPORTABLE	**TRADE ASSOCIATIONS NON-REPORTABLE**
• Where association staff serve as presenters in union avoidance seminars • Where association staff undertake indirect persuader activities for particular employer members, other than providing off-the-shelf materials	• Contracting with outside consultants to serve as presenters at association-sponsored union avoidance seminars • Providing off-the-shelf persuader materials to members • Helping members select such materials
OTHER GENERALLY REPORTABLE ACTIVITIES	**OTHER GENERALLY NON-REPORTABLE ACTIVITIES**
Any plan or direction of a course of conduct recommended to an employer that is not traditionally recognized as "legal services" and/or indirectly persuades employees	An oral or written recommendation regarding decision or course of conduct, agreements where the consultants or attorneys exclusively provide legal services or representation in

regarding unionization.	court, and during collective bargaining negotiations.
Counselling employer representatives on what they should say to employees to the extent such statements are indirectly persuasive and are not confined to what the employer may lawfully say to employees.	Exclusively counselling employer representatives on what they may lawfully say to employees, ensure clients comply with the law, offer guidance in employer personnel policies and best practices, or provide guidance on the NLRB
"Push" surveys	Employee attitude surveys

The extensive text purporting to explain the foregoing significant changes in the long settled meaning of "advice" makes clear that each of the foregoing (and additional) examples of "indirect persuasion," according to the new Rule, are reportable even though they may consist entirely of recommendations by the advisor to the employer regarding a decision or a course of conduct, which the employer is free to accept or reject, and which only the employer implements. As is also repeatedly shown in the text supporting the new Rule, DOL only considers advice to be exempt if it qualifies as "legal" advice, as "traditionally" provided by labor lawyers, without any object to persuade the employees of any employer being so advised. This, too, is contrary to the plain language of the advice exemption, which clearly exempts any form of advice, not merely "legal" advice. *See* 29 U.S.C. § 433(c).To draw such distinctions makes no sense in the real world, as no business seeks to only know the black-letter law. Rather, businesses need advice with respect to how to apply the law to a specific set of facts within a broader context of moral, economic, social and political factors, that may be relevant to the client's situation. Under the New Rule, such advice would become reportable conduct.

DOL's Rule usurps Congress' legislative power and violates the plain language of the LMRDA, as well as the legislative history and settled judicial interpretation of the advice exemption. In particular, DOL's new Rule contradicts the plain language of the statute, which states that reporting is not to be required "covering the services of [the consultant] by reason of … giving or agreeing to give advice." 29 U.S.C. § 433(c). As the Eighth Circuit held in *Donovan v. Rose Law Firm*, 768 F.2d 964, 974–75 (1985), Section 203(c) of the LMRDA is crafted as a "broad" exemption from the requirements of Sections 203(a) and (b). This holding fatally undermines the core premise of the new Rule, repeated several times by DOL, to the effect that the advice exemption is nothing more than a "clarification" that "makes explicit what was already implicit" in the reporting requirements. *See* 81 Fed. Reg. at 15941, 15950, 15951 (each time repeating this phrase to support DOL's new position that the advice exemption is not a "broad" one).[4]

[4] In the *Rose Law Firm* case, the Eighth Circuit expressly disagreed with other circuits that had viewed Section 203(c) as merely "making explicit what was implicit in Section 203(b)." 768 F.2d at 973–75. To the contrary, relying on committee reports overlooked by the other circuit decisions, the Eighth Circuit correctly declared that the advice exemption was intended by Congress to broadly exempt conduct that would otherwise be covered by Section 203(b). *Id*.

b. *The Rule is Arbitrary and Capricious.*

By adopting the position that an advisor's recommendations to an employer on a course of conduct can somehow constitute reportable persuasion of the employer's employees, "regardless of whether the employer is free to accept or reject the recommendation" (81 Fed. Reg. at 15926), DOL has also departed from the commonly accepted meaning of the terms "advice" and "recommendation." Indeed, the dictionary definitions cited by DOL in the Rule's preamble state that advice ordinarily is understood to mean a "recommendation" regarding a decision or a course of conduct. *See* 81 Fed. Reg. at 15941. In turn, the dictionary definition of the term "recommendation" refers to such an action as a mere "suggestion" which the recipient is free to accept or reject. *See Recommendation*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Recommend*, DICTIONARY.COM (available at http://dictionary.reference.com/browse/recommend) (last accessed March 28. 2016) ("to advise, as an alternative; suggest a choice, course of action, etc."). Thus, contrary to DOL's newly stated view, the plain language of the Act's advice exemption, even as redefined by DOL, excludes from reporting any written or verbal recommendation from an advisor suggesting that an employer communicate a message to employees about unions, so long as the employer is free to accept or reject that recommendation, and so long as it is the employer and not the advisor who controls and communicates the actual message.[5]

For these reasons, the Rule is arbitrary and capricious. Proof positive of this contention is demonstrated by the "Reportable – Non-Reportable" chart above. DOL's new Rule creates a regulatory scheme that is so confusing and convoluted, with so many illogical exceptions and mandates, that neither employers nor their advisors, including labor law experts, can understand how to comply with it. To name only a few, here are some of the inconsistencies inherent in the new Rule:

- The new Rule deems an advisor to be an "indirect persuader" and requires reports if the advisor "drafts, revises or selects persuader materials" in advising the employer, even though it remains the employer's decision whether to disseminate, revise further, or distribute the materials to the employees.

- If the advisor exclusively counsels employers with regard to "lawfulness" then the advisor may provide or revise examples or descriptions of statements found by the NLRB to be lawful without reporting; but if the revision is intended to increase the persuasiveness of the material then the reporting requirement is triggered; and if both are true, reporting is also required.

[5] Numerous commenters in the Administrative Record pointed out this flaw in DOL's reasoning, as acknowledged in the Rule. 81 Fed. Reg. at 15948–49. In response, DOL has simply concluded that the ability of the employer to accept or reject a recommendation is "not the relevant inquiry." *Id.* at 15951, n.45. To the contrary, under the statutory language, and even under DOL's own definition "advice" as an oral or written "recommendation," the ability of an employer to accept or reject recommendations of a consultant is the only relevant inquiry to determine whether the consultant's activities constitute "advice."

- The Rule allows advisors to provide "off the shelf" materials to employers without reporting; but if they actually *advise* the employers by helping them select the right materials for their campaign, then the consultants *lose* the "advice" exemption; unless of course the advisor is a trade association, who is allowed to help select such material, but only so long as the association staff do not advise the employer how to tailor the material to the employer's particular needs.

- Consultants can present seminars on union organizing to groups of employers without reporting, unless of course the presenters advise the attending employers how to develop anti-union tactics and strategies for use in a union campaign. Trade associations can sponsor such seminars but cannot present them with their own staff without reporting. Employers can attend anti-union seminars and receive the advice but without themselves filing reports, even though the consultant who presents the advisory program is required to file reports.

- Reporting is required if the consultant develops or implements personnel policies or actions with the object to persuade employees. But no reporting is required if the policies only "subtly" affect or influence the attitudes or views of the employees.

What most of these arbitrary line-drawing efforts have in common is that they do not bear any relation to how advice, including legal advice, is given to businesses in the real world. Contrary to the new Rule, employers are entitled to ask for and receive advice not only regarding what course of conduct is "lawful" but also regarding what messages will be most *effective* to achieve their lawful business objectives. Such advice often mixes questions of law and strategy. It is impossible to pigeonhole each piece of advice in a union organizing campaign, and the Rule's efforts to force such separation between types of advice—some reportable, some not—creates a compliance nightmare where even the slightest misinterpretation by the advisor and the employer can land one—quite literally—in jail.

c. *The Rule Violates the First Amendment.*

The new Rule irreparably harms the First Amendment rights of employers and their advisors both by coercing speech in the form of the newly required public reports and by chilling lawful speech and membership rights of the employers and their advisors on labor relations issues, which would now have to be *publicly* reported for the first time in the LMRDA's history.

The First Amendment to the United States Constitution guarantees employers the right to "persuade to action with respect to joining or not joining unions." *Thomas v. Collins*, 323 U.S. 516, 537-38 (1945); *NLRB v. Virginia Electric and Power Company*, 314 U.S. 469, 476-77 (1941). *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617-18 (1969) ("[A]n employer's free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or the Board."). Section 8(c) of the NLRA, 29 U.S.C. § 158(c), further codifies the employer's right to express its "views, argument or opinion" to its employees. In *Chamber of Commerce v. Brown*, 554 U.S. 60 (2008), the Supreme Court emphasized that Congress manifested in section 8(c) the congressional intent "to encourage free debate on issues dividing labor and management." *Id.* at 67–68. The Court went on to state that Congress had

"characterized this policy judgment, which suffuses the NLRA as a whole, as favoring uninhibited, robust, and wide-open debate in labor disputes, stressing that freewheeling use of the written and spoken word . . . has been expressly fostered by Congress and approved by the [NLRB]." *Id.* at 68.

In 1959, Congress acknowledged the importance of section 8(c) through LMRDA section 203(f), which provides: "nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 8(c) of the National Labor Relations Act, as amended." 29 U.S.C. § 433(f). Thus, employer communications with employees about unionization and collective bargaining enjoy protection under the First Amendment, the NLRA, and the LMRDA.

As DOL's own statistics confirm, the significant majority of employers seeking to communicate with their employees on the subject of unions have found it necessary to obtain advice from their attorneys, trade associations, or other advisors with expertise in the labor field. This is because the line between free speech and unlawful coercion in the union organizing context is difficult for the courts and even the NLRB to draw, and an employer's error can result in a costly unfair labor practice charge or setting aside an election.[6] Since employer speech under the First Amendment or the labor statutes requires both legal and labor relations advice in order to be effective, any burden placed on the right of employers to obtain both types of advice burdens employers' freedom of speech. It is also important to recognize that not only does the Rule place a burden on employer speech, but the burden is entirely content based. The Rule applies only to speech that contains a persuasive message opposing unionization, and it applies only to employer – and not union – persuasive speech.[7]

A government regulation that is content-based and either prohibits speech or compels speech is subject to strict scrutiny. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000) (applying strict scrutiny to a federal statute that required cable television operators providing sexually-oriented programming to scramble or block their channels); *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 795, 798–801 (1988) (applying a strict scrutiny standard to content-based regulation that compelled professional fundraisers to disclose the percentage of charitable contributions actually turned over to charity). The new DOL Rule is content-based regulation because it applies only to advice to employers that DOL deems to be persuasive to employees against unionization.[8] Under a strict scrutiny analysis, the Rule fails because DOL

[6] *See, e.g.*, John E. Higgins, Jr., THE DEVELOPING LABOR LAW 95–209, 505–49 (6th Ed. 2012).

[7] The Rule analogizes repeatedly, but erroneously, to certain financial reports filed by unions outside the persuader field. 81 Fed. Reg. at 15977. It remains undisputed that unions are not required to report to anyone their efforts to persuade employees to support unionization.

[8] The Rule is distinguishable from the campaign-finance disclosure statutes, to which the courts have applied intermediate scrutiny. Those statutes only require an organization to divulge the identity of its contributors and the amounts contributed, *e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 366–67 (2010), not the details of an employer's dealings with its consultant. Campaign finance disclosure laws are also supposed to apply equally to contributors regardless of which

has not articulated a "compelling governmental interest" that would justify this content-based regulation on speech. At the outset, there can be no compelling governmental interest here where DOL itself, as well as Congress and the courts, have all consistently applied the broad exemption and interpretation of "advice" that has been in effect for the past 50-plus years. Against this obvious lack of any compelling government interest supporting the new Rule, the principal justification DOL has offered is that reporting persuader agreements in detail will provide employees with "essential information regarding the underlying source of the views and materials being directed at them." 81 Fed. Reg. at 16001. This justification does not satisfy strict scrutiny as a matter of law.

The Rule is also invalid under the First Amendment's overbreadth doctrine. A showing "that a law punishes a substantial amount of protected free speech, judged in relation to the statute's plainly legitimate sweep, suffices to invalidate all enforcement of that law," unless the law is otherwise narrowed so as to remove the threat or deterrence to protected speech. *Virginia v. Hicks*, 539 U.S. 113, 118–19 (2003). As noted by the Supreme Court, many individuals, "rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech, harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas." *Id*. The overbreadth doctrine, "by suspending all enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." *Id*. DOL's warped and tortured rationale DOL in favor of the expanded reporting requirement in the new Rule plainly punishes a substantial amount of protected employer speech by both employers and their advisors.

Finally, all of the above grounds equally establish a violation of employers' rights to Freedom of Association, which is likewise protected by the First Amendment. *See Buckley v. Valeo*, 424 U.S. 1, 74 (1976); *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). Many employers have been the subject of violent, union-sponsored attacks and other coercive union tactics over recent decades. This history of violence, threats, and coercion against employers is well-known. *See* Samuel Cook, FREEDOM IN THE WORKPLACE (2005). Because many employers have been targeted by agents of labor organizations, including some members of the Commenters' organizations, ABC Arkansas, among others, is very reluctant to disclose its membership publicly. The compelled disclosure of one's membership through the reporting requirements of the new DOL Rule discourage employers from joining certain organizations, including Arkansas ABC, and thereby infringes on their right to freedom of association.

d. *The Rule Violates the Attorney-Client Privilege.*

The official instructions attached to the new initially-proposed Form LM-20 require that the persuader "provide a detailed explanation of the terms and conditions of the agreement or

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side they are supporting in an election, unlike DOL's new Rule which limits its reporting requirements to those who support the employer's position in union organizing campaigns. As further discussed below, however, the new Rule does not meet even intermediate scrutiny standards.

arrangement" with the client. In addition to requiring that confidential information be disclosed, the instructions also state that if any agreement or arrangement is contained in a written instrument, or has been reduced to writing, the persuader must attach a copy of it to the form. Where the persuader is an attorney who has limited his conduct to advice to an employer client, now deemed reportable under the new Rule, any written evidence of the confidential communication between attorney and client confirming the arrangements, and any written agreement between them, is subject to disclosure, as is the substance of the confidential advisory communication.

Attorneys who disclose such confidential client information under the new Rule will be in violation of Rule 1.6(a) of the Arkansas Rules of Professional Conduct, which provides that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent." Rule 1.6(c) provides that a "lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client." Rule 2.1 of the Arkansas Rules of Professional Conduct further provides that, "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. **In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation**." ARK. R. PROF'L CONDUCT 2.1 (emphasis added). The Comments to Rule 2.1 further provide:

> Scope of Advice
> [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
>
> [2] **Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.** It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.
>
> [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

> [4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts. Offering Advice
>
> [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

ARK. R. PROF'L CONDUCT 2.1, Cmt. (emphasis added).

Recognizing the ethical dilemma posed by DOL's new Rule, the American Bar Association opposed the proposed version of the Rule in 2011, explaining that it is "clearly inconsistent with lawyers' existing duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule." *See* Administrative Record, Comment Letter from Wm. T. (Bill) Robinson III, President of the American Bar Association (September 21, 2011). The ABA stated that it was "defending the confidential client-lawyer relationship and urging the Department not to impose an unjustified and intrusive burden on lawyers and law firms and their clients." As the ABA further explained:

> The range of client information that lawyers are not permitted to disclose under ABA Model Rule 1.6 is broader than that covered by the attorney-client privilege. Although ABA Model Rule 1.6 prohibits lawyers from disclosing information protected by the attorney-client privilege and the work product doctrine, the Rule also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential. This category of non-privileged, confidential information includes the identity of the client as well as other information related to the legal representation, including, for example, the nature of the representation and the amount of legal fees paid by the client to the lawyer.

Id. All fifty states and the District of Columbia follow the ABA's Model Rule 1.6 (or a similar rule) and maintain ethical restrictions against disclosing client identity or fees paid by the client without the client's permission. Arkansas Rule 1.6, like the Model ABA Rule, does contain an exception that allows an attorney to disclose confidential information "to comply with other law or a court order." However, because Section 203 of the LMRDA does not require that attorneys reveal confidential client information to the government, contrary to the new Rule, the "compliance with law" exception does not apply. In fact, the existence of Section 203 in the LMRDA demonstrates Congress' intent that the statute not interfere with an attorney's duty to protect confidential communications and information.

On February 4, 2016, the Arkansas Attorney General signed a letter in opposition to DOL's proposed rule, stating that the new Rule:

> would undermine [attorney-client] protections by requiring the reporting of advice related to persuasion of employees, regardless of whether the lawyers who provide the advice communicate with anyone other than their clients. These new reporting requirements would put lawyers in our states in an ethical dilemma: An attorney must either risk professional disciplinary action by disclosing employer confidences or risk liability under the LMRDA by refusing to disclose employer confidences.

Leslie Rutledge, Arkansas Attorney General, Letter Dated February 4, 2016 in Opposition to the Proposed Persuader Exemption Rule. Even where an exception to Model Rule 1.6 permits disclosure of confidential information to comply with another law, rulings in several states require an attorney to resist disclosing a client's identity in required government filings unless the attorney first receives a court order requiring the disclosure.[9]

Even more serious is the position of a lawyer sued by DOL for failing to report alleged persuader services. In order to disprove such allegations—and thus avoid potential criminal liability—the lawyer will be forced to disclose why the lawyer performed the services at issue, because of the new Rule's subjective test as to the purpose of the lawyer's advice. Such a disclosure, of course, will violate the lawyer's ethical duty not to disclose confidential information, leading potentially to disciplinary proceedings. Given these risks and potential consequences, many attorneys can reasonably be expected to decline to provide labor relations advice and legal services to employers, causing employers to commit unfair labor practices inadvertently, or to give up their right to communicate with their employees to avoid the commission of unfair labor practices.

This ethical dilemma is an inevitable outcome of the new Rule because whether advice given by a lawyer to an employer-client constitutes reportable persuader activity depends on the employer's motivation for seeking advice. Consequently, a lawyer will be compelled to disclose

[9] *See,* e.g. *Massachusetts Ethics Opinion* 94-7 (1994); *Washington Ethics Opinion* 194 (1997); Florida Ethics Opinion 92-5 (1993); Georgia Ethics Opinion 41 (1984); and *D.C. Ethics Opinion* 214 (1990) to the effect that only if a court finds that the confidentiality rule does not apply and orders disclosures is the attorney's ethical duty satisfied.

attorney-client privileged communications in order to respond to allegations that the services the attorney performed on behalf of a client had an object to persuade the client's employees. Faced with this dilemma, lawyers will be forced to refrain from advising their clients at all on these matters, despite the "broader public interests in the observance of law and administration of justice" the privilege fosters. *Upjohn Co. v. United States*, 449 U. S. 383, 389 (1981).

Section 203 of the LMRDA provides a privilege against disclosure of "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." The Final Rule violates Section 203 by requiring labor lawyers to choose between (1) revealing privileged or confidential information and exposing themselves to ethical sanctions; or (2) refusing to reveal such information and risking criminal charges. The initially proposed New Forms LM-10 and LM-20 require an employer and its outside counsel, respectively, to divulge specific assistance received from the attorney.

Certainly the forms require a public report on a client's confidential plans to communicate with its employees about union organizing activities and collective bargaining, even in the absence of any specific union organizing campaign. The LM-10 and LM-20 forms require the public disclosure of details such as "drafting, revising or providing a speech for presentation to employees" and "drafting, revising, or providing written materials for a presentation, dissemination or distribution to employees." These matters fall within the attorney-client privilege. For this reason as well, the new Rule violates the Act and must be rescinded.

e. ***The Rule is Violates the Fifth Amendment's Due Process Clause.***

The Rule's new test for distinguishing between reportable persuader activity and non-reportable advice is so vague and confusing that it violates the Due Process Clause of the Fifth Amendment by failing to provide fair warning to employers and their advisors as to what activities will trigger criminal liability, thereby causing further irreparable harm. U.S. CONST. amend. V. By abandoning the previous objective test for "advice" in favor of one that depends upon a subjective motive unmoored to any recognized definition of the term, DOL has issued a Rule that deprives employers and their advisors of any fair warning of what conduct on their part is likely to be subjected to criminal penalties under 29 U.S.C. § 439. The vagueness of the Rule is compounded by the additional expansion of reporting requirements beyond union organizing and into the even more nebulous concept of "concerted, protected activity."

This level of ambiguity in a statute with severe criminal sanctions is unconstitutional under the Fifth Amendment. Regulations with such sanctions "must define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Koldender v. Lawson*, 461 U.S. 352, 357 (1983). This standard of clarity is required for regulations with criminal penalties because it is "a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Thus, laws are unconstitutionally vague if we are "left to guess" at their meaning. *Id*. Under this standard, a speaker cannot "be at the mercy of the varied understanding of his hearers and consequently of whatever inference may be drawn as to his intent and meaning." *Thomas v. Collins*, 323 U.S. 516, 535 (1945).

To cite only a few of the many examples referred to in the Administrative Record, which includes the comments received during the NPRM process, employers can only guess whether reporting is required when they ask a lawyer or human relations consultant to recommend a no-solicitation/distribution rule (or any other progressive workplace policy for that manner) for an employee handbook? Or when a guest speaker at a trade association dinner meeting speaks about the NLRB's recent changes to its union election rules and recommends that employers take immediate steps to prepare for union organizing? Or when the employer asks a benefits consultant to recommend cost-effective improvements to the employer's group health insurance plan, knowing that such improvements could help the employer reduce the desire of employees to organize a union? Or when an advisor revises a speech to be given by the employer and recommends changing a word not only to make the language more "lawful" but also to make it "sound better" to employees?

No employer (or advisor) can safely predict the answers to these questions under DOL's new interpretation of Section 203 —yet criminal fines and prison sentences for employers, trade associations, and law firm leaders depend on the answers. The new Rule must be set rescinded on this additional ground.

f. ***The Rule should be Rescinded because DOL Failed to Adequately Analyze its Adverse Impact on Small Employers.***

Finally, the Rule fails to adequately address the burdensome impact of its requirements on millions of small business employers and their advisors, in violation of the Regulatory Flexibility Act, 5 U.S.C. § 611 ("RFA"). In each of these aspects, the Rule violates the Administrative Procedure Act, 5 U.S.C. § 706 ("APA").

The gist of the DOL's regulatory cost-benefit analysis is that the proposed change in interpretation of Section 203(c), which potentially affects every private business, many trade and business associations, every labor relations consultant, and most law firms in the United States, will burden the economy in an amount under $10 million dollars. The flaws in this analysis are breathtaking. DOL reasons that the only businesses affected by the change in interpretation will be those that retain consultants during union representation election campaigns and in group seminars. This assumption is directly contradicted by the Rule itself, which states that its requirements are NOT limited to any union organizing campaign or labor dispute. DOL nevertheless estimates that only 2,601 employers will enter into reportable persuader agreements (three quarters of the number of union elections conducted each year by the NLRB and the National Mediation Board). In reality, when one clearly examines the breadth and scope of this new Rule, the correct number of employers potentially covered by the new Rule is in the millions.[10]

To the 2,601 employers alleged to be affected by this new Rule, the DOL then applies an absurdly low estimate of how long it will take each of the affected employers to gather the

[10] U.S. Census, Statistics of U.S. Business data as of 2008 report 2,536,606 businesses in the U.S. with five or more employees. Only 18,469 businesses had 500 or more employees.

necessary financial and other information and to fill out the form. The estimate is one hour per filing. To the contrary, evidence in the Administrative Record indicates that hundreds of hours would have to be spent by employers and their advisors to determine whether each particular piece of advice does or does not meet DOL's vague and overbroad test for persuader activity.

DOL has, according to its own record, undertaken no analysis to determine the real world effects of the Department's new interpretation, even though the tools for such an analysis are readily available to it. As noted in the Chamber of Commerce's comments on the original NPRM, even if the DOL's one-hour estimate is accurate and the employer finds an attorney willing to accept $87.59 per hour to do this work, the economic burden will exceed $200 million because the Rule will affect millions of employers more than the 2,601 on which the DOL's estimate is based. The Chamber of Commerce estimated in its comments that total compliance costs for all affected U.S. businesses were between $910 million to $2.1 billion in the first year under the Rule and $285 million to $793 million each year thereafter. A more recent cost estimate published by the Manhattan Institute estimates the total burden for the first year would be between $7.5 billion and $10.6 billion, with subsequent annual costs amounting to between $4.3 billion and $6.5 billion. The total cost over a ten-year period could be $60 billion.[11]

In addition to these omissions, DOL failed to account for the impact of impending changes DOL has announced for the LM-21 annual report form, which are inextricably linked to the new Rule. Indeed, it was improper for DOL to proceed to issue the new Rule making drastic changes to the Forms LM-10 and LM-20 without analyzing the impact of the planned changes to the LM-21. The changes to the LM-21 will be exponentially magnified as a result of the new Rule, and the Department was obligated to consider these linked provisions in their totality. *See Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 409–10 (D.C. Cir. 2013) (rejecting bifurcated rulemaking which the agency had inadequately justified).

The DOL has not rationally addressed these concerns in the Rule, and the Rule must be set aside on this ground as well. Accordingly, the Rule should be rescinded.

4. Litigation Enjoining the New Rule

On June 27, 2016—before the Rule's effective date—the United States District Court for the Northern District of Texas, Lubbock Division, in *National Federation of Independent Business et seq. v. Thomas E. Perez et seq.*, 5:16-CV-00066, at ECF Doc. 85 (N.D. Tex. June 27, 2016), issued a **nationwide** injunction against the United States of America, its departments, agencies, officers, agents and employees, including Defendants Thomas E. Perez and Michael J. Hayes, from implementing any and all aspects of the Persuader Advice Exemption Rule, as published in 81 Fed. Reg. 15,924 *et seq.*, pending a final resolution of the merits or until a further order of the court. On November 16, 2016, the U.S. District Court for the Northern District of Texas granted summary judgment to NFIB, denied DOL's cross-motion for summary judgment, and held that the Rule was unlawful because it:

[11] Diana Furchtgott-Roth, *The High Costs of New Labor Law Regulations*, MANHATTAN INSTITUTE (Jan. 27, 2016), available at http://www.manhattan-institute.org/html/high-costs-proposed-new-labor-law-regulations-5715.html (last accessed March 28, 2016).

- Exceeded the DOL's statutory authority by effectively eliminating the advice exemption;
- Was arbitrary, capricious, and an abuse of discretion;
- Violated the First Amendment's protections for free speech and association;
- Was unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment; and
- Violated the Regulatory Flexibility Act (RFA) because DOL failed to properly account for the costs of the New Rule.

See Nat'l Fed'n of Indep. Bus. v. Perez, No. 5:16-CV-066-C, 2016 WL 8193279 (N.D. Tex. Nov. 16, 2016).

The Commenters agree with the U.S. District Court for the Northern District of Texas that, as the Court stated in its decision upon issuing a preliminary injunction, the Persuader Rule was "defective to its core because it entirely eliminates the LMRDA's Advice Exemption." *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *45 (N.D. Tex. June 27, 2016). The Court rightly set aside the Persuader Rule under the Administrative Procedure Act (5 U.S.C. 706(2)) upon issuing a permanent injunction in that case. *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-066-C, 2016 WL 8193279 (N.D. Tex. Nov. 16, 2016). The Commenters hereby incorporate in these comments by reference the decisions, judgments, plaintiffs' filings, and evidence in the record of *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5: 16-cv-00066 (N.D. Tex.), specifically including the documents issuing a preliminary injunction (Doc. 85, "[b]ecause the scope of the irreparable injury is national, and because the DOL's New Rule is facially invalid, the injunction should be nationwide in scope"), a permanent injunction (Doc. 135, "the Court is of the opinion that" the Persuader Rule "should be held unlawful and set aside pursuant to 5 U.S.C. §706(2), and the Court's preliminary injunction preventing the implementation of that Rule should be converted into a permanent injunction with nationwide effect,") and the final judgment (Doc. 145, Persuader Rule "is held unlawful and is set aside"). The Commenters also incorporate by reference in these comments certain documents filed in *Associated Builders & Contractors of Arkansas* v. *Perez*, No. 4:16-CV-169 (E.D. Ark.), including their: Complaint for Injunctive and Declaratory Relief (Doc. 1); Motion for Preliminary Injunction and Expedited Hearing, Memorandum in Support, and Reply in Support (Docs. 3, 4, and 41); Amici briefs of (a) the States of Arkansas, Alabama, Arizona, Michigan, Nevada, Oklahoma, South Carolina, Texas, Utah, and West Virginia (Doc. 27), (b) the Employment Law Alliance (Doc. 29), (c) the Chamber of Commerce of the United States of America (Docs. 30 & 75), and (d) the Washington Legal Foundation (Doc. 76); Response to Notice of Recent Authority and Notice of Additional Recent Authority (Doc. 48); and Motion for Summary Judgment and Brief in Support (Docs. 69 & 73).

The Commenters note that, as a legal matter, the Persuader Rule, having been set aside, is a nullity; nevertheless, upon DOL's withdrawal of its appeal in the Fifth Circuit, the Commenters would welcome the Department's revocation of the Persuader Rule to clean up the Code of Federal Regulations.

COMMENTERS' RECOMMENDATIONS

In addition to voicing their support for rescission of DOL's new interpretation of the Persuader Rule, the Commenters make the following four recommendations in response to the NPRM.

1. Adopt DOL's Proposal in the NPRM to Rescind the Persuader Rule Regulations

The Commenters recommend that DOL adopt the NPRM's proposal to rescind the regulations established in the final rule titled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," effective April 15, 2016. Significant litigation regarding the Rule's efficacy makes clear that DOL's issuance of the Persuader Rule in 2016 exceeded the Department's authority under section 203(c) of the LMRDA, improperly arrogated to the Department the power to regulate advisory relationships, and trampled on the First Amendment rights of free speech and association.

Here, it is clear that DOL's Rule was a misguided solution in search of a problem. The fifty-four year status quo demonstrates that no additional regulatory activity is required on the part of the DOL with respect to the Persuader Rule. Thus, the Commenters urge DOL to simply rescind the Rule, and—instead of engaging in any further regulatory processes with respect to crafting a similar Rule that avoids the significant problems identified above—redirect the Department's resources towards implementing the Commenters' recommendations set forth below. As set forth in the NPRM, DOL has the "right to shape [its] enforcement policy to the realities of limited resources and competing priorities." *See International Union, United Auto., Aerospace & Agr. Implement Workers of Am.* v. *Dole,* 869 F.2d 616, 620 (D.C. Cir. 1989). The Department's resource constraints weigh in favor of rescinding the Rule because, under the prior interpretation, there are significantly fewer reports, which reduces the investigative resources devoted to enforcing the rules on filing timely and complete reports. Further, under the prior interpretation, those case investigations generally involve obtaining and reviewing the written agreement and interviewing employees only. In contrast, enforcement of the Rule would likely involve a lengthier and more complicated investigation, examining in more detail the actions of consultants and their interaction with the employers' supervisors and other representatives. The investigator would be required to review both the direct reporting category and the four indirect persuader categories. As DOL aptly noted, "[t]his is a more resource-intensive process," and as such, it should completely rescind the Rule, allow every employer in this Country to return to the previously undisturbed status quo, and reallocate its limited resources to reduce the burdensome regulatory framework already thrust upon employers and their advisors.

Importantly, complete rescission in this case is also proper because DOL has demonstrated that returning the interpretation of the advice exemption under the LMRDA is "permissible under the statute, that there are good reasons for it, and that [DOL] believes it to be better, which the conscious change of course adequately indicates." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009). The agency "need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one." *Id.* at 515. The proposed rescission satisfies all of the *Fox TV* requirements because DOL's proposed rescission returns the state of the law to the long-accepted previous enforcement of the advice exemption, which is

plainly permissible under the statute, as confirmed by the U.S. Court of Appeals for the D.C. Circuit in *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Dole*, 869 F.2d 616 (D.C. Cir. 1989). Returning to the long-accepted view of the advice exemption is also supported by the *NFIB* Court's analysis, as well as the reasons set forth in the NPRM itself. As such, DOL is fully justified in its stated belief that rescinding the proposed Rule is better policy than the arbitrary regulatory scheme adopted in 2016, which the *NFIB* court described as "defective to its core" and the *Labnet* court characterized as "incoherent."

Complete rescission will also serve DOL in stewarding its limited resources because any departure from the status quo will almost certainly result in additional litigation. Litigation in turn will pose undue burdens on employers, who may be required to individually litigate aspects of any new rule (which the Court in *Labnet Inc.* v. *United States Department of Labor* (D. Minn. 0:16-cv-00844) proposed in its June 22, 2016 Order, and which will thus subject the Department to all costs of litigation, including potentially payment of a challenger's attorneys' fees and costs.

There are several sound bases included in the NPRM for rescinding the new Rule—all of which are consistent with the APA. These include DOL's need to ensure that its interpretation of the advice exemption is fully consistent with the LMRDA in light of the recent court action; the need to give more consideration to the newly identified adverse effects of the Rule on regulated employers and their attorney advisors; the importance of considering how Form LM-20's revisions interact with potential changes to LM-21; and, of course, the prioritization of the agency's limited resources that have come about after the Rule's issuance in 2016. Because DOL's resources are better spent on creating a viable and competitive infrastructure for the American workforce, free from bureaucratic red-tape, DOL should completely rescind the Rule and reallocate its resources to adopting the Commenters' other recommendations set forth below.

2. Review all Remaining Regulations and Interpretive Documents Under Section 203 of the LMRDA

The Commenters further recommend that DOL review all its remaining regulations and interpretive and other guidance implementing Section 203 of the LMRDA and tailor them more closely to the text of the LMRDA. The Department should revise such regulations and guidance to ensure, in particular, that the regulations give the full, broad scope to the statutory exemption for advice in subsection 203(c) of the LMRDA. Relevant to this recommendation, the Commenters specifically encourage DOL streamline the required reporting forms (LM-10, 20, and 21) into one narrowly-tailored document that expressly provides examples of exempt information that should not be reported, and that provides an avenue for filers to make confidential any and all information that has been disclosed under the mistaken belief that advice-exempted information was subject to reporting.

3. Adopt a Five-Year Moratorium on Civil or Criminal Penalties Under the LMRDA

Relevant to its second recommendation, the Commenters also propose that DOL, after rescission of the Rule, place a five-year moratorium on pursuing any civil or criminal penalties under the LMRDA, to account for the nationwide confusion caused by DOL's unjustified and unprecedented disturbance of a fifty-four year-old interpretation of the LMRDA's Advice

Exemption. Exercising prosecutorial discretion will allow employers and their attorneys the time necessary to reorganize compliance efforts and retrain employees and clients alike with respect to reportable and exempt information.

4. Foster and Support Direct Democracy

The Commenters note that DOL refused to accept ***any*** written comments that were submitted outside of the established electronic submission portal. *See* 82 Fed. Reg. at 26877 (stating that the Department of Labor stated that commenters could submit comments "only" by submission of electronic comments at http://www.regulations.gov). Section 553(c) of Title 5 of the U.S. Code provides that "the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments," and thus, it is highly doubtful that the agency can lawfully prohibit an interested person from filing comments by sending written comments to the Department through the U.S. mail. Moreover, the prohibition on non-electronic comments excludes from participation in the Department's rulemaking processes Americans who lack internet access. *See Thorn File and Camille Ryan*, "Computer and Internet Use in the United States: 2013," U.S. Bureau of the Census (ACS-28) (November 2014). The Commenters note that electronic-only submission is inconsistent with the law, deprives many Americans of the opportunity to participate in DOL's rulemaking process, and provides an unacceptable barrier to access for individuals who are visually impaired and who require reasonable alternatives in submission formats.

CONCLUSION

Associated Builders and Contractors of Arkansas, the Arkansas State Chamber of Commerce/Associated Industries of Arkansas, and the Arkansas Hospitality Association, Inc. appreciate the opportunity to comment on the NPRM, and look forward to continuing to assist the U.S. Department of Labor in its efforts to sensibly implement the laws of the United States in a manner that refrains from imposing unwarranted burdens on Americans who own, operate, and grow the small and independent businesses that generate so much economic growth and so many jobs for Americans.

Sincerely,

J. Bruce Cross
on behalf of Associated Builders and Contractors of Arkansas, the Arkansas State Chamber of Commerce/Associated Industries of Arkansas, and the Arkansas Hospitality Association, Inc.