COMMENTS ON THE PROPOSED RESCISSION OF THE RULE INTERPRETING THE "ADVICE" EXEMPTION IN SECTION 203(C) OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

(RIN 1245-AA07)

Submitted by

THE COUNCIL ON LABOR LAW EQUALITY

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August 11, 2017

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SUMMARY

The Council on Labor Law Equality (COLLE) supports the Department of Labor's (Department's) proposal to rescind its rule interpreting the "advice" exemption in Section 203(c) of the Labor Management Reporting and Disclosure Act (LMRDA) (hereafter, "2016 Rule") as published in the Federal Register on June 12, 2017.[1]

Rescinding the 2016 Rule will correct the error that the Department made by promulgating it in the first place. The Department initially proposed changing its interpretation of the LMRDA's "advice" exemption in a notice of proposed rulemaking on June 21, 2011.[2] In response, COLLE submitted detailed comments on September 21, 2011 (hereafter, the "2011 Comments"), urging the Department to withdraw its proposal. (Attachment A.)

COLLE's 2011 Comments identified multiple defects in the Department's proposed changes to its interpretation of the LMRDA's "advice" exemption, including that the proposed rule:

- conflicted with the plain language of the LMRDA, the legislative history, and the Department's own longstanding interpretation of the advice exemption, *see* 2011 Comments at pages 2-6;
- was inconsistent with the common law definition of "advice" protected by the attorney-client privilege, *id.* at pages 6-8;
- would inhibit the peaceful resolution of collective bargaining negotiations in many unionized industries, *id.* at pages 8-10; and
- expanded, without explanation, the scope of reportable information-supplying activities, *id.* at pages 10-11.

COLLE respectfully repeats those criticisms here, which apply with equal force to the 2016 Rule as finalized by the Department. To that end, COLLE re-submits its 2011 Comments, which are attached hereto.

In addition, the Department should give substantial weight to the decision of U.S. Senior District Judge Sam R. Cummings who issued an 86-page order reviewing the 2016 Rule in close

[1] 82 Fed. Reg. 26,877.

[2] 76 Fed. Reg. 36,178.

detail, concluded it was "defective to its core," and enjoined its implementation. *See Nat'l Fedn. of Indep. Bus.* (hereafter "*NFIB*") *v. Perez*, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016). Judge Cummings ultimately entered summary judgment against the Department and ordered that the rule be set aside under the Administrative Procedure Act, 5 U.S.C. § 706(2). *NFIB v. Perez*, 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016). Indeed, the Department should withdraw its appeal from the *NFIB* court's judgment setting aside the 2016 Rule, because Judge Cummings' decision is comprehensive and correct.

In addition to all of the reasons set forth in COLLE's 2011 Comments and Judge Cummings' decisions, the Department should rescind the 2016 Rule because it significantly overstepped the Department's statutory authority. COLLE addresses this issue below.

THE COUNCIL ON LABOR LAW EQUALITY

COLLE is a national association of employers that was formed to comment on, and assist in, the interpretation of the law under the NLRA and related statutes, including the LMRDA. COLLE's purpose is to follow the activities of the National Labor Relations Board, the Department of Labor, and the courts as they relate to federal labor law for private-sector employers. Through the filing of amicus briefs and other forms of participation, COLLE provides a specialized and continuing business community effort to maintain a balanced approach – in the formulation and interpretation of national labor policy – to issues that affect a broad cross-section of industry.

COLLE'S COMMENTS

In promulgating the 2016 Rule, the Department decided as a matter of policy that it believed employers and consultants, including attorneys, should publicly disclose all agreements under which consultants give advice to employers relating to persuading employees on unionization and related matters. Under the 2016 Rule, such reportable advice should include:

(a) Recommendations and guidance relating to (e.g., planning, directing, or coordinating) activities that might be undertaken by supervisors or other employer representatives, including meetings and interactions with employees;

(b) Recommendations and guidance relating to (e.g., providing) material or communications that an employer, in oral, written, or electronic form, might disseminate or distribute to employees;

(c) Recommendations and guidance for (e.g., conducting a seminar for) supervisors or other employer representatives; and

(d) Recommendations and guidance relating to (e.g., developing or implementing) personnel policies, practices, or actions for the employer.

81 Fed. Reg. 15,938. Under the 2016 Rule, the Department concluded that reportable activities ought to include recommendations about effective, lawful means to communicate employers'

views on unionization, guidance to employers' supervisors on how to respond lawfully and effectively to employee questions on unionizing issues, suggestions to employers about what facts regarding unions that employees might find relevant to their decision making, and all general assistance to employers in planning a lawful, effective strategy for responding to oftentimes aggressive, highly pressurized union campaigns. The Department hypothesized that a variety of vaguely described benefits might flow from such disclosures, including the protection of "employee rights to organize and bargain collectively," the promotion of "transparency" and "peaceful and stable labor-management relations," and the provision to employees of "essential information." *See, e.g.*, 81 Fed. Reg. 15,926.

Whatever the arguable, theoretical merits of the Department's newly declared policy preferences, the Department lacked the authority to impose them. Congress, with the plain text of the LMRDA, has already expressly **exempted** advice from that statute's disclosure requirements. *See* 29 U.S.C. § 433(c) (entitled "**Advisory or representative services exempt from filing requirements**"). The Department does not have authority to read Congress' advice-exemption out of the statute, even if the agency now disagrees with that exemption on policy grounds.

In attempting to anchor its new policy preference to some authority, the Department engaged in verbal sleight of hand. To avoid the LMRDA's express advice exemption, the Department simply tried to rename all of the forms of advice it now seeks to have reported as "indirect persuasion." *See, e.g.*, 81 Fed. Reg. 15,925. The Department also contorted the plain meaning of "directly or indirectly" in LMRDA Sections 203(a) and (b) and purported to discover a hitherto ignored concept in the LMRDA: "indirect persuasion" in which a consultant uses an employer-intermediary to "indirectly persuade" employees. The Department was equally slippery with the language it pulled from the LMRDA's legislative history and precedent interpreting the statute. That legislative history and precedent focused on various activities involving *direct*, oftentimes deceptive contact between "middlemen" and employees, which those authorities generally referred to as "persuader activity." *See, e.g.*, *Wirtz v. Fowler*, 372 F.2d 315, 324 & 326 (5th Cir. 1966) (noting "the McClellan Committee, in which the LMRDA had its genesis, was primarily concerned with management-hired labor spies and undisclosed middlemen who engaged in espionage and deceptive persuasion" and in 1959, bills were introduced "directed toward the elimination of the evils which had been revealed by the McClellan Committee hearings").[3] From these authorities, the Department cited references to the potential "evils of persuaders" and disingenuously suggested those legislative judgments applied equally to consultants' providing advice to employers on how best to respond to a union's campaign but without the consultants' ever having any contact, deceptive or otherwise, with employees. *See, e.g.*, 81 Fed. Reg. 15,954. The Department failed to cite any findings in the LMRDA's extensive legislative history suggesting that Congress was concerned about such advisory activities by consultants, including lawyers, or regarded those activities as "evil" or otherwise deleterious.

The 2016 Rule is also unreasonable, arbitrary and capricious. It is not only contrary to the statutory text and legislative history of the LMRDA, it has no basis in fact. The new rule is

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

aimed at solving an imaginary problem: the alleged "underreporting" of "indirect persuader" agreements under the Act. The Department unreasonably failed to consider that: (1) the small number of "persuader" agreements reported reflects the success of the LMRDA in curbing the types of deceptive, middleman activities that gave rise to the statute a half-century ago and which it was *intended* to discourage, and (2) the lack of reporting of advisory agreements results from the statute's exemption of them. The Department's complaint that more advisory agreements should be reported is only a complaint about the statute itself.

A. The LMRDA's plain text unambiguously provides an exemption for advice that the 2016 Rule nullifies.

The fundamental premise of the 2016 Rule is that "advice" as used in Section 203(c)'s exemption cannot have an object to persuade. Under the familiar two-step analysis of *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc*., 467 U.S. 837 (1984), the threshold question is whether Congress has directly spoken to that question, *i.e*., does the LMRDA unambiguously provide that advice, *including advice with an object to persuade*, is exempted from the LMRDA's reporting requirements? The answer to that question is yes.

In the 2016 Rule, the Department defines "advice" as "an oral or written recommendation regarding a decision or a course of conduct." 81 Fed. Reg. 15,939. Standing alone, this definition is unobjectionable. However, the 2016 Rule also made clear that the Department would now treat "advice" under Section 203(c) and "activities where an object thereof, directly or indirectly, is to persuade" under Sections 203(a) and (b) as mutually exclusive concepts. Under the 2016 Rule, "advice" could never have "an object . . . to persuade."[4]

The Department's new test for whether an activity triggers reporting is solely whether it has an object to persuade. In practice, under the 2016 Rule, there would be no separate test for advice any longer, because whether an activity can be characterized as advice will have no bearing on whether it is reportable; all that matters is whether the activity has an object to persuade. Based on this new interpretation, DOL will now deem a wide variety of activities that had been exempt for the past 50 years to be reportable persuader activity because, regardless whether they involve advice as ordinarily understood, they have "an object . . . to persuade." But DOL's new interpretation is contrary to the text and structure of the LMRDA and precedent recognizing that advice and activities having an object to persuade are ***not*** mutually exclusive. DOL cannot ignore the plain intent of the statute by eliminating an exemption created by Congress.

1. The 2016 Rule is contrary to precedent.

In *Fowler* and *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Dole ("UAW")*, 869 F.2d 616, 619 (D.C. Cir. 1989), the courts acknowledged that the

[4] *See, e.g.*, 81 Fed. Reg. 15,937 ("'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.").

LMRDA's text does not define "advice." However, despite the lack of a precise definition of advice, both of those cases assumed – contrary to the 2016 Rule – that there is overlap between "advice" on one hand and activities with an object to persuade on the other. *See, e.g., UAW*, 869 F.2d at 618-19. To the extent those cases noted any lack of "statutory clarity" or ambiguity, it was only concerning the line dividing advice that had an object to persuade from other persuasive activities.[5] But that is not the question raised by the 2016 Rule. Indeed, because the 2016 Rule rejected the very notion of advice that has an object to persuade, that rule no longer makes any effort to distinguish such advice from other, reportable persuader activities.

Indeed, in *Fowler*, the Fifth Circuit acknowledged exactly the possibility of advice with an object to persuade. Noting that "the Act requires the reporting of any persuasion[.]," the Fifth Circuit added, "[t]hat is, of course, with the exception of those activities covered by § 203(c)." *Fowler*, 372 F.2d at 329 & n.27. The court explained:

> [O]ne can readily conceive of a situation where the giving of advice could be said to have the object of direct or indirect persuasion. At first the Department of Labor took the position that the reporting requirements covered an attorney's undertaking to draft speeches, letters, and other written material which are to be delivered or disseminated by the employer to employees for the purpose of persuading them with regard to the exercise of their rights. Upon reconsideration, the Department conceded that such activities by attorneys, though admittedly intended to have a persuasive effect, came within the 'advice' exemption of § 203(c). Donahue, Some Problems Under Landrum-Griffin, 1962 Proceedings of ABA Labor Relations Law Section 45.

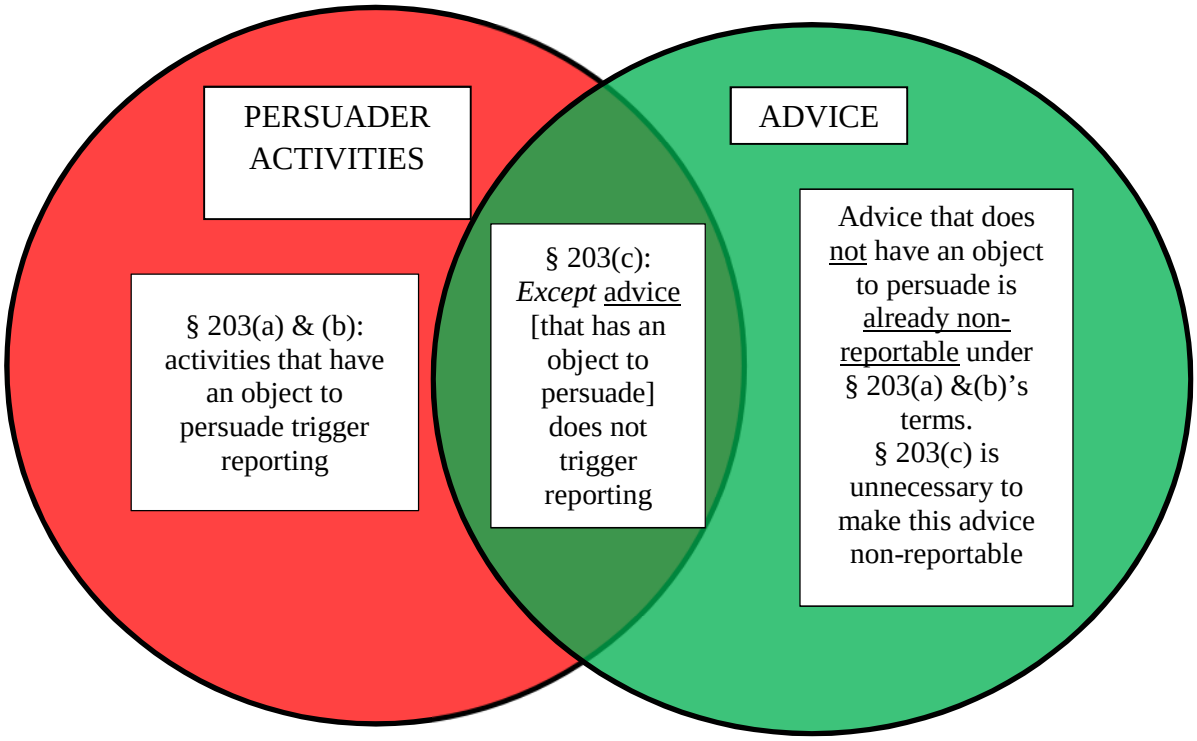
Id. at 329 n.27 (citation omitted; emphasis added). *See also id.* at 330 (noting Section 203(c) was inserted into the LMRDA "to remove from the coverage of § 203(b) those grey areas where the giving of advice . . . could possibly be characterized as exerting indirect persuasion on employees . . ."). The 2016 Rule thus does exactly what the Fifth Circuit said § 203(c) was intended to prevent: characterize certain forms of advice as indirect persuasion reportable under Section 203(b).

The Fifth Circuit thus recognized that "advice" as used in Section 203(c) can have an object of persuading such that it would be covered by Sections 203(a) and (b) *but for* Section 203(c)'s exemption. *See also UAW*, 869 F.2d at 618 & n.3 (evaluating "advice [that] has as 'an object' employee persuasion").

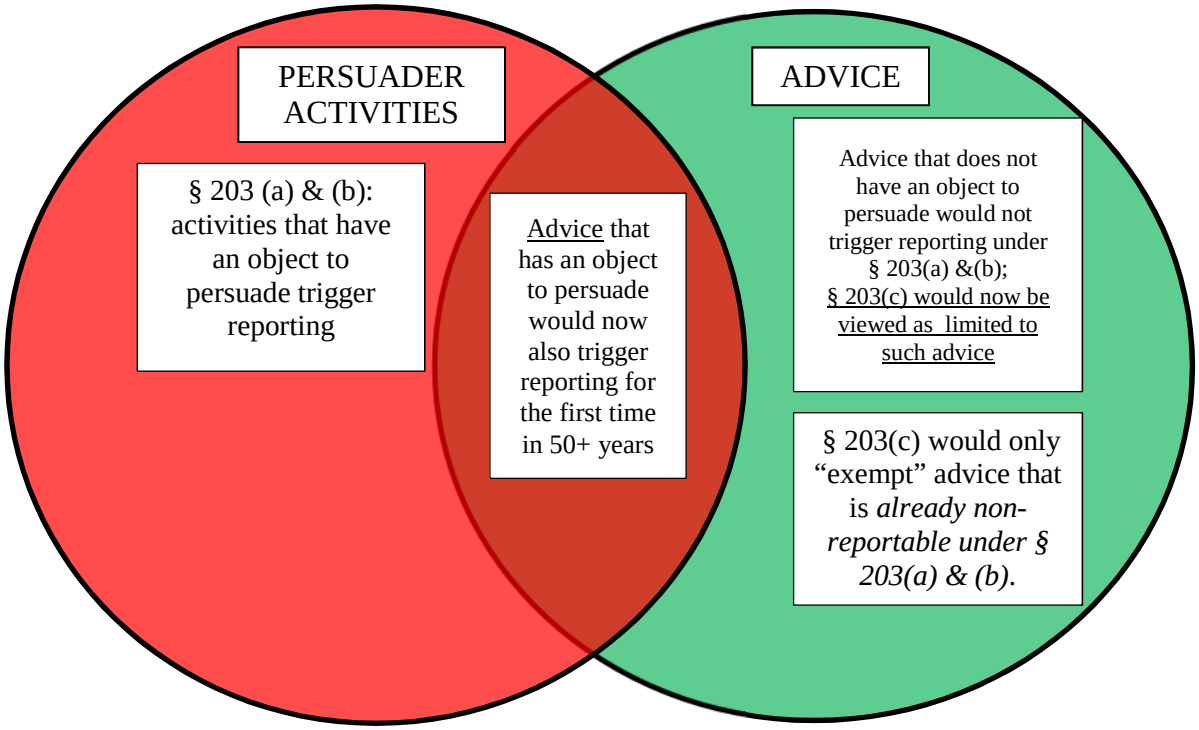
[5] *See, e.g. Fowler*, 372 F.2d at 330 & n.32 ("For the purposes of this case, it is unnecessary for us to ascertain the precise location of the line between reportable persuader activity and nonreportable advice" but citing with apparent approval authorities reasoning that the advice exemption should 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. The 2016 Rule makes Section 203(c) superfluous.

The LMRDA as understood for the past 50 plus years is structured as follows:



However, under the 2016 Rule, the LMRDA would be structured as follows:



In short, the 2016 Rule makes Section 203(c) entirely superfluous.[6] In contrast to the 2016 Rule, which distorts the plain text of the statute and renders Section 203(c) nugatory, the former, longstanding interpretation of the "advice" exemption properly gave effect to both Section 203(c) and Sections 203(a) and (b). Activities with an object to persuade trigger reporting, except advice, even if the advice has an object to persuade. This former interpretation recognizes the obvious meaning of the plain text, was adopted by the Department itself for over 50 years, and is consistent with relevant case law.

3. The 2016 Rule misreads the LMRDA's references to "directly or indirectly".

In a further effort to avoid Congress's clearly expressed intent, the Department, in adopting the 2016 Rule, attempted to read the text of the LMRDA to regulate "indirect persuader activity," which the Department claimed refers to consultants' working "behind the scenes" to "persuade employees 'indirectly'" and which the Department contended is a reportable persuader activity that has been overlooked for the past 50 years. *See, e.g.*, 81 Fed. Reg. 15,925. The 2016 Rule thus attempted to force an unnecessary reading on the statute that merely creates textual problems where there were none before.

Unless the advice exemption applies, Section 203(a) requires employers to file reports with respect to "any agreement or arrangement with a labor relations consultant . . . pursuant to which such person **undertakes activities where an object thereof, directly or indirectly, is to persuade** employees . . ." 29 U.S.C. § 433(a)(4) (emphasis added). Section 203(b) likewise requires consultants to file reports with respect to "any agreement with an employer **undertakes activities where an object thereof is, directly or indirectly**-- (1) **to persuade employees** . . . or (2) **to supply an employer with information** concerning the activities of employees or a labor organization . . . ." 29 U.S.C. § 433(b) (emphasis added).

On its face, there is nothing ambiguous about the statute's use of "directly or indirectly." That phrase makes clear that the statute covers both activities that have the direct object of persuading employees (e.g., "I agree to give speeches to employees urging them to vote against the union.") and activities that have the indirect object of persuading employees (e.g., "I agree to pose as an employee and circulate rumors to make employees believe the union is corrupt and wastes employees' money."). This commonsense reading treats the statute's text as recognizing that "persuasion" can be accomplished both by explicit argument and by subtler, non-explicit means, including, in some instances, deception. Indeed, the latter class of activities – those with

[6] Elsewhere in *Fowler*, the Fifth Circuit observed that "§ 203(c) was not intended to limit in any substantial manner the coverage of § 203(b)." 372 F.2d at 330 n.30. That remark should be viewed in the context in which it was made. The court was rejecting the attorney-appellees' argument that Section 203(c) exempted them from Section 203(b) simply by virtue of their being attorneys. However, the facts showed the attorneys had engaged in extensive direct contact with employees, including "directly arguing to employees the economic, rather than legal, consequences of unionization, passing out antiunion propaganda, interrogating employees as to their union sympathies, visiting employees homes to persuade them to vote against the union, etc." *Id.* at 326. The court concluded that regardless of whether Congress considered such activities to be "within the 'legitimate practice of labor law,' it is clear that Congress meant for this type of activity to be reported." *Id.* The court thus concluded Section 203(c) did not exempt the reporting of persuader activities simply because they were performed by attorneys.

the *indirect* object of persuading – would include the types of deception and manipulation that Congress identified in the legislative history and which prompted Congress to pass the LMRDA.

In contrast to this commonsense reading of "directly and indirectly," the 2016 Rule assumes the statute refers instead to consultants' "indirectly persuading" employees by providing materials to employers that employers then distribute to employees. Notably, that is exactly the type of activity that had been considered *exempt advice* for the last half century. The Department's new "understanding" of the statutory language is without merit, among other reasons, because:

- It is not a natural reading of the language of the statute, as set forth above;
- It is not supported by the legislative history, which focused on direct contact by "middlemen" with employees that was often deceptive, not contact between consultants and employers;
- It is inconsistent with DOL's own reading of the statute for the past 50 plus years; and
- It creates a bizarre scenario in which *employers* would be viewed as the "middlemen" between consultants and employees.

In short, the Department cannot attempt to insert new meanings into the LMRDA to support its unauthorized 2016 Rule.

The plain text of the LMRDA makes "the intent of Congress . . . clear" that an exemption for advice exists, and "that is the end of the matter . . . ." *Chevron*, 467 U.S. at 842-43. The Department "must give effect to the unambiguously expressed intent of Congress" to exempt advice from the LMRDA's reporting requirements. *Id.* at 843. In short, Section 203(c) serves to "exempt" certain otherwise reportable activities – advice with an object of persuading – from the coverage of Sections 203(a) and (b).

4. The Department's limited authority under Section 208 does not allow it to regulate hypothetical "circumvention or evasion."

The Department invoked Section 208 as a basis for its authority to issue the 2016 Rule. 29 U.S.C. § 438; 81 Fed. Reg. 15,929. The Department apparently believed that it could regulate what it called "indirect persuader activity" (which, as described above, includes advice with an object to persuade) to avoid possible "circumvention or evasion of" statutory reporting requirements. But that reasoning was circular at best. The Department failed to show that the 2016 Rule is necessary "to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. § 438. Indeed, the Department did not identify any evidence in its 127-page Final Rule of any "circumvention or evasion" by employers or consultants of the LMRDA's reporting requirements under the prior, long-standing advice exemption.

Although the Department claimed that employers hire consultants in over 70 percent of union organizing campaigns and that the Department receives only "a small number of direct persuader reports," those facts are not evidence of evasion or circumvention. They demonstrate

only that the LMRDA has effectively discouraged the types of "persuader" agreements involving "middlemen" engaging directly with employees that were common when Congress passed the statute. Moreover, that many, if not most, consultant agreements are not reported is a function of the statute's express exemption for "advice." Surely, if employers or consultants were abusing the "advice" exemption and engaging in direct contact with employees without reporting it, unions would likely file complaints to alert the Department of any such violations. Without any actual finding of "circumvention or evasion," the Department could not rely on its limited Section 208 authority. *See, e.g., Am. Fed'n of Labor & Cong. of Indus. Orgs. v. Chao*, 409 F.3d 377, 384 (D.C. Cir. 2005) (finding that DOL lacked authority to issue regulation requiring certain financial reporting by unions that "reache[d] information unrelated to a union's [LMRDA] reporting requirements . . .").

In *American Federation of Labor*, the D.C. Circuit found that the Department's "determination that union members would benefit from 'more information about the financial activities of a "fund in which [a union] has an interest,"' 67 Fed. Reg. 79,283, obviously is not the same as the determination required by section 208 that reporting on such a fund is necessary to prevent union circumvention or evasion of Title II reporting requirements." *Id.* at 390. The same is true here: the Department's policy decision that employees might theoretically benefit from additional information regarding consultants (a proposition that lacked any persuasive evidence in any event) is not a finding of circumvention or evasion that is necessary to trigger the Department's rulemaking authority under Section 208.

B. <u>The 2016 Rule is unreasonable, arbitrary and capricious.</u>

As noted above, Congress's intent to grant an exemption for advice from Section 203(a) and (b)'s reporting requirements is clear, foreclosing the 2016 Rule under *Chevron*'s first step. However, even if the analysis proceeded to *Chevron*'s second step, the 2016 Rule was also be invalid.

Under *Chevron*'s second step, "if Congress' intent is unclear, [a] court must determine whether the agency's construction is based upon a permissible construction of the statute." *Highland Med. Ctr. v. Leavitt*, No. 5:06-cv-082-C, 2007 WL 5434880, at *3 (N.D. Tex. 2007) (internal quotation marks omitted). Additionally, pursuant to the APA, courts must "hold unlawful and set aside an action by an agency that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Odessa Reg'l Hosp. v. Leavitt*, 386 F.Supp.2d 885, 890 (W.D.Tex. 2005) (quoting *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994)); 5 U.S.C. § 701 *et seq*. (2012).

First, for all of the reasons set forth above, the 2016 Rule's novel interpretation of the LMRDA and Section 203(c) is unreasonable, impermissible, arbitrary, and capricious.

Second, the Department's prior advice interpretation should be given weight in determining the meaning of the statute due to its adoption shortly after Congress enacted the LMRDA and its duration for more than a half-century. Although the Department focused some attention on its short-lived "original interpretation," which matched the 2016 Rule, the Department failed to acknowledge that it quickly discarded that "original" interpretation in what the Fifth Circuit has described as a concession upon reconsideration. *See Fowler*, 372 F.2d at

329 n.27. Indeed, the fact the Department threw that "original" interpretation overboard so quickly suggests that it was viewed as a mistake the first time around. If it was a mistake then, it would still be one now.

Third, under the 2016 Rule, whether or not certain activities triggered reporting – such as helping an employer develop personnel policies, counselling an employer on employment issues, providing seminars to employers, and preparing materials to employers – would vary depending on the subjective intent of the employer and/or the consultant. Under the 2016 Rule, the relevant question would be solely whether the consultant or employer developed these policies or undertook the other activities with an object to persuade employees. If so, the agreement or arrangement would trigger reporting; if not, the agreement/arrangement would not be reportable.

Significantly, under the 2016 Rule, different employees in different companies or at different times might receive exactly the same communications or policies from their employers, but in some instances the "sources" of those communications or policies would be disclosed under the LMRDA and in others they would not due solely to the different "objects" with which a consultant or attorney prepared them. If one attorney prepared an "open door" policy for her client with the object that it might reduce the possibility of unionizing, it would be disclosed; if another attorney prepared the same policy for a client solely with the object that it facilitate dialogue in the workplace, it would not trigger reporting. The disparity in the Department's suggested treatment is unreasonable and irrational.

Additionally, the Department apparently did not consider that a consultant can be retained to perform certain tasks for an employer with an object to persuade, such as drafting certain communications, but the employer might decide not to use the consultant's work with any employees. Apparently reporting still would be required in such cases under the 2016 Rule. But the Department provides no rational explanation for requiring such reporting to provide employees "transparency" concerning communications or materials they never received.

Fourth, under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009), the 2016 Rule is not "permissible under the statute," because the Department failed to provide "good reasons for it," even if "the agency *believes* it to be better." Aside from reciting vague platitudes regarding the benefits of "transparency" and pointing to unsubstantiated concerns about alleged underreporting as noted above, the Department failed to offer any "good reason" for its dramatic alteration of a rule that has been in place for 50 plus years through numerous administrations of both parties. Indeed, the Department has not conducted any fact-finding or investigation of its own to determine that the change represented by the 2016 Rule was needed or likely to yield any actual benefits to anyone.

Fifth, the Department relied only on second-hand, often outdated, pro-union research to assert that "much of the conduct that Congress intended to address by requiring disclosure continues to persist." 81 Fed. Reg. 15,962. This assertion was wholly unsupported. Certainly the Department has not identified in its lengthy Final Rule any evidence of rampant misconduct by "middlemen" comparable to that which came to light in the late 1950s and is documented in the LMRDA's legislative history.

Sixth, the Department concluded that the disclosures to be required by its new Advice Exemption Interpretation are necessary for employees to "'exercise . . . their protected rights to organize" and to be "fully informed about all of the circumstances regarding their decision on representation.'" 81 Fed. Reg. 15,935 & 15,957. But the Department's solicitude for employees' rights under Section 8 of the NLRA exceeds that of the National Labor Relations Board ("NLRB"), itself, *which actually has jurisdiction over the conduct of union elections*. *See, e.g., Midland Nat'l Life Ins. Co.*, 263 NLRB 127, 129 (1982) ("'[E]mployees . . . undoubtedly recognize [campaign] propaganda for what it is, and discount it.'"); *Shopping Kart Food Mkt.*, 228 NLRB 1311, 1313 (1977) (rejecting "view of employees as naive and unworldly whose decision on as critical an issue as union representation is easily altered by the self-serving campaign claims of the parties").

Finally, the 2016 Rule would create unnecessary and serious conflicts for attorneys with regard to their new, purported obligation to report client information under the LMRDA and their longstanding ethical duty to maintain client confidentially. Those conflicts threatened to drive attorneys out of the traditional labor practice, depriving clients of needed legal advice. Indeed, one leading law firm promptly announced:

> In response to the persuader regulations, Morgan Lewis has decided that it will not provide services that would trigger reporting under the new requirements. This decision is intended to protect the confidentiality and integrity of the attorney-client relationship for all clients that engage Morgan Lewis to provide services in labor and employment matters, including matters that have nothing to do with union organizing or collective bargaining.

https://www.morganlewis.com/pubs/dol-persuader-regulations-expose-every-employer-to-reporting-requirements-and-disclosures#sthash.2GNqtvSa.dpuf.

C. Conclusion.

In enjoining and setting aside the 2016 Rule, Judge Cummings held that the rule violated the APA, infringed upon employers' free speech rights under the NLRA and the First Amendment of the U.S. Constitution, was unconstitutionally vague, and violated the Regulatory Flexibility Act (RFA). Among other failings, the 2016 Rule functionally eliminated the LMRDA's "advice" exemption contrary to the LMRDA's text and well beyond the Department's statutory authority.

For all of these reasons, as well as those given by the *NFIB* court, the 2016 Rule should be rescinded.

Respectfully Submitted,

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DATED: August 11, 2017

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