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The Honorable R. Alexander Acosta
Secretary of Labor
Attn: Andrew Davis, Chief
Division of Interpretations and Standards
Office of Labor-Management Standards
Room N-5609
U.S. Department of Labor
200 Constitution Ave., NW
Washington, DC 20210

RE: Docket No. 2017-11983 (RIN 1245-AA07), Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act.

Dear Secretary Acosta:

Representing more than 150,000 registered nurses ("RNs") who work as bedside healthcare professionals in every state in the nation, National Nurses United ("NNU") submits these comments in response to Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), 82 Fed. Reg. 26,877 (Jun. 12, 2017). NNU strongly opposes the Department of Labor's proposed rescission of the 2016 final rule, 81 Fed. Reg. 15,923 (Mar. 25, 2016) (hereinafter "2016 Rule"), which interprets the section 203(c) "advice" exemption of the LMRDA, 29 U.S.C. § 433. This much needed rule closes long-standing gaps in the Department of Labor ("DOL") interpretation of the "advice" exemption of section 203 of the LMRDA, and realigns disclosure requirements for labor relations consultants with requirements mandated by the statute. Rescission of the rule now would unconscionably deprive workers of complete information about labor relations consultants and would frustrate the rights of employees under the National Labor Relations Act ("NLRA") to form a union and to engage in collective action. For the following reasons and for the reasons set forth by the American Federation of Labor-Congress of Industrial Organizations in its comments submitted through the Federal Register (LMSO-2017-0001-0543), NNU urges the DOL to abandon the proposed rescission of the 2016 Rule and proceed with its implementation.

I. The DOL Must Uphold its Statutory Mandate to Enforce the LMRDA's Requirement that Employers and Labor Relations Consultants Disclose Both Direct and Indirect Activities Taken to Persuade Employees in the Exercise of Their Rights to Unionize.

In enacting the LMRDA, Congress sought to promote the rights of employees, guaranteed by the NLRA, to form a union for the purposes of collective bargaining. It did so by imposing

statutory obligations to disclose certain financial transactions, agreements, and arrangements onto employers, unions, and labor consultants. To that end, the DOL has a statutory duty under the LMRDA "to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. § 438.

Fulfilling the DOL's statutory duty under the LMRDA, the 2016 Rule would close recognized deficiencies in its interpretation of the LMRDA reporting obligations related to employer use of labor consultants—or "persuaders"—to discourage employees in their union organizing efforts. It is a necessary corrective that would finally realign the DOL's interpretation of section 203 of the LMRDA with the basic reporting obligations that the statute demands—that both "indirect" and "direct" persuader activities and agreements between employers and labor consultants are publicly disclosed.

Specifically, section 203(b) of the LMRDA requires employers and labor relations consultants to report their agreements pursuant to which the consultant undertakes activities with "an object . . . , *directly or indirectly*" to persuade employees concerning their rights to organize and bargain collectively. 29 U.S.C. § 433(b) (emphasis added). But the DOL's interpretative rule has long been under inclusive such that information on indirect persuader activities has not been reported. The 2016 Rule simply adjusts the interpretation of section 203(c)'s "advice" exemption such that indirect, non-privileged persuader activity is actually reported as Congress originally intended.

A wholesale rescission of the 2016 Rule would disregard the DOL's duty under the LMRDA, allowing employers and labor consultants to continue evading their statutory disclosure obligations. As the U.S. District Court of Minnesota found in its denial of a motion to enjoin or temporarily stay the 2016 Rule, "[a]n order staying enforcement of the entire rule would therefore prevent [the] DOL from requiring disclosure of information that it has the right (indeed, a statutory mandate) to obtain." *Labnet Inc. v. U.S. Department of Labor*, 197 F. Supp. 3d 1159, 1176 (D. Minn. 2016). The DOL and other commenter's reliance on the *Labnet* court's criticism of the 2016 Rule to justify rescission is misplaced and utterly misses the key conclusion of the court's denial of the motion for temporary stay or preliminary injunction. *See id.* The court found that any alleged harm to plaintiff-persuaders is minimal and uncompelling, and ultimately concluded that the important interest in meeting the statutory obligations in the LMRDA to collect reports from persuaders outweighs any asserted flaws in the rule or harm to persuaders. Significantly, the *Labnet* court found that, because the 2016 Rule has important valid applications, that it is preferable for persuaders to take their arguments challenging the application of the rule in the context of enforcement actions, not the court. *Id.*

The DOL's role in enforcing the statutory reporting obligations under the LMRDA is fundamental in the promotion of employee rights established under the NLRA to exercise their choice of a union representative and to engage in protected concerted activity. To fulfill these elemental obligations to enforce disclosure requirements under the LMRDA, NNU urges the DOL to reject the proposed rescission of the 2016 Rule.

II. Full Disclosure of Indirect Persuader Data, as the 2016 Rule Requires, is Necessary to Ensure That Employees Have Complete and Balanced Information During Unionization Efforts.

Data on indirect persuader activity that would be collected under the 2016 Rule plays a fundamental role in ensuring that employees can come to fully-informed decisions regarding union representation. Incomplete information about whether an employer has made agreements or arrangements with a third-party consultant would undermine the balance envisioned in the NLRA between labor and management during union representation campaigns. Without the 2016 Rule, the ability of the National Labor Relations Board to conduct free and fair elections would continue to be stymied because information available to employees would continue to tip one-sidedly in favor of the employer in union representation campaigns.

It is important here to reiterate the role that the LMRDA plays in protecting employees' rights under the NLRA. Congress enacted the LMRDA "to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection . . . ." 29 U.S.C. § 401(a). The LMRDA does so by making sure that employees have complete and balanced information about the employer, the union, and, importantly, any third-parties working on behalf of any party. In developing the 2016 Rule, the DOL concluded that, by enacting section 203, Congress intended that employees know about consultants used by their employers to run anti-union campaigns because "[s]uch information provides employees the ability to assess the underlying source of the information directed at them, aids them in evaluating its merits and motivations, and assists them in developing independent and well-informed conclusions regarding union representation." 76 Fed. Reg. 36,177, 36,190 (Jun. 21, 2011).

In NNU's experience, the work of persuaders has permeated throughout each of our recent organizing campaigns. Employers hire these "union-busting" consultants to place their thumb on the scales of information and access to employees. While using these outside labor relations consultants to shape workers' opinions on unionization, employers simultaneously claim preference in working "directly" with employees rather than engaging with "third-parties." From targeted terminations on employees leading organizing campaigns to false statements about employee rights to solicit and access their coworkers, employers use these third-party persuaders to act on its behalf by orchestrating campaigns of intimidation and disinformation. NNU suspects that persuader activity results in the majority of unfair labor practices and objectionable conduct that prevents free and fair elections. Yet, precisely because the DOL's reporting requirements fail to capture the behind-the-scenes work of persuaders, employees and unions can never accurately demonstrate the effect of persuader activity on an organizing campaign. Without complete disclosures by persuaders as Congress intended, workers are left in the blind as to what is being fed to them by hired consultants and to what lengths their employer is taking—and to what costs it is spending—to prevent workers from exercising their right to form a union.

Because complete disclosure of persuader activity—both direct and indirect—is a fundamental component of employees' rights to organize and to choose a collective bargaining representative, NNU urges the DOL to withdraw the proposed rescission of the 2016 Rule.

III. The DOL's Justifications for the Proposed Rescission are Disingenuous in that LM-21 Reports Were Set to be Addressed in Separate Rulemaking and Nothing in the Rule Restricts Persuader Activity.

First, any justification that the 2016 Rule should be rescinded to further study potential burdens related to new Form LM-21 filers is disingenuous and does not adequately outweigh the harm to employee rights to full and complete information regarding persuaders deployed by their employers during organizing campaigns. In order to obtain persuader information, the DOL develops and collects three forms from employers and persuaders: the Form LM-10 (for employers to report arrangements for persuader activities), the Form LM-20 (for labor relations consultants to report persuader activities), and Form LM-21 (for annual reporting by persuaders). The 2016 Rule sought only to adjust Form LM-10 and Form LM-20 so that employers and labor consultants report minimal information about indirect persuader activity.

The DOL's primary justification for its proposal to rescind the 2016 Rule is "to consider the interaction between Form LM-20 and Form LM-21." 82 Fed. Reg. at 26,880. But an evaluation of the 2016 Rule's impact on Form LM-21 is both irrelevant to the effects of the rule at issue and impossible to conduct because reporting on Form LM-21 of information regarding employers for whom a consultant did not engage in any persuader activity has been suspended under the 2016 Rule's Special Enforcement Policy. The DOL also repeatedly stated that it planned to address potential changes to Form LM-21 in separate rulemaking. There is nothing regarding the 2016 Rule's impact on Form LM-21 that can or needs to be studied. Any new Form LM-21 filers are simply being asked to meet basic statutory reporting requirements that the DOL previously neglected to collect.

Second, the DOL's claim that it must rescind the rule to consider "chilling effects" on employers' ability to use persuaders is specious. Consistent with its role in ensuring the disclosure of persuader information, the DOL in its 2016 Rule did not alter an employer's ability to engage in persuader activities and it did not limit an employer's ability to obtain the services of a third-party persuader. Employers are free, as they had been prior to the publication of the 2016 Rule, to express their viewpoint on unionization through its own supervisors and managers or through arrangements with third-party persuaders. Subject to already existing restrictions under the NLRA, employers can continue, *inter alia*, to make speeches to employees at mandatory meetings, to hold one-on-one meetings with employees, and to distribute flyers, emails, and other material to employees. Employers' access to employees and ability to engage in the panoply of persuader activities during employees' unionization drives have not been altered by Rule 2016. In other words, the landscape of labor and management's access to employees and ability to engage in persuader activity during union organizing drives remains as it always has been, where employers retain the advantage over unions because they control the workplace. The 2016 Rule merely demands, as the LMRDA requires, that employers and labor

relations consultants must disclose when they engage in either direct or indirect persuader activity.

The DOL must not rescind the 2016 Rule on the basis that attorneys or employers may choose not to engage in persuader activity in order to avoid statutory reporting requirements. As noted in the final rule, the U.S. Court of Appeal for the Ninth Circuit rejected the invocation of attorney-client privilege in attempts to shield attorneys from disclosing information about the amount, date, and form of fees paid to the attorney. *Tornay v. United States*, 840 F.2d 1424, 1428-29 (9th Cir. 1988); see 81 Fed. Reg. at 15,999. For the *Tornay* court, the claim that potential clients may decide not to obtain legal counsel for fear that the attorney may be required to disclose information about the services provided was an insufficient reason to apply the protection of attorney-client privilege. *Id.*

In the context of Form LM-20, it would be equally absurd to justify the rescission of the 2016 Rule based on the unsubstantiated claim that employers may be "chilled" in obtaining attorneys' to engage in persuader activity because broader types of persuader activity must now be disclosed. As the *Tornay* case demonstrates, attorneys can engage in an array of services for their clients that may be subject to public disclosure laws. For example, attorneys who engage in lobbying activities for clients, sometimes in addition to more traditional legal services, are subject to disclosures under the Lobbying Disclosure Act of 1995. The fact that an attorney, rather than a non-attorney, engages in a service does not automatically render that activity and basic information about that activity subject to the protections of attorney-client privilege.

Moreover, clear tests were given in the 2016 Rule for attorneys and other labor relations consultants to determine what kind of persuader activities trigger reporting, minimizing any potential confusion over what activity must be disclosed and what is privileged. Even assuming that confidential communications could fall under the revised Form LM-20 reporting requirements, section 204 of the LMRDA expressly exempts attorneys from reporting any information protected by attorney-client privilege, affording the same protections for privileged attorney-client communications that are available under federal common law. 29 U.S.C. § 434; see 76 Fed. Reg. at 36,192; *Humphreys, Hutcheson, and Moseley v. Donovan*, 755 F.2d 1211, 1219, n. 12 (6th Cir. 1985) (holding that, in enacting section 204 of the LMRDA, Congress intended to afford the same protection as that provided by the common-law attorney-client privilege). Despite fears that attorney-client communications may need to be reported under the revised Form LM-20, federal common law does not deem the fact of legal consultation, clients' identities, attorney's fees, and the scope and nature of the employment as privileged attorney-client information. *See* Restatement (Third) of the Law Governing Lawyers § 69. The DOL thoroughly examined concerns that commenters raised about attorney-client privilege, noting in the final rule that the limited information required to be disclosed is not information that generally would be protected by attorney-client privilege under federal law or rules of state bars. 81 Fed. Reg. at 15,928; see 76 Fed. Reg. at 36,192. The DOL must not shirk its responsibility to fully implement and enforce the LMRDA simply on the basis that attorneys who engage in labor relations consultation may need to discern what is or is not reportable persuader activity.

IV. Rescission of the 2016 Persuader Rule Would Frustrate the Rights of Employees, Perpetuates Loopholes in Disclosure Rules, and Exacerbates Information Imbalance During Union Organizing Campaigns.

The DOL's persuader reporting requirements have been perpetually under inclusive. Even as employers' use of persuaders to contest union organizing campaigns has grown, rates of reporting have increased only by a small amount. Underreporting persists because of gaps in the DOL's interpretive rules, which—contrary to the requirements under the section 203—have excluded indirect persuader activity. In explaining the history of section 203's interpretive rule, the DOL admitted that "[t]he prior interpretation construed the advice exemption in a manner that failed to give the full effect to the requirement that indirect persuasion of employees, as well as direct persuasion, trigger reporting." 81 Fed. Reg. at 15,926. In litigation related to the 2016 Rule, the DOL admitted and the U.S. District Court of Minnesota agreed that DOL's previous interpretation of sections 203(b) and 203(b) was under inclusive in that indirect non-advice persuader activity went unreported in contravention to the LMRDA's reporting requirements. *Labnet Inc. v. U.S. Department of Labor*, 197 F. Supp. 3d 1159, 1168 (D. Minn. 2016).

Underreporting has long proliferated under previous rules, perpetuating imbalances between information available to employees about unions and about persuader activity. Reports estimate, as the DOL noted in its final rule, that employers use labor relations consultants to engage in indirect persuader activities in over 70 percent of union-organizing campaigns. 81 Fed. Reg. at 15,961; see Commission on the Future of Worker-Management Relations, Fact-Finding Report at 68 (May 1994). But the DOL receives on average 192.4 LM-20's annually, which is only 7.4% of the 2,601 reports that would be expected. 76 Fed. Reg. at 36,186.

By comparison to the paltry reporting by persuaders, all labor organizations—including NNU—must submit detailed financial data each year to the DOL in Form LM-2, Form LM-3, or Form LM-4 in an electronic format that can be converted immediately into a searchable database online. Even more, the DOL has placed new rulemaking on the 2017 Spring Unified Regulatory Agenda to impose additional financial disclosure requirements on unions by re-establishing Form T-1. If the DOL is truly seeking to reach the information balance originally envisioned by Congress when it enacted the LMRDA, it would only make sense to implement the 2016 Rule's updates to employer and persuader disclosure requirements in Form FM-10 and Form FM-20.

Without correcting the gaping defects in DOL disclosure rules, imbalances in information will continue to deprive workers of their right to free and fair elections for collective bargaining representatives. As such, the DOL must withdraw the proposed rescission of the 2016 Rule.

V. Conclusion

To carry out its statutory duty to fully enforce the LMRDA's disclosure requirements regarding labor relations consultants, and to protect the rights of workers to form a union and to take collective action, the DOL must not rescind the 2016 Rule. Because workers deserve complete and balanced information as they exercise their right to organize, NNU strongly

opposes the proposed Rescission of the Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (82 Fed. Reg. 26,877).

Sincerely,

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