UNITED STATES DEPARTMENT OF LABOR
OFFICE OF LABOR-MANAGEMENT STANDARDS

Rescission of Rule Interpreting the "Advice" Exemption in LMRDA Section 203(c)
RIN 1245-AA07

COMMENTS OF THE UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO

These comments are submitted on behalf of the United Food and Commercial Workers International Union, AFL-CIO (UFCW) in response to the U.S. Department of Labor's (DOL's) proposal, set forth at 82 Fed. Reg. 26,877 (June 12, 2017), to rescind its April 2016 final Rule interpreting the "advice" exemption to the reporting requirements in Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA). 29 U.S.C. § 433. The UFCW, which is affiliated with the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), is a labor organization with approximately 1.3 million members and over 400 affiliated local unions throughout North America.

The UFCW strongly opposes the DOL's proposed rescission of the Rule for the reasons stated in the Comments of the AFL-CIO (a copy of which we attach hereto and incorporate by reference herein) and the following additional comments.

(1)

Section 203 of the LMRDA specifically requires employers and labor relations consultants to report on "any agreement or arrangement…pursuant to which the [consultant] undertakes activities where an object thereof, directly **or indirectly**, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively…." *Id. at* § 433(b)(1) (emphasis added). But, as noted in the AFL-CIO's comments, DOL's proposed rescission of the Rule would revert to a flawed prior interpretation that "categorically exempt[s] activities in which a consultant has no direct contact

with employees" by taking the "position that only direct communication between a consultant and employees trigger[s] the reporting requirement, and that any other activity [i]s exempt advice." 82 Fed. Reg. at 26,879. The proposed rescission is particularly troubling since under the agency's flawed prior interpretation, "some persuader activity that was reportable under § 203(b), and not exempt under § 203(c)," namely "persuader activity…not involv[ing] direct contact with employees", "nevertheless went unreported." *Labnet, Inc. v. U.S. Dept. of Labor*, 197 F.Supp.3d 1159, 1168 (D.Minn. 2016). In short, the proposed rescission would conflict with the statutory requirement that indirect as well as direct persuader activities must be reported. 29 U.S.C. § 433(b)(1).

In addition, the proposed rescission would disregard DOL's statutory duty under section 208 of the LMRDA. 29 U.S.C. § 438. Section 208 directs the Secretary of Labor, when "issu[ing], amend[ing], and rescind[ing] rules and regulations prescribing the form and publication of reports required to be filed under" the LMRDA, "to prevent the circumvention or evasion of such reporting requirements." *Id.* And nothing in the LMRDA's "advice" exemption, 29 U.S.C. § 433(c), requires or supports DOL's proposed rescission, which if adopted clearly will enable "the circumvention or evasion of such reporting requirements." *Id.*

(2)

DOL's asserted rationale in support of its fourth reason for the proposed rescission – limited resources and competing priorities – is specious. According to DOL's notice of proposed rulemaking, the Rule's enforcement "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." 82 Fed. Reg. at 26,881. Further,

investigators supposedly "would be required to review both the direct reporting category and the four indirect persuader categories" under the Rule. *Id.*

The UFCW does not question DOL's "right to shape [its] enforcement policy to the realities of limited resources and competing priorities." *Id., citing International Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Dole, 869 F.2d 616, 620 (D.C. Cir. 1989).* However, we disagree with DOL that unless the Rule is rescinded, its investigators will necessarily be required to engage in the "resource-intensive process" of undertaking a "complicated investigation" of each filed report by "examining in…detail the actions of consultants and their interaction with the employers'" agents and by reviewing each of the persuader categories. 82 Fed. Reg. at 26,881. Nothing in the Rule precludes the DOL from taking "the realities of limited resources and competing priorities" into account when shaping its enforcement policy relative to the Rule. While we would hope to see the DOL take a proactive approach to enforcing the Rule, having a Rule that the agency does not vigorously enforce is certainly preferable to the Rule's rescission.

This is because, as explained in the AFL-CIO's Comments, it is vitally important that non-union workers who are deciding whether to have a union in their workplace be able to learn how much money their employer is paying an outside third party to persuade the workers to remain union-free (when that money could have instead been spent on improving the workers' terms and conditions of employment). In virtually every union organizing campaign, employers and their union-busting consultants provide the workers with salary and other information from the union's LM-2 reports. *See* Levitt, *Confessions of a Union Buster* 42 (1993) ("…our anti-union activities were carried on in backstage secrecy; meanwhile we gleefully showcased every detail of union finances that could be twisted into implications of impropriety or incompetence").

Yet, remarkably, at the same time it is proposing to rescind the Rule so that consultants can continue to carry on many persuader activities in backstage secrecy, DOL is proposing to increase union reporting requirements under the LMRDA. RIN 1245-AA08 (Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies); RIN 1245-AA09 (Trust Annual Reports). The proposed rescission of the Rule ignores the "congressional intent" manifested in section 8(c) of the National Labor Relations Act (NLRA), as amended, 29 U.S.C. § 158(c), "to encourage free debate on issues dividing labor and management" that is "uninhibited," "robust," and "wide-open." *Chamber of Commerce of U.S. v. Brown*, 128 S.Ct. 2408, 2413-2414 (2008).

DOL's proposed rescission of the rule cannot be squared with the terms of LMRDA §§ 203(b)(1) and 208, and the congressional intent underlying NLRA § 8(c). For all of the foregoing reasons, the Department should reconsider its proposal to rescind the Rule.

Respectfully submitted,

Nicholas W. Clark
General Counsel

Peter J. Ford
Assistant General Counsel

United Food and Commercial
Workers International Union,
AFL-CIO
1775 K Street, NW
Washington, DC 20006
(202) 466-1523

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Attachment

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF LABOR-MANAGEMENT STANDARDS

Rescission of Rule Interpreting the "Advice" Exemption in LMRDA § 203(c) — RIN 1245-AA 07

COMMENTS OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS

These comments on behalf of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and its affiliated unions are submitted in response to the Department of Labor's proposed rescission of the final rule interpreting the "advice" exemption to the reporting requirements stated in § 203 of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 433, that became effective on April 25, 2016. 82 Fed. Reg. 26877 (June 12, 2017). The AFL-CIO strongly opposes the proposed rescission of the rule.

A. Section 203 of the Act broadly requires employers and labor relations consultants to report on "any agreement or arrangement . . . pursuant to which [the consultant] undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively." 29 U.S.C. § 433(a)(4). *See also id.* § 433(b)(1). At the same time, the Act also states

that this broad reporting requirement does "not require any employer or [consultant] to file a report covering the services of [the consultant] by reason of [the consultant] giving or agreeing to give advice to such employer." 29 U.S.C. § 433(c). The Department has long recognized that "application of the 'advice' exemption requires an examination of the intrinsic nature and purpose of the arrangement to ascertain whether it essentially calls exclusively for advice or for other services in whole or part." *LMRDA Interpretative Manual* § 265.005. In this regard, the Department has observed that "[s]uch a test cannot be mechanically or perfunctorily applied" but, rather, "involves a careful scrutiny of the basic fundamental characteristics of any arrangement to determine whether giving advice or furnishing some other services is the real underlying motivation for it." *Ibid.*

The 2016 Rule interprets LMRDA § 203 as "requir[ing] employers and their consultants to report not only agreements or arrangements pursuant to which a consultant directly contacts employees, but also where a consultant engages in activities 'behind the scenes,' where an object is to persuade employees concerning their rights to organize and bargain collectively." 82 Fed. Reg. at 26,879. The proposed rescission of

the Rule would substitute an interpretation that "categorically exempt[s] activities in which a consultant has no direct contact with employees" by taking the "position that only direct communication between a consultant and employees trigger[s] the reporting requirement, and that any other activity [i]s exempt 'advice.'" *Ibid.*

The Department does not deny that its proposed "interpretation of § 203(b) and § 203(c) [i]s underinclusive," in "that an act can constitute persuader activity – and not constitute advice – even though the act does not involve direct contact with employees." *Labnet, Inc. v. U.S. Dept. of Labor*, 197 F.Supp.3d 1159, 1168 (D.MN. 2016). As the Department observes, the present interpretation that it proposes to rescind rests on "evidence that the use of outside consultants to contest union organizing efforts ha[s] proliferated, while the number of reports filed remain[s] consistently small." 82 Fed. Reg. at 26,879.

Remarkably, the Department attempts to make a virtue of the underreporting that will inevitably follow from the proposed rescission. The Department explains that underreporting will result in "significantly fewer reports, which reduces the investigative resources devoted to enforcing the rules on filing timely and complete reports." 82

Fed. Reg. at 26,881. That rescission of the 2016 Rule will allow the Department to save resources by turning a blind eye to systematic evasion of the LMRDA reporting requirements is hardly a point in favor of the proposed rescission.

The Department's statutory duty when "issu[ing], amend[ing]. and rescind[ing] rules and regulations prescribing the form and publication of reports required to be filed under [the LMRA]" is "to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. § 438. Far from "prevent[ing] the circumvention or evasion of such reporting requirements," *ibid.*, the interpretation the Department now proposes would permit consultants to "easily slide out from under the scrutiny of the Department of Labor" by "deal[ing] directly only with supervisors and management." Levitt, *Confessions of a Union Buster* 42 (1993). Martin Jay Levitt, a prominent labor consultant, explained his modus operandi:

> "The entire campaign . . . will be run through your foremen. I'll be their mentor, their coach. I'll teach them what to say and make sure they say it. But I'll stay in the background." Levitt, *Confessions of a Union Buster* 10.

The proposal does not even attempt to explain how facilitating such blatant evasion figures as "part of the Department's continuing effort to fairly effectuate the reporting requirements of the LMRDA." 82 Fed. Reg. at 26,877.

B. The Department's principal justification for "propos[ing] to rescind the Rule [is] to provide the Department with an opportunity to give more consideration to several important effects of the Rule on the regulated parties." 82 Fed. Reg. at 26,879. The Department specifies two effects in particular that it would like to study. First, it wants "to consider the interaction between Form LM-20 and Form LM-21," because "an increase in the range and number of activities that constitute 'persuader activity' will increase both the number of Form LM-20 filers and Form LM-21 filers." *Id.* at 26,880. Second, it wants to consider how reporting on "[t]he new categories of 'indirect' persuasion" would, "as a practical matter, affect the behavior of the regulated community, with regard to furnishing and receiving legal services." *Id.* at 26,880-81.

The Department does not attempt to explain how the proposed rescission will allow it to study the "effects of the Rule on the regulated

parties." 82 Fed. Reg. at 26,879. If the 2016 final rule is rescinded, no one will have filed the revised LM-20 form. That will make it impossible "to consider the interaction between [the revised] Form LM-20 and Form LM-21" or how filing the revised Form LM-20 would, "as a practical matter, affect the behavior of the regulated community." *Id.* at 26,879. If the Department really wants to consider those two practical matters, it will allow reporting under the Rule to begin and see what the effects actually are. Because reporting under parts (B) and (C) of Form LM-21 has been suspended, this experiment could be conducted with only a minimal burden on the regulated community.

Resurrecting the former Form LM-20 will provide no information about the effects of closing the reporting loophole. The old Form LM-20 allowed "union-busters" to "easily slide out from under the scrutiny of the Department of Labor." Levitt, *Confessions of a Union Buster* 42. Thus, continued reporting on that form will provide no information about the extent of behind the scenes persuader activity nor the effects of exposing that activity through the reporting mandated by LMRDA § 203.

Before adopting the present interpretation of LMRDA § 203, the

Department did everything it could – short of actually implementing the proposed interpretation – to consider the practical effects of closing the reporting loop hole. The Department first held a public meeting to discuss whether it should change its interpretation. 81 Fed. Reg. 15,924, 15,936 (March 24, 2016). The Department then published a detailed proposal. 76 Fed. Reg. 36,178 (June 21, 2011). The Department extended the comment period on the proposal to three months, and ultimately received 9,000 comments. 82 Fed. Reg. at 26,879. And, the Department carefully addressed these comments when it issued the Rule. 81 Fed. Reg. at 15,945-16,000.

In short, the explanation that "rescind[ing] the Rule [will] provide the Department with an opportunity to give more consideration to [the] effects of the rule on the regulated parties," 82 Fed. Reg. at 26,879, is completely implausible.

C. Equally implausible is the assertion that "rescind[ing] the Rule [will] allow the Department to engage in further statutory analysis," so that, the Department "can provide as thorough an explanation of its statutory interpretation as possible," if it, once again, "proposes to change the scope of reportable activity" to prevent blatant evasion of the

statutory reporting requirements. 82 Fed. Reg. at 26,879-80. The Department has already given a "thorough . . . explanation of its statutory interpretation," *ibid.*, in both proposing and promulgating the Rule.

In proposing to close the loophole that allowed behind the scenes persuader activity by consultants to go unreported, the Department engaged in a thorough analysis of both the statutory text and legislative history of LMRDA § 203. 76 Fed. Reg. at 36,183-84. This analysis led the Department to conclude that "in enacting section 203 of the LMRDA[,] Congress intended that employees be permitted to know whether employers are using consultants to run anti-union campaigns or otherwise engage in persuader activities," 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 motivation, and assists them in developing independent and well-informed conclusions regarding union representation." *Id.* at 36,190. This conclusion, combined with "evidence that the Department's interpretation of the 'advice' exception has led to the under-reporting of these activities," indicated that "[t]he Department

must take action to ensure that its interpretation of the provisions of section 203 comports with Congressional intent." *Ibid.*

In promulgating the 2016 Rule, the Department gave careful consideration to comments addressed to the statutory analysis justifying the revised interpretation of the "advice" exemption. 81 Fed. Reg. at 15,946-54. The proposal to rescind the Rule does not so much as mention the detailed statutory analysis in the preamble to the 2016 final Rule. Nor does the proposal question the conclusion that allowing behind the scenes persuader activity to go unreported was contrary to the legislative purpose of LMRDA § 203.

To be sure, the proposal to rescind does note that the 2016 Rule has been subject to criticism by two district courts. 82 Fed. Reg. at 26,879-80. But the most considered of the district court opinions – that by Judge Schiltz – recognized that the Rule closed a significant loophole created by the prior "underinclusive" interpretation of LMRDA § 203. *Labnet*, 197 F.Supp.3d at 1168. Recognizing that "the rule plainly has multiple valid applications," Judge Schiltz concluded that enjoining any enforcement of the Rule would "prevent DOL from requiring disclosure of information that it has the right (indeed, a statutory mandate) to

obtain." *Id.* at 1176.

Rescission of the 2016 Rule will have precisely the effect of "prevent[ing] DOL from requiring disclosure of information that it has the right (indeed, *a statutory mandate*) to obtain." *Labnet*, 197 F.Supp.3d at 1176 (emphasis added). Thus, rescission would violate the Department's duty to "prevent the circumvention or evasion of [the LMRDA] reporting requirements." 29 U.S.C. § 438. If there are perceived defects in the 2016 Rule, the answer is to correct those defects rather than knowingly reinstitute an "underinclusive" interpretation of the LMRDA § 203. *Id.* at 1168.

D. Finally, it is important to point out the practical importance of the information provided in the expanded LM-20 reports to workers who are deciding whether to form a union with their co-workers.

Under our current system, there is a gross imbalance in the ability of employers to influence employees about whether to form a union and the ability of workers and unions to communicate about the many advantages of forming a union. Employers can – and do – lawfully hold employee orientation sessions for new employees where they discourage unionization. They can – and do – lawfully require employees to attend

meetings where supervisors criticize unions and make predictions about adverse consequences if workers decide to unionize. Employers can – and do – require supervisors to have one-on-one conversations with employees to persuade them against forming a union. Studies confirm that employers use these tactics in virtually every organizing campaign. And one of the central points employers try to make in these indoctrination sessions is that workers do not need a "third party" to represent them, erroneously characterizing the workers' union as a "third party" rather than the workers themselves.

Workers, on the other hand, are very limited in their ability to discuss the benefits of unionization with each other, and union organizers are not permitted on the employer's property to talk with workers – all contact must occur off-premises, with rare exceptions. Thus, at the workplace employees are subjected to a largely one-sided campaign by their employers, urging them to reject unionization.

In this context, it is essential that workers have the right to information about the actual third parties their employer is hiring, what the employer is hiring them to do, and how much their employer is paying them to oppose the workers' efforts to form a union. Workers

deserve to know that the anti-union words coming out of their supervisors' mouths are not the supervisors' own words but rather words crafted by an outside third party to have maximum impact in a campaign. Workers deserve to know that the same employer that is denying them a raise on grounds of financial distress is paying an outside third party hefty sums to defeat the workers' organizing campaigns.

There is no basis for hiding information from workers about the third parties employers hire to defeat their organizing drives. The Department should not be shielding union-busters; it should give workers the information they deserve to have about who is trying to influence their vote and how much they are being paid to do so.

Respectfully submitted,

Lynn K. Rhinehart
Harold Craig Becker
General Counsel

James B. Coppess
Associate General Counsel

American Federation of Labor and
Congress of Industrial Organizations
815 Sixteenth Street, NW
Washington, DC 20006
(202) 637-5337