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UNITED STATES OF AMERICA

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Mr. Andrew R. Davis
Chief of the Division of Interpretation and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW, Room N-5609
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By electronic submission: www.regulations.gov

RE: RIN 1245-AA07; Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act (82 Fed. Reg. 26877, June 12, 2017)

Dear Mr. Davis:

The U.S. Chamber of Commerce (Chamber) is pleased to submit these comments in response to the Department of Labor's (Department's) proposal to rescind its recent 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]

The Chamber is the world's largest business federation, representing the interests of more than three million businesses and organizations of every size, sector, and region. The vast majority of the Chamber's company membership are employers as defined by the LMRDA and National Labor Relations Act (NLRA). The Chamber's membership also includes a significant number of law firms and trade associations. The Chamber has one overarching mission—to strengthen the competitiveness of the U.S. economy, which benefits everyone, employers and employees alike. To that end, the Chamber's fundamental activity is to develop, support, and advocate for effective and lawful policies on major issues affecting business.

The Chamber strongly supports the Department's proposal to rescind the 2016 Rule. As an initial matter, the Chamber notes that the United States District Court for the Northern District of Texas has already permanently enjoined and set aside that rule pursuant to the Administrative Procedure Act (APA), 5 U.S.C. § 706(2). *See Nat'l Fedn. of Indep. Bus.* (hereafter "*NFIB*") *v. Perez*, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016); *NFIB v. Perez*, 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016). The Chamber further understands the Department filed a notice of appeal from the district court's decision enjoining the 2016 Rule and that appeal

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

is currently being held in abeyance by the United States Court of Appeals for the Fifth Circuit at the Department's request. The Chamber believes the Department should withdraw its appeal from the order setting aside the 2016 Rule, which was thoughtful, comprehensive, and correct in its analysis of the rule's many defects. Notwithstanding the court's injunction, the Department has taken the further step of proposing to rescind the 2016 Rule. The Chamber submits these comments in support of that proposal, which would demonstrate the Department has reformed its stated policy preferences consistent with the district court's judgment rejecting the 2016 Rule.

Background

On June 21, 2011, the Department published a proposal to change its settled, nearly five-decade-old, easily understood and applied interpretation of the LMRDA's "advice" exemption.[2] The Department provided no persuasive explanation for why it proposed this change at this time. In response, the Chamber submitted comments on September 21, 2011, which opposed the proposal and urged the Department to withdraw it. The Chamber's 2011 comments identified multiple legal and policy defects in the Department's new proposed interpretation of the LMRDA's "advice" exemption.

Regrettably, the Department failed to give adequate consideration to the Chamber's 2011 comments or those of numerous other observers and stakeholders who opposed the rule changes, including the American Bar Association (ABA), employers, trade associations, lawyers, law firms, and others. The Department instead largely adhered to its 2011 proposal in promulgating a final version of the rule on March 24, 2016.[3]

Experience since the new rule was issued has confirmed the 2016 Rule was deeply flawed on legal, policy, and practical grounds. Most notably, the United States District Court for the Northern District of Texas, on June 27, 2016, issued a preliminary injunction enjoining the Department on a nationwide basis from implementing any and all aspects of the 2016 Rule pending a final resolution on the merits. The court lambasted the rule as "defective to its core" because it "entirely eliminate[d] the LMRDA's Advice Exemption" contrary to the plain text and intent of the statute, among its many other failings. In addition to analyzing the requirements of the LMRDA, the court based its preliminary injunction decision in part on evidence from witnesses – including employers, trade association representatives, lawyers, and legal ethics experts – that demonstrated the detrimental effects that the 2016 Rule would have on employers' access to necessary legal advice and employers' free speech rights. According to the court, that evidence established employers and others would suffer irreparable injury under the rule, requiring an immediate injunction against the Department implementing it. The court subsequently entered summary judgment against the Department and made its preliminary injunction permanent. *NFIB*, 2016 U.S. Dist. LEXIS 183750.

Based on this further experience, the Chamber urges the Department to revisit the issues raised by the Chamber in its original comments dated September 21, 2011, and to give those

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

[3] *See* "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; Final Rule," 81 Fed. Reg. 15,924 (Mar. 24, 2016).

issues the full consideration they merit. The Chamber is confident that upon such consideration, the Department will agree the now-enjoined 2016 Rule should be abandoned and the Department's prior, long-standing, and effective interpretation of the advice exemption, which is consistent with LMRDA's text and purpose, should be left in place undisturbed.

The Chamber's 2011 Comments

The Chamber attaches hereto its September 21, 2011 comments ("2011 Comments"), which it reaffirms. (*See* Attachment 1.) These comments, along with those of many other stakeholders who opposed the rule changes, are as applicable to the 2016 Rule as they were to the 2011 proposal.[4] The Department should rescind the enjoined 2016 Rule for all of the same reasons that the Chamber and other commenters provided for not adopting that rule initially. In particular, the Chamber draws the Department's attention to the following issues raised by its 2011 Comments, which subsequent experience and analysis demonstrate require the Department's further consideration.

1. The 2016 Rule is contrary to the LMRDA's express exemption for "advice."

The Chamber's 2011 Comments criticized the Department's proposed changes to the persuader rule for making the LMRDA's "advice" exemption "nearly meaningless." *See* 2011 Comments at pages 1-5, 12-13. The 2011 Comments posed a number of hypotheticals that showed how unclear the new interpretation was and whether reporting would be required, including for example, in the case of an employer's consulting with an interior decorator to make employees' workspace more pleasant or with a lawyer to develop more generous compensation or benefits packages. Under the new rule, classification of such activities as exempt "advice" or as reportable "persuader activity" would apparently depend entirely on the employer's or consultant's subjective intent. This approach was not only contrary to the LMRDA's intended exemption of advice but unworkable in practice. Despite these concerns, the Department responded that it believed its new rule "establishes a clear test for attorneys and others to know what activities will trigger reporting and thereby avoid such activities if their goal is to avoid even the limited reporting required under this rule." 81 Fed. Reg. 15,999.

Following the 2016 Rule's promulgation, two United States district courts reviewed the new rule: the District of Minnesota in *Labnet Inc. v. United States Dep't of Labor*, 197 F. Supp. 3d 1159 (D. Minn. 2016) and the Northern District of Texas as noted above.[5] Both courts found, consistent with the Chamber's and other commenters' objections, that the 2016 Rule was contrary to the LMRDA's text and purpose and prior authority interpreting the LMRDA's "advice" exemption.

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[4] The only significant change between the 2011 proposal and the 2016 Rule was the Department's dropping its attempt to expand the scope of covered "persuader" activity so that disclosure reporting would also be triggered by any effort to persuade employees with respect to engaging in "protected concerted activity."

[5] The Chamber filed *amicus* briefs consistent with the Chamber's 2011 Comments in both the *Labnet* and *NFIB* cases as well as a third lawsuit that similarly challenged the 2016 Rule, *Associated Builders & Contractors of Arkansas v. Perez*, Case No. 4:16-cv-169 (E.D. Ark.).

The central error that both courts identified was the 2016 Rule's novel treatment of "advice" and "persuader activity" as mutually exclusive concepts under the LMRDA rather than potentially overlapping activities. This new, categorical distinction effectively eliminated the statute's "advice" exemption by rendering it meaningless because it led the Department to require reporting based on consultants' providing advice to employers when that advice had an object to persuade.

To illustrate the 2016 Rule's root problem, the Minnesota court explored a number of hypotheticals with Department of Justice attorneys during a hearing in that case. Contrary to the Department's assertion that the new rule "establishes a clear test for attorneys and others to know what activities will trigger reporting," 81 Fed. Reg. 15, 999, the *Labnet* Court found that the Department's own legal representatives had trouble applying the 2016 Rule's new standards to determine whether certain activities would trigger reporting. For example, the *Labnet* court asked:

> Court: Here's hypothetical one: I advise you to implement a more generous policy on lunch breaks and post it as soon as possible period. It's a letter to me from my client [sic]. Okay? Hypothetical two: I advise you to adopt a new policy similar to the attached and get it posted right away, Sincerely, me. Both advice? Neither advice? See. So the record will reflect – I'm not saying this to be mean. The record will reflect a long pause, which is kind of the problem, right, with the vagueness challenge. I have the world's leading expert on this new regulation standing before me --

Labnet, Case No. 16-CV-0844 (D. Minn. May 26, 2016), Tr. Hearing at 54 (Attachment 2 hereto).

The *Labnet* court thus concluded:

> DOL contends that its interpretation of § 203(c) is sound notwithstanding the fact that it has difficulty applying that interpretation to certain hypothetical scenarios. But the Court's questions did not involve exotic scenarios or outlier cases; the Court asked DOL about the sort of bread-and-butter work that lawyers perform for clients every single day. DOL's difficulty answering the Court's questions reflects not the inevitable ambiguities that arise when applying a reasonably clear principle to marginal cases, but rather the untenability of DOL's central position that persuader activity can never be advice, and advice can never be persuader activity.
>
> Proceeding from that flawed premise, DOL categorizes conduct that clearly constitutes advice as reportable persuader activity. For example, a lawyer who merely advises a client to adopt a new policy—or merely advises a client to add a sentence to a memorandum to its employees—has done one thing and one thing only: given the client *advice*. Under § 203(c), the giving of advice to an employer cannot, by itself, trigger the reporting requirement. But under DOL's new interpretation, the giving of what any reasonable person would define as "advice" does, by itself, trigger the reporting requirement. The Court therefore concludes

> that plaintiffs have a strong likelihood of success on their claim that the new rule conflicts with the plain language of the statute.

Labnet, 197 F. Supp. 3d at 1170.

The *NFIB* court agreed with the *Labnet* court's conclusions on this point as well as the Chamber's analysis in its *amicus* brief and held that the 2016 Rule was invalid under *Chevron*'s first step. *NFIB*, 2016 U.S. Dist. LEXIS 89694, at *71-*79. (N.D. Tex. June 27, 2016).[6] The *NFIB* court held:

> In whatever manner DOL defines "advice," it must do so consistent with the statute and therefore must actually exempt advice, including advice that has an object to persuade. The New Rule not only fails to do that, it does the exact opposite: it nullifies the exemption for advice that relates to persuasion.

Id. at *124.[7]

The 2016 Rule should thus be rescinded in the first instance because its attempted nullification of the LMRDA's express exemption for "advice" is well beyond the Department's statutory authority.

2. The 2016 Rule is contrary to the attorney-client privilege and attorneys' general duty of confidentiality.

As also discussed in the Chamber's 2011 Comments, the Department's revised interpretation of the "advice" exemption interferes with the attorney-client privilege and attorneys' traditional duty of confidentiality. 2011 Comments at 13-14. This defect in the 2016 Rule was also explored at length in comments submitted by the American Bar Association, a non-partisan professional association focused on developing model rules of professional conduct for attorneys.

After reviewing the scope of and the important policies underlying attorneys' duty of confidentiality, the Chamber observed in its 2011 Comment that the Department had paid "almost no attention to how its proposal would impact the attorney client relationship and strong public policy arguments favoring attorney-client privilege and policy protecting client confidences." 2011 Comments at 13. The 2011 Comments added that "we find it shocking that

[6] *See NFIB*, Case No. 5:16-cv-00066 (N.D. Tex. May 4, 2016), ECF No. 33-1, U.S. Chamber *Amicus* Br. at 5-22.

[7] The *Labnet* court ultimately declined to preliminarily enjoin the rule based on the record in that case. But there, the plaintiffs were attorneys rather than employers, and the question presented was whether those attorneys were threatened by irreparable harm. On the other hand, in *NFIB*, the plaintiffs were trade associations, and that court found they and their employer-members were threatened with irreparable harm under the 2016 Rule. Additionally, the *NFIB* court, unlike the *Labnet* court, heard testimony from numerous witnesses, including representatives of trade associations, an employer, and multiple attorneys and experts.

the Department says nothing about the strong public policy favoring the protection of client confidences, including client name, fees, and the nature of work performed for the client." *Id.*

Unfortunately, in promulgating the 2016 Rule, the Department continued to give inadequate attention to these issues. In responding to the Chamber's and other comments asserting that the Department's new interpretation of the "advice" exemption would negatively impact potential clients' access to needed legal counsel, the Department largely sidestepped the issue.

First, the Department continued to reject the notion that its new interpretation would require employers and lawyers to file disclosure reports as a result of giving and receiving legal advice. The Department, applying its new and categorical distinction between "advice" and persuader activity, refused to acknowledge that confidential legal advice can, at the same time, have an object to persuade. By taking the position that advice, including legal advice, simply cannot have an object to persuade, the Department failed to acknowledge that under its new interpretation, providing legal advice would trigger reporting for the first time. On this point, the *NFIB* court correctly observed:

> [I]n the Final Rule, DOL states that attorneys who have ethical reservations about reporting confidential information "always have the option to choose to decline to provide persuader services … and limit services to legal services." 81 Fed. Reg. 15,998. The problem with DOL's approach, however, is that some "persuader services" ***are*** legal services. Thus an attorney can only avoid the New Rule's disclosure requirements by also declining to provide ***some legal services***, which severely burdens those clients who need such services.

NFIB, 2016 U.S. Dist. LEXIS 89694, at *120-121.

Second, the Department failed to acknowledge the detrimental chilling effects of applying the LMRDA's disclosure requirements to legal advice. Those chilling effects flow in part from the extremely broad disclosures required under Section 203(b) of the LMRDA and on Form LM-21, which would extend not only to "persuader" clients but to all of a lawyer's clients for any labor relations advice and services. Since the 1960s, beginning with the enactment of the Equal Pay Act of 1963 and the Civil Rights Act of 1964, the amount of regulation relating to employment has grown substantially, and today's employment lawyers and law firms typically dedicate much of their practice to employment-related compliance and advice that is unrelated to "traditional labor" matters. Under the 2016 Rule, Form LM-21 would require lawyers and law firms who have provided any advice with an object to persuade to some clients also to disclose confidential information about a significant portion of their clients who have not sought or received such advice. The potential conflict between a law firm's clients who receive triggering advice and those who do not is obvious, and the interests of the latter could in many instances lead a lawyer or law firm to decline to provide potentially triggering advice at all.[8]

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[8] Shortly after the 2016 Rule was published, one prominent law firm 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

The Department avoided considering these effects of its new rule on the ground that Form LM-21 was not the subject of its rulemaking. *See, e.g.*, 81 Fed. Reg. 16,000 ("[I]ssues arising from the reporting requirements of the LM-21 are not appropriate for consideration under this rule."). The Department's refusal to consider how Form LM-21's disclosure requirements would impact potential filers under its new interpretation of the "advice" exemption was arbitrary and led it to ignore the rule's chilling effect on lawyers' providing, and employers' seeking out and receiving, certain legal advice. Indeed, the Chamber and other commenters repeatedly attempted to bring this issue to the Department's and administration's attention but were ignored. [9]

Finally, the Department also brushed aside concerns about the 2016 Rule's creating conflicts with attorneys' long-standing ethical obligations by reasoning that state ethical rules would be preempted by federal law. 81 Fed. Reg. 15,997-15-998. The *NFIB* court was correctly unpersuaded by the Department's reasoning, holding:

> DOL asserts that the conflicts its new Advice Exemption Interpretation will create with state ethical requirements can simply be overcome by federal preemption. 81 Fed. Reg. 15,997–15,998. But the question here is whether it would be arbitrary and capricious of DOL to create those conflicts in the first place by adopting its new Advice Exemption Interpretation. Given the historic importance of attorneys' duty of confidentiality, duty of loyalty, the attorney-client privilege and other ethical obligations, there is nothing in the text of the LMRDA that suggests Congress authorized DOL to nullify those duties at its discretion.

NFIB, 2016 U.S. Dist. LEXIS 89694, at *85-86.

3. The 2016 Rule is based on a fundamentally flawed rationale and is inconsistent with the free speech provisions of the NLRA and LMRDA.

In its 2011 Comments, the Chamber pointed out that the rationales given by the Department for adopting its new interpretation of the "advice" exemption were based on flawed assumptions and unreliable "studies" conducted by pro-union advocates and would chill free speech contrary to the NLRA and LMRDA. 2011 Comments at pages 6-12. Regrettably, the

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> 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.

[9] *See* Letter to Honorable Thomas Perez, Secretary of Labor, Department of Labor, dated Feb. 19, 2014 (Request to Consolidate the Proposed Persuader Advice Exemption Rule with the Impending Proposal to Change Form LM-21); Letter to Honorable Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget, dated Dec. 18, 2015 (Request to Consolidate the Proposed Persuader Advice Exemption Rule with the Impending Proposal to Change Form LM-21).

Department continued to operate based on those flawed assumptions in promulgating its 2016 Rule.

In response to the Chamber 2011 Comments, the Department claimed that it was not primarily relying on the criticized studies and declared that instead "the foundation for this rule is the statutory language chosen by Congress to require the disclosure and reporting of agreements between employers and labor relations consultants to persuade employees about the exercise of their union representation and collective bargaining rights." 81 Fed. Reg. 15, 962. But as shown above and as concluded by the *Labnet* and *NFIB* courts, that was not the case: the 2016 Rule was in fact contrary to the "statutory language chosen by Congress," which exempts "advice" from the LMRDA's disclosure requirements. The Department further asserted in the 2016 Rule that the "chief value in the research findings" that the Chamber and many other commenters criticized was "to show that the conduct that Congress intended to address by requiring disclosure and reporting persists." *Id.* But that reasoning ignored the very point made in the Chamber's and others' criticisms of those studies: due to their bias and defective methodology, they could not be relied upon to conclude that the problematic conduct targeted by Congress in the late 1950s persisted. Instead, those studies assumed without evidence that employers were engaging in unlawful conduct interfering with employees' rights and mischaracterized employers' exercising their own Constitutionally and statutorily protected free speech rights as wrongful, which was contrary to the law.

Upon reconsideration of these issues, the Department may take note of the fact that the rate of unionization in the private sector has declined in recent decades. Today, union membership has dropped to less than seven percent of the private sector workforce in the United States.[10] However, the Department should also be aware that organized labor and pro-union advocates offer a narrative to explain this decline that shifts any responsibility from themselves entirely to employers. This narrative accuses today's employers—without evidence—of widely using underhanded tactics to interfere with employees' right to organize in the same manner as the Nathan Shefferman-like "middlemen" who sought to sabotage employees' collective bargaining activities in the 1950s and earlier. The Department should treat this narrative for what it is: a self-serving account proffered by organized labor's partisans to deflect accountability in their inability to grow their membership.

The Department should also recognize that in contrast to the propagandistic narrative put forward by unions and their allies, neutral observers identify multiple causes for the decline in unionization in many western countries that have nothing to do with any alleged employer misconduct. These causes include a decrease in the number of manufacturing jobs, increased globalization, increased prevalence of wage and anti-discrimination laws that may reduce employees' need for unions, and unions' failure to adapt to change. *See, e.g.* E.H. "Why Trade

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[10] Union membership has steadily fallen for decades. In 1945, more than a third of non-agricultural workers were union members. Gerald Mayer, "Union Membership Trends in the United States" (CRS [Congressional Research Service] Report for Congress, August 31, 2004) at CRS-12, available at http://www.digitalcommons.ilr.cornell.edu/key_workplace/174/. In 1983, union membership was 20.1 percent. Bureau of Labor Statics, Economic News Release. Union Members-2016 (Jan. 26, 2017), available at http://www.bls.gov/news.release/union2.nr0.htm. By 2016, the rate of union membership had declined to 10.7 percent as a whole and within the private sector stood at 6.4 percent. *Id.*

Unions are declining," *The Economist* (Sept. 28, 2015), available at http://www.economist.com/blogs/economist-explains/2015/09/economist-explains-19. In short, the mere fact that unionization rates have decreased cannot support an assumption that employers are interfering with employees' rights to unionize, that employers are evading the LMRDA's disclosure requirements, or that the Department's longstanding interpretation of exempt "advice" was inadequate.

Nevertheless, in promulgating the 2016 Rule, the Department appears to have uncritically accepted the narrative of organized labor and its advocates, including their assumption that the decline in union membership is inherently bad and should be reversed and their attributing the general decline in unionization to presumed, but unproven, misconduct by employers. The Department also appeared wrongly to have believed that its mission is to reverse the decline in unionization rather than to ensure the LMRDA's provisions are enforced according to the statute's requirements. For example, in its *Weekly Newsletter* of February 4, 2016, the Department proclaimed it to be beyond debate that "union membership boosts the incomes of workers . . . and helps people punch their tickets to the middle class." U.S. Dept. of Labor, Tom Perez, *Unions Matter* (2016) (Attachment 3 hereto). According to the Department, "when folks make it harder for unions to organize . . . it weakens the middle class." *Id.* The Department further stated that supporting labor unions is "one surefire way" to build a strong middle class. *Id.* However, these are debatable propositions and not appropriate justifications for regulatory changes under the LMRDA.

Against the backdrop of the Department's acceptance of these pro-union assumptions, the 2016 Rule apparently was intended to offer campaign assistance to union organizers by creating barriers to lawyers' performing labor-relations work and by attempting to discredit information supplied by employers during union campaigns. For example, the Department stated:

> [T]he premise of the rule is that with knowledge that the source of the information received is an anti-union campaign managed by an outsider, workers will be better able to assess the merits of the arguments directed at them . . . With this information, they will be able to better discern whether the views and specific arguments of their supervisors . . . reflect a scripted . . . antipathy towards union representation and collective bargaining.

Id. at 15926-27 (March 24, 2016).

The Department glaringly omitted from its analysis any description of what actually occurs during a typical modern union organizing campaign. In fact, employers today find that the most effective way to respond to a union campaign is to provide *more* information to employees about unions and unionization that the unions and their allies fail to provide. Because most employers who respond to an organizing campaign have little experience with unions or labor law, they typically must rely on their employment attorneys to advise them regarding lawful, effective methods for sharing their position and viewpoint with employees. For example, during a typical modern union campaign, an attorney or other consultant might advise an employer to share with employees handouts with information such as the following:

Question: I was told I should vote for the union to give it a chance and, if we don't like it, we can just get rid of the union. Is that true?

Answer: No, you cannot just get rid of a union at any time if you don't like it.

Fact: If the union is voted in, you must live with it for a minimum of 1 year. That is the law.

Fact: To get rid of a union after the 1 year period, employees must submit a Decertification Petition to the National Labor Relations Board (NLRB) that meets all its rules and requirements. Here are a few things to know about that process:

- If employees need a lawyer for the NLRB process, they have to hire one themselves.
- The NLRB only considers a petition to remove a union at certain times:
  - One year after the election date if no labor contract is signed, or
  - 60 to 90 days before the end of any contract of 3 years or less, or
  - Upon expiration of any contract, or
  - Any time after 3 years for a contract with a longer term.

Because most initial contracts are for a term of 3 years, if the union wins the election and a contract is signed, it could easily take 4 years to get rid of the union if you don't like it.

Fact: The union could file legal charges with the NLRB when a Decertification Petition is pending, and you can't get rid of the union until those legal charges are resolved. These legal cases often take years.

Fact: Unions have disciplined members for trying to kick out the union when workers decided they no longer wanted it.

An employer's providing such information does not convey a "scripted antipathy" to unions, nor does it interfere with employees' rights in any way. Rather, it does one thing: it makes employees better informed about the consequences of their choices. Many employers may believe that having such information will increase the likelihood that some employees will exercise their right to vote against unionization—which is why some employers provide it and why unions and their advocates want to prevent employers from providing it—but there can be no dispute that such information is true, accurate, and relevant. Causing employers to withhold such information because it is deemed persuader activity and thus triggers reporting would make employees' decision making *less* informed, not more so.

Although the Department's ostensible rationale for adopting the 2016 Rule was to insure that employee-voters in union representation elections are better informed, the rule's effect would have been the very opposite. On one hand, the 2016 Rule would do nothing to insure that employees voting in union representation elections would be better informed about the fact that their employers may receive advice from lawyers and other consultants (a fact that the Department merely assumed but failed to show would be relevant to employee decision making in any event). The LM disclosure forms required to be filed pursuant to the 2016 Rule would not normally be filed and available for inspection until *after* employees have voted in a union representation election.[11] At the same time, by deterring experienced attorneys from providing labor-relations advice and employers from seeking assistance in responding the union campaigns, the 2016 Rule would inevitably result in employees receiving *less* accurate and relevant information such as that identified above. If employers, assisted by experienced attorneys and consultants, do not provide such information to employees about the potential downsides of voting in favor of a union, certainly no one else will.

In finalizing the 2016 Rule, the Department plainly accepted the pro-union and anti-employer narrative offer by organized labor and its advocates, including the "studies" criticized in the Chamber's 2011 Comments. For instance, the Department explained:

> The Department concludes that, as was true in the 1950s, the *undisclosed* use of labor relations consultants—even where their activities are undertaken in strict accordance with the law—impedes employees' exercise of their protected rights to organize and bargain collectively and disrupts labor-management relations.

81 Fed. Reg. 15,935. The Department further reasoned that "law firms have engaged in the same kinds of activities as other consultant firms, providing services similar to practices advocated by Nathan Shefferman, the face of the 'middlemen,' mentioned in the McClellan hearings and the LMRDA's legislative history." 81 Fed. Reg. 15, 992.

These were astounding and unfounded conclusions. The Department's analogizing current employers' practice of retaining reputable and ethical attorneys and consultants to assist them in providing accurate information to employees regarding reasons they might prefer not to unionize to the underhanded deceit and sabotage engaged in by Nathan Shefferman-type "middlemen" in the 1950s is a gross distortion of contemporary labor relations. The Department must reject this biased and unfounded narrative and ensure that the Department's regulatory decision making is based only on facts, not propaganda.

The rationale offered by the Department for the 2016 Rule was so weak and unsupported by evidence as to be arbitrary, capricious, and an abuse of discretion. 2011 Comments at 6. Indeed, the real concern motivating many supporters of the 2016 Rule is not that employees need more information but that they are already receiving too much information that causes them to

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[11] *See NFIB*, 2016 U.S. Dist. LEXIS 89694, at *91-92 ("DOL fails to show that the information disclosed in the LM reports will typically be 'known to employees' when they cast their votes" because union elections are now typically held about 21 days after the employer receives the Notice of Hearing on the union's election petition, but an attorney's or other consultant's LM-20 report is not due until 30 days after being retained by the targeted employer).

question the value of unionizing.[12] The Chamber's 2011 Comments noted that "many within organized labor believe employers should have no role in union organizing campaigns and that employer free speech should be abolished." 2011 Comments at page 11 (citations omitted). The Department should reject such logic, which is contrary to the law and to the interests of employees in being fully informed in their decision making.

Finally, and significantly, the Department has no jurisdiction with respect to union organizing campaigns or NLRB elections. Those matters are regulated solely by the NLRB, a separate and independent agency. 29 U.S.C. § 153 *et. seq.* The Department's apparent goal underlying the 2016 Rule of increasing unionization was well outside the bounds of the Department's authority and mission.

4. The 2016 Rule imposes extraordinary but unjustified costs that the Department failed to consider.

Finally, the Chamber's 2011 Comments contained a detailed analysis of the costs and burdens of the proposed rule. 2011 Comments at pages 14-24. The 2016 Rule failed to give the Chamber's analysis adequate consideration. Indeed, the *NFIB* court found that the Department "understated the economic impact of its New Rule," "failed to provide an adequate factual basis for its cost estimates," and "failed to meaningfully consider and address the weight of the comments and cost estimates submitted in response to proposed rulemaking." *NFIB*, 2016 U.S. Dist. LEXIS 89694, at *105. The Chamber stands by its 2011 economic analysis and urges the Department to revisit it.

Additionally, the Department should conclude that the economic benefit of rescission of the 2016 Rule may be significantly greater than the $1,198,714 annual cost savings cited in its proposal to rescind the rule.[13] The $1,198,714 saving amount is based on avoidance of the annual cost that the Department calculated for the 2016 Rule, but that cost was a gross underestimate of the real burden that the 2016 Rule would impose on regulated entities if it were to become effective. As the Chamber pointed out in its 2011 Comments, the full cost burden of the rule would be $910 million to $2.2 billion the first year of effectiveness and $285.9 million to

[12] There are also reasons to be concerned that the Department's adopting the 2016 Rule was influenced by political considerations. The Department itself observed that "[t]he sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office." 81 Fed. Reg. 15,985 (citation omitted). Here, the political party of the administration that adopted the 2016 Rule has been the beneficiary of substantial financial contributions from labor unions. *See New Analysis: Dues Money Goes to Causes that Union Members Don't Support*, LaborPains (Nov. 13, 2015), http://laborpains.org/2015/11/13/new-analysis-dues-money-goes-to-causes-that-union-members-dont-support/ (based on analysis of union disclosure reports filed with Department, finding that in 2014, union political contributions to the party of the administration adopting the 2016 Rule and aligned groups amounted to nearly $75 million). Moreover, the Secretary of Labor who was responsible for overseeing the Department's adoption of the 2016 Rule immediately became chair of the national committee of his political party following the expiration of his term as Secretary. In his new role, the former Secretary is responsible for raising funds for his political party, which continues to be supported in significant part by union contributions.

[13] 82 Fed. Reg. 26,881.

$793.1 million each year thereafter. This is a better measure of the savings benefit that will result from rescission of the 2016 Rule.

The large shortfall in the Department's estimate of the regulatory burden arose from two sources, as pointed out in the Chamber's 2011 Comments:

a. The Department's economic analysis ignored the vast majority of firms impacted by the proposed rule.

The Department based its estimates of numbers of employers and service providers who would experience cost burdens under the proposed rule only on an estimate of the number of employers and service providers who would actually have the obligation to file Forms LM-10 and LM-20. The Department estimated 2,484 additional Form LM-10 filers and 2,410 additional Form LM-20 filers. The Department based its estimate on data regarding the number of union organizing petitions filed each year, which in itself underestimates the number of employers who would actually need to file Form LM-10 or the number of service providers who would need to file Form LM-20, because filing obligations arise under broader conditions than the filing of an election petition. While an estimate of the number of actual Form LM-10 or Form LM-20 filers may have been appropriate for purposes of estimating the reporting burden under the Paperwork Reduction Act, that estimate limited to actual filers does not provide the correct basis for estimating the economic impact for purposes of Executive Order 12866, the Unfunded Mandates Act, or for analysis of small business impacts under the Regulatory Flexibility Act.

As noted above, many businesses (both employers and service providers) will be required because of the expanded definition of reportable arrangements to devote additional time and resources to the task of determining each year whether or not they have any obligation to file a Form LM-10 or Form LM-20 report. This results in a real and significant cost burden on private employers in the aggregate. In 2008, according to U.S. Census, Statistics of U.S. Business Data, there were a total of 5,930,132 private business firms in the United States, and each of these may be affected in some way by the increased time and expense necessary to determine their compliance obligations under the proposed rule. Of these businesses, 2,536,606 firms had five or more employees, 236,012 had 50 or more employees, and 18,469 had 500 or more employees. Even if the average cost burden were a relatively small amount of $175.18 that the Department estimated as the average cost of Form LM-10 compliance, and were only applied to the 2.5 million firms with five or more employees, the aggregate cost on private business would be over $444 million per year and clearly in excess of the amount required to define the proposed rule as a major rule under the Unfunded Mandates Act (approximately $140 million).

The Chamber's own more detailed analysis that takes into account realistic time requirements for different size categories of business found that the cost of annual reviews to determine whether or not Form LM-10 must be filed would cost businesses with five or more employees between $204 million and $408 million per year. The range covers just the cost of making the determination of whether the form must be filed and does not include the cost of actually completing and filing the form for those who are required to do so.

For Form LM-20 filing obligations, the Department's estimate of 2,410 additional filers ignores the fact that the 2016 Rule would have imposed additional annual cost burdens for

review of their client services to determine whether Form LM-20 filing was required on all of the 5,806 Human Resource Management Consultant services firms (NAICCS code 541612) and 166296 Offices of Lawyers firms (NAICS code 541110). The Chamber estimates that these costs for determination of Form LM-20 filing requirement status would cost these firms between $82.1 million and $385.5 million per year. *See* 2011 Comments at page 19.

b. The Department underestimated the initial cost of familiarization with the new regulation.

Even if many businesses would arguably have small ongoing annual costs to review their service agreements and determine annually whether they have a reporting obligation, every business would still need to be informed about the content of the 2016 Rule in order to assess whether it imposes requirements that would require on-going compliance review and monitoring. Familiarization involves, at a minimum, the time that it takes a senior business manager to read and understand the regulation and the instructions accompanying the form, but in larger firms it would be necessary for more than one person to become familiar with the regulation and often necessary to seek legal counsel to fully understand the implications and obligations imposed by the 2016 Rule.

The Department grossly underestimated the labor time needed to read the 2016 Rule. The Department's estimate of 20 minutes reading time for the instructions to Form LM-10 and of 10 minutes reading time for the instructions to Form LM-20 were not based on any empirical data or experiment and was instead arbitrary and unreasonable conjecture. To fully comprehend the 2016 Rule, a prudent business executive will read the entire 52 pages of fine print published in the Federal Register, including the important explanatory material in the preamble, the regulatory text itself, and the attached forms and instructions. This is a task that will require at least two hours of time, and in larger firms many more labor hours as multiple reviewers read the rule. The cost of legal counsel would push the initial familiarization cost even higher. Again, the Department's error seems to be related to its confusion about the distinction between Paper Work Reduction Act reporting time burden computations and full analysis of the economic impact of the proposed rule. The initial familiarization cost of a complex and broadly applicable rule necessarily involves more time and attention by senior management than does the routine completion of reporting forms in subsequent years once the requirements are familiar. The Chamber estimated that the initial year familiarization costs associated with the proposed rule would be between $549.6 million and $1.1 billion for potential Form LM-10 filers and between $74.6 million and $298.3 million for potential Form LM-20 filers. 2011 Comments at page 18.

For just the initial familiarization costs and the pre-filing annual monitoring and review costs to determine filing requirement status (whether required to file or not) for private firms with five or more employees, the Chamber estimated that the proposed rule would impose a first year cost burden on the economy of $910.1 million to $2.2 billion and subsequent annual costs of $285.9 million to $793.1 million. 2011 Comments at page 18. The costs would be broadly applicable across the range of businesses with five or more employees for familiarization with the regulation and for annual review to determine whether Forms LM-10 and LM-20 must be filed. These are all pre-filing costs that would accrue regardless of whether an employer or service provider ultimately must file either Form LM-10 or Form LM-20.

The Chamber's estimates were and remain based on informed estimates of the amount of labor time required for firms to become initially familiar with the new requirements should the proposed rule be promulgated. These estimates were presented as ranges to illustrate the sensitivity of costs to these important time parameters. The Chamber's estimates do not represent all of the potential compliance cost burdens associated with the proposed rule, but only two readily identifiable elements of the cost burdens.

The Chamber's estimates of time requirements were based on input from individuals knowledgeable about businesses regulatory compliance processes, but do not represent the results of a large-scale survey of actual practices or of controlled experiments because the permitted public comment time was too limited. We urge the Department to rescind the 2016 Rule in part due to the absence of additional research, including surveys of potentially affected firms to ascertain the extent to which they purchase or provide services that could trigger LMRDA obligations and determine the extent to which businesses would need to implement additional monitoring and review activities to determine their compliance obligations. We also note that the Department failed to conduct controlled experiments to determine realistic time parameters for reading and comprehending the proposed LMRD requirements.

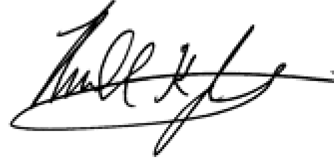
Significantly, the Department also failed to present any monetized estimate of the purported benefits that might accrue to workers or society from the 2016 Rule. In light of the large potential costs that the proposed rule would have imposed, the Department should rescind the rule due to the absence of any attempt to monetize its purported benefits.

5. Conclusion

As the Chamber noted in 2011, the Department's revised interpretation of the LMRDA represented a "dramatic narrowing of the advice exemption and a dramatic increase in what will be considered reportable persuader activity." 2011 Comments at 24. That change, which the Department finalized in its 2016 Rule, wrongly "replace[d] an easily understandable objective test with a confusing subjective test," was "contrary to the LMRDA and its legislative history," and "drastically underestimate[d] costs and fail[ed] to satisfy the numerous regulatory process requirements not the least of which are the Administrative Procedure Act and the Regulatory Flexibility Act." For all of these reasons and those given by the *NFIB* and *Labnet* courts, the

2016 Rule should be rescinded, the Department should withdraw its appeal from the *NFIB* court's order setting aside the 2016 Rule, and the prior, longstanding interpretation of the LMRDA's "advice" exemption should be retained.

Sincerely,



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