SHAWE
ROSENTHAL LLP

One South Street
Suite 1800
Baltimore, MD 21202
P: 410-752-1040
F: 410-752-8861

shawe.com

VIA ELECTRONIC SUBMISSION
(http://www.regulations.gov)

Original to follow by First Class Mail

August 7, 2017

The Honorable R. Alexander Acosta
Secretary of Labor
U. S. Department of Labor
200 Constitution Avenue, N.W.
Washington, DC 20210

Attention: Andrew Davis, Chief
Division of Interpretations and Standards
Office of Labor-Management Standards

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

Dear Mr. Secretary:

This comment is submitted on behalf of Worklaw Network ("Worklaw"), a consortium of management-side labor and employment law firms. Worklaw supports the rescission of the unlawful and indeed unconstitutional interpretation ("New Interpretation") of the "advice exemption" to the Labor-Management Reporting and Disclosure Act ("LMRDA") previously promulgated by the Department of Labor (the "Department") on March 23, 2016. The New Interpretation was based upon intentional misinterpretations of the LMRDA that were designed to vilify and silence attorneys and others who provide advice to management.

Worklaw also supports the Department's commitment to consider the obligations related to Form LM-21 when it considers the impact of rules related to Forms LM-20 and LM10. However, Worklaw has some reservations about language in the Notice of Proposed Rulemaking

("NPRM") that suggests the Department is considering further action following its rescission of the New Interpretation.

For the reasons that follow, as well as the reasons that Worklaw has raised in its lawsuit against the Department challenging the New Interpretation, *Labnet, Inc. d/b/a Worklaw Network v. United States Department of Labor*, Civil Action No. 0:16-cv-00844-PJS-JSM, the Department should issue an unqualified rescission of the New Interpretation and return to its prior longstanding interpretation consistent with statute.

I. The LMRDA

Section 203(a) of the LMRDA requires employers to report agreements and payments with a consultant or independent contractor when the "object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing...." 29 U.S.C. § 433(a)(4). This is commonly referred to as the Act's "reporting requirement." Employers fulfill this statutory requirement by filing LM-10 forms with the Department.

LMRDA Section 203(b) imposes this same "reporting requirement" on consultants and independent contractors. 29 U.S.C. § 433(b). These parties must file LM-20 forms (within 30 days of the agreement). Consultants and independent contractors that file LM-20 forms are also required to file LM-21 forms (annually).

Section 203(c) of the LMRDA carves out an exception from the reporting requirement for advice: "Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer . . ." 29 U.S.C. § 433(c). This exemption, commonly referred to as the "advice exemption," is not limited to legal advice.

LMRDA Section 204 emphasizes that the statute is not intended to invade the attorney-client relationship. Attorneys in good standing in any state are not required to include in any report information lawfully communicated to them by their clients in the course of a legitimate attorney-client relationship. 29 U.S.C. § 434.

Congress' undisputed goal in passing the LMRDA was to curb abuses by what were said to be unscrupulous middlemen who had direct contact with employees. Accordingly, the LMRDA has been historically interpreted as requiring employers and consultants to report only when a

consultant had direct contact with employees and either directly told employees not to join a union or indirectly suggested that joining a union was a bad idea. On March 23, 2016, the Department published a final rule regarding its interpretation of the advice exemption (the "New Interpretation"). The New Interpretation set forth a definition of advice, but cast the definition aside by requiring that all advice be reported.

II. Reasons To Rescind The Rule

a. The New Interpretation Is Contrary To Statute

The New Interpretation was contrary to the plain text of the statute. *Labnet Inc.*, No. 0:16-cv-00844-PJS-JSM, 2016 WL 3512143, at *5-8 (D. Minn. June 22, 2016); *Nat'l Fed'n of Indep. Bus. v. Perez*, No. 5:16-CV-00066-C, 2016 WL 3766121, at *25 (N.D. Tex. June 27, 2016). It expanded the scope of the activity that must be reported and simultaneously eviscerated the advice exemption. It also improperly invaded the attorney-client relationship, contrary to Congressional intent.

"DOL's new rule conflicts with §203(c)—at least in some of its applications—because it requires a consultant 'to file a report covering the services of such person by reason of his giving or agreeing to give advice to [an] employer ....'" *Labnet* at *6.

The Act expressly excludes the giving of advice. 29 U.S.C. § 433(c). But, under the New Interpretation, the Department claimed there was no need to inquire as to whether the activity constitutes advice. 81 F.R. 15938.

The Obama Administration's position that "Section 203(c) makes explicit what is left implicit in section 203(a) and (b)[,]'" 81 F.R. 15941, has been rejected by the Eighth Circuit. *Donovan v. Rose Law Firm*, 768 F.2d 964, 972 (8th Cir. 1985). The Obama Administration's position that "persuader activities do not overlap with tasks that may constitute advice to the employer[,]" 81 F.R. 15980, is contrary to the D.C. Circuit's decision in *UAW v. Dole*, in which the court specifically noted that there is an overlap between what is reportable under 203(a) and (b) and what is advice under 203(c). 869 F.2d 616, 618 (D.D.C. 1989).

The New Interpretation destroyed the advice exemption. The only services that are covered in the first place are services with the object to persuade employees. Thus, the advice exemption would be meaningless if it did not cover advice with the object to persuade employees. Yet, the new Interpretation specifically stated that advice does not include communications "that are undertaken with an object, directly or indirectly, to persuade employees concerning their rights

to organize or bargain collectively." 81 F.R. at 15937. The New Interpretation eviscerated the advice exemption by reading it to cover only activities that are not covered in the first place.

Furthermore, in the New Interpretation "DOL does not [even] apply its own definition of 'advice.' Instead, DOL requires reporting of activity that is 'advice' under any reasonable interpretation of that word—*including DOL's*." *Labnet Inc.*, at *6.

> At the root of DOL's problem is its insistence that persuader activity and advice are mutually exclusive categories. As already noted, this is not what the Eighth Circuit believes, and this Court has difficulty understanding how this could be true. Giving advice is unquestionably an "activity," and that "activity" can unquestionably be performed with the intent to indirectly "persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing ...." 29 U.S.C. § 433(b)(1).

Id. "Proceeding from that flawed premise, DOL categorizes conduct that clearly constitutes advice as reportable persuader activity." *Id.*

The New Interpretation of the advice exemption does not have any legitimate applications. The New Interpretation required reporting in every scenario in which the exemption must apply. Only persuasive activity is covered by the reporting requirement. Out of that set of activity, the subset of advice is exempt from reporting. That is, all persuasive advice is exempt. Yet, the New Interpretation, which was purportedly limited to an interpretation of the advice exemption, required reporting of all advice that is persuasive. In every possible scenario involving the advice exemption, advice that is exempt from reporting under the statute must be reported under the New Interpretation.

In addition to eviscerating the advice exemption, the New Interpretation unlawfully expanded the scope of reportable activity far beyond that which is required by the Act. The statute requires reporting of "any agreement or arrangement with an employer…where an object thereof is, directly or indirectly, to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing[.]" 29 U.S.C. § 433(b)(1).

The New Interpretation mischaracterized as "indirect" persuader activity, conduct outside the scope of the reporting requirements that was not previously reported. The terms direct and indirect refer not to contact with employees, but to whether employees are presented

with straightforward (direct) or subtle (indirect) arguments. *See Master Printers of Am. v. Marshall*, Nos. 78-720-A and 78-721-A, 1979 WL 1872, *3 (E.D. Va. May 9, 1979) (*rev'd* in part by *Master Printers of Am. v. Marshall*, 620 F.2d 293 (4th Cir. 1980)).

The New Interpretation reached activities so far outside the scope of the statute that the Department could not even reject the possibility that, under its new definition of persuader activity, an interior decorator could be required to submit a report. 81 F.R. 15974. This is contrary to Congressional intent. James R. Beaird, *Reporting Requirements For Employers and Labor Relations Consultants in the Labor Management Reporting and Disclosure Act of 1959,* 53 GEO. L. J. 267, 272-73 (1965) (citing 104 Cong. Rec. 18269 (1958)) (noting Congressional intent to exclude activities such as sending Christmas hams when done with the tangential intent of avoiding union organizing).

Finally, the New Interpretation would have forced attorneys to violate attorney confidentiality obligations under ABA Model Rule 1.6 and similar provisions found in State professional rules of conduct, and rendered Section 204 a nullity.

Rule 1.6 states, "A lawyer shall not reveal information relating to the representation of a client...." Model Rules of Prof'l Conduct R. 1.6. Each of the state attorney regulatory agencies applicable to the Plaintiff law firms in the Worklaw case has adopted a similar, if not identical rule. "It is undisputed that the regulation of the practice of law is traditionally the province of the states." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471 (D.C. Cir. 2005). "[I]f Congress intends to alter the 'usual constitutional balance between the States and Federal Government,' it must make its intention to do so unmistakably clear in the language of the statute." *Id.* at 471-72 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)). The drafters of the LMRDA considered and addressed the impact of the law on the attorney-client relationship. Had they intended to alter that relationship, they would have made that intention unmistakably clear. Instead, what they made unmistakably clear was their intent not to alter the relationship.

Rule 1.6(b) allows for disclosure "to comply with other law or a court order." Model Rules of Prof'l Conduct R. 1.6(b) & cmt 12. "Nothing in the LMRDA expressly or implicitly requires lawyers to reveal client confidences to the government." *See* American Bar Association Comments Submitted to Department Concerning 76 Fed. Reg. 36178, September 21, 2011, at 6, n. 19. A requirement to disclose client confidences would solely emanate from the New Interpretation, not from any law. Thus, the New Interpretation created an invalid exception to Rule 1.6 without support in the text of the statute.

Additionally, the New Interpretation was contrary to Section 204's attorney-client protections. Completing the Department's required checklist and forms requires disclosure of attorney-client protected material, both **privileged** and confidential. Defending a Department investigation under the New Interpretation would require disclosure of **privileged** and confidential information. And, critically, the act of reporting itself reveals a client's **privileged** motive to persuade employees. The act of submitting a report constitutes the disclosure of a privileged fact – the client's motive. It is undisputed that a client's motive to persuade employees is privileged, 81 F.R. 15994-95, and the act of filing a report discloses that privileged information. The fact of reporting reveals the **privileged** motive of the client because the reporting requirement is triggered based on the motive of the client. The statute explicitly carves out privileged information from the reporting requirement.

The New Interpretation also failed to consider the significant amount of confidential information that must be revealed in Form LM-21. The LM-21 reporting requirements have already been deemed by the Eighth Circuit to be unlawful in *Donovan v. Rose Law Firm*. Congress did not intend that such confidential information be disclosed as a consequence of attorneys advising clients regarding routine labor and employment matters. *Labnet*, 2016 WL 3512143, at *28.

b. The New Interpretation Is Unconstitutional

The New Interpretation violated the First Amendment. *Nat'l Fed'n of Indep. Bus.*, 2016 WL 3766121, at *31. The New Interpretation conceded on its face that it was designed for the purpose of invidious discrimination against attorneys who advise management. When there is record evidence of such invidious discrimination even a law that imposes facially evenhanded restrictions is invalid. *Buckley*, 424 U.S. at 31. (citing *James v. Valtierra*, 402 U.S. 137 (1971)).

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.... We have not recognized an exception to this principle...." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). The New Interpretation specifically targeted employer and consultant speech that contains an "anti-union" viewpoint. The New Interpretation repeatedly indicated that activity must be reported if it is "anti-union" or engaged in for the purpose of "union avoidance."

The New Interpretation singled out a viewpoint disfavored by the Obama Administration. The Obama Administration admitted its discriminatory intent: that the New Interpretation was designed to target consultants "hired as []specialist[s] in defeating union organizing

campaigns." 81 F.R. 15926 (emphasis added). In fact, the DOL admits that "the premise of the rule is to [require reporting of] anti-union campaign[s] managed by outsider[s.]" *Id.* (emphasis added).

The New Interpretation also fails strict scrutiny as a content-based restriction on speech. *See United States v. Playboy Entm't Grp. Inc.*, 529 U.S. 803, 811 (2000). "[C]ontent-based restrictions on speech…can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest[.]'" *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2231 (2015) (quoting *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett,* 564 U.S. 721 (2011) (quoting *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010))).

First, the stated interest in the New Interpretation is not compelling. The purported interest is "transparency" as to the source of the information provided by an employer in response to a union organizing campaign. 81 F.R. 15983; 81 F.R. 15925. A review of relevant case law reveals that no court has ever found compelling such an interest in transparency or providing to employees information regarding the provision of advice by attorneys to employers. Moreover, the LMRDA's legislative history has no reference to a supposed interest in providing transparency to employees in union elections as to the source of information, especially when it is clear the employer endorses the message. Rather, the original interest underlying the LMRDA was to inform employees as to the identity of middlemen so that employees could determine whether middlemen were sent by the employer to persuade them. The Department lacks a compelling interest. *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 348 (1995) ("The simple interest in providing voters with additional relevant information does not justify a state requirement that a writer make statements or disclosures she would otherwise omit.").

Second, the New Interpretation was not narrowly tailored or even substantially related to the asserted government interest. The Obama Administration's actual interest in silencing speech it disfavored, which was apparent from the face of the New Interpretation, was neither legitimate nor sufficiently important. In any event, the disclosure requirement bears little relation to the asserted government interest.

The New Interpretation was both overinclusive and underinclusive, and not substantially related to the asserted governmental interest in transparency in elections. The means were not substantially (or even loosely) related to the asserted government interest in transparency to employee-voters as to the source of a message conveyed in the course of union elections. First, the New Interpretation would apply in a plethora of scenarios far removed from the context of union elections, including policy revisions, seminars, and, absurdly, even interior decorating. 81

F.R. 15974. Second, the timeline for the submission of Form LM-20 is 30 days from engagement, but NLRB statistics confirm that the median time from the filing of a petition to the election is 24 days. National Labor Relations Board, Annual Review of Revised R-Case Rules (April 2016); National Labor Relations Board, Three Quarter Review of Revised R-Case Rules (January 2016). If the means were substantially related to the asserted government interest, the disclosure would be required in advance of an election, not after the fact. Moreover, when the message conveyed is truly that of a third party and not the employer, no report is required. The New Interpretation was underinclusive, requiring disclosure when the information is the result of advice received by the employer from its attorney, but not when the information conveyed to employees was quite literally the views of third parties who drafted off-the-shelf materials.

Moreover, the Obama Administration did nothing to attempt to achieve its purported goal of transparency with respect to advisers to unions, or even to union middlemen, known as "salts." Salting has been defined as "the act of a trade union in sending a union member or members to an unorganized jobsite to obtain employment and then organize the employees." *Tualatin Electric*, 312 NLRB 129, 130 n.3 (1993), *enfd.* 84 F.3d 1202, 1203 n. 1 (9th Cir. 1996). There are no analogous disclosure or reporting requirements on unions, which commonly rely on high-paid public relations firms and salts to influence employees' views on their employer and the union itself.

The New Interpretation was also impermissibly vague. *Nat'l Fed'n of Indep. Bus.*, 2016 WL 3766121, at *36. "Vague laws offend several important values" by "impermissibly delegating policy matters to policemen, judges, and juries for resolution on an ad hoc basis." *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972). Vague laws that either regulate the right to free speech or carry criminal sanctions are subject to a strict application of the vagueness test. *Vill. of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982); *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

The New Interpretation drew lines that were "simply incoherent." *Labnet*, 2016 WL 3512143, at *6. The Court in *Labnet* found that the Department's definition of advice was reasonable, but that the Department would not actually apply the definition of advice set forth in the New Interpretation. Under the new Interpretation, the definition of "advice" and meaning of "persuade" become irrelevant—the Department conceded it would disregard them in favor of an undefined and incoherent enforcement of the reporting requirement. That the contours of the New Interpretation were not defined and that the proposed definition would not in fact be applied is the essence of a vague rule.

c. The New Interpretation Is Arbitrary And Capricious

The New Interpretation was arbitrary and capricious. *Nat'l Fed'n of Indep. Bus.*, 2016 WL 3766121, at *28. An administrative action is arbitrary and capricious if the agency fails to "examine the relevant data and articulate a satisfactory explanation for its action." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). The Department acknowledged that in developing the New Interpretation it conducted no research of its own. 81 F.R. 15962. Nor could the Department rely on its own experience. Union organizing drives and elections are regulated by the NLRB, an independent agency outside the Department. 29 U.S.C. §§ 153, *et seq.*

The Department failed to consider the NLRB's revised Representation case (R-case) rules which took effect April 2015. Since implementation of the revised R-case rules, the median number of days between petition filing and election is 24. National Labor Relations Board, Annual Review of Revised R-Case Rules (April 2016); National labor relations board, three quarter review of revised r-case rules (January 2016). Yet, the Department ignored this data and instead chose to rely on inaccurate, outdated NLRB statistics contained in FY 2009-2012 Summary of Operation Reports – no research, no first-hand experience, no logic – the New Interpretation was arbitrary and capricious.

As for the forms and instructions, there was no justification for straying from the statutory text—none exists. The lack of any justification is the very definition of arbitrary and capricious under *FCC*, 556 U.S. at 513.

d. The New Interpretation Violated The Regulatory Flexibility Act

Worklaw member firms are small businesses as that term is defined in the Small Business Act and applicable regulations. *See* 13 C.F.R. 121.201 (Sector 541110). The Regulatory Flexibility Act ("RFA") requires an agency promulgating a rule to consider the effect of the proposed regulation on small businesses and to design mechanisms to minimize any adverse consequences. *See* 5 U.S.C. § 601; *S. Offshore Fishing Ass'n v. Daley*, 995 F. Supp. 1411, 1433 (M.D. Fla. 1998). The RFA exempts an agency from the requirement to publish an Initial Regulatory Flexibility Analysis and a Final Regulatory Flexibility Analysis if the agency "certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities." 5 U.S.C. §605(b). The Small Business Regulatory Enforcement and Fairness Act of 1996 authorized judicial review of an agency's compliance with the RFA and final certification under the arbitrary and capricious standard set forth in 5 U.S.C. § 706(2)(a). 5 U.S.C. § 611(a)(1).

The Department certified that the New Interpretation would not have a significant economic impact on a substantial number of small entities. 81 F.R.16001. In reaching that conclusion, the Department purported to compare the cost of compliance in relation to the revenue of the entity. The Department stated that the cost of compliance would be an average of $107.68. The average was based on a non-filing cost of $92.53 and a filing cost of $1,771. The average gross revenue was estimated to be $734,058. The average cost for a filing consultant "is not significant because it represents only a 0.24% share of a consultant's average annual gross revenue." 81 F.R. 16018.

The Department's estimate of the cost to small entities was wrong. A subsequent independent analysis by Diana Furchtgott-Roth, the former Chief Economist at the Department, concluded that the first-year cost alone for firms would be $10,433 per firm. *See* Diana Furchtgott-Roth, *The High Cost of Proposed Labor Law Regulations*, Manhattan Institute Issue Brief #21, April 2013) ("*High Cost*"). In subsequent years, the cost of compliance is estimated at $5,216.50 per firm. *Id.* at 11.

Firms that file LM-20 forms are also required by law to file LM-21 forms. Many law firms have never filed an LM-21 form because of the previous Interpretation from the Department. Under the New Interpretation, such firms would be required to file LM-21 forms with the Department. The certification in the New Interpretation ignores the cost of new LM-21 filings. Ms. Furchtgott-Roth estimates that the LM-21 form will also result in first year costs of $10,433 per firm and subsequent years' costs of $5,216.50 per firm. *High Cost* at 10, 11.

Although the New Interpretation would impact every business, labor relations consultant, and many law firms, the Obama Administration contended that only labor relations consultants and employers confronting union organizing campaigns will be impacted. Given the extremely broad scope of reportable activity under the new definition of what constitutes persuasive activity, this contention was false. Employers who work with consultants to develop policies outside the context of union organizing campaigns may fall within the scope of the New Interpretation. Any employer who is aware of and considers the possibility of union organizing in making any of its business decisions would have to be keenly aware of the reporting requirements under the New Interpretation.

III. Following Rescission, No Further Action By The Department Is Necessary

As discussed above, the *status quo* prior to the implementation of the unlawful and unconstitutional New Interpretation was the most reasonable interpretation of the advice

exemption. There is no basis for departing from the longstanding interpretation that comports with the statute and the United States Constitution.

Respectfully,

/s/ *Mark J. Swerdlin*

Mark J. Swerdlin
Parker E. Thoeni
SHAWE & ROSENTHAL LLP
One South Street, Suite 1800
Baltimore, MD 21202
(410) 752-1040
swerdlin@shawe.com
thoeni@shawe.com

/s/ *Douglas P. Seaton*

Douglas P. Seaton
SEATON, PETERS, & REVNEW, P.A.
Seaton, Peters & Revnew, P.A.
7300 Metro Boulevard, Suite 500
Minneapolis, MN 55439
(952) 896-1700
dseaton@seatonlaw.com

MJS/ker

#585818_2