IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS

ASSOCIATED BUILDERS AND CONTRACTORS OF ARKANSAS; ASSOCIATED BUILDERS AND CONTRACTORS, INC.; ARKANSAS STATE CHAMBER OF COMMERCE; ASSOCIATED INDUSTRIES OF ARKANSAS; ARKANSAS HOSPITALITY ASSOCIATION; COALITION FOR A DEMOCRATIC WORKPLACE; NATIONAL ASSOCIATION OF MANUFACTURERS; and **CROSS, GUNTER, WITHERSPOON & GALCHUS, P.C.,** on behalf of themselves and their membership and clients, **PLAINTIFFS,** v. **THOMAS E. PEREZ**, in his official capacity as Secretary of Labor, U.S. Department of Labor; and **MICHAEL J. HAYES**, in his official capacity as Director, Office of Labor-Management Standards, U.S. Department of Labor, **DEFENDANTS.**	**CASE NO. 4:16-CV-169 (KGB)**

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases that raise issues of vital concern to the Nation's business community.

The Chamber's members, which include companies and law firms and even solo practitioners, have a strong interest in the outcome of this proceeding. From 1962 until the present, the Department of Labor ("DOL") across administrations of both parties applied a clear and consistent interpretation of the advice exemption to the reporting requirements of the Labor-Management Reporting and Disclosure Act ("LMRDA") for "persuader" activity. That interpretation of the LMRDA permitted lawyers, their firms, and non-lawyer consultants to provide recommendations on union-organizing matters to their clients without fear of breaching their ethical obligations with respect to client confidences. At the same time, it faithfully implemented the statutory requirement of disclosure by those who did not advise employers, but instead sought to directly or indirectly persuade employees on union-related issues.

The DOL's new rule, however, abandons that well-established and longstanding interpretation, and thus imposes stringent disclosure obligations on attorneys, law firms, and consultants providing their employer clients what anyone would call "advice." It raises serious constitutional questions regarding employers' statutory and constitutional right to seek advice on how to communicate with their employees. It will chill the free exchange of ideas between employers and employees and will impose substantial compliance costs as employers and their

attorneys are forced to grapple with DOL's incoherent new guidelines. Of greatest concern, the DOL's new interpretation of the advice exemption in the LMRDA—if allowed to take effect—threatens to expose thousands of lawyers, law firms, and companies to potential criminal liability for failure to abide by an exceedingly vague interpretation of the LMRDA.

For these reasons, the Chamber submits this brief on behalf of its members' interests and in support of a preliminary injunction. To minimize duplication, the Chamber does not address the irreparable injury, balance of the equities, and public interest requirements, and instead focuses on two issues of statutory interpretation and administrative law before the Court. On all scores, however, the Chamber supports the Plaintiffs on their arguments.

SUMMARY OF ARGUMENT

The DOL's interpretation of the reporting obligations imposed by the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 433, is contrary to the unambiguous statutory text. Section 433(b) imposes certain reporting obligations for employers and third-party consultants that agree, directly or indirectly, to engage in activity to persuade an employee to join (or not to join) a union. The statute carves out from that reporting requirement the provision of "advice." Since 1962, DOL consistently has construed "advice" to encompass communications between an employer and its lawyers or other consultants where the employer was receiving recommendations on how to proceed, which the employer was of course able to follow or to decline.

But DOL, abandoning a bipartisan interpretation that had offered clear bright lines for employers, lawyers, and other consultants, has now announced a new, artificially narrow interpretation of "advice." *Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act*, 81 Fed. Reg. 15,924 (Mar. 24, 2016). This new interpretation excludes many communications that are obviously "advice" under the

ordinary meaning of that term—such as a consultant's suggestions on how to write a persuasive speech, or a recommendation from a law firm about a best course of action.

DOL contends that its cramped interpretation of "advice" is necessary because the prior interpretation did not give sufficient weight to the LMRDA's requirement that both "direct" *and* "indirect" persuasion activities be reported. But that is simply not true. DOL's longstanding interpretation did not render meaningless the reporting obligations for "indirect" persuader activity. Indeed, the D.C. Circuit previously found DOL's prior interpretation to be permissible—and DOL's rulemaking expressly concedes that it was. *Int'l Union v. Dole*, 869 F.2d 616, 620 (D.C. Cir. 1989) (R.B. Ginsburg, J.); 81 Fed. Reg. at 15,941. In finding its prior interpretation inadequate, DOL overlooked an interpretation of "indirect persuasion" that is perfectly compatible with the ordinary meaning of "advice." "Direct persuasion" refers to communications that forthrightly advocate a particular view of unionization, while "indirect persuasion" means persuasion through more subtle or oblique methods, such as statements endorsing a particular worldview or providing factual information without specifically opining on whether an employee should join a union. By its plain terms, the statute covers both forms of persuasive communications to employees, while exempting communications to employers that any English speaker would characterize as "advice."

Furthermore, DOL's new interpretation of the LMRDA's advice exemption is also contrary to the basic canons of statutory construction. For more than five decades, DOL adopted a clear, administrable interpretation of the advice exemption that cohered with the overall statutory context and scheme of the LMRDA and that advanced the intent of Congress. That longstanding interpretation avoided serious constitutional questions under the First Amendment and the Fifth Amendment—questions that DOL's new interpretation raises, rather than avoids.

Those issues are particularly important because violations of the reporting requirements for persuader activity in the LMRDA are subject to criminal penalties, and the rule of lenity requires that any statutory ambiguity be resolved in favor of lenity. Therefore, if there is any doubt as to the statute's proper interpretation, then DOL's prior, narrower interpretation of the reporting requirement and its broader interpretation of the advice exemption must govern. Because the statute, when interpreted in light of these canons, clearly precludes DOL's interpretation, that interpretation must be rejected under the first step of *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

Even if § 433 is ambiguous (and it is not), for these same reasons DOL's interpretation is unreasonable and therefore fails at *Chevron*'s second step. DOL's interpretation not only ignores the statutory text, structure and purpose, but also adopts an unworkably vague standard and imposes severe burdens on attorney-client confidences. Indeed, even if the literal text of § 433 is susceptible of more than one construction, the established canons of construction render DOL's new interpretation an impermissible resolution of any ambiguity.

In addition, DOL's rule is arbitrary and capricious. The Plaintiffs have identified numerous ways in which DOL's Rule falls short of the well-established requirements for reasoned decisionmaking. In this brief, the Chamber highlights one particular flaw, which is that DOL impermissibly undertook to reform two of the statute's three reporting requirements in open disregard of the consequences its decision would have for the third. DOL requires the use of three reporting forms: the LM-10, LM-20, and LM-21. Several commenters argued that DOL's new rule would impose particularly arduous reporting obligations with respect to the LM-21 form. DOL's answer was to address only the LM-10 and LM-20 form and defer its consideration of the LM-21 form to a future rulemaking. That response is irrational because

DOL's interpretation of "advice" will necessarily affect the reporting obligations with respect to the LM-21 form. DOL cannot just ignore those obligations when adopting its interpretation.

ARGUMENT

Plaintiffs seek to enjoin DOL from implementing and enforcing its new interpretation of the scope of the reporting obligations imposed by the LMRDA, 29 U.S.C. § 433. The agency adopted this new interpretation in a final rule published on March 24, 2016 ("the Rule"). 81 Fed. Reg. 15,924. Under the Rule, many agreements between employers and law firms and non-lawyer consultants, which previously were exempt under the LMRDA's advice exemption, now will be subject to the statute's reporting requirements on the ground that they involve "indirect[]" persuasion of employees, 29 U.S.C. § 433(b)(1), and do not constitute "giv[ing] advice," *id.* § 433(c). DOL previously interpreted the advice exemption to apply where, for example, a lawyer provided advice to an employer regarding union-organizing activities notwithstanding that the advice, if accepted by the employer, might result in the lawyer indirectly facilitating the employer's efforts to persuade employees not to join a union.

But now DOL interprets the reporting obligation to apply unless the lawyer or other consultant is engaged *solely* in advice that does not indirectly persuade. Because that new interpretation cannot be reconciled with the plain meaning of the statute, is contrary to the context and congressional purpose of the LMRDA, and is foreclosed by several established interpretive principles, it is entitled to no deference and should be set aside.

I. DOL's New Interpretation Is Unambiguously Foreclosed By The LMRDA.

Under the *Chevron* framework, an agency's interpretation governs "if it is a reasonable interpretation of the statute." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 (2009) (citing *Chevron*, 467 U.S. at 843-44). If DOL's interpretation is contrary to the clear meaning of the LMRDA, then "that is the end of the matter; for the court, as well as the agency, must give

effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. That is because any such interpretation would be unreasonable as a matter of law. *Entergy*, 556 U.S. at 218 n.4 ("[I]f Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable."). In assessing whether an interpretation is reasonable, the Court should employ all of the "traditional tools of statutory construction." *Chevron*, 467 U.S. at 843 n.9. Here, application of those traditional tools demonstrates that DOL's new interpretation of the LMRDA "goes beyond the meaning that the statute can bear." *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994).

A. The Plain Meaning of the Statute Cannot Be Reconciled With DOL's New Interpretation.

As traditionally understood, the LMRDA sets up a straightforward two-step inquiry. First, the statute imposes a reporting obligation on "activities where an object thereof is, directly or indirectly . . . to persuade employees" regarding unionization. 29 U.S.C. § 433(b)(1). Second, the statute carves out an exemption from the reporting requirement for certain activities, including "giv[ing] advice to [an] employer." *Id.* § 433(c). Thus, the statute states that the reporting obligation applies to all activities motivated by a particular purpose—*i.e.*, persuading employees regarding unionization—unless those activities constitute the giving of advice.

DOL's new interpretation transforms this straightforward statutory scheme into a complex and unadministrable hash. DOL reads the statute to create two mutually exclusive categories of activities: activities having the "object" to "persuade employees," and the giving of advice. According to DOL, if the purpose of a communication with an employer is to persuade employees not to join a union, then the communication ceases to be "advice." But this is obviously incorrect: many communications can be both "advice" *and* intended to persuade. Suppose, for example, that an employer has drafted a speech to deliver to employees about the

potential consequences of unionization. The employer contacts a consultant and specifically asks for "advice" about the speech. The consultant answers that her "advice" is to strike a more conciliatory tone, including, perhaps, by using certain suggested language in lieu of some of the original phrasing. Any English speaker would agree that the consultant has offered "advice" about the speech. Yet DOL's new interpretation would hold that this was not "advice" at all, because it had the ultimate object of helping the employer better persuade the employees. *See, e.g.*, 81 Fed. Reg. at 15,927 (advice exemption does not encompass "revising employer-created materials . . . if an 'object' of the revisions is to enhance persuasion"); *id.* at 15,939 ("revising an employer created document to further dissuade employees from supporting the union[] will trigger reporting"). That newly invented definition of "advice" simply cannot be reconciled with the plain meaning of the word. *See, e.g.*, *Merriam-Webster's Collegiate Dictionary* (10th ed. 2002) (defining "advice" as "recommendation regarding a decision or course of conduct: counsel").

Indeed, the implausibility of DOL's interpretation is underscored by the fact that the very same act apparently would be "advice" if it had a different motivation. For example, if the consultant's sole purpose was to help the company avoid unflattering press coverage, the same comments on the same speech would turn out to be "advice" after all. There is simply no way this distinction can be reconciled with the ordinary meaning of "advice."

DOL justified its extraordinary definition of "advice" as an effort to ensure that the advice exemption does not "override" the otherwise-applicable reporting obligation. 81 Fed. Reg. at 15,926. But "overriding" something is exactly what an exemption is *supposed* to do. Congress imposed a broad reporting obligation and then overrode it—in part—by exempting specified activities, including giving advice. If there were any doubt, the section's heading

makes its function crystal clear: it makes "[a]dvisory or representative services *exempt* from filing requirements." 29 U.S.C. § 433(c) (emphasis added); *see INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid in resolving an ambiguity in the legislation's text.").

DOL's effort to define persuader activities and advice giving so that they form non-overlapping categories is thus unnecessary, and indeed squarely at odds with the exemption regime that Congress adopted. Because DOL's new interpretation defies the "design and structure of the statute" and gives an unrecognizable meaning to the simple word "advice," it is foreclosed by Congress's clearly expressed intent. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2442 (2014) (quotation marks omitted).

According to DOL, however, the agency's cramped reading of the "advice" exemption is necessary because Congress decided to cover activities that aim "directly *or indirectly*" to persuade employees. 29 U.S.C. § 433(b) (emphasis added); *see, e.g.*, 81 Fed. Reg. at 15,925-26 ("This rule ensures that indirect reporter [sic] activity, as intended by Congress, is reported and disclosed . . . ."). Indeed, the agency relies on this argument in the very first sentence of the Rule: "The purpose of this rule is to revise the Department's interpretation of section 203 . . . to require reporting of 'indirect' persuader activities and agreements." 81 Fed. Reg. at 15,925. The central premise of this argument is that, under DOL's prior interpretation, the advice exemption swallowed the statute's express coverage of "indirect[]" persuasion.

But that premise is wrong; DOL's new interpretation is not necessary to give meaning to the LMRDA's coverage of "indirect" persuasion. The prior rule embraced by five decades of DOL's predecessors—across administrations of both parties—did not read "indirect" persuasion

out of the statute, or in any way render it a nullity. The prior interpretation simply understood the term differently—and far more plausibly—than DOL now suggests.

In ordinary usage, "direct" persuasion involves open, frank communication addressed to the question at issue, and "indirect" persuasion involves subtler or more oblique efforts to change a person's mind. If a piece of persuasive writing (such as a brief) is described as "direct," for example, that means that it is forthright and speaks squarely to the issue at hand. By contrast, if it is characterized as "indirect," that means it gets at the point more subtly or obliquely. Both are efforts to persuade the audience, but one style pursues this directly, and the other does so indirectly. For instance, if a person directly suggests that an employee not join a union, he is engaging in direct persuasion. If that person offers factual information about the history of unions, or mentions that an admired family member did not unionize, without offering a specific opinion on whether to join a union, he is engaging in indirect persuasion.

The phrase "indirectly persuade" is routinely used in precisely this way. *See, e.g.*, *Davis v. Halpern*, 768 F. Supp. 968, 985 (E.D.N.Y. 1991) (explaining that, under Title VII, a "plaintiff may indirectly persuade the court of pretext by showing that the employer's proffered explanation is not worthy of credence"); Brian Cogan & Tony Kelso, *Encyclopedia of Politics, the Media, and Popular Culture* 281 (2009) (describing a "denunciation of the George W. Bush administration that was designed to indirectly persuade the population to vote for democratic challenger Senator John Kerry"). To take another example, there is a substantial literature on the relative virtues of "direct" and "indirect" persuasion in advertising, where those terms are used in this same way.[1] Both forms of advertising are "direct" in the sense that they are *directed* at the

[1] *See, e.g.*, Edward F. McQuarrie & Barbara J. Phillips, *Indirect Persuasion in Advertising: How Consumers Process Metaphors Presented in Pictures and Words*, 34 J. Advertising 7 (2005);

consumer, with no intermediary; they simply differ in the way they go about persuading him or her of the virtues of a product.

As DOL's prior rule recognized, Congress sought to cover both of these forms of persuasion. That is, a persuader who resorts to *indirection* in communicating with employees, like a persuader who squarely urges a view about unionization, is subject to the statute's requirements. The "directly or indirectly" language thus precludes quibbling over whether the persuader was really trying to change an employee's mind on the ultimate question of unionization, rather than simply to inform the employee of certain relevant facts, to influence the employee's overall worldview, or the like. The statute short-circuits such debates because it applies *whenever* the speaker is trying to bring his audience around to a certain view about unionization—by whatever route, be it direct or indirect.

This understanding of "indirect" persuasion squares with the ordinary meaning of the statutory language, and it readily explains why the "advice" exemption, as previously construed, in no way swallows the reporting rule. But DOL did not fairly consider this longstanding and straightforward interpretation of the statute. Instead, it caricatured the old rule as simply omitting "indirect" persuasion altogether (which it did not), and proceeded to offer an extended attack on that straw man as a basis for its radical new understanding of the word "advice." Accordingly, the agency's new interpretation is an implausible solution in search of a problem.

B. Well-Established Canons of Construction Confirm That Congress Clearly Did Not Intend DOL's New Interpretation.

The *Chevron* analysis requires the Court to look not only to the plain text of the statute, but also to the various other tools that courts customarily employ to discern a law's meaning.

Youjae Yi, *Direct and Indirect Approaches to Advertising Persuasion: Which Is More Effective?*, 20 J. Bus. Res. 279 (1990).

See, e.g., *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (relying on the "ordinary canons of statutory construction" to discern whether the statute unambiguously forecloses the agency's reading); *see also City of Arlington v. FCC*, 133 S. Ct. 1863, 1876 (2013) (Breyer, J., concurring in part) (explaining that "the statute's text, its context, the structure of the statutory scheme, and canons of textual construction are relevant in determining whether the statute is ambiguous" and collecting cases to that effect).

In this case, three tools of statutory construction—context, constitutional avoidance, and the rule of lenity—confirm that Congress intended to exempt all advice offered to employers from the statute's reporting obligation. Accordingly, DOL's interpretation is entitled to no deference, and the Rule cannot stand.

1. Context Precludes DOL's New Interpretation.

"A fair reading of legislation demands a fair understanding of the legislative plan." *King v. Burwell*, 135 S. Ct. 2480, 2496 (2015). In this case, the plan is perfectly clear. Congress exempted "advice" from the reporting obligations in order to exempt legal advice, as well as that of non-lawyer consultants, about how to persuade employees on union issues. Congress had legal advice squarely in mind when it exempted "advice": other activities exempted in the very same statutory sentence were "representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer," which are the typical work of lawyers. 29 U.S.C. § 433(c). And Congress's intent to cover non-lawyer consultants is clear from Congress's use of the phrase "advice" rather than "legal advice"—a point confirmed by the legislative history. *See* S. Rep. No. 85-1684, at 8-9 (1958) ("Since *attorneys at law and other responsible labor-relations advisers* do not themselves engage in influencing or affecting

employees in the exercise of their rights under the National Labor Relations Act, an *attorney or other consultant* who confined himself to giving advice, taking part in collectively bargaining and appearing in court and administrative proceedings nor would such a consultant be required to report." (emphasis added)).

Thus, in context, the question before the Court is this: would the ordinary understanding of "legal advice" encompass efforts to assist a client in persuading a third party? The answer is obviously yes. Lawyers routinely assist their clients in persuading third parties. They advise companies poised to go public by drafting a prospectus; they help individuals and advocacy groups persuade legislators by drafting testimony; and so forth. All of this material is plainly encompassed in the ordinary meaning of "legal advice." *See, e.g.*, *Int'l Union*, 869 F.2d at 619 n.4 (R.B. Ginsburg, J.) ("the term 'advice,' in lawyers' parlance, may encompass, *e.g.*, the preparation of a client's answers to interrogatories, the scripting of a closing or an annual meeting" (citation omitted)). Yet DOL's new interpretation holds that none of this material is "advice"—apparently because the ultimate purpose of that material is to persuade someone of something. In light of Congress's evident purpose to exempt legal advice from the statute's coverage, that interpretation is untenable.

The same logic extends to consultants. The word "consult"—a synonym of "advise"—is ordinarily understood to encompass activities whose ultimate purpose is persuasion. A consultant might be retained to help prepare an effective presentation, for example, or to advise a company about the efficacy of different persuasive tactics. For example, an employer might be familiar with several different arguments against unionization—the cost of union dues, the possibility of inadequate union representation, or the like—and might seek advice from a consultant on which of those arguments would be the most effective in persuading its employees

not to join a union. Clearly, a consultant providing such work product is engaging in the act of "consulting"—and hence "advising." Given that such engagements were one of the paradigms for which the advice exemption was devised, it makes no sense to suppose that Congress meant to exclude such material from that same exemption merely because the purpose of the consulting arrangement was to persuade employees not to unionize. Rather, Congress unambiguously intended to exempt all such communications from the LMRDA's reporting requirements.

DOL's new interpretation also conflicts with the plain terms and context of the LMRDA in another respect. The statute specifically exempts from reporting the services of a consultant by reason of his "engaging or agreeing to engage in collective bargaining on behalf of [an] employer . . . or the negotiation of an agreement or any question arising thereunder." 29 U.S.C. § 433(c). The process of collective bargaining necessarily includes communications and conduct at the bargaining table, as well as those that occur before and after the bargaining session. *See generally Procter & Gamble Mfg. Co.*, 160 NLRB 334, 340-341 (1966). Indeed, as the Second Circuit aptly observed:

> Labor negotiations do not occur in a vacuum. While the actual bargaining is between employer and union, the employees are naturally interested parties. During a labor dispute the employees are like voters whom both sides seek to persuade. . . . [U]nions are granted extensive powers to communicate with employees in the represented unit. Consistent with the First Amendment, the employer must also be afforded an opportunity to communicate its positions.

NLRB v. Pratt & Whitney Air Craft Div., 789 F.2d 121, 134 (2d Cir. 1986) (citations omitted).

Although DOL's rule does not require reporting regarding persuader activities undertaken in formal collective bargaining sessions, it does require consultants to report communications "drafted by the consultant" for potential use by an employer "about the parties' progress in negotiations, arguing the union's proposals are unacceptable to the employer, encouraging employees to participate in a union ratification vote or support the union committee's

recommendations, or concerning the possible ramifications of striking." 81 Fed. Reg. at 15,971; *see id.* at 15,939 ("While many reports will be triggered by persuader activities related to the filing of representation petitions, *others will result from activities related to collective bargaining*. . . ." (emphasis added)).

Thus, no reporting is required for activities where a lawyer sits at the bargaining table, argues that the employer's proposals are fair and reasonable, and informs the union bargaining team that if they strike, the employer has the right to replace them on a temporary or permanent basis. But if the very same lawyer recommends to his client that they make those very same points to employees who were not at the bargaining table, or assists the employer in drafting any such communications, DOL's new rule transforms that work into reportable "persuader activities." That outcome finds no support in the text of the statute, and it "makes scant sense." *Mellouli v. Lynch*, 135 S.Ct. 1980, 1989 (2015) (declining to accord *Chevron* deference to an agency's "incongruous" parsing of a statutory scheme resulting in an interpretation that "makes scant sense"). DOL's interpretation therefore fails at *Chevron* Step 1.

2. Constitutional Avoidance Precludes DOL's New Interpretation.

The canon of constitutional avoidance is "a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). This indicator of Congress's intent is central to the determination whether Congress unambiguously resolved a question at *Chevron*'s first step. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988) (explaining at *Chevron* Step 1 that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid

such problems unless such construction is plainly contrary to the intent of Congress" (citations omitted)).

Even if DOL's new interpretation were textually permissible (and it is not), the constitutional doubts it raises would nonetheless preclude it. DOL does not—nor could it—deny that the prior interpretation, which it applied for fifty years, is a permissible reading of the statute. And the new reading clearly raises formidable constitutional difficulties that the prior reading did not. The canon of constitutional avoidance compels the conclusion that Congress intended the old rule.

First, DOL's new interpretation undermines the First Amendment justification for the statute's disclosure requirement. Because disclosure requirements impose a significant burden on constitutionally protected speech, they are, at a minimum, subject to "'exacting scrutiny,'" which requires a "'substantial relation' between the disclosure requirement and a 'sufficiently important' governmental interest." *John Doe No. 1 v. Reed*, 561 U.S. 186, 196 (2010) (internal quotation marks omitted). Specifically, in the election context, disclosure requirements are upheld only if they serve to ferret out misleading activities, such as the pernicious practice of running election-related advertisements "'while hiding behind dubious and misleading names,'" *McConnell v. FEC*, 540 U.S. 93, 197 (2003), which misleads voters and impairs the integrity of the marketplace of ideas.

That is very similar to the interest traditionally served by the LMRDA's disclosure requirements. As previously understood, those disclosure requirements ensure that, where employees are on the receiving end of anti-union messages by someone who cannot readily be identified as the employer's agent, they know if their employer is really behind those messages. That purpose reflects the "prime congressional concern to uncover employer-expenditures for

anti-union persuasion carried out, often surreptitiously, not by employers or supervisors, but by consultants or middlemen." *Int'l Union*, 869 F.2d at 619 n.5; *see* Pls. Br. at 4-7 (detailing legislative history). Indeed, the Senate Report on the legislation specifically observed that "public disclosure" of covered activities "will accomplish the same purpose as public disclosure of conflicts of interest." S. Rep. No. 86-187, at 12 (1959). This interest has served as the basis for decisions upholding the constitutionality of the LMRDA's reporting requirements under DOL's prior interpretation. *See, e.g.*, *Humphreys, Hutcheson & Moseley v. Donovan*, 755 F.2d 1211, 1222 (6th Cir. 1985); *Master Printers of Am. v. Donovan*, 751 F.2d 700, 707-08 (4th Cir. 1984).

DOL's new, narrow interpretation of the advice exemption, however, unmoors the LMRDA's reporting provision from this familiar interest. Informing employees that an employer has obtained advice from particular attorneys or consultants to help the employer be more persuasive does *not* help the employees to better understand the speaker's—that is, the employer's—incentives.[2] Nor does it serve to identify the real party in interest behind a communication (which is still the employer). The employer's incentives are the same whether or

[2] Indeed, that is especially true because the National Labor Relations Board ("NLRB") has truncated its representation case procedures so that a union campaign and election can—and now often does—occur in far less than 30 days. *See* Jennifer Abruzzo, Deputy General Counsel, National Labor Relations Board, UPDATE ON NLRB REPRESENTATION CASE RULE CHANGES 17 (October 2015) (noting a median of 23 days between the filing of the representation petition and an election), http://static.politico.com/90/7f/9962cd2d4f0bac217340c784a691/nlrb-data-on-representation-procedures.pdf. But the report due under the LMRDA must be filed only 30 days after an employer and a consultant have entered into an agreement. *See, e.g.*, 29 C.F.R. §406.2. Thus, the new reporting that DOL requires may be useless to employees in light of the NLRB's changes to the timing of union elections.

not it has obtained outside input, and the real party-in-interest is plainly the employer, not the consultant, regardless.[3]

DOL candidly acknowledges these distinctions from the disclosure interests previously credited by the courts, 81 Fed. Reg. at 15,985-86, which cannot support its new interpretation. Accordingly, the agency spins out a new theory: disclosure of consulting arrangements, it argues, provides "pertinent information" because it allows employees to put the employer's message "into the proper context." *Id.* at 15,986. It is highly dubious that this novel and sweeping interest would pass constitutional muster. *See, e.g.*, *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."). But, at a minimum, DOL's new theory raises grave constitutional questions that the traditional interpretation entirely avoids. Assuming that both interpretations are plausible, therefore, the constitutional avoidance canon dictates that the prior interpretation must be preferred.

Second, DOL's new interpretation construes the statute as imposing a content-based distinction, whereas the old interpretation did not. Under the prior rule, the statute's applicability turned on the speaker's *audience*. If a consultant addressed only the employer, disclosure was not required; if the same consultant addressed employees themselves, it was. *See* 81 Fed. Reg. at

[3] DOL's invocation of the Wizard of Oz in announcing the Rule is thus particularly inapt. *See* Office of Labor Management Standards, *Final Rule on Persuader Reporting Increases Transparency for Workers*, http://www.dol.gov/olms/regs/compliance/ecr_finalrule.htm (last updated Mar. 24, 2016) ("'Pay no attention to that man behind the curtain. The great Oz has spoken,' the actor Frank Morgan thundered in the famous 1939 movie."). This "man behind the curtain" interest aptly captures the *original* concern motivating (and justifying) the LMRDA. But it has nothing to do with DOL's new interpretation, which extends the rule to cases where the apparent speaker is *not* controlled by a hidden speaker and is serving its *own* agenda rather than someone else's.

15,925 (explaining that the prior rule "shield[ed] employers and their consultants from reporting agreements in which the consultant has no face-to-face contact with employees"). By contrast, under the new rule, the statute's application for the first time turns on what the speaker *says* to the employer.

This new regime implicates the First Amendment principle that the government may not engage in content discrimination, which inevitably skews the marketplace of ideas. DOL failed to appreciate the significance of this point because it focused only on the extent of the *burden* imposed by disclosure requirements. *See* 81 Fed. Reg. at 15,984. The costs of disclosure, the agency insists, are not so heavy that speakers will be deterred from exercising their rights. *See id.* But whatever the merits of this response, it entirely ignores an important aspect of the problem. The First Amendment strongly disfavors selective government interventions into the marketplace of ideas *whether or not* speech is being completely deterred. "The first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 835 (1995). Even if all the government proceeds to do is *subsidize* or *facilitate* the speech that it classifies favorably, that interference with the free market is presumptively impermissible. *Id.* at 834; *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 110 (2001).

DOL's new interpretation exposes the LMRDA to serious First Amendment doubts because, whether or not anyone is ultimately deterred from speaking, it marks a new intervention by the federal government into the marketplace of ideas. The examples set forth in the Rule make this clear. "For example, reporting is required if the consultant determines that a monthly bonus to employees should be the equivalent of one month's dues payments of the union

involved in an election." 81 Fed. Reg. at 15,973. But if the consultant simply offers *different* advice—such as offering "guidance on employer personnel policies and best practices" without touching on the union, *id.* at 15,928—no reporting obligation applies. This imposition of regulatory consequences based on the content of speech raises serious constitutional concerns—and that is putting it mildly. Indeed, both Congress and the Supreme Court have stressed the special importance of "encourag[ing] free debate on issues dividing labor and management" in the workplace. *Chamber of Commerce of U.S. v. Brown*, 554 U.S. 60, 67 (2008) (quotation marks omitted). The LMRDA should not be read to enact a system of selective, content-based speech regulations in this delicate area unless no alternative interpretation is available. Here, of course, the prior rule offers an alternative account—and indeed a more plausible one—that is free of this new form of constitutional doubt.

Third, DOL's new interpretation of the statute also threatens to render it unconstitutionally vague. The Due Process Clause proscribes any law that is "so standardless that it invites arbitrary enforcement," *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015), or which fails to give fair notice of what is prohibited, such that "men of common intelligence must necessarily guess at its meaning and differ as to its application," *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). As the Supreme Court has emphasized, these principles apply with particular force in the First Amendment context because vague regulations inevitably deter even unregulated speech. *See FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.").

Here, at a minimum, DOL's new interpretation unnecessarily steers the statute perilously close to "a vagueness shoal." *Skilling v. United States*, 561 U.S. 358, 368 (2010). Under the

prior rule, "advice" bore its ordinary meaning—and so long as consultants or attorneys were engaged in advising an employer, they could be confident they were not also involved in covered persuasion. Now, however, whether an activity constitutes "advice" will depend on the "object" or motive that a court may later impute to the consultant's speech—taking account of "the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking." 81 Fed. Reg. at 15,928. Attorneys and consultants will understandably balk at the prospect of having their speech parsed under this totality-of-the-circumstances test and will be forced to stay well clear of the line—chilling more protected speech than even DOL identifies in the Rule. Moreover, the Rule gives obscure and inconsistent instructions that will necessarily leave "men of common intelligence" to "guess at its meaning" in a given case. *Connally*, 269 U.S. at 391. For example, a consultant need not report if he merely provides the employer with a selection of "off-the-shelf" materials from which the employer may choose. 81 Fed. Reg. at 15,938. But if the consultant "plays an active role in selecting the materials," the reporting obligation applies. *Id.* It is entirely unclear what constitutes an "active role," or how large a menu of choices the consultant must provide the employer to avoid being accused of guiding the employer's selection. Likewise, a consultant may advise an employer regarding personnel policies, such as developing a grievance process. *Id.* at 15,939. But the very same action becomes reportable if an enforcement agency might infer from "the circumstances" that the policy had a purpose, at least in part, of obviating the need for union representation. *Id.*

By replacing a clear and determinate reporting rule with an ambiguous one, DOL's new interpretation once again exposes the statute to new, serious, and unnecessary constitutional doubts. It should be strongly disfavored on that basis.

3. The Rule of Lenity Precludes DOL's New Interpretation.

Violations of the reporting requirements in 29 U.S.C. § 433 are misdemeanor offenses, subject to criminal penalties of up to one year in jail and as much as a $10,000 fine, 29 U.S.C. § 439. Accordingly, any ambiguity in the scope of § 433 must "be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quotation marks omitted). The rule of lenity requires that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-22 (1952); *see id.* at 222 ("We should not derive criminal outlawry from some ambiguous implication.").

At a minimum, it is plausible to read the advice exemption as DOL did for the past fifty-plus years, *see Int'l Union*, 869 F.2d at 620; 81 Fed. Reg. at 15,941, and that reading avoids concerns about the scope and vagueness of the criminal penalties under this statute. As the Supreme Court has explained, "[I]f a statute has criminal applications, 'the rule of lenity applies' to the Court's interpretation of the statute" even in noncriminal cases, "'[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.'" *Martinez*, 543 U.S. at 381 (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2004)).

II. DOL's New Interpretation Is An Untenable Resolution Of Any Ambiguity In The Statute.

Even if the LMRDA does not unambiguously preclude DOL's new interpretation of the advice exemption, the Court may not defer to DOL's view as "a permissible construction of the statute" under *Chevron*, 467 U.S. at 843, because it is not "a reasonable interpretation" of the law. *Id.* at 844.

Each of the considerations raised above functions not only as a reason that DOL's new interpretation is contradicted by the statute's unambiguous meaning, but also as a reason why resolving any remaining ambiguity as DOL has done is unreasonable. *See Mayo Foundation for Medical Educ. & Research v. United States*, 562 U.S. 44, 53 (2011) (noting that *Chevron*'s second step requires consideration of "whether the agency's answer is based on a permissible construction of the statute" (quotation marks omitted)). Those reasons include the plain meaning of the statute (including the word "advice"); its context and manifest purpose; the canon of constitutional avoidance; and the rule of lenity. This overwhelming case against DOL's new interpretation places it beyond "the bounds of reasonable interpretation." *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (quotation marks omitted). And the unreasonableness of the agency's interpretation is confirmed by the fact that—notwithstanding Congress's clear intent to protect attorneys from being required to disclose confidential information, *see* 29 U.S.C. § 434—the Rule construes the statute to mandate disclosure of highly sensitive information regarding the nature and scope of the representation. Moreover, as the plaintiffs rightly point out, an attorney seeking to defend himself under the statute will be compelled to disclose the purpose of the work for which he was retained, a fact that goes to the heart of the confidential attorney-client relationship. *See* Pls. Br. 46. Accordingly, the Rule would fail at *Chevron*'s second step even if it made it past the first.

III. DOL's New Interpretation Is Arbitrary and Capricious.

In addition, the Rule should be set aside under the Administrative Procedure Act because it is arbitrary and capricious. *See* 5 U.S.C. § 706(2)(A). The Plaintiffs have identified numerous ways in which DOL's Rule falls short of the well-established requirements for reasoned decisionmaking. Pls. Br. 26-32. In this brief, the Chamber highlights one flaw in particular, which is that DOL impermissibly undertook to reform two of the statute's three reporting

requirements in open disregard of the consequences its decision would have for the third. That manner of proceeding allowed the agency to avoid engaging with serious objections to its proposed approach and thereby rendered its decision-making process irrational.

The LMRDA imposes three distinct reporting requirements. First, a consultant who is engaged by an employer for purposes of covered activity must file a report within thirty days of entering into such a relationship. 29 U.S.C. § 433(b). DOL has prescribed Form LM-20 for this purpose. Second, an employer who engages in any such arrangements must file a year-end report covering all such activities for the past year. *Id.* § 433(a). DOL has prescribed Form LM-10 for that purpose. And finally, a consultant who has engaged in any covered activities must also file a year-end report, which must detail its receipts and disbursements in connection with its work. *Id.* § 433(b). DOL has prescribed Form LM-21 for that purpose.

In the rulemaking at issue here, DOL overhauled its interpretation of what must be reported on Forms LM-20 and LM-10—that is, the consultant's per-engagement report, and the employer's annual report. Since the reporting requirements embodied in Form LM-21 are triggered by whether a person engages in any covered activity under the LMRDA, 29 U.S.C. § 433(b), these changes necessarily overhauled who will be subject to the annual reporting obligation implemented by Form LM-21.

Yet DOL refused to consider the ramifications of its new statutory interpretation in light of the additional demands imposed by the consultant's annual report (Form LM-21). Rather, the agency consigned such concerns to a separate rulemaking, which it estimates will give rise to a proposed rule in September 2016. 81 Fed. Reg. at 15,992 & n.88. In particular, the ABA and other commenters had forcefully argued that the agency's new construction of the statute would subject far more lawyers to an unreasonable and potentially unconstitutional mandate to disclose

vast amounts of privileged and confidential information. *Id.* at 15,999-16,000. Indeed, the Chamber and a broad coalition of business groups and other associations explicitly told both the Secretary of Labor and the Office of Information and Regulatory Affairs that it should address Form LM-21 in the same rulemaking as Form LM-10 and Form LM-20, in light of the overlapping issues. *See* Letter to the Honorable Thomas Perez, Secretary of Labor, Request to Consolidate the Proposed Persuader Advice Exemption Rule with the Impending Proposal to Change Form LM-21 (Feb. 19, 2014) (attached as Exhibit A); Letter to the Honorable Howard Shelanski, Administrator of OIRA, Request To Consolidate The Proposed Persuader Advice Exemption Rule (RIN: 1245-AA03) With The Impending Proposal To Change Form LM-21 (RIN: 1245-AA05) (Dec. 18, 2015) (attached as Exhibit B). Yet, rather than respond to these serious concerns, DOL faulted the commenters for "fail[ing] to note that this rulemaking focuses exclusively on the Form LM-20, not the Form LM-21." 81 Fed. Reg. at 16,000.

Agencies may ordinarily proceed incrementally and confront one facet of a broad regulatory problem at a time. But they may not enact "a rule that utterly fails to consider how the likely future resolution of crucial issues will affect the rule's rationale." *Nat'l Ass'n of Broad. v. FCC*, 740 F.2d 1190, 1210 (D.C. Cir. 1984). Moreover, "an agency does not act rationally when it chooses and implements one policy and decides to consider the merits of a potentially inconsistent policy in the very near future." *ITT World Commc'ns, Inc. v. FCC*, 725 F.2d 732, 754 (D.C. Cir. 1984).

In this case, there are only two possibilities. The first is that DOL will reconsider the scope of the advice exemption in good faith in the course of its Form LM-21 rulemaking, this time considering the costs that its new definition will impose by virtue of the annual reporting obligation imposed on attorneys and consultants. If that were the case, the agency's decision to

implement the policy without regard to those costs—only to reconsider it "in the very near future"—would be irrational. *ITT World Commc'ns,* 725 F.2d at 754. The second possibility is that DOL has already made up its mind about the scope of the advice exemption through *this* rulemaking, while artificially excluding important costs of its approach from consideration by deferring them to the next one, when the issue will already have been resolved. In other words, DOL structured its decision-making in such a way that it "'entirely failed to consider an important aspect of the problem.'" *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 658 (2007) (quoting *Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). In either event, the Rule is arbitrary and capricious and should be set aside. And at an absolute minimum, the implementation of the revisions to Forms LM-10 and LM-20 should be stayed until DOL has completed its rulemaking regarding the revisions to Form LM-21.

CONCLUSION

For the foregoing reasons, the Chamber respectfully contends the Court should grant the Plaintiffs' motion for a preliminary injunction.

Dated: April 8, 2016

Respectfully submitted,

By: _____

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Exhibit A

February 19, 2014

The Honorable Thomas Perez
Secretary of Labor
U.S. Department of Labor
200 Constitution Avenue NW
Washington DC 20210

Re: Request To Consolidate The Proposed Persuader Advice Exemption Rule With The Impending Proposal To Change Form LM-21

Dear Secretary Perez:

The undersigned represent millions of employers who employ many millions of employees throughout the United States. Nearly all of the undersigned submitted comments to the Office of Labor-Management Standards ("OLMS") during the comment period following the DOL's Notice of Proposed Rulemaking ("NPRM") in the summer of 2011 requesting that the proposed persuader rule be withdrawn. We reiterate that position now, but write to highlight additional issues.

In particular, we wish to advise you of our concerns regarding the Department of Labor's Current Regulatory Agenda (most recently published in Fall 2013). That agenda indicates that the DOL is considering publication of a final rule in March 2014 revising its interpretation of Section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA"), more commonly referred to as the "advice exemption" to the LMRDA, without first addressing likely significant changes to the Form LM-21, a major component of the persuader reporting process. We are writing to ask that in the event that the proposed rule is not withdrawn in its entirety, that these two closely related rulemakings be consolidated, and that the "advice exemption" rule not be issued until the LM-21 rule is finalized also.

Unfortunately, although the Department's proposed rule states that offering "seminars, webinars, or conferences" in certain circumstances could trigger the reporting requirements, it is devoid of any instruction as to what information must be reported on Form LM-21. Would an organization holding a seminar, webinar, or conference be required to disclose everyone who attends the seminar, webinar, or conference, or everyone who downloads or otherwise gets access to the materials? Potentially subjecting millions of organizations and individuals to such disclosure obligations without clarifying what, exactly, must be included in such a report is illogical.

As more fully explained below, the two proposed rule changes are so closely intertwined as to foreclose issuance of one without the other. Moreover, the full cost impact of the proposed change to the advice exemption cannot accurately be measured without knowledge of the scope of the proposed changes to the LM-21 rule. Finally, the very serious concerns over the impact of the changes to the advice exemption may be magnified or mitigated by the as yet unknown changes to the Form LM-21. For each of these reasons, we request that the DOL postpone further consideration of the advice exemption rulemaking and/or re-open the NPRM to allow consolidation of that rule with any proposed changes to the Form LM-21, as the latter rule

impacts the cost of compliance and the impact of both rules on the ethical obligations that attorneys owe to their clients.[1]

The DOL's Fall 2013 Regulatory Agenda

The Fall 2013 Regulatory Agenda provided estimated dates for the DOL's publication of the final rule regarding the interpretation of the advice exemption and the issuance of a NPRM regarding changes to Form LM-21, the "Receipts and Disbursements Report" that persuaders with reporting obligations under the LMRDA are required to submit annually. These timelines are included, respectively, in Regulation Identification Numbers ("RIN") 1245-AA03 and 1245-AA05.

The DOL aims to publish the final rule regarding the DOL's revised interpretation of the advice exemption in March 2014. The final rule, if it is published in a manner consistent with the June 2011 NPRM, will result in significant changes to the manner in which the LMRDA is construed and enforced. Three of the significant changes are as follows:

- The DOL's revised interpretation of the advice exemption will expand the scope of reporting obligations under the LMRDA by narrowing the scope of the advice exemption. Since 1962, the DOL has interpreted the advice exemption to exclude from the LMRDA's reporting requirements circumstances in which a person or entity provides advice to an employer regardless of whether the content of that advice also had a persuasive component. Under the revised interpretation, an employer's duty to report will be triggered if "persuading employees is an object, direct or indirect, of the person's activity pursuant to an agreement or an arrangement with an employer." NPRM at 36191.

- The pending rule will define "persuasion" to cover activities that influence the decisions of employees with respect to any "protected, concerted activity in the workplace." NPRM at 36191, 36192.

- The rule will include changes to Forms LM-10 and LM-20, which employers and persuaders who engage in reportable activity under the LMRDA, respectively, are required to submit to OLMS.[2]

[1] There is recent and relevant precedent for delaying certain employer reporting requirements when integral components of the process remain unfinalized. In drafting the regulations implementing employer and insurer reporting requirements under Sections 6055 and 6056 of the Affordable Care Act, the Administration recognized that it made little sense to institute a reporting obligation without first clarifying what was to be reported. Consequently, the Administration has delayed the employer mandate until it can issue regulations which implement the employer and insurer reporting obligations. Similarly, DOL should do the same with the NRPM regarding the "advice exemption" and the yet to be initiated Form LM-21 rule making process. It makes little sense to advise "persuaders" they must track and report "other labor relations services" without first telling those "persuaders" what that phrase actually means.

[2] An employer must submit its Form LM-10 within ninety days of the conclusion of the employer's fiscal year. A persuader must submit the Form LM-20 within thirty days of the persuader's agreement with an employer to perform reportable activity.

According to the Fall 2013 Regulatory Agenda, the DOL also "intends to a publish a notice and comment rulemaking seeking consideration of the Form LM-21." That rulemaking "will propose mandatory electronic filing for Form LM-21 filers, and it will review the layout of Form LM-21 and its instructions, including the detail required to be reported." (Emphasis added.) According to the Regulatory Agenda, the DOL will not issue the NPRM regarding the proposed changes to the Form LM-21 until October 2014 – seven months after the DOL's scheduled publication of the final rule regarding the advice exemption.

The DOL Should Postpone Implementing Its Final Rule Regarding Its Revised Interpretation Of The Advice Exemption Until The Department Implements Its Final Rule Regarding Any Proposed Changes To The Form LM-21.

We respectfully request that the DOL consolidate these two closely related and intertwined rules. The DOL should refrain from publishing its final rule regarding the DOL's revised interpretation of the advice exemption until the DOL publishes its final rule regarding the Form LM-21. Given the significant impact of the DOL's revised interpretation of the advice exemption, and the DOL's reversal of an interpretation that has been in effect for over fifty years, it is imperative that the DOL refrain from publishing the final rule until it publishes its changes to the Form LM-21.

The DOL requires a person or entity that enters into a reportable persuader agreement with an employer to submit a Form LM-21 within ninety days after the completion of the persuader's fiscal year. In the Form LM-21, the persuader must disclose, among other things, "all receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services" and all disbursements made "in connection with labor relations advice or services rendered to [those employers]." Accordingly, it is critical that a persuader diligently track the nature and scope of services provided in each fiscal year, as well as the persuader's receipts from employers and disbursements.

The DOL has not provided any guidance or suggestion as to the "detail required to be reported" on the revised Form LM-21.[3] In the absence of direction from the DOL regarding the information that persuaders will need to report on the new Form LM-21, "persuaders" who incur reporting obligations will be required to speculate regarding the information they must track in order to comply with the new Form LM-21's requirements. This uncertainty is even more problematic for the persons or entities that previously were exempted from filing Form LM-21s, but will incur a reporting obligation under the LMRDA's revised interpretation of the advice exemption.

There are several pending issues regarding the Form LM-21 that will require clarity, especially in light of the upcoming rule regarding the advice exemption. For example, there has been a longstanding split among the federal appellate courts regarding the propriety of the existing Form LM-21's requirement that a persuader disclose all activities that the persuader performed on behalf of all the employers it had a relationship with during the fiscal year, including employers to which the persuader did not provide any persuader services. Some circuits have

[3] In the NPRM, the DOL submitted proposed Forms LM-10 and LM-20 in light of the planned revised interpretation of the advice exemption. The DOL did not submit any proposed revisions to the Form LM-21.

upheld the DOL's position. *See, e.g., Humphreys, Hutcheson and Moseley v. Donovan,* 755 F.2d 1211 (6th Cir. 1985)*; Master Printers Association v. Donovan,* 699 F.2d 370 (7th Cir. 1983); *Douglas v. Wirtz,* 353 F.2d 30, 32 (4th Cir. 1965); *Price v. Wirtz,* 412 F.2d 647, 651 (5th Cir. 1969). However, the Eighth Circuit Court of Appeals has reached a different conclusion and held that a persuader's LM-21 report need not disclose the services the persuader provided to employers to which the persuader did not provide any persuader services. *Donovan v. Rose Law Firm*, 768 F.2d 964, 975 (8th Cir. 1985). Given that the putative rule regarding the advice exemption will unquestionably broaden reporting requirements, it is inevitable that this legal issue will be revisited after the final rule is published. Accordingly, it is essential that all issues regarding the scope and propriety of the new Form LM-21's requirements be resolved prior to the publication of the final rule regarding the advice exemption.

The lack of clarity regarding specific Form LM-21 reporting obligations will create a tremendous burden on employers and labor law and human resources professionals. Parties entering into arguably reportable "persuader" relationships will need to implement new processes to ensure that all time and expenses relating to the persuader's services are properly recorded. Labor lawyers and human resources professionals will be required to inform their employer-clients regarding the new reporting obligations and the employers' obligation to gather and provide specific information to the DOL. Employers, in turn, will then need to inform and train their employees regarding the information that must be recorded and maintained for submission to the DOL. Without definitive direction or instruction from the DOL regarding the new Form LM-21, employers and labor relations professionals will have no choice but to speculate regarding what information will need to be recorded disclosed on a Form LM-21. This creates an unmanageable burden for employers and their consultants and lawyers.

Moreover, issuing a final rule on the advice exemption and then subsequently modifying the Form LM-21, an integral form for consultants who engage in any reportable persuasion activity in a given year, will cause duplicative and unnecessary costs. If the final rule on the advice exemption is published before any rule regarding the requirements of the Form LM-21, affected persons will have to modify their information systems to comply in the context of the existing form. Issuing a revised form later will result in another costly round of review, analysis and information systems modifications by affected companies or persons. If the DOL issues the Form LM-21 NPRM before it issues the final rule regarding the advice exemption, then the DOL can consider comments on the Form LM-21 that may also be relevant to its consideration regarding the final rule on the advice exemption.

In light of the foregoing, the DOL should refrain from publishing its final rule regarding the advice exemption until the DOL publishes its final rule regarding the Form LM-21. Employers and consultants that will incur reporting obligations under the new interpretation of the advice exemption should not be required to wait several months, if not years, for the DOL to provide clarity regarding the information that they will need to disclose as a result of the revised Form LM-21.

Any Changes To The Form LM-21 Will Directly Impact The Cost Analysis Underlying the Advice Exemption Rule As Well As The Impact Of Both Rules On The Ethical Obligations of Attorneys.

As has been argued in many previous comments, the June 2011 NPRM on the advice exemption failed to provide sufficient consideration and analysis regarding the costs that will be imposed by the significant change encompassed by that rule. Moreover, the NPRM failed adequately to consider the impact of the revised interpretation on the ethical obligations that attorneys owe to their clients. Each of these defects will be greatly exacerbated by subsequent publication of changes to the LM-21 whose scope is not yet known. Indeed, absent publication of the final rule on changes to the LM-21, the DOL cannot properly calculate the costs of the advice exemption rule change nor can it properly analyze the impact of the advice exemption change on the attorney-client ethical obligations.

The June 2011 NPRM's Cost Analysis Regarding The Pending Change In The DOL's Advice Exemption Is Inadequate, In Light Of The Planned Changes To The LM-21.

In the June 2011 NPRM, the DOL provided an analysis regarding its estimate of the costs that will result due to change in the DOL's interpretation of the advice exemption. The DOL's analysis is insufficient, and it severely underestimates the true costs of the pending rule change.

The gist of the DOL's regulatory cost-benefit analysis is that the proposed change in the advice interpretation will burden the economy in an amount just over $826,000 annually. The DOL reached this conclusion based on its assumption that only employers that retain consultants during union representation election campaigns retain persuaders in a manner that would incur reporting obligations under the new rule. As at least some comments have noted, this estimate is woefully inadequate and the initial annual cost of the proposed rule may be as high as $2 billion.[4]

Indeed, the NPRM failed to take into consideration the fact that the new rule will impose reporting obligations on a broader population. As explained above, the rule significantly narrows the advice exemption. Moreover, the pending rule expands reporting requirements to encompass any persuasion regarding "any protected concerted activity . . . in the workplace." NPRM at 36178, 36192, 36211. As such, the pending rule will significantly increase the number of employers and consultants that will incur reporting obligations.

Furthermore, the June 2011 NPRM significantly underestimated the number of employers that will be affected by the rule. The DOL's estimated number of employers subject to reporting requirements under the pending rule – 3,414 – represents *less than 1.5 percent* of the number of employers with 50 or more employees, many of which are likely to incur reporting obligations under the new rule.[5]

[4] *See* Letter from Randel K. Johnson, Senior Vice President, U.S. Chamber of Commerce to Andrew R. Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor (September 21, 2011).

[5] *See id*., at pg. 8 (noting 2008 U.S. Census data shows 236,012 private business firms had 50 or more employees).

The NPRM also grossly underestimated the number of persons or firms that will incur reporting obligations under the new rule, as well as the time and costs employers and persuaders will incur in order to comply with the new rule. The DOL estimates that employers will spend only two hours each year completing the Form LM-10, with the assistance of counsel, and persuaders will only spend one hour on the Form LM-20. This estimate is insufficient because it fails to account for the fact that employers will need first to research and determine whether they are required to submit a Form LM-10 based on any activities during the year before they spend any time and/or resources completing and submitting a Form LM-10.

The NPRM also grossly underestimated the time that labor relations consultants, human resources professionals, and labor lawyers will need to spend to ensure compliance with the new rule. The NPRM assumes that "persuaders" will only need to devote one hour each year on compliance with the LMRDA, but presented no factual basis for the time needed to compile information, to determine what activities may be reportable and to actually complete and submit the required forms. In short, there is no evidence presented that the NPRM's time estimates have any basis in fact or reality.

All of the foregoing problems with the cost analysis of the advice exemption rule will be exacerbated by any changes to the Form LM-21. Without knowing the scope of those changes, neither employers nor their consultants can ascertain the full burden of compliance with the annual reporting requirement, which directly impacts the burden of filing the LM-10 and LM-20 reports. The DOL's failure to consider the likely changes to the Form LM-21 together with the other forms is a serious flaw in the regulatory analysis which can only be redressed by consolidating the two rules and analyzing their impact jointly.

The June 2011 NPRM Failed To Account For The Impact Of The Planned LM-21 Rule Change On Attorneys' Ethical Obligations.

The DOL should also reopen the NPRM because the pending rule compels attorneys who practice labor and employment law to violate their ethical responsibilities to their clients. The planned changes to the LM-21 exacerbate this problem also.

The LM-21, in combination with the proposed change to the advice exemption, will require an attorney who provides advice that will for the first time be deemed to be reportable persuader "advice" activity to report the existence of all attorney-client relationships, the identities of all clients, the general nature of all legal representations, and the legal fees and disbursements billed by the attorney for all labor relations activities for an entire year for all of the attorney's employer clients—regardless of whether the attorney engaged in any persuader activities for such clients.[6]

In combination with the foregoing LM-21 requirements, the proposed advice exemption rule requires lawyers who incur reporting obligations as a result of their provision of advice regarding matters of persuasion to disclose the identities of their clients, the nature of their representation of clients, the fees received from those clients, and other confidential information. Attorneys

[6]As explained above, there is a split among the federal circuit courts regarding whether the DOL's Form LM-21 instruction in this regard.

who make these disclosures of confidential client information will be in direct conflict with Rule 1.6(a) of the Model Rules of Professional Conduct, which provides that a "lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."

Recognizing this ethical dilemma, the American Bar Association opposed the rule after the DOL issued the June 2011 NPRM, explaining that the rule is "clearly inconsistent with lawyers' existing duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule." The ABA stated that it was "defending the confidential client-lawyer relationship and urging the [DOL] not to impose an unjustified and intrusive burden on lawyers and law firms and their clients." As the ABA further explained:

> The range of client information that lawyers are not permitted to disclose under ABA Model Rule 1.6 is broader than that covered by the attorney-client privilege. Although ABA Model Rule 1.6 prohibits lawyers from disclosing information protected by the attorney-client privilege and the work product doctrine, the Rule also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential. This category of non-privileged, confidential information includes the identity of the client as well as other information related to the legal representation, including, for example, the nature of the representation and the amount of legal fees paid by the client to the lawyer.

See Letter from Wm. T. (Bill) Robinson III, President of the American Bar Association, to the Office of Labor-Management Standards, U.S. Department of Labor (September 21, 2011).

All 50 states and the District of Columbia follow the ABA's Model Rule 1.6 (or a similar rule) and maintain ethical restrictions against disclosing client identity or fees paid by the client without the client's permission. There is a direct conflict between the ethical restrictions imposed by these state laws and the obligations imposed by the DOL's new Rule as outlined above. Recognizing this conflict, the State Bar Associations of Arizona, Florida, Georgia, Illinois, Michigan, Mississippi, Missouri, Nevada, Ohio, South Carolina, and Tennessee submitted letters to OLMS endorsing the ABA's position and requesting the withdrawal of the rule. Moreover, the Attorney Generals for the states of Michigan, Texas and Idaho have written letters to OLMS requesting that the rule be withdrawn because of the impact it will have on attorneys' ethical obligations.

As noted in the ABA's letter, by forcing attorneys to disclose confidential information regarding their employer clients, the proposed rule could chill and undermine the confidential attorney-client relationship. The rule could discourage employers, who do not wish to have such confidential information disclosed, from seeking any legal advice that relates in any manner to persuasion. Accordingly, the rule could effectively deprive employers of their right to counsel.

In the June 2011 NPRM, the DOL failed to address these issues in an adequate manner. Instead, the DOL simply cited Section 204 of the LMRDA for the proposition that ". . . privileged matters

are protected from disclosure." NPRM 36192. The DOL also did not address the fact that the rule requires disclosure of legal advice to the extent the legal advice became "intertwined" with advice as to persuasion. Most importantly, the 2011 NPRM did not address the issue of the Form LM-21's required disclosure by counsel of confidential information of clients that were not engaged in persuasion.

Because the planned changes to the Form LM-21, whatever they may be, will directly impact the scope of attorneys disclosures of confidential information in conjunction with the changed interpretation of advice, the two rules must be considered together. Particularly in light of the June 2011 NPRM's inadequate consideration of the effect of the rule on attorneys' ethical obligations, it is imperative that the DOL reopen the NPRM and consolidate it with the planned change to the Form LM-21.

Conclusion

For the foregoing reasons, we believe it is essential that the DOL consolidate the advice exemption rule change with the planned change to the Form LM-21. The DOL should therefore postpone its publication of any final rule regarding the revised interpretation of the advice exemption until the proposed rule on Form LM-21 is published for notice and comment and finalized together with the advice exemption rule. Given the significant issues that remain outstanding with regard to both rules, it is imperative that the DOL give further consideration to them in a consolidated proceeding.

Thank you for your consideration of this necessary request. Should you need any further information regarding these matters, please do not hesitate to contact us.

Sincerely,

Agricultural Retailers Association
Air Conditioning Contractors of America
American Apparel & Footwear Association
American Bakers Association
American Fire Sprinkler Association
American Meat Institute
American Rental Association
American Staffing Association
American Trucking Associations
Assisted Living Federation of America
Associated Builders and Contractors
Associated General Contractors
American Hotel & Lodging Association
Asian American Hotel Owners Association
Association of Equipment Manufacturers
Association for Manufacturing Technology
Automotive Aftermarket Industry Association
Building Owners and Managers Association International

Food Marketing Institute
Forging Industry Association
HR Policy Association
Industrial Fasteners Institute
International Franchise Association
Independent Electrical Contractors
International Foodservice Distributors Association
International Warehouse Logistics Association
Metal Service Center Institute
Motor & Equipment Manufacturers Association
National Association of Home Builders
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Automobile Dealers Association
National Club Association
National Council of Chain Restaurants
National Council of Textile Organizations
National Federation of Independent Business
National Grocers Association
National Lumber and Building Material Dealers Association
National Ready Mixed Concrete Association
National Retail Federation
National Roofing Contractors Association
National Stone, Sand and Gravel Association
National Tooling and Machining Association
North American Die Casting Association
Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Retail Industry Leaders Association
Snack Food Association
SPI: The Plastics Industry Trade Association
Society for Human Resource Management
Truck Renting and Leasing Association
U.S. Chamber of Commerce

CC: Rep. John Kline, Chairman, House Committee on Education and the Workforce

Rep. George Miller, Ranking Member, House Committee on Education and the Workforce

Rep. Jack Kingston, Chairman, House Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Rep. Rosa DeLauro, Ranking Member, House Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Sen. Tom Harkin, Chairman, Senate Committee on Health, Education, Labor and Pensions; Chairman, Senate Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Sen. Lamar Alexander, Ranking Member, Senate Committee on Health, Education, Labor and Pensions

Sen. Jerry Moran, Ranking Member, Senate Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Education, and Related Agencies

Sen. Ron Johnson

Cecilia Munoz, Assistant to the President and Director of the Domestic Policy Council

Howard Shelanski, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget

Bill Schuette, Attorney General of Michigan

Greg Abbott, Attorney General of Texas

Lawrence Wasden, Attorney General of Idaho

Exhibit B

December 18, 2015

Via Electronic and U.S. Mail

The Honorable Howard Shelanski
Administrator, Office of Information and Regulatory Affairs
Office of Management and Budget
1650 Pennsylvania Avenue NW, Room 262
Washington, DC 20503

Re: Request To Consolidate The Proposed Persuader Advice Exemption Rule (RIN: 1245-AA03) With The Impending Proposal To Change Form LM-21 (RIN: 1245-AA05)

Dear Administrator Shelanski:

The undersigned represent millions of employers who employ many millions of employees throughout the United States. We write to notify you of serious procedural and substantive concerns that we have with the above-captioned rulemakings. The Department of Labor's (DOL) proposed persuader advice exemption rule is so closely intertwined with DOL's proposal to make changes to the yearly receipts and disbursement report (Form LM-21), that the two rulemakings should proceed concurrently, rather than separately as currently indicated.[1] Accordingly, we respectfully request that the proposed persuader advice exemption rule be returned to DOL in order to be consolidated with DOL's inextricably linked proposal to change Form LM-21.

The most recent Regulatory Agenda (Agenda), published on November 19, 2015, notes that the proposed persuader advice exemption rule is scheduled to be finalized in March, 2016.[2] The Agenda further notes that a notice of proposed rulemaking to make changes to Form LM-21 is not even scheduled to issue until six months later, in September, 2016. Form LM-21 is the reporting form that the persuader must file which discloses "all receipts from employers in connection with labor relations advice…" Making changes to the persuader advice exemption without

[1] Proposed changes to other applicable forms in the persuader reporting process – Forms LM-10 and LM-20 – were appropriately included in the proposed persuader exemption rule. It follows that the third reporting form, LM-21, should be included, as well.
[2] The proposed rule was sent to your office for review on December 7, 2015.

making concurrent changes to Form LM-21 renders the form obsolete and potentially undermines the persuader reporting process.

We made Secretary Perez aware of our concerns via the attached letter dated February, 2014, but received no response. While the date on the calendar has fast-forwarded approximately 10 months, the substantive issue still remains: DOL appears to be finalizing its final persuader rule without making the necessary changes to Form LM-21. Proceeding in this manner: (1) will create confusion for "persuaders" who will be forced to speculate as to what type of information must be recorded on Form LM-21; (2) will lead to duplicative costs as consultants will have to modify their reporting systems twice instead of once; (3) will lead to second-guessing by the Office of Labor-Management Standards as to what should be reported on Form LM-21; and (4) will obscure the true economic burden of the two proposals. These rulemaking deficiencies are explained in further detail in the attached February, 2014 letter to Secretary Perez.

Substantively, the proposed narrowing of the "advice" exemption under the Labor Management Reporting and Disclosure Act would remove the "bright-line" reporting test of direct communication with employees and replace it with a confusing subjective test involving the intent of the agreement between the employer and its attorney or consultant. The proposal would also increase the scope of covered "persuader" activity to cover any "protected, concerted activity in the workplace," the definition of which has expanded greatly under the current National Labor Relations Board. If implemented as proposed, the onerous reporting scheme and penalties will likely lead to a decrease in the labor-related legal services available to employers. Perversely, this may result in an increase in unfair labor practice allegations, as many employers – particularly small employers who do not have labor relations experts on staff – will be forced to navigate the complexities of federal labor law on their own and without legal counsel. These issues are only exacerbated by the current piece-meal approach to the persuader advice exemption and Form LM-21 rulemakings.

DOL should consolidate its proposed persuader rule with its planned changes to Form LM-21. Therefore, we respectfully request that the persuader rulemaking be returned to DOL to allow the Department to undertake an appropriately comprehensive rulemaking. Proceeding in this fashion is sound rulemaking and will provide greater clarity for the regulated community.

Thank you for your attention to this matter. Please do not hesitate to contact us with any questions.

Sincerely,

ACCA-The Indoor Environment & Energy Efficiency Association
American Foundry Society
American Home Furnishings Alliance
American Hotel & Lodging Association
American Rental Association
American Society of Employers
American Staffing Association
AMT- The Association for Manufacturing Technology
Argentum (formerly ALFA)
Arizona Builders Alliance
Arkansas Hospitality Association
Arkansas hospitality association
Arkansas State Chamber of Commerce
ASAE
Associated Builders & Contractors – Central PA Chapter
Associated Builders & Contractors, Inc. - New Orleans/Bayou Chapter
Associated Builders and Contractors
Associated Builders and Contractors of Georgia, Inc.
Associated Builders and Contractors of Iowa
Associated Builders and Contractors of Maine
Associated Builders and Contractors of Metro Washington
Associated Builders and Contractors of the Carolinas
Associated Builders and Contractors of Wisconsin
Associated Builders and Contractors -Pacific Northwest Region
Associated Builders and Contractors, Alabama Chapter
Associated Builders and Contractors, Central California Chapter
Associated Builders and Contractors, Central Florida Chapter
Associated Builders and Contractors, Delaware Chapter
Associated Builders and Contractors, Florida East Coast Chapter
Associated Builders and Contractors, Greater Michigan Chapter
Associated Builders and Contractors, Hawaii Chapter
Associated Builders and Contractors, Illinois Chapter
Associated Builders and Contractors, Indiana/ Kentucky Chapter
Associated Builders and Contractors, Keystone Chapter
Associated Builders and Contractors, Los Angeles/ Ventura Chapter
Associated Builders and Contractors, Mississippi Chapter
Associated Builders and Contractors, New Mexico Chapter

Associated Builders and Contractors, Rocky Mountain Chapter
Associated Builders and Contractors, South Texas Chapter
Associated Builders and Contractors, Southeast Texas Chapter
Associated Builders and Contractors, Virginia Chapter
Associated Builders and Contractors, Western Michigan Chapter
Associated Builders and Contractors, Western Pennsylvania Chapter
Associated Builders and Contrators - Heart of America
Associated General Contractors of America
Auto Care Association
CAWA- Representing the Automotive Parts Industry
Customized Logistics and Delivery Association (CLDA)
Equipment Dealers Association
Farm Equipment Manufacturers Association
Food Marketing Institute
Global Cold Chain Alliance
HR Policy Association
Independent Electrical Contractors
Independent Office Products and Furniture Dealers
International Foodservice Distributors Association
International Franchise Association
International Warehouse Logistics Association
Maryland Chamber of Commerce
Motor & Equipment Manufacturers Association
National Association of Homebuilders
National Association of Manufacturers
National Association of Wholesaler-Distributers
National Automobile Dealers Association
National Club Association
National Council of Chain Restaurants
National Federation of Independent Business
National Grocers Association
National Lumber and Building Material Dealers Association
National Ready Mixed Concrete Association
National Retail Federation
National Roofing Contractors Association
National Small Business Association
National Tooling and Machining Association
Nebraska Chamber of Commerce & Industry
Nebraska Grocery Industry Association
North American Die Casting Association
Pennsylvania Chamber of Business and Industry

Precision Machined Products Association
Precision Metalforming Association
Printing Industries of America
Snack Food Association
Society for Human Resource Management
SPI: The Plastics Industry Trade Association
Textile Rental Services Association
The Broadmoor
Truck Renting and Leasing Association
U.S. Chamber of Commerce
Virginia Chamber of Commerce
Western Electrical Contractors Association (WECA)

CC: The Honorable Thomas Perez, Secretary of Labor

Andrew R. Davis, Chief, Division of Interpretations and Standards, Office of Labor-Management Standards, Department of Labor

Sen. Lamar Alexander, Chairman, Senate Committee on Health Education, Labor and Pensions

Rep. John Kline, Chairman, House Committee on Education and the Workforce

Sen. Roy Blunt, Chairman, Senate Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Educations and Related Agencies

Rep. Tom Cole, Chairman, House Committee on Appropriations' Subcommittee on Labor, Health and Human Services, Educations and Related Agencies

Janis Reyes, Assistant Chief Counsel, U.S. Small Business Association, Office of Advocacy