Honorable Rene Alexander Acosta ID: LFG-2017-0009

Secretary of Labor

Attn: Andrew R. Davis

Chief, Division of Interpretation and Standards

200 Constitution Ave., N.W.

Washington, DC 20210

olms-public@dol.gov

Sent via: Electronic mail

December 3rd, 2017

Re: Opposition to 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 Secretary Rene Acosta,

I am sending you this letter as a comment in opposition to the United States Department of Labor's rescission of rule interpreting "advice" exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act in which was published in the Federal Register on June 12, 2017, at 82 Fed. Reg. 26877. I am currently in opposition to the 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). While this letter to you will not list all of the reasons why I am in opposition of the United States Department of Labor doing so, I take the same stance that the Economic Policy Institute has as to this issue. Therefore, please consider the Economic Police Institute's comments to your office as to this issue the same current opinion that I have as to this issue.[1]

It does appear as if Secretary Alexander Acosta on May 22, 2017 stated on the persuader rule:

> Today there are several regulations enacted by the Obama administration that federal courts have declared unlawful. One is the Persuader Rule, which would make it harder for businesses to obtain legal advice. Even the American Bar Association believes the rule goes too far. Last year a federal judge held that "the rule is defective to its core" and blocked its implementation. Now the Labor Department will engage in a new rule-making process, proposing to rescind the rule.[2]

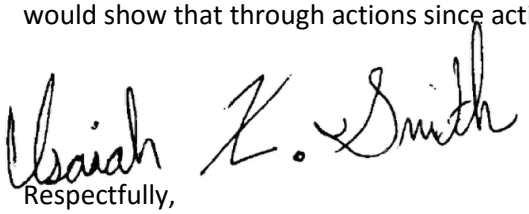
I do not like this because I believe that the United States Department of Labor has statutory mandate when promulgating the Persuader Rule and because the case in the statement was referring to occurred out of the State of Texas. I do agree with the Economic Policy Institute that the United States

[1] The Economic Policy Institute on August 9th, 2017 sent a letter to your office in opposition to the recession of the Persuader Rule by the United States Department of Labor. See Exhibit 1.

[2] The case that I believe that he was referring to was out of the State of Texas. The State of Texas is a southern State of the United States and it has been known as being backwards and behind time. The south generally has had a procedural history of being backwards and behind time.

Department of Labor's reason for rescinding the Persuader Rule is contrary to the legislative history and the purpose of the LMRDA. I also agree with them that the United States Department of Labor already engaged in a thorough statutory analysis when it issued the Persuader Rule; that the United States Department of Labor does not need to rescind the Persuader Rule in order to consider how the rules affects Form LM-21; that the United States Department of Labor does not need to further consider attorneys' roles under the LMRDA because multiple appellate courts have already held that if attorneys act as persuaders that they must report; that the United States Department of Labor's mandate is to use its resources to safeguard workers' rights, and statutorily mandated disclosure of union-avoidance activities should be a priority in light of that mandate .

In conclusion, I would like to reclarify that I currently take the position that the Economic Policy Institute has on this issue. Sadly, in the United States, it does appear as if some political figures are interested and have had campaign platforms as to being advocates for the repeal of everything that the White House under the direction of President Barack Obama supported. This is not good because as a country we should be working together to help improve and to help reform things in the United States that do need to be reformed. I do not believe that it would be in the best interest for the United States Department of Labor to rescind the Persuader Rule and I am hoping that the United States Department of Labor will make sure that does not occur. I believe that the United States should always protect employees' basic rights and I am hoping that the United States Department of Labor would not only agree with that but would show that through actions since actions do speak louder than words.



Respectfully,

Isaiah X. Smith[3]

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EXHIBIT 1

Economic Policy Institute

Comment to the U.S. Department of Labor opposing the rescission of the Persuader Rule

Testimony • By Marni von Wilpert • August 9, 2017

EPI Associate Labor Counsel Marni von Wilpert sent the following comment to the U.S. Department of Labor, Office of Labor-Management Standards, on August 9, 2017.

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW, Room N-1519
Washington, DC 20210

Attention: RIN 1245-AA07 – Interpretation of the Advice Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act.

To Department of Labor:

I am submitting this comment as the Associate Labor Counsel at the Economic Policy Institute. I write this comment in opposition to the Department of Labor's (DOL) June 2017 proposal (81 Fed. Reg. 15924) to rescind the final rule titled, "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act" (the "Persuader Rule"), issued on March 24, 2016. (82 Fed. Reg. 26877). In this comment, I first show that the Persuader Rule is consistent with both the purpose and legislative history of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). Second, I explain why the four reasons that DOL has presented for rescinding this rule do not justify its rescission, and I show that they, in fact, contravene the purpose of the LMRDA itself.

DOL followed its statutory mandate when promulgating the Persuader Rule

Congress was crystal clear that one of its primary purposes in enacting the LMRDA was to help protect employees' basic rights under our nation's labor laws. As Section 2(a) of the Act states, "Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection[.]" (29 U.S.C. § 401). In enacting the LMRDA, Congress was addressing concerns that some labor consultants, acting on behalf of management, were working behind the scenes to discourage legitimate employee-organizing drives and were engaging in activities intended to undercut employee support for unions.[1]

Between 71 and 87 percent of employers fight their employees' efforts to bargain collectively by hiring professional anti-union consultants—or "persuaders"—to bust their employees' organizing drives with sophisticated anti-union campaigns.[2] Union-busting firms promise to equip employers with "campaign strategies" and "opposition research."[3] They produce anti-union videos, websites, posters, buttons, T-shirts, and PowerPoint presentations for employers to deploy against their workers' unionizing efforts. Employers spend large amounts of money to hire anti-union consultants, sometimes hundreds of thousands of dollars,[4] and the union-avoidance industry has been estimated to be a $1 billion industry.[5]

The 1959 Senate Committee Report accompanying the LMRDA stated that persuader activities "are disruptive of harmonious labor relations and fall into a gray area" between proper and improper conduct. (S. Rep. No. 86-187). To address this potential for harm, Congress chose to rely on transparency through disclosure and reporting of persuader activities, instead of outright prohibiting such activities. As Justice Brandeis once famously said, "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."[6] Public disclosure of union-avoidance consultant activities allows employees in the workplace, like voters in the political arena, to understand the source of the information they are given during the course of a union election campaign. By enacting the LMRDA, Congress intended that employees be given the knowledge that a third party—the consultant hired by their employer—is the source of the anti-union information.

Accordingly, under Section 203(a) of the LMRDA, consultants and attorneys who engage in direct and indirect persuader activities—and the employers who hire them—must disclose their arrangements, a description of the services to be performed, and the amount the employer paid. Section 203(a) states that employers must disclose agreements in which a consultant,

> undertakes activities where an object thereof, *directly or indirectly*, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.[7]

Despite the congressional mandate to require employers and anti-union consultants to disclose their persuader activities, a significant amount of persuader activity has gone unreported because of a loophole in DOL's regulations. The LMRDA does not require employers and anti-union consultants to report if the consultant is only giving "advice" to the employer. (29 U.S.C. § 433(c)). But the LMRDA does not define the term "advice," and so it has been up to DOL to issue regulations delimiting what types of activities must be reported.

As DOL concluded in the preamble to its final rule, it had previously interpreted the "advice" exemption so broadly that no reporting was required unless consultants had direct contact with employees. That interpretation created a loophole in which all indirect, behind-the-scenes persuader activities were regarded as non-reportable "advice" to the employer.[8] In other words, this interpretation literally reads "indirectly" out of the statutory mandate to disclose activities persuading employees "directly or indirectly." As DOL found, "Under this interpretation, labor relations consultants to employers avoided reporting a broad category of activities undertaken with a clear object to persuade employees regarding their rights to organize or bargain collectively."[9] Indeed, as DOL noted, "Although employees may hear a strong message from their employer about how they should make choices concerning the exercise of their rights, in the absence of indirect persuader reporting requirements, they generally do not know the source of the message."[10]

On March 24, 2016, following notice and comment rulemaking that began in June 2011, DOL issued its final Persuader Rule, closing the loophole by reinstating the LMRDA's requirement to report both direct and indirect persuader activity. As DOL explained in the final rule, "[t]he prior interpretation failed to achieve the very purpose for which [LMRDA] . . . was enacted—to disclose to workers, the public, and the Government activities undertaken by labor relations consultants to persuade employees—directly or indirectly, as to how to exercise their rights to union representation and collective bargaining." (81 Fed. Reg. 15926). And the LMRDA states that DOL shall "have authority to issue, amend, and rescind rules and regulations . . . necessary to prevent the circumvention or evasion of [LMRDA's] reporting requirements."[11] Accordingly, in issuing the final rule, DOL fulfilled its congressional mandate by closing the reporting loophole for indirect persuader activities.

DOL's reasons for rescinding the Persuader Rule are contrary to the legislative history and purpose of the LMRDA

In its June 2017 Notice of Proposed Rulemaking (NPRM), DOL listed four reasons for rescinding the rule: (1) to allow DOL to engage in further statutory analysis; (2) to allow DOL to consider the interaction between Form LM-20 and Form LM-21; (3) to allow more detailed consideration of attorneys' activities; and (4) because DOL has limited resources and competing priorities. None of these reasons justify rescinding the Persuader Rule.

1. DOL already engaged in a thorough statutory analysis when it issued the rule.

DOL's Office of Labor Management Standards (OLMS) engaged in a careful, well-reasoned analysis of the LMRDA when promulgating the Persuader Rule. DOL took into consideration the 8,872 comments[12] it received from the public, and provided an analysis spanning nearly 130 pages when it issued the final rule on March 24, 2016.[13] As DOL explained at length in the analysis, the final rule was issued to close a loophole in the statutory reporting requirements, since DOL had concluded that its prior interpretation of the advice exemption "failed to achieve the [statute's] very purpose."[14]

In its NPRM proposing to rescind the rule, however, DOL cited a Texas district court's injunction as a reason to engage in further statutory analysis. But rescinding a properly promulgated rule based on a single trial court's order in a lawsuit initiated by regulated business groups is a dereliction of DOL's duty to protect the rights of workers. And, in fact, two other district courts, in Minnesota and Arkansas, did not issue preliminary injunctions when reviewing similar challenges to the rule.[15] Moreover, the Texas district court decision is currently on appeal to the United States Court of Appeals for the Fifth Circuit—a court that has sided with "the Government's view" of the LMRDA when interpreting the statute's reporting and disclosure requirements in a prior case.[16] DOL should await the results of the appeal rather than taking the extraordinary step of initiating the process of rescinding the rule under the Administrative Procedures Act based on a single district court's decision.

2. DOL does not need to rescind the Persuader Rule in order to consider how the rule affects Form LM-21.

DOL does not need to rescind the Persuader Rule (which affected only Forms LM-10 and LM-20) in order to consider how the rule affects Form LM-21. Instead, DOL should leave the final rule in place, and proceed with rulemaking for Form LM-21. In its fall 2015 Semi-Annual Regulatory Agenda,[17] DOL announced that OLMS intended to pursue a rulemaking to revise Form LM-21,[18] and issued a special non-enforcement policy for Form LM-21 while the rulemaking was pending. Instead of rescinding a properly promulgated final rule, DOL should just proceed with its previously stated goal of updating Form LM-21.

3. DOL does not need to further consider attorneys' roles under the LMRDA—multiple appellate courts have held that if attorneys act as persuaders, they must report.

The question of how and when attorneys must report their persuader activities under the LMRDA has long been settled by the courts. As the U.S. Court of Appeals for the Sixth Circuit previously explained:

> [A]s long as an attorney confines himself to the activities set forth in section 203(c),

> [rendering legal advice and representing a client in legal proceedings or in bargaining] he need not report, but if he crosses the boundary between the practice of labor law and persuasion, he is subject to the extensive reporting requirements.[19]

Indeed, multiple United States Courts of Appeal have upheld the LMRDA's reporting requirements for attorneys.[20] As the Fifth Circuit once reasoned:

> Since a principal object of LMRDA was neutralizing the evils of persuaders, it was quite legitimate and consistent with the Act's main sanction of goldfish-bowl publicity to turn the spotlight on the lawyer who wanted not only to serve clients in labor relations matters encompassed within § 203(c) but who wanted also to wander into the legislatively suspect field of a persuader.[21]

Moreover, there is no merit to the claim that attorneys' duty of confidentiality prohibits them from disclosing persuader activities. In a letter submitted to the U.S. House of Representatives Committee on Education and the Workforce, law professors from across the country affirmed that the LMRDA's reporting requirements—and DOL's final rule—are consistent with an attorney's professional responsibility to maintain confidentiality.[22] While the president of the American Bar Association (ABA) expressed opposition to the Persuader Rule, over 500 attorneys—244 of whom are ABA members—submitted a letter to the Committee in support of the rule and voiced their concern about the ABA "taking sides in a labor-management issue contrary to the views of its members who represent workers and unions."[23]

The question of when attorneys' activities must be reported under the LMRDA has been asked and answered: when attorneys engage in persuader activity, they must report just like any other anti-union consultant. There is no need to rescind the final rule on this basis.

4. DOL's mandate is to use its resources to safeguard workers' rights; statutorily mandated disclosure of union-avoidance activities should be a priority in light of that mandate.

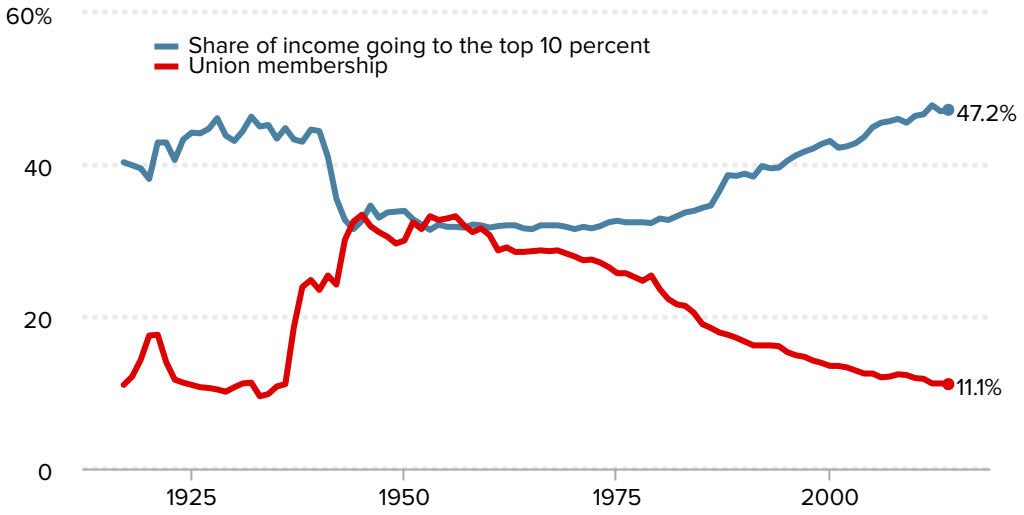
DOL is letting America's working people down by proposing to rescind the Persuader Rule due to "limited resources and competing priorities." First, the final rule, if implemented as intended, would have made public disclosure of persuader agreements less resource-intensive for DOL by requiring parties to simply electronically file their LM-20 and LM-10 forms on DOL's website. As DOL stated in its justification for the final rule, "Electronic filing . . . improves the efficiency of OLMS in processing the reports and in reviewing them for reporting compliance."[24]

Second, the benefits of the rule far outweigh the relatively low cost of implementing the rule. DOL also stated in the preamble to the final rule that "[t]he qualitative benefits associated with the rule are substantial. . . . This rule promotes the important interests of the Government and the public by ensuring that employees will be better informed and thus better able to exercise their rights under the NLRA."[25]

Figure A

As union membership has fallen, the top 10 percent have been getting a larger share of income

Union membership and share of income going to the top 10 percent, 1917–2014



Sources: Piketty and Saez 2014, Gordon 2013, and Bureau of Labor Statistics Current Population Survey public data series

Economic Policy Institute

DOL's mission is to safeguard the welfare of America's workers by, among other things, "strengthening free collective bargaining."[26] The Persuader Rule would further DOL's mission by taking a modest step toward leveling the playing field for workers by making sure they receive the information they deserve before making a decision on forming a union. Indeed, as reports from the Economic Policy Institute have shown, the single largest factor suppressing wage growth for working people over the last few decades has been the erosion of collective bargaining.[27] And as union membership has fallen over the last few decades, the share of income going to the top 10 percent has steadily increased, as shown in **Figure A**.

Instead of using its resources to initiate a lengthy process to rescind the final rule, DOL should be targeting its resources to protect America's workers' fundamental rights to join together improve their wages, working conditions, and ultimately, their lives.

Sincerely,

Marni von Wilpert
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The Economic Policy Institute
1225 Eye St. NW, Suite 600
Washington, DC 20005

Endnotes

1. 81 Fed. Reg. 15930 (*citing* S. Rep. No. 86–187, at 10, 1 LMRDA Leg. Hist., at 406).

2. 81 Fed. Reg. 15933 & n.10 (citing studies).

3. *See, for example*, the Labor Relations Institute, Inc.'s "Fighting a Union" webpage, *available at* http://lrionline.com/fighting-a-union-3/ (last visited July 28, 2017).

4. Marni von Wilpert, "Union Busters Are More Prevalent Than They Seem, and May Soon Even Be at the NLRB," *Working Economics* (Economic Policy Institute blog), May 1, 2017, *available at* http://www.epi.org/blog/union-busters-are-more-prevalent-than-they-seem-and-may-soon-even-be-at-the-nlrb/.

5. 81 Fed. Reg. 15956.

6. *Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (quoting from L. Brandeis, *Other People's Money* [National Home Library Foundation, 1933], 62).

7. 29 U.S.C. § 433(a) (emphasis added). Section 203(b) contains a similar reporting requirement for union-avoidance consultants.

8. 81 Fed. Reg. 15925; *see also* Memorandum from Charles Donohue, Solicitor of Labor regarding "Modification of Position Regarding 'Advice' under Section 203(c)" of the LMRDA, February 19, 1962.

9. 81 Fed. Reg. 15925.

10. 81 Fed. Reg. 15925.

11. 29 U.S.C. 438; 81 Fed. Reg. 15929.

12. Number of comments received is shown in the right-hand column of the "request for comments" page, *available at* https://www.regulations.gov/document?D=LMSO-2011-0002-0001.

13. 81 Fed. Reg. 15924–16051.

14. 81 Fed. Reg. 15926.

15. *Labnet, Inc. et al v. U.S. Dep't of Labor et al*., Case No. 0:16-CV-00844 (D. Minn); *NFIB v. Perez*, Case No. 5:16-CV-00066 (N.D. Tex.); *Associated Builders and Contractors of AR v. Perez,* Case No. 4:16-cv-00169-KGB (E.D. Ark).

16. *Price v. Wirtz*, 412 F.2d 647, 649 (5th Cir. 1969) (en banc).

17. *Available at* https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201510&RIN=1245-AA05.

18. *Available at* https://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm.

19. *Humphreys v. Donovan*, 755 F.2d 1211, 1216 (6th Cir. 1985); accord *Price v. Wirtz*, 412 F.2d 647, 651 (5th Cir. 1969) (en banc).

20. *See, e.g., Humphreys et al v. Donovan*, 755 F.2d 1211, 1219 (6th Cir. 1985); *Wirtz v. Fowler*, 372 F.2d 315, 332-33 (5th Cir. 1966), *rev'd in part on other grounds, Price v. Wirtz*, 412 F.2d 647 (1969); *Douglas v. Wirtz*, 353 F.2d 30, 33 (4th Cir. 1965).

21. *Price v. Wirtz*, 412 F.2d 647, 650 (5th Cir. 1969) (en banc).

22. Letter from law professors to Chairman Kline and Ranking Member Scott, May 16, 2016, *available at* http://democrats-edworkforce.house.gov/imo/media/doc/Law%20Professors%20Persuader%20Rule.pdf.

23. Letter from labor attorneys to Chairman Kline and Ranking Member Scott, May 17, 2016, *available at* http://democrats-edworkforce.house.gov/imo/media/doc/5%2017%2016%20labor%20lawyer%20persuader%20letter.pdf.

24. 81 Fed. Reg. 15942.

25. 81 Fed. Reg. 15929.

26. *See* https://webapps.dol.gov/dolfaq/go-dol-faq.asp?faqid=478&faqsub=General+Information&faqtop=About+DOL&topicid=9.

27. Lawrence Mishel and Jessica Schieder, "As Union Membership Has Fallen, the Top 10 Percent Have Been Getting a Larger Share of Income," May 24, 2016, *available at* http://www.epi.org/publication/as-union-membership-has-fallen-the-top-10-percent-have-been-getting-a-larger-share-of-income/.