STATEMENT OF

PAULETTE BROWN

PRESIDENT OF THE AMERICAN BAR ASSOCIATION

submitted to the

SUBCOMMITTEE ON HEALTH, EMPLOYMENT, LABOR, AND PENSIONS

of the

COMMITTEE ON EDUCATION AND THE WORKFORCE

of the

UNITED STATES HOUSE OF REPRESENTATIVES

concerning

"THE PERSUADER RULE: THE ADMINISTRATION'S LATEST ATTACK ON EMPLOYER FREE SPEECH AND WORKER FREE CHOICE"

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1050 Connecticut Ave. NW, Suite 400 • Washington, DC 20036
www.americanbar.org

Mr. Chairman and Members of the Subcommittee:

My name is Paulette Brown, and I am the President of the American Bar Association ("ABA") and a partner at Locke Lord LLP in Morristown, New Jersey, where I practice in the area of labor and employment law. On behalf of the ABA, which has over 400,000 members, thank you for the opportunity to express our concerns regarding the U.S. Department of Labor's recent changes to the "Persuader Rule."[1] Those changes substantially narrow the Department's longstanding interpretation of what lawyer and other consultant activities constitute "advice" to employer clients and hence are exempt from the extensive reporting requirements of Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA" or "Act"), 29 U.S.C. § 433 (1982). We request that this statement be made part of the hearing record.

At the outset, I would like to emphasize that by expressing concerns over the Final Rule, the ABA does not intend to take sides on a union-versus-management dispute. Instead, the ABA is defending the confidential lawyer-client relationship and seeking to prevent the Department from imposing what we view as an unjustified and intrusive burden on lawyers, law firms, and their clients.

As explained in more detail below, the ABA believes that the Department's original broad interpretation of the advice exemption in effect for over 50 years—which excluded lawyers from the Act's "persuader activities" reporting requirements when they merely provide persuader-related advice or other legal assistance directly to their employer clients *but have no direct contact with the employees*—should be retained with respect to lawyers and their employer clients for several important reasons. In particular, the Department's previous interpretation provides a

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[1] The text of the Department of Labor's final rule, titled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," 81 Fed. Reg. 15924 ("Final Rule"), was published in the Federal Register on April 24, 2016 and is available at https://www.gpo.gov/fdsys/pkg/FR-2016-03-24/pdf/2016-06296.pdf. The Department's previous proposed rule, published in the Federal Register on June 21, 2011 ("Proposed Rule"), is available at. https://www.gpo.gov/fdsys/pkg/FR-2011-06-21/pdf/2011-14357.pdf.

useful, bright-line rule that is consistent with the actual wording of the LMRDA and congressional intent, while the new interpretation will essentially nullify the Act's advice exemption, undermine the related attorney-client communications exemption, and hence thwart the will of Congress. The Final Rule will also conflict with lawyers' existing state rules of professional conduct regarding client confidentiality and will seriously undermine both the confidential lawyer-client relationship and the employers' fundamental right to effective counsel. Once it is fully implemented, the Final Rule could also require lawyers engaged in direct or indirect persuader activities to disclose a great deal of other confidential client information that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor.

To avoid these negative consequences, the ABA urges Congress to preserve the previous well-established interpretation of the advice exemption. Lawyers should continue to be exempt from the Persuader Rule's disclosure requirements when they provide advice or other legal assistance to their employer clients that is designed to help the employer to persuade its employees on unionization issues, without any direct lawyer communication with the employees on these issues.

The Department's New Interpretation of the "Advice" Exemption

Under Section 203(b) of the LMRDA, consultants and independent contractors, including attorneys, are generally required to file periodic disclosure forms with the Department describing any "persuader" agreements or arrangements with employers where the object is to influence their employees' unionization decisions. In addition, Section 203(a) imposes a similar reporting requirement on employers that have entered into these types of persuader agreements or arrangements.

At the same time, Section 203(c) of the statute contains the following broad "advice" exemption to the general reporting requirements outlined in Section 203(b):

> Nothing contained in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or 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…. [Section 203(c), 29 U.S.C. § 433(c).]

In addition, Section 204 of the LMRDA specifically exempts lawyers from having to report "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship."[2] Although the Department and some federal courts have taken the view that this provision exempts lawyers from disclosing any information protected by the attorney-client privilege and that the provision provides the same degree of protection as that provided in the common-law attorney-client privilege, the expansive language of Section 204 appears to exempt all attorney-client communications from disclosure, not just those communications that are "privileged"; that term simply appears nowhere in Section 204.

Over the years, both the federal courts and the Department have noted that a significant "tension" exists between the broad coverage provisions of Section 203(b) of the LMRDA requiring disclosure of persuader activities and the Act's broad exemption for "advice." However, since 1962 this tension has been alleviated by the Department's broad interpretation of the advice exemption under Section 203(c) as generally excluding from the rule's disclosure requirements any advice or materials provided by the lawyer or other consultant to the employer for use in persuading employees, so long as the consultant has no direct contact with the employees.[3] The Department has also long taken the position that when a particular consultant activity involves

[2] See Section 204, 29 U.S.C. § 434.

[3] See Section 265.005 (Scope of the "Advice" Exemption) (1962) of the LMRDA Interpretative Manual and the Memorandum from Mario A. Lauro, Jr., Acting Deputy Assistant Secretary for Labor-Management Standards (March 24, 1989) ("Lauro Memorandum"), both cited in the Final Rule, 81 Fed. Reg. at 15935-15936.

both advice to the employer and persuasion of employees, but the consultant has no direct contact with the employees, the advice exemption controls.

In its new Final Rule, the Department has adopted major changes to its longstanding interpretation and application of Section 203. In particular, the Final Rule states that the advice exemption will no longer shield employers and their lawyers from reporting agreements in which the lawyer or other consultant "has no face-to-face contact with employees but nonetheless engages in activities behind the scenes (known as indirect persuader activities) where an object is to persuade employees concerning their rights to organize and bargain collectively."[4] The Final Rule also states that "if the consultant engages in both advice and persuader activities…the entire agreement or arrangement must be reported."[5] The Final Rule became effective on April 25, 2015 and will apply to arrangements, agreements, and payments made on or after July 1, 2016.

As a result of these major changes, lawyers will now be required to file periodic disclosure reports when they advise their clients on the clients' persuader activities, even if the lawyer has no direct contact with the employees. These reports, in turn, will require lawyers (and their employer clients) to disclose a substantial amount of confidential client information, including the existence of the lawyer-client relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed. In addition, once the Labor Department begins to fully enforce the new rule and unless Form LM-21 ("Receipts and Disbursements Report") is substantially changed,[6] lawyers will be forced to report detailed

[4] See Final Rule, 81 Fed. Reg. at 15925.

[5] *Id*. at 15937.

[6] On April 13, 2016, the Department announced a "Special Enforcement Policy for Certain Form LM-21 Requirements" that explained that because it plans to propose additional changes to Form LM-21—the form that requires consultants engaging in persuader activities to disclose a great deal of financial information regarding all of their employer clients—the Department will not take enforcement action against consultants who fail to disclose this financial information on Form LM-21 until further notice. However, the Special Enforcement Policy is a temporary measure only and can be rescinded by the Department at any time by providing 90 days' notice.

information regarding the *legal fees paid by all of the lawyers' employer clients, and disbursements made by the lawyers, on account of "labor relations advice or services" provided to any employer client, not just those clients who were involved in persuader activities.*

The ABA's Concerns Regarding the Department's Final Rule

Many organizations and individuals have voiced opposition to the Department's new Persuader Rule for a variety of reasons. Let me be clear that the ABA has a single overarching concern: The Final Rule substantially narrows the traditional scope of the advice exemption, and so for the first time in 50 years, many lawyers and their employer clients will now be required to report a great deal of sensitive and confidential client information that has not previously been subject to disclosure. The ABA also believes that the Final Rule is deeply flawed and we oppose it[7] for several important reasons.

First, while the Department's longstanding interpretation of the advice exemption is consistent with the structure and the actual wording of the LMRDA, the new interpretation outlined in the Final Rule runs counter to the plain language of the statute. The result is unfortunate: the Final Rule will effectively nullify the advice exemption and undermine the attorney-client communications exemption. As noted above, the three key provisions of the Act applicable to lawyers advising employer clients include Section 203(b), establishing a general

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[7] For over 50 years, the ABA has opposed measures similar to the Department's new Final Rule. In 1959, the ABA House of Delegates adopted a formal resolution which provided in pertinent part as follows:

> *Resolved*, That the American Bar Association urges that in any proposed legislation in the labor-management field, the traditional confidential relationship between attorney and client be preserved, and that no such legislation should require report or disclosure, by either attorney or client, of any matter which has traditionally been considered as confidential between a client and his attorney, including but not limited to the existence of the relationship of attorney and client, the financial details thereof, or any advice or activities of the attorney on behalf of his client which fall within the scope of the legitimate practice of law…

While the Department's new Persuader Rule is only designed to increase the obligations of *employer-side* labor lawyers—and not *union-side* labor lawyers—to report confidential client information to the Department, the ABA would be equally opposed to any similar future attempt by the Department or any other agency to force union-side lawyers to disclose any confidential client information.

reporting requirement for consultants engaged in persuader activities, followed by the broad advice exemption in Section 203(c), and finally the equally broad attorney-client communication exemption in Section 204.

For many years, the Department distinguished between lawyers who are subject to the reporting requirements of Section 203(b) because they communicate directly with employees in an effort to persuade them on unionization issues and lawyers who are exempt under Sections 203(c) or 204 because they have no direct contact with employees but merely provide advice and other legal services to their employer clients that may in turn help the clients persuade the employees on these issues. So long as lawyers limited their activities to providing advice, materials, and other communications directly to their employer clients and did not contact the employees directly, the Department properly deemed those legal services to be exempt "advice" under Section 203(c) or attorney-client communications under Section 204. These communications were thus not reportable "persuader activities" under Section 203(b) of the statute.

The Department's longstanding interpretation of the advice exemption provided an appropriate and rational bright-line test that harmonized the broad scope of the Section 203(b) reporting requirement with the equally broad advice and attorney-client communication exemptions in Sections 203(c) and 204 far better than the Department's new interpretation. Sections 203(c) and 204 clearly contemplate that at least some of the advice and attorney-client communications that a lawyer provides to the employer client might be designed to help the employer to persuade employees on unionization issues. This is evident because if none of the lawyer's advice or other communications to the employer client were related to persuader activities, the statute simply would not be applicable, with or without the advice or attorney-client communications exemptions, and no such exemptions would be needed.

Conversely, the Department's new interpretation of the advice exemption—which provides that a lawyer who gives advice or provides other legal assistance to an employer client will now be subject to the Act's disclosure requirements if an object of the advice or legal assistance is to help persuade the employees on unionization matters—will effectively remove the advice exception from Section 203(c) of the statute, undermine the attorney-communications exemption in Section 204, and thwart the will of Congress.

Second, the ABA is concerned that by requiring lawyers to disclose confidential client information to the government regarding the identity of the client, the nature of the representation, and details concerning legal fees, the Final Rule is inconsistent with ABA Model Rule of Professional Conduct 1.6 dealing with "Confidentiality of Information" and with the many binding state rules of professional conduct that closely track the ABA Model Rule.[8] ABA Model Rule 1.6 states that "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent…" or unless one or more of the narrow exceptions listed in the Rule is present.[9]

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

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[8] See ABA Model Rule of Professional Conduct 1.6, and the related commentary, available at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information.html See also Charts Comparing Individual Professional Conduct Rules as Adopted or Proposed by States to ABA Model Rules, available at http://www.americanbar.org/groups/professional_responsibility/policy.html.

[9] Although ABA Model Rule 1.6(6) allows a lawyer to disclose confidential client information "to comply with other law or a court order," nothing in the LMRDA expressly or implicitly requires lawyers to reveal client confidences to the government. On the contrary, Section 204 of the statute expressly exempting "information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship" strongly suggests that Congress recognized and sought to protect the ethical duty that lawyers have to protect client confidences, whether or not that client information is technically privileged.

privilege and the work product doctrine, the Model Rule also forbids lawyers from voluntarily disclosing other non-privileged information that the client wishes to keep confidential.[10] In most jurisdictions, this category of non-privileged, confidential client information includes the identity of the client as well as other information related to the legal representation, such as the nature of the representation and the amount of legal fees paid by the client to the lawyer. Because the Final Rule will require all lawyers who provide persuader-related advice or other legal assistance to their employer clients to disclose the identity of those clients, the nature of the representation, the fees received from the clients, and other confidential client information, the new rule is clearly inconsistent with lawyers' existing ethical duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule.

Third, the ABA is concerned that the application of the Final Rule to lawyers engaged in the practice of law could seriously undermine both the confidential client-lawyer relationship and employers' fundamental right to counsel. Lawyers for employer companies play a key role in helping those entities and their officials to understand and comply with the applicable law and to act in the entities' best interest. To fulfill this important societal role, lawyers must enjoy the trust and confidence of the company's officers, directors, and other leaders, and the lawyers must be provided with all relevant information necessary to properly represent the entity. In addition, to maintain the trust and confidence of the employer client and provide it with effective legal representation, its lawyers must be able to consult confidentially with the client. Only in this way can the lawyer engage in a full and frank discussion of the relevant legal issues with the client and provide appropriate legal advice.

[10] See, e.g., Alabama Ethics Op. 89-111 (1989) (lawyer may not disclose name of client to funding agency).; Texas Ethics Op. 479 (1991) (law firm that obtained bank loan secured by firm's accounts receivable may not tell bank who firm's clients are and how much each owes); South Carolina Ethics Op. 90-14 (1990) (lawyer may not volunteer identity of client to third party); and Virginia Ethics Op. 1300 (1989) (in absence of client consent, nonprofit legal services corporation may not comply with federal agency's request for names and addresses of parties adverse to certain former clients, since that may involve disclosure of clients' identities, which may constitute secret).

By requiring lawyers to file detailed reports with the Department stating the identity of their employer clients, the nature of the representation and the types of legal tasks performed, and the receipt and disbursement of legal fees whenever the lawyers provide advice or other legal services relating to the clients' persuader activities—all under penalty of criminal sanctions—the Final Rule could chill and seriously undermine the confidential client-lawyer relationship. In addition, by imposing these unfair reporting burdens on both the lawyers and the employer clients they represent, the Final Rule will likely discourage many employers from seeking the expert legal representation that they need, thereby effectively denying them their fundamental right to counsel.

Finally, the ABA is concerned with the overly broad scope of the information that the Department's Final Rule will ultimately require lawyers and law firms to disclose to the government on a periodic basis once the Department begins to enforce that portion of the new rule.[11] The Final Rule provides that when a lawyer or law firm enters into an agreement to provide persuader-related advice and other legal services to an employer client, the lawyer or law firm will be required to fill out both a revised version of Form LM-20 ("Agreement & Activities Report") and the current version of Form LM-21 ("Receipts and Disbursements Report"), unless Form LM-21 is significantly modified as a result of the future rulemaking process recently announced by the Department. Form LM-21 currently requires lawyers and law firms engaged in persuader activities to disclose all receipts of any kind received from all their employer clients "on account of labor relations advice or services" and disbursements made in connection with such services, not just those receipts and disbursements that are related to persuader activities.[12]

[11] As noted in footnote 6, *supra*, while the Department's "Special Enforcement Policy" announced on April 13 states that the Department will not take enforcement action against consultants who fail to disclose certain information on Form LM-21 while the Department considers possible changes to the form, the policy is temporary only and can be unilaterally rescinded by the Department with as little as 90 days' notice.

[12] See the current Instructions for Department of Labor Form LM-21, at pages 3-5, available at http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-21_Instructions.pdf.

Unless it is substantially changed in a future Department rulemaking, the overly broad scope of this disclosure requirement will compel many lawyers who were previously exempt from the Persuader Rule to disclose a great deal of confidential financial information about clients that has no reasonable nexus to the "persuader activities" that the Act seeks to monitor. In particular, the current disclosure requirement is grossly excessive to the extent it seeks to compel lawyers to report all receipts from and disbursements on behalf of *every employer client* for whom the lawyers performed any "labor relations advice or services," not just those employer clients for whom the lawyer provided persuader-related advice.

No rational governmental purpose is served by this overly broad requirement. By analogy, while law firms and lawyers who lobby Congress on behalf of clients must file periodic reports with the Clerk of the House and the Secretary of the Senate disclosing the identity of those clients, the issues on which they lobbied, and the dollar amount received for lobbying, the Clerk and the Secretary would never presume to require a law firm or lawyer to disclose extensive information regarding all of their other clients to whom they give advice on governmental issues, but for whom they are not registered lobbyists.

Moreover, by discouraging lawyers and law firms from agreeing to represent employers, the overly broad financial disclosure requirement in the Final Rule could have the unintended consequence of increasing the number of employers who, without advice of counsel, would engage in unlawful activities in response to union organizing campaigns and concerted, protected conduct by employees.

Clearly, these required disclosures triggered by the Final Rule are unjustified and inconsistent with a lawyer's existing ethical duties under Model Rule 1.6 (and the related state rules) not to disclose confidential client information absent certain narrow circumstances not present here. Lawyers should not be required, under penalty of perjury, to publicly disclose

confidential information regarding such clients who have not even engaged in the persuader activities that the statute seeks to address. The ABA also agrees with the Eighth Circuit Court of Appeals that it is "extraordinarily unlikely that Congress intended to require the *content* of reports by persuaders under § 203(b) and (c) to be so broad as to encompass dealings with employers who are not required to make any report whatsoever under § 203(a)(4)." *Donovan v. Rose Law Firm*, 768 F.2d 964, 975 (8th Cir. 1985).

While acknowledging the concerns raised by the ABA and others concerning the excessive scope of the affected lawyers' reporting requirements under LM-21, the Department summarily dismissed those concerns in its Final Rule, noting that it planned to propose certain changes to Form LM-21 in a separate rulemaking in the future. Unfortunately, the Department's assurance of revisiting the overly broad reporting requirements of Form LM-21 at some point in the future provides little comfort to the many lawyers—and their employer clients—who were previously exempted from the rule's onerous reporting requirements but could be compelled to disclose an excessive amount of confidential client information to the government if and when the Department decides to begin enforcing compliance with Form LM-21, either in its current form or with only minor modifications.

Conclusion

For all these reasons, the ABA urges Congress to preserve the Department of Labor's longstanding interpretation of the advice exemption to the Persuader Rule so that lawyers and law firms will continue to be exempt from the rule's onerous disclosure requirements when they merely provide advice or other legal assistance to their employer clients regarding the clients' persuader activities and the lawyers have no direct contact with the employees. In addition, irrespective of whether the new Final Rule is implemented, the ABA urges the Department to narrow the scope of Form LM-21 so that when a lawyer engages in persuader activities that are

not subject to the advice or attorney-client communications exemptions, disclosure is required only for those receipts and disbursements that relate directly to the employer clients for whom persuader activities were performed, not for those other employer clients for whom no such persuader activities were provided.

Thank you again for the opportunity to express the ABA's views on this important issue.