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Interpretation of the ''Advice'' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; Final Rule

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Parts 405 and 406

RIN 1215–AB79; 1245–AA03

Interpretation of the ''Advice'' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act

AGENCY: Office of Labor-Management Standards, Department of Labor.

ACTION: Final rule.

SUMMARY: The Office of Labor-Management Standards of the Department of Labor (''Department'') is revising the Form LM–20 Agreement and Activities Report and the Form LM–10 Employer Report upon review of the comments received in response to its June 21, 2011 Notice of Proposed Rulemaking (NPRM). In the NPRM, the Department proposed to revise its interpretation of the advice exemption in section 203(c) of the Labor-Management Reporting and Disclosure Act (LMRDA) to better effectuate section 203's requirement that employers and their labor relations consultants report activities undertaken with an object, directly or indirectly, to persuade employees about how to exercise their rights to union representation and collective bargaining. Under the prior interpretation, reporting was effectively triggered only when a consultant communicated directly with employees. This interpretation left a broad category of persuader activities unreported, thereby denying employees important information that would enable them to consider the source of the information about union representation directed at them when assessing the merits of the arguments and deciding how to exercise their rights. The Department proposed to eliminate this reporting gap. The final rule adopts the proposed rule, with modifications, and provides increased transparency to workers without imposing any restraints on the content, timing, or method by which an employer chooses to make known to its employees its position on matters relating to union representation or collective bargaining. The final rule also maintains the LMRDA's section 203(c) advice exemption and the traditional privileges and disclosure requirements associated with the attorney-client relationship. The Department has also revised the forms and instructions to make them more user-friendly and to require more detailed reporting on employer and consultant agreements. Sections of the Department's regulations have also been amended consistent with the instructions. Additionally, with this rule, the Department requires that Forms LM–10 and LM–20 be filed electronically. This rule largely implements the Department's proposal in the NPRM, with modifications of several aspects of the revised instructions as proposed.

DATES: This final rule is effective on April 25, 2016. The rule will be applicable to arrangements and agreements as well as payments (including reimbursed expenses) made on or after July 1, 2016.

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SUPPLEMENTARY INFORMATION:

Table of Contents

I. Executive Summary
A. Purpose, Justification, and Summary of the Rule
B. Benefits of the Rule and Estimated Compliance Costs
II. Authority
III. Statutory and Regulatory Background/Justification for the Final Rule
A. Statutory and Regulatory Requirements for Employer and Labor Relations Consultant Reporting
B. History of the LMRDA's Reporting Requirements and Justification for the Final Rule
1. Dealing With a Growing Phenomenon—1960 and Earlier
2. A Disclosure Vacuum—From 1962 Until Today
3. Transparency Promotes Worker Rights by Creating a More Informed Electorate
4. Underreporting of Persuader Agreements
5. Transparency Promotes Peaceful and Stable Labor-Management Relations, a Central Goal of the Statute
C. History of the Department's Interpretation of Section 203(c)
IV. Revised ''Advice'' Exemption Interpretation
A. Summary of the Revised Interpretation
B. Revised Advice Exemption Overview
1. Categories of Persuasion
2. Exempt Agreements or Arrangements
3. Changes From the NPRM
4. Reportable Information-Supplying Agreements
C. The Statutory Basis for the Revised Interpretation
D. Revised Form LM–20, LM–10, and Instructions
1. Mandatory Electronic Filing for Form LM–20 and Form LM–10 Filers
2. Detailing the Activities Undertaken Pursuant to a Reportable Agreement or Arrangement
3. Revised Form LM–20 and Instructions
4. Revised Form LM–10 and Instructions
V. Review of Comments Received
A. General Comments
B. Comments on the Statutory Analysis of LMRDA Justifying the Revised ''Advice'' Exemption Interpretation
1. Comments That the Revised Interpretation Is Contrary to Statute
2. Department's Response to Comments on the Statutory Analysis
a. General Response
b. How To Read Section 203
c. Legislative History
d. ''Advice'' or ''Legal advice''
C. Comments Concerning Department's Policy Justification for Revised Interpretation
1. Benefit to Workers
a. Comments in Support of NPRM
b. Comments in Opposition to NPRM
c. Comments on the Disclosure of the Source of Persuader Communications
d. Comments on the Term, ''Middlemen,'' in the Legislative History
e. Comments on the Comparisons of Persuader Disclosure to Other Disclosure Regimes
f. Comments on Timeliness of Disclosure
2. Underreporting of Persuader Agreements and Research Studies
a. Review of Comments Received
b. Comments on Research Studies
c. Comments on the Underreporting of Persuader Agreements
d. Comments on the Consultant Industry Growth
e. Comments on Election Outcomes
3. Disclosure as a Benefit to Harmonious Labor Relations
D. Comments on Clarity of Revised Interpretation
E. Comments on Scope of Persuader Activities and Other Provisions of Section 203
1. Comments on Specific Persuader Activities and Changes Made to Proposed Advice Exemption Instructions
a. Direct Interaction by Consultant With Employees
b. Planning, Directing, or Coordinating Supervisors and Other Employer Representatives
c. Providing and Revising Materials
d. Seminars
e. Personnel Policies
f. Employee Attitude Surveys/Employer Vulnerability Assessments
2. Comments on the Scope of Employee Labor Rights Included in Section 203
3. Comments on the Scope of ''Agreement or Arrangement''
4. Comments on the Scope of ''Labor Relations Consultant'' and the Perception by Some Commenters That the Proposed Rule Favors Unions
a. Reporting by Employer's ''In-House'' Labor Relations Staff
b. Industry-Specific Reporting Requirements
c. Perceived Bias Between Reporting Requirements for Employers and Those for Unions
d. Railway Labor Act
e. Extraterritorial Application
F. Comments on Revised Forms and Instructions

1. Proposed Form LM–20/Form LM–10, Part C
a. Contact and Identifying Information
b. Hardship Exemption
c. Reporting the Terms and Conditions of the Agreement or Arrangement
d. Identifying Persuader Activities
e. Identifying Information-Supplying Activities
f. Identifying Targeted Employees
2. Comments Received on Other Aspects of Form LM–10
G. Comments Asserting Constitutional Infirmities With Revised Interpretation, Including First Amendment Concerns, and Alleged Inconsistency With Employer Free Speech Rights Under NLRA
1. Comments Involving First Amendment Concerns
2. Comments on Revised Interpretation's Impact on NLRA Section 8(c)
3. Comments Alleging Vagueness of Revised Interpretation
H. Comments Alleging Conflict Between Revised Interpretation and Attorney-Client Privilege and Attorney's Duty To Protect Confidential Information
1. Comments Involving the Attorney-Client Privilege and LMRDA Section 204
2. Confidential Information and Attorneys' Ethical Obligations
3. ''Chilling'' the Ability To Obtain Attorneys
4. Comments on Form LM–21 and Client Confidentiality
VI. Regulatory Procedures
A. Executive Orders 13563 and 12866
B. Unfunded Mandates Reform
C. Small Business Regulatory Enforcement Fairness Act of 1996
D. Executive Order 13132 (Federalism)
E. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)
F. Executive Orders 12866 and 13563
G. Paperwork Reduction Act
1. Overview and Response to Comments Received
2. Overview of the Revised Form LM–20, LM–10, and Instructions
3. Methodology for the Burden Estimates
H. Regulatory Flexibility Analysis and Executive Order 13272
Appendix A: Revised Form LM–10 and Instructions
Appendix B: Revised Form LM–20 and Instructions

I. Executive Summary

A. Purpose, Justification, and Summary of the Rule

The purpose of this rule is to revise the Department's interpretation of section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA) to require reporting of ''indirect'' persuader activities and agreements. The LMRDA and the National Labor Relations Act (NLRA) address generally the obligations of unions and employers to conduct labor-management relations in a manner that protects the rights of employees to exercise their right to choose whether to be represented by a union for purposes of collective bargaining. While the NLRA, enforced by the National Labor Relations Board (NLRB), ensures compliance with these rights by investigating and prosecuting unfair labor practice complaints, the LMRDA promotes these rights by requiring unions, employers, and labor relations consultants to publicly disclose information about certain financial transactions, agreements, and arrangements.

Section 203(b) of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 433(b), requires employers and labor relations consultants to report their agreements pursuant to which the consultant undertakes activities with ''an object . . . , *directly or indirectly*'' to persuade employees concerning their rights to organize and bargain collectively. (Emphasis added). The Department's authority to promulgate regulations implementing section 203 is established by sections 203 and 208 of the LMRDA. The Secretary of Labor has delegated this authority to the Office of Labor-Management Standards (OLMS).

Section 203(c) of the LMRDA exempts ''advice'' from triggering the reporting requirement. Specifically, employers and consultants are not required to file a report covering the services of a consultant ''by reason of his giving or agreeing to give advice'' to the employer. Under the Department's original, 1960 interpretation of the ''advice'' exemption, labor relations consultants were required to report arrangements to draft speeches or other written materials to be delivered or disseminated to employees for the purpose of persuading them as to their right to organize and bargain collectively. Two years later, the Department revised its position to say that reporting was not required if the consultant limited his or her activity to providing the employer with materials that the employer had the right to accept or reject. In the early 1980s, the Department again reduced the reporting obligation of contractors: No reporting was required unless they had direct contact with employees. 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. In this rule, the Department revises its interpretation of the advice exemption, consistent with the Department's original interpretation of section 203, to better effectuate section 203's requirement that consultants report persuader activities. Based upon the Department's consideration of contemporary practices under the federal labor-management relations system, and the comments received on its proposal, the final rule expands reporting of persuader agreements and provides employees with information about the use of labor relations consultants by employers, both openly and behind the scenes, to shape how employees exercise their union representation and collective bargaining rights. The final rule promotes the statute's purposes while also protecting employer free speech rights and the relationship between an attorney and his or her client. 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. By knowing that a third party—the consultant hired by their employer—is the source of the information, employees will be better able to assess the merits of the arguments directed at them and make an informed choice about how to exercise their rights. This information promotes transparency and helps employees assess the applicability of those messages and the extent to which they reflect the genuine view of their employer and supervisors about issues in their particular workplace or instead, may reflect a strategy designed by the consultant to counter union representation whenever its services are hired.

As noted above, this rule requires employers and their consultants to report not only their agreements for ''direct persuader activities,'' but also to report their agreements for ''indirect persuader activities.'' The rule takes fully into account section 203(c), which exempts from reporting ''services of [a consultant] by reason of his giving or agreeing to give advice to [an] employer.'' Based on the traditional meaning of ''advice,'' the Department believes, contrary to its prior interpretation, that section 203(c) (known as the ''advice exemption'') does not shield employers and their consultants from reporting agreements in which the 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.

This rule ensures that indirect reporter activity, as intended by Congress, is reported and disclosed to

workers and the public. Indirect persuader activity occurs when an employer hires a consultant to help defeat a union organizing campaign. The consultant has no direct contact with employees, but it directs a campaign, often formulaic in its design and implementation, for the employer to persuade employees to vote against union representation. Under this arrangement, the consultant often scripts the campaign, including drafting letters, flyers, leaflets, and emails that the employer distributes to its employees, writing speeches that management gives to employees in mandatory meetings, providing statements for supervisors to use in meetings they are required to hold with employees who report to them, often in one-on-one settings, and controlling the timing, sequence, and frequency of each of these events. Employers hire consultants to engage in this type of indirect persuasion in over 70 percent of organizing campaigns. See n. 9, 76 FR 36186.

Although the statute explicitly requires reporting of agreements involving the consultant's direct or indirect persuasion of employees, the Department's prior interpretation had the practical effect of relieving employers and labor relations consultants from reporting any persuader agreements, except those involving direct communication with employees. The Department had based its position on its interpretation of section 203(c), known as the ''advice'' exemption. The previous interpretation left workers unaware of the majority of persuader agreements. In fact, the Department only receives a small number of direct persuader reports, covering only a fraction of organizing campaigns. This lack of awareness by workers of consultant activity is reflected in many of the comments submitted on the NPRM.

It is the Department's view, based on its experience in administering and enforcing the LMRDA and its review of comments submitted in response to the proposed rule, that full disclosure of both direct and indirect persuasion activities protects employee rights to organize and bargain collectively and promotes transparency and the peaceful and stable labor-management relations sought by Congress. The disclosure required under this rule will provide employees with essential information about the underlying source of the views, materials, and policies directed at them and designed to influence how they exercise their statutory rights to union representation and collective bargaining. They will be better able to understand the role that labor relations consultants play in their employers' efforts to shape their views about union representation and collective bargaining.

As explained in the NPRM and in this preamble, the Department maintains that section 203 is better read to require employers and labor relations consultants to report activities that clearly are undertaken with an object to persuade employees, but which were viewed under the prior interpretation as the giving of ''advice'' to the employer. The prior interpretation failed to achieve the very purpose for which section 203 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. Under this rule, exempt ''advice'' activities are now limited to those activities that meet the plain meaning of the term: An oral or written recommendation regarding a decision or course of conduct. The rule restores the traditional meaning to the term whereby an attorney or a labor relations consultant does not need to report, for example, when he counsels a business about its plans to undertake a particular action or course of action, advises the business about its legal vulnerabilities and how to minimize those vulnerabilities, identifies unsettled areas of the law, and represents the business in any disputes and negotiations that may arise. It draws a line between these activities, which do not have to be reported, and those activities that have as their object the persuasion of employees—activities that manage or direct the business's campaign to sway workers against choosing a union—that must be reported. An employer's ability to ''accept or reject'' materials provided, or other actions undertaken, by a consultant, common to the usual relationship between an employer and a consultant and central to the prior interpretation's narrow scope of reportable activity, no longer shields indirect persuader activities from disclosure.

The prior interpretation construed the advice exemption in a manner that failed to give full effect to the requirement that indirect persuasion of employees, as well as direct persuasion, triggers reporting. It did so in a manner that allowed the advice exemption to override this requirement. Upon our consideration of the comments received on the proposal and further review of the issue, we can find no policy justification, and only slender legal support, for the Department's earlier interpretation of section 203. The position effectively denied employees, the public, and the Government information about labor relations consultants that Congress had determined was necessary for employees to effectively exercise their rights to support or refrain from supporting a union as their collective bargaining representative, thereby impeding the national labor policy as established in the NLRA and the LMRDA. Under the interpretation embodied in this final rule, both the language of the advice exemption and the other components of section 203 are given effect in a manner that clearly tracks the language of section 203 more closely and better effectuates the purposes underlying the section.

The rule imposes no restrictions on what employers may say or do when faced with a union organizing campaign. Rather, the premise of the rule is that with knowledge that the source of the information received is an anti-union campaign managed by an outsider, workers will be better able to assess the merits of the arguments directed at them and make an informed choice about how to exercise their rights. With this information, they will be able to better discern whether the views and specific arguments of their supervisors about the benefits and drawbacks of union representation are truly the supervisors' own, reflect their company's views, or rather reflect a scripted industrywide (or even wider) antipathy towards union representation and collective bargaining. Once they have learned that a consultant has been hired to persuade them, employees will be able to consider whether the consultant is serving as a neutral, disinterested third party, hired to guide the employer in adhering to NLRB election rules or rather as one who has been hired as a specialist in defeating union organizing campaigns. They will also be better able to consider the weight to attach to the common claim in representational campaigns that bringing a union, as a third party, into the workplace will be counterproductive to the employees' interests. In the context of an employer's reliance on a third party to assist it on a matter of central importance, it is possible that an employee may weigh differently any messages characterizing the union as a third party. In these instances, it is important for employees to know that if the employer claims that employees are family—a relationship will be impaired, if not destroyed, by

the intrusion of a third party into family matters—it has brought a third party, the consultant, into the fold to achieve its goals. Similarly, with knowledge that its employer has hired a consultant, at substantial expense, to persuade them to oppose union representation or the union's position on an economic issue, employees may weigh differently a claim that the employer has no money to deal with a union at the bargaining table.

In crafting the final rule, the Department has focused on providing workers with information about the source of persuader activities so they can make informed decisions. The Department has been careful, just as Congress was in prescribing reporting by employers and consultants, to allow unions and employers to engage in an informed debate about the advantages and disadvantages of union representation, consistent with the First Amendment and the NLRA. Neither the statute nor the final rule restrains in any way the content of an employer's message—whether delivered by itself or with the assistance, directly or indirectly of a consultant—its timing, or the means by which it is delivered on matters relating to union representation and collective bargaining. Likewise, as discussed below, the rule also does not infringe upon the attorney-client relationship. The affected employees and the public interest benefit from the exchange of competing ideas. This can best be done by requiring that employers and labor relations consultants disclose their agreement to engage in persuader activities. Both the statute and this regulation fulfill the Government's important interest in ensuring that workers and the public are informed about such agreements. Regardless of the choices made by employees on whether to support or oppose representation in their workplace, the rule will ensure that they are more informed decision makers, which will result in more stable and peaceful labor-management relations.

The Department recognizes that most employers and their consultants, like most unions, conduct their affairs in a manner consistent with federal law. The law encourages debate, imposing only broad bounds in the labor relations context, imposing sanctions only in limited circumstances and without prior restraint—where employers ''interfere with, restrain or coerce employees in the exercise of their rights guaranteed in [29 U.S.C. 157] or unions ''to restrain or coerce'' employees in the exercise of those rights. 29 U.S.C. 158(a)(1); 29 U.S.C. 158(b)(1). Congress intended the LMRDA, including the reporting requirements, to complement the NLRA, a result achieved by the final rule without abridging the right of employers and their consultants to engage in a robust debate about the advantages and disadvantages of union representation and collective bargaining. Thus, it is important to note that the Department has not attempted to regulate the content, timing, or veracity of communications by labor relations consultants or employers.

Research indicates that the number of firms engaged in persuader activities has grown substantially since the LMRDA was enacted. Recent studies show that in somewhere between 71% and 87% of employee organizing drives, the employer retains one or more consultants. See n. 9. 76 FR 36186. The size of the industry, per se, is not a concern of the Department's, but its growth exacerbates the transparency concerns: As the size has increased, employees in a substantial majority of representation campaigns are increasingly left unaware of information that may be important to them and may affect their decisions to support or oppose union representation in their workplaces. As noted in the NPRM, these studies demonstrate that employer campaigns against unions have become standardized, almost formulaic, because employers frequently turn to labor relations consultants, including law firms, to manage their efforts to oppose unionization. Those efforts utilize indirect persuasion almost exclusively. Despite the growth of this industry, historically, only a relatively small number of reports about persuader agreements and arrangements have been filed with the Department. The Department attributes this fact to the overly narrow view of the activities reportable under the prior interpretation, which essentially restricted reporting to just direct persuasion. By issuing this rule, the Department ensures that persuader activities receive the transparency that Congress intended, but was never attained under the prior rule—a need that has become more important over time as the use of consultants by employers to resist union representation has become the norm.

The rule, by revising the instructions to forms filed by employers (Form LM–10) and labor relations consultants (Form LM–20) to report persuader agreements and arrangements, helps them to comply with their reporting obligations. Reports must be filed if the labor relations consultant undertakes activities that fall within the categories described below:

Direct Persuasion

- The obligation to report direct persuasion by consultants remains. Consultants must report if they engage in any conversation or other direct communication with any employee, where the consultant has an object to persuade the employee about how he or she should exercise representation or collective bargaining rights. For example, reporting would be required if the consultant speaks directly with employees (in person or by telephone or other medium) or disseminates materials directly (such as by email or mail) that are intended to persuade. This contrasts, as it also does in indirect persuader activities, with situations in which the employer or its regular staff communicates directly with employees, a situation in which reporting is not required, as provided by 29 U.S.C. 433(e). This aspect of the rule is unchanged from the Department's prior interpretations.

Indirect Persuasion

- Planning, Directing, or Coordinating Supervisors or Managers. Reporting is required if the consultant—with an object to persuade—plans, directs, or coordinates activities undertaken by supervisors or other employer representatives. This includes both meetings and other less structured interactions with employees.
- Providing Persuader Materials. Reporting is required if the consultant provides—with an object to persuade—material or communications to the employer, in oral, electronic (including, *e.g.,* email, Internet, or video documents or images), or written form, for dissemination or distribution to employees. Reporting would be required, for example, if the consultant drafted, revised, or selected persuader materials for the employer to disseminate or distribute to employees. In revising employer-created materials, including edits, additions, and translations, a consultant must report such activities only if an ''object'' of the revisions is to enhance persuasion, as opposed to ensuring legality. The sale, rental, or other use of ''off-the-shelf'' persuader materials, such as videos or stock campaign literature, which are not created for the particular employer who is party to the agreement, will not be reportable unless the consultant helps the employer select the materials. A consultant who created literature previously, without any knowledge of the specific employer requesting the literature, including the labor union involved, industry, or employees, and has no role thereafter in disseminating

the literature for the specific employer, cannot be said to have acted, pursuant to an agreement with the employer in question, with a purpose of persuading these employees.

• Conducting a Seminar for Supervisors or Other Employer Representatives. Some labor relations consultants hold seminars on a range of labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights. Seminar agreements must be reported if the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employer, the employers' supervisors or other representatives. As explained below, however, employers whose representatives attend such seminars generally will have no reporting obligation. Additionally, trade associations are required to report only if they organize and conduct the seminars themselves, rather than subcontract their presentation to a law firm or other consultant. We note that not all seminars will be reportable. For example, a seminar where the consultant conducts the seminar without developing or assisting the employer-attendees in developing a plan to persuade their employees would not be reportable, nor would a seminar where a consultant merely makes a sales pitch to employers about persuader services it could provide.

• Developing or Implementing Personnel Policies or Actions. Reporting is only required if the consultant develops or implements personnel policies or actions for the employer with an object to persuade employees. For example, a consultant's identification of specific employees for disciplinary action, or reward, or other targeting based on their involvement with a union representation campaign or perceived support for the union would be reportable. As a further example, a consultant's development of a personnel policy during a union organizing campaign in which the employer issues bonuses to employees equal to the first month of union dues, would be reportable. On the other hand, a consultant's development of personnel policies and actions are not reportable merely because they improve the pay, benefits, or working conditions of employees, even where they could subtly affect or influence the attitudes or views of the employees. Rather, to be reportable, the consultant must undertake the activities with an object to persuade employees, as evidenced by the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking.

These aspects of the rule effectuate the statute's requirement, largely negated by the Department's longstanding interpretation, that ''indirect activities'' undertaken by a labor relations consultant must be reported. The final rule, however, ensures that no reporting is required by reason of a consultant merely giving ''advice'' to the employer, such as, for example, when a consultant offers guidance on employer personnel policies and best practices, conducts a vulnerability assessment for an employer, conducts a survey of employees (other than a push survey, *i.e.,* one designed to influence participants and thus undertaken with an object to persuade), counsels employer representatives on what they may lawfully say to employees, conducts a seminar without developing or assisting the employer in developing anti-union tactics or strategies, or makes a sales pitch to undertake persuader activities. Reporting is also not required for merely representing an employer in court or during collective bargaining, or otherwise providing legal services to an employer.

As noted above, the final rule does not require employers to file a report solely by reason of their attendance at a union avoidance seminar. The Department determined that the aggregated burden associated with such reporting by large numbers of employers outweighed the marginal benefit that would be derived by requiring reports from both attendees and the firms presenting the seminars. Under the rule, the firms presenting the seminar will report essentially the same information that would have been reported by the attending employers.

To further reduce burden under the rule, the Department has determined that it is appropriate to treat trade associations somewhat differently than other entities insofar as reporting is concerned. Trade associations as a general rule will only be required to report in two situations—where the trade association's employees serve as presenters in union avoidance seminars or where they undertake persuader activities for a particular employer or employers (other than by providing off-the shelf materials to employer-members). The Department expects that trade associations typically will sponsor union avoidance seminars but rely on other consultants to actually present the seminar.

In response to comments, the Department emphasizes that the interpretation embodied in this rule does not interfere with free speech or other rights under the U.S. Constitution or free speech under section 8(c) of the National Labor Relations Act. Similarly, contrary to the view of some commenters, the Department's revised interpretation does not infringe on the common law attorney-client privilege, which is still preserved by section 204, or on an attorney's ethical duty of confidentiality. None of the information required to be reported under the revised interpretation is protected by the attorney-client privilege. To the extent the agreement provides confidential details about services other than reportable persuader/information-supplying activities, the principles of attorney-client privilege would apply and such information is not reportable absent consent of the client. We have carefully reviewed comments submitted by the American Bar Association (ABA), other associations of attorneys, law firms representing employers, and other commenters, urging the Department to adopt an interpretation that would differentiate between attorneys and other labor relations consultants and essentially exempt attorneys from reporting any activities other than those in which they communicate directly with employees. Importantly, although the ABA sought to include a provision in the bill that became the LMRDA that would have achieved this result, Congress struck that provision from what became law. The commenters' position has been rejected by the courts in cases where attorneys engaged in persuader activities unsuccessfully raised this privilege argument as a defense to their failure to report such activities. Moreover, the ABA and other commenters on this point have failed to advance any argument that attorneys who engage in the same activities as non-attorney consultants to counter union organizing campaigns—activities and circumstances significantly different from those typically involved with legal practice—should be able to avoid disclosing activities identical to those performed by their non-attorney colleagues in guiding employers through such campaigns. While some of the comments submitted in this rulemaking concern issues that may arise in connection with the Form LM–21 Receipts and Disbursements Report, such as the scope and detail of reporting about service provided to other employer clients, that report is not the subject of this rulemaking.

In the final rule, the Department has eliminated the term ''protected concerted activities'' from the definition of ''object to persuade employees,'' as

had been proposed in the NPRM. Instead, reporting is required only for agreements in which the consultant engages in activities with an object to persuade employees concerning representational and collective bargaining activities, but not ''other protected concerted activities.'' This better comports with the language of section 203, which, in contrast to the National Labor Relations Act, does not expressly refer to ''concerted activities.''

Finally, the Department has revised the forms and instructions to require more detailed reporting on persuader agreements and to make the forms and instructions more user-friendly. The final rule requires that they be filed electronically with the Department.

B. Benefits of the Rule and Estimated Compliance Costs

The qualitative benefits associated with the rule are substantial. As discussed in the preceding section and throughout the preamble, employees, unions, the public, and this Department will benefit from the disclosure associated with this rule by requiring that both direct and indirect persuader activities be reported. This disclosure will particularly benefit employees involved in a representation campaign, enabling them to better consider the role that labor relations consultants play in their employer's efforts to persuade them about how they should exercise their rights as employees to union representation and collective bargaining matters. 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.

The Department estimates annual totals of 4,194 Form LM–20 reports and 2,777 Form LM–10 reports under this rule (the first number compares to the 2,601 estimate in the NPRM; the second figure compares to 3,414 in the NPRM). The Form LM–20 total represents an increase of 3,807 Form LM–20 reports over the total of 387 reports estimated in the Department's most recent Information Collection Request (ICR) submission to the Office of Management and Budget (OMB). The Form LM–10 total represents a 1,820 increase over the average of 957 Form LM–10 reports estimated in the Department's most recent ICR submission to OMB. The total estimated annual burden for all reports is approximately 6,851 hours for Form LM–20 reports and 6,804 hours for Form LM–10 reports. The total annual cost for the estimated 4,194 Form LM–20 reports is $633,932.16, which is $576,743.16 greater than the $57,189 estimated for the most recent ICR submission. The total annual cost for the estimated 2,777 Form LM–10 reports/filers is $629,567.34, which is $417,003.34 greater than the $212,564 estimated for the most recent ICR submission. The average cost per Form LM–20 form is $151.14. The average annual cost per Form LM–10 filer is $226.70.

II. Authority

The legal authority for this rule is set forth in sections 203 and 208 of the LMRDA, 29 U.S.C. 432, 438. Section 208 of the LMRDA provides that the Secretary of Labor shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under Title II of the Act and such other reasonable rules and regulations as she may find necessary to prevent the circumvention or evasion of the reporting requirements. 29 U.S.C. 438. The Secretary has delegated her authority under the LMRDA to the Director of the Office of Labor-Management Standards and permits re-delegation of such authority. See Secretary's Order 8–2009, 74 FR 58835 (Nov. 13, 2009).

III. Statutory and Regulatory Background

A. Statutory and Regulatory Requirements for Employer and Labor Relations Consultant Reporting

Section 203(a) of the LMRDA, 29 U.S.C. 433(a), requires employers to report to the Department of Labor ''any agreement or arrangement with a labor relations consultant or other independent contractor or organization'' under which such person''undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise,'' or how to exercise, their rights to union representation and collective bargaining. 29 U.S.C. 433(a)(4).[1] ''[A]ny payment (including reimbursed expenses) pursuant to such an agreement or arrangement must also be reported. 29 U.S.C. 433(a)(5).

The report must be one ''showing in detail the date and amount of each such payment, . . . agreement, or arrangement . . . and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.'' 29 U.S.C. 433. The Department of Labor's implementing regulations require employers to file a Form LM–10 (''Employer Report'') that contains this information in a prescribed form. See 29 CFR part 405.

LMRDA section 203(b) imposes a similar reporting requirement on labor relations consultants and other persons. It provides, in part, that every person who enters into an agreement or arrangement with an employer and undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or how to exercise, their rights to union representation and collective bargaining ''shall file within thirty days after entering into such agreement or arrangement a report with the Secretary . . . containing . . . a detailed statement of the terms and conditions of such agreement or arrangement.'' 29 U.S.C. 433(b). Section 203(b) also requires persons subject to this requirement to report receipts and disbursements of any kind ''on account of labor relations advice and services.'' [2] The Department of Labor's implementing regulations require labor relations consultants and other persons who have engaged in reportable activity to file a Form LM–20 ''Agreement and Activities Report'' within 30 days of entering into the reportable agreement or arrangement, and a Form LM–21 ''Receipts and Disbursements Report'' within 90 days of the end of the consultant's fiscal year, if during that year the consultant received any receipts as a result of a reportable agreement or arrangement. See 29 CFR part 406.

LMRDA section 203(c) ensures that sections 203(a) and 203(b) are not construed to require reporting of ''advice.'' Section 203(c) provides in pertinent part that ''nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer.'' 29 U.S.C.

[1] The LMRDA defines a ''labor relations consultant'' as ''any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities.'' 29 U.S.C. 402(m).

[2] Under LMRDA section 202, 29 U.S.C. 432, union officers and employees are required to report anything of value received ''directly or indirectly'' from an employer (including payments or benefits received by an official's spouse or minor child) that would present a conflict of interest with their obligation to the union. The reason for this requirement, as explained in the legislative history, is similar to the reason given for consultant reporting. See S. Rep. No. 86–187, at 38 (1959), reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (1 LMRDA Leg. Hist.), at 397, 434 (''Reports are required as to matters which should be public knowledge so that their propriety can be explored in the light of known facts and conditions'').

433(c). Section 203(c) is referred, in this final rule, as the ''advice'' exemption.

Finally, LMRDA section 204 exempts from reporting attorney-client communications, which are defined as ''information which was lawfully communicated to [an] . . . attorney by any of his clients in the course of a legitimate attorney-client relationship.'' 29 U.S.C. 434.

B. History of the LMRDA's Reporting Requirements and Justification for the Final Rule

The Secretary of Labor administers and enforces the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), Public Law 86–257, 73 Stat. 519–546, codified at 29 U.S.C. 401–531. The LMRDA, in part, establishes labor-management transparency through reporting and disclosure requirements for labor organizations and their officials, employers, labor relations consultants, and surety companies.[3]

1. Dealing With a Growing Phenomenon—1960 and Earlier

In enacting the LMRDA in 1959, a bipartisan Congress expressed the conclusion that the public interest is served by continuing ''to protect employees' rights to organize, choose their own representatives, bargain collectively . . . that it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations,'' and that ''[this Act] will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.'' 29 U.S.C. 401(a), (b).

The LMRDA was the direct outgrowth of a highly-publicized investigation conducted by the Senate Select Committee on Improper Activities in the Labor or Management Field, commonly known as the McClellan Committee, which convened in 1958. The committee's investigation focused on racketeering and corruption among certain unions, union officials, employers, and labor relations consultants. See generally, *Interim Report of the Select Committee on Improper Activities in the Labor or Management Field,* S. Rep. No. 85–1417 (1957). Enacted in 1959 in response to the report of the McClellan Committee, the LMRDA addressed various issues identified by the Committee through a set of integrated provisions aimed, among other areas, at shedding light on labor-management relations, governance, and management. These provisions include financial reporting and disclosure requirements for labor organizations, their officers and employees, employers, labor relations consultants, and surety companies. See 29 U.S.C. 431–36, 441.

Among the concerns that prompted Congress to enact the LMRDA was conduct by some labor relations consultants retained by employers, usually undertaken behind the scenes, that Congress had found impeded the right of employees to organize labor unions and to bargain collectively under the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et. seq.* See, *e.g.,* S. No. 86–187. Rep, at 6, 10–12, reprinted in 1 LMRDA Leg. Hist., at 397, 402, 406–408. Congress was concerned that some labor consultants, acting on behalf of management, worked directly or indirectly to discourage legitimate employee organizing drives and engage in activities with the aim to undercut employee support for unions. S. Rep. No. 86–187, at 10, 1 LMRDA Leg. Hist., at 406. The Senate Report explained that under section 203 ''every person who enters into an agreement with an employer to persuade employees as regards the exercise of their right to organize and bargain collectively or to supply an employer with information concerning the activity of the employees or labor organizations in connection with a labor dispute would be required to file a detailed report.'' [4] The report explained that ''this public disclosure will accomplish the same purpose as public disclosure of conflicts of interest and other union transactions which are required to be reported'' under other sections of the bill that was to become the LMRDA. S. Rep. No. 86–187, at 5, 12, reprinted in 1 LMRDA Leg. Hist., at 401, 408. (Emphasis added).[5] Congress was clearly aware that some consultant activity designed to be reported was accomplished ''indirectly.'' See S. Rep. No. 86–187, at 10, 12; 1 LMRDA Leg. Hist., at 406–407 (there have been *direct or indirect* management involvements involving middlemen; ''[i]n *some cases* they work directly on employees or through committees to discourage'' organizing efforts). The report noted an exception from reporting: ''An attorney or consultant who confines himself to giving legal advice, taking part in collective bargaining and appearing in court or administrative proceedings would not be included among those required to file reports.'' S. Rep. No. 86–187, at 5, 12, reprinted in 1 LMRDA Leg. Hist., at 401, 408.

The reporting requirements on employers and their consultants under LMRDA section 203 resemble those prescribed for labor organizations and their officials under LMRDA sections 201 and 202, respectively. 29 U.S.C. 431, 432. Under LMRDA section 208, the Secretary of Labor is authorized to issue, amend, and rescind rules and regulations prescribing the form and publication of required reports, as well as ''such other reasonable rules and regulations . . . as he may find necessary to prevent the circumvention or evasion of such reporting requirements.'' 29 U.S.C. 438. The Secretary also is authorized to bring civil actions to enforce the LMRDA's reporting requirements. 29 U.S.C. 440. Willful violations of the reporting requirements, knowing false statements made in a report, and knowing failures to disclose a material fact in a report are subject to criminal penalties. 29 U.S.C. 439.

A notable, contemporary account of the McClellan hearings demonstrates the breadth of the activities to be reported. Prior to becoming Attorney General and then Senator, Robert F. Kennedy served as staff director for the special committee that conducted those hearings. In his book, *The Enemy*

[3] The LMRDA and the NLRA are the two federal statutes that address generally the obligations of unions and employers to refrain from actions that interfere with the exercise by employees of their rights to union representation, collective bargaining, and union membership. While the NLRA, enforced by the NLRB, ensures compliance with these rights by investigating and prosecuting unfair labor practice complaints, the LMRDA promotes these rights by requiring unions, employers, and labor relations consultants to publicly disclose information about identified financial transactions, agreements, and arrangements. These foundational statutes are discussed in many texts and scholarly articles, too numerous to mention. To appreciate the historical significance of the statutes, see generally Philip Taft, *Organized Labor in American History* (1964), chapters 36, 44, and 51.

[4] Congress recognized that some of the persuader activities occupied a ''gray area'' between proper and improper conduct and chose to rely on disclosure rather than proscription, to ensure harmony and stability in labor-management relations. See S. Rep. No. 86–187, at 5, 12; 1 LMRDA Leg. Hist., at 401, 408.

[5] H.R. Rep. No. 86–741 (1959), at 12–13, 35–37, reprinted in 1 LMRDA Leg. Hist., at 770–771, 793–795, contained similar statements. However, it should be noted that the House bill contained a much narrower reporting requirement—reports would be required only if the persuader activity interfered with, restrained, or coerced employees in the exercise of their rights, *i.e.,* if the activity would constitute an unfair labor practice. The House bill also contained a broad provision that would have essentially exempted attorneys, serving as consultants, from any reporting. In conference, the Senate version prevailed in both instances, restoring the full disclosure provided in the Senate bill. See H. Rep. No. 86–1147 (Conference Report), at 32–33; 1 LMRDA Legis. Hist., at 936–937.

Within (1961), Kennedy discussed the activities that had been engaged in by Nathan Shefferman, who had served as labor relations consultant for several prominent companies. Kennedy's description of Shefferman's activities and those of his associates belies any notion that Congress, in later enacting the LMRDA, was limiting reporting to activities involving direct communication with employees. As described by Kennedy, Shefferman regularly hid his firm's activities in opposing union representation, preferring instead to orchestrate behind the scene an employer's actions to oppose a union. To illustrate Shefferman's advice to employers, Kennedy draws from a memorandum prepared by Shefferman for one of his clients: ''Don't dignify them. Call them bums and hoodlums. Cheap common bums. Don't argue wage differential. Don't answer it. Stay away from it. Ridicule leaders.'' *The Enemy Within,* at 218–219. Against this backdrop, it is clear that Congress intended that employers and their labor relations consultants were to report both their direct and indirect persuader activities. Moreover, as will be discussed in the next section of the preamble, the same activities that Shefferman was among the first to ''perfect'' continue to be utilized by labor relations consultants today.

2. A Disclosure Vacuum—From 1962 Until Today

With the Department's 1962 interpretation of the advice exemption to require reporting in only limited circumstances in which the employer was not free to ''accept or reject'' materials offered by the consultant, the reporting of persuader activities (activities which, by their nature, are most often ''indirect'') largely came to an end. At the same time, the consultant industry expanded as employer use of its services became increasingly common until the present day, where an employer's decision to rely solely on its own existing staff to meet a union campaign is uncommon. As a consequence, without the disclosure intended by Congress in enacting section 203, the work of consultants in helping employers oppose union representation remains undisclosed to employees.

Many employers engage consultants to conduct union avoidance or counter-organizing efforts to prevent workers from successfully organizing and bargaining collectively. In recent times, the use of law firms in particular to orchestrate such campaigns has been documented by several industrial relations scholars. John Logan, *The Union Avoidance Industry in the U.S.A.,* 44 British Journal of Industrial Relations 651, 658 (2006), *citing* Bruce E. Kaufman and Paula E. Stephan, *The Role of Management Attorneys in Union Organizing Campaigns,* 16 Journal of Labor Research 439 (1995); John Logan, Trades Union Congress, *U.S. Anti-Union Consultants: A Threat to the Rights of British Workers* 11 (2008) (hereafter ''Logan, *U.S. Anti-Union Consultants''*); 1984 Subcommittee Report, at 2; John Logan, *Consultants, Lawyers, and the 'Union Free' Movement in the U.S.A.,* 33 Industrial Relations Journal, 197, 199–212 (2002) (hereafter ''Logan, *Union Free Movement''*); Terry A. Bethel, *Profiting from Unfair Labor Practices: A Proposal to Regulate Management Representatives,* 79 Nw. U. L. Rev. 506, 519–525 (1984). As Kaufman and Stephan reported, consultants, who often are attorneys, provide employers with a range of services, and have varying degrees of involvement with employees, during union avoidance campaigns:

> Typically at the first sign of union activity at a facility management seeks the advice and counsel of one or more attorneys. In some cases the attorney's role is largely one of providing legal assistance, such as advising supervisors on what constitutes an unfair labor practice under the NLRA, with overall direction of the firm's campaign entrusted to either top management or an outside consultant. In other situations, the attorney not only provides legal counsel but also plays an important (sometimes dominant) role in developing and implementing the company's anti-union strategy and campaign tactics.

Kaufman and Stephan, at 440.[6] The literature reports a wide range of activities conducted or directed by consultants, many of which are lawful means to oppose the formation of the union (though some are not). To provide a sense of the kinds of activities engaged in by a labor relations consultant, we have compiled a list from activities mentioned in a study about union organizing and representation in the United States. The list does not differentiate between ''persuader activities'' and non-persuader activities, whether a particular activity would constitute ''direct'' or ''indirect'' persuasion,'' or whether the undertaking of a particular activity, by itself, would trigger reporting. The activities mentioned in the study include—

- Monitor NLRB daily dockets to get a jump on union activity and to offer their services to the targeted employer even before it is aware of the union's activity
- Encourage employers to write, publicize and enforce a clear policy against solicitation on a company premises by non-employees
- Inform employees that signing a union authorization card is akin to a power of attorney or blank check
- Have supervisors (falsely) state the union's campaign is going badly and that the union has been intimidating, harassing, and pressuring employees to sign union authorization cards
- Convey the false impression that support for a union is eroding by distributing sample letters to employees asking the union to return signed authorization cards
- Argue in favor of bargaining units that group together employees opposed to the union
- Argue that union advocates are supervisors, thereby removing them from voting and advocating on behalf of the union
- Tell supervisors that union representation will be ''a personal calamity'' for them by undermining their authority on the shop floor
- Warn supervisors they can be terminated for refusing to participate in the employer's anti-union campaign
- Relieve supervisors from any concern that they could be held culpable for their actions during the campaign by explaining that the NLRB holds the employer, not individual supervisors, responsible for any violation of the law
- Require supervisors to talk daily to employees on a one-to-one basis to gauge their support for the union, requiring that they report to the consultant on a daily or more frequent basis
- Organize ''vote no'' committees
- Script messages that predict violent strikes and permanent replacement of workers, highlight restrictive clauses in union constitutions, emphasize high salaries of union officials, the union's interest in obtaining dues payments from employees, and alleging union corruption
- ''[W]rite or help employers to write anti-union letters signed by senior

[6] A 1980 Congressional subcommittee report noted the increase in the use of law firms to assist employers in their union avoidance activities:

> Many lawyers no longer confine their practice to traditional services such as representing employers in administrative and judicial proceedings or advising them about the requirements of the law. They also advise employers and orchestrate the same strategies as non-lawyer consultants for union ''prevention,'' union representation election campaigns, and union decertification and de-authorization. Lawyers conduct management seminars, publish widely, and often form their own consulting organizations.

Subcommittee on Labor-Management Relations, H. Comm. on Education and Labor, *Pressures in Today's Workplace* (Comm. Print 1980) (''1980 Subcommittee Report''), at 28–29.

management, which are delivered to employees on the job by supervisors in order to witness each employee's response and to 'stimulate discussion' between supervisors and employees''
- ''Utiliz[e] gimmicks such as anti-union comic books, cartoons, competitions and 'vote-no' t-shirts and buttons. Competitions typically include 'the longest Union Strike contest' (the correct answer being the greatest to three possible choices) or 'true or false' quizzes (sample question: the union president earns $150,000 per year and has a chauffeur-driven limousine') with a cash prize worth six months union dues money''
- Train employers how to conduct captive audience meetings with large and small groups of employees, taking place on the company premises on paid time

Adapted from *Logan, Union Free Movement,* at 203–205.[7]

3. Transparency Promotes Worker Rights by Creating a More Informed Electorate

Employees are often unaware that their employer has retained a third party to orchestrate a campaign against the union. See Logan, *Union Free Movement,* at 201. As described by Logan: ''[E]mployees are often blissfully unaware of the consultant's presence in the workplace because consultants use first-line supervisors to spearhead their anti-union campaigns. This allows the consultant to remain in the background, avoid becoming the focus of the union reporting requirements of the LMRDA.'' Logan, *Union Free Movement,* at 201. Quoting a lawyer-consultant about the importance of remaining anonymous: ''I don't want the union to have the political advantage. They will tell the workers, ''Look the company hired this guy from New York City.'' Id. Later, the article states; ''Management's efforts to label the union an outside influence indicates the importance of keeping the consultant, obviously an outsider, well hidden during the counter-[organizing] campaign.'' Id. at 206. Further, even if employees know that a consultant has been hired, they may be unaware that the consultant is in the business of defeating employee efforts to form, join, or assist a union, rather than only serving the employer as an advisor on legal requirements.

The purpose of this rule is disclosure—not to express a view regarding the hire of labor relations consultants, the utility of their services, the growth of the industry, nor to single out particular firms or tactics for praise or criticism. The Department agrees with comments submitted in this rulemaking suggesting diversity in the labor relations consultant arena—both in terms of the types of services offered by consultants and the reasons employers seek to retain consultants. We acknowledge that the consultants may, in fact, be hired solely to help employers adhere to the law. The disclosure of the employer's persuader agreement or arrangement with a consultant allows workers to evaluate the source of the arguments and information designed to influence the exercise of their representation and collective bargaining rights. With this information, employees can better evaluate the merits of the views expressed by the employer's supervisors and managers, allowing employees to make more informed choices regarding their protected rights.

Union avoidance efforts often utilize supervisors and other management representatives to persuade employees. The reason for this approach is that these individuals, as co-workers, are generally known and more easily trusted by the employees than would be an outside consultant. See Logan, *Union Free Movement,* at 201–203. Employees may evaluate the message and methods of their supervisors and managers differently when they have information that reveals that a consultant is coaching these supervisors, drafting talking points, and scripting their interactions with employees. Without this information, employees are unable to provide necessary context to a common employer argument that a union is a ''third party'' that employees do not need to further their interests. Id. at 201, 206.

In contrast to the limited information available to employees about consultants under the Department's prior interpretation, employees already have a great deal of information available to them concerning the union or unions seeking to represent or currently representing them, including the amount that unions spend on organizing activities and who they engage to assist them in those organizing activities.[8] This information is publicly available in reports filed by unions with OLMS pursuant to section 201 of the LMRDA. For example, a union that files the Form LM–2 annual financial report is required to identify the percentage of time that its officers and employees spend on ''Representational Activities.'' See the Instructions for Form LM–2 Labor Organization Annual Report, at 19–20. On Schedule 15 of the Form LM–2, the union provides a further accounting of its direct and indirect disbursements related to representational activities, which include organizing efforts and collective bargaining. If a disbursement of $5,000 or more was made in this category, the union is required to itemize the disbursement by identifying the full name and address, and the type, of business or individual that received the disbursement and a statement of the reason for the disbursement. Id. at 25–26. Additionally, workers may view Form LM–30 reports from union officials disclosing potential conflicts of interest, as well as the results of union audits, union officer elections and civil and criminal cases against union officials, and Office of Labor-Management Standards (OLMS) annual reports and enforcement data. See LM reports and other information on the Department's Web site at *www.dol.gov/olms*; see also S. Rep. No. 86–187, at 39–40, 1 LMRDA Leg. Hist., at 435–436, stating, in part, that ''if unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who'' use consultants. This disclosure advances the goals of an informed electorate able to distinguish between well-reasoned and accurate information and campaign pressure. It is a reasonable approach to restore more transparency for workers.

Under this rule, employees, as intended by Congress in requiring the reporting of direct and indirect persuader activities, will gain considerable information about the amount of money involved in disbursements to the consultant, and many details about the nature and extent of the persuader agreement. They will benefit from publicly-available information that bears on the exercise of their rights as employees. Employers and consultants already have access to comprehensive reports filed with the Department pursuant to the LMRDA by unions and union officers that detail various financial arrangements and transactions. This rule restores the

[7] Consultants offer a complete slate of persuader services. As described by one consultant: ''[We] prepare all counter union speeches, small group meeting talks, letters to employees' homes, bulletin board posters, handouts to employee, etc., and schedules dates for each counter union communication media piece to be used. We have assembled a very large library of counter union materials, much of what is customized to a particular union.'' Logan, *Union Free Movement,* at 203.

[8] As noted by an international union in its comments on the proposed rule, it is routine for labor relations consultants to include information from Form LM–2 reports in their efforts to undermine employee support for a union.

missing piece from overall reporting requirements—by unions, union officers, employers, and labor relations consultants—established by the LMRDA.

The Department addresses comments concerning the rule's impact on employees' need for transparent information in Sections V.C.1, 3.

4. Underreporting of Persuader Agreements

The impetus for this rulemaking was the Department's recognition that, while employers routinely use consultants to orchestrate counter-organizing campaigns, most agreements or arrangements with such consultants went unreported. Underlying the paucity of reports was the Department's interpretation to essentially require consultants to report only agreements in which a consultant agrees to directly persuade employees on matters relating to union representation and collective bargaining. We recognized that despite the significant growth of the persuader industry and employers' increasing reliance on their services since the LMRDA's enactment, there had been no uptick in the number of reports received on persuader activity.[9]

As stated in the NPRM, recent studies place the contemporary consultant-utilization rate of employers who face employee organizing drives somewhere between 71% and 87%.[10] 76 FR 36186. Although there is some variation from year to year, the average number of representation cases filed with the National Mediation Board (NMB) during fiscal years 2010 to 2014 is 40; the average number of NLRB representation petitions filed during the most recent period available, 2009–2013, is 2,658.[11] Using the mean utilization rate of consultants by employers from the studies discussed above, the Department would expect that 78% of the combined NLRB and NMB representation matters would result in about 2,104 arrangements or agreements requiring a Form LM–20 consultant report annually during the same five-year period.[12] However, the Department received an average of about 545 LM–20's annually,[13] only 25.9% of those it could expect.[14] It appears clear that only a small fraction of the organizing campaigns in which consultants were utilized to manage counter-organizing campaigns resulted in the filing of a Form LM–20. When such a small proportion of persuader consulting activity is reported, employees are not receiving the information that would enable them to make an informed decision on organizing and collective bargaining.[15]

The lack of reporting of employer-consultant agreements, despite the increase in employer utilization of consultants to orchestrate anti-union campaigns and programs, stems from the interpretative decisions of the Department. The prior interpretation effectively exempts agreements for activities consisting of indirect persuasion of employees. Indeed, the prior interpretation did not properly take into account the widespread use of indirect tactics, such as directing the persuader activities of the employer's supervisors and providing persuasive materials to the employer for dissemination to employees, and thus did not result in the reporting of most persuader agreements. This conclusion has also been reached by observers of the consultant industry. See John Logan, ''*Lifting the Veil*'' *on Anti-Union Campaigns: Employer and Consultant Reporting under the LMRDA, 1959–2001,* 15 Advances in Industrial and Labor Relations 295, 297 (2007) (hereafter Logan, *Lifting the Veil*) (''As the size and sophistication of the consultant industry has grown, the effectiveness of the law on consultant disclosure and reporting has diminished.''). Indeed, the charge is that ''[e]nforcement of the consultant reporting requirements had practically ground to a halt by the mid-1980s—all during a time when, according to organized labor, employers and consultants were ever more actively, boldly, and creatively fighting unionization.'' Id. at 311.[16]

Members of the consultant industry have also cited the Department's interpretation as the cause of underreporting of persuader agreements. A former consultant, Martin Jay Levitt, observed:

> The law states that management consultants only have to file financial disclosures if they engage in certain kinds of activities, essentially attempting to persuade employees not to join a union or supplying the employer with information regarding the activities of employees or a union in connection with a labor relations matter. Of course, that is precisely what anti-union consultants do, have always done. Yet I never filed with [LMRDA] in my life, and few union busters do . . . As long as [the consultant] deals directly only with supervisors and management, [the consultant] can easily slide out from under the scrutiny of the Department of Labor, which collects the [LMRDA] reports.

Martin Jay Levitt (with Terry Conrow), *Confessions of a Union Buster,* at 41–42 (New York: Crown Publishers, Inc. 1993). Mr. Levitt describes consultant strategies that he employed to avoid reporting his activities:

> Within a couple of weeks I had identified the few supervisors who were willing to

[9] The use of consultants to orchestrate union avoidance and counter-campaigns appears to have increased tremendously since 1959. See the NPRM at 76 FR 36182, 85–86.

[10] See Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform,* in Restoring the Promise of American Labor Law 80 (Sheldon Friedman et al. eds. ILR Press 1994) (hereafter ''Bronfenbrenner, *Employer Behavior*'') (71% of employers); Logan, *Union Avoidance Industry,* at 669 (75% of employers); Kate Bronfenbrenner, Economic Policy Institute, *No Holds Barred: The Intensification of Employer Opposition to Organizing* 13 (2009) (hereafter ''Bronfenbrenner, *No Holds Barred*'') (75% of employers in period 1999–2003); Chirag Mehta and Nik Theodore, American Rights at Work, *Undermining the Right to Organize: Employer Behavior during Union Representation Campaigns* 5 (2005) (hereafter ''Mehta and Theodore, *Undermining the Right to Organize*'') (82% of employers); James Rundle, *Winning Hearts and Minds in the Era of Employee Involvement Programs,* in Organizing to Win: New Research on Union Strategies 213, 219 (Kate Bronfenbrenner, et al. eds., Cornell University Press 1998) (hereafter ''Rundle, *Winning Hearts and Minds*'') (87% of employers). See also Subcommittee on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor, *The Employee Free Choice Act* (Feb. 8, 2007) (testimony by Professor Harley Shaiken, quoting an article in *Fortune,* finding that most employers hire consultants to block organizing drives).

[11] See NLRB Annual Report Data, Table 1, for FYs 2009–10 at *http://www.nlrb.gov/reports-guidance/reports/annual-reports*, as well as the NLRB Summary of Operations for FYs 2011–12 at *http://www.nlrb.gov/reports-guidance/reports/summary-operations.* See also NLRB data for FY 2013 at *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections.* See also the NMB FY 2014 Annual Report at *https://storage.googleapis.com/dakota-dev-content/NMB-2014-Annual-Report.pdf* for NMB FY 2010–2014 data.

[12] This figure may still under represent the total, as it does not take into account employers who hire multiple consultants or consultants who hire sub-consultants, each of whom would need to file separate Form LM–20 reports.

[13] Information on the number of LM reports received for FYs 2010–14 is available through the Department's Electronic Labor Organization Reporting System (e.LORS).

[14] The Department notes that it has updated the NLRB, NMB, and LM reports data used in the NPRM. The data in the final rule reflects the most recent fiscal years: 2010–14 (2009–2013 for the NLRB data), whereas the NPRM utilized a prior period: FYs 2005–09. See the Paperwork Reduction Act analysis in Section VI.G.1.

[15] See Charles B. Craver, *The Application of the LMRDA ''Labor Consultant'' Reporting Requirements to Management Attorneys: Benign Neglect Personified,* 73 Nw. U. L. Rev. 605 (1978) (reporting on survey of lawyers engaged in legal advice and persuader activities, noting pervasive noncompliance with disclosure even where activity obviously involved direct persuader activity and noting the particular problems where employees are unaware that an attorney is acting as the employer's representative).

[16] See also Assistant Secretary Hobgood's testimony, discussed supra, ''acknowledg[ing] that Department [enforcement] activity had 'declined significantly' since the first few years after the enactment of [the LMRDA].'' 1980 Subcommittee Report, at 45.

work extra hard for me . . . . Through that handful of good soldiers I set to work establishing a network of rank-and-file employees who would serve as spies, informants, and saboteurs. Those so-called loyal employees would be called upon to lobby against the union, report on union meetings, hand over union literature to their bosses, tattle on their co-workers, help spread rumors, and make general pests of themselves within the organizing drive. I rarely knew who my company plants were. . . . It was cleaner that way. Nobody could connect me to the activities, I steered clear of the reporting requirements of [the LMRDA], and the workers' 'pro-company' counter campaign was believed to be a grass-roots movement.

Id. at 181.[17]

As discussed further below, a congressional subcommittee concluded that there is significant underreporting of persuader agreements, as a result of the Department's interpretation. The 1980 Subcommittee Report characterizes the extent and effectiveness of employer and consultant reporting under the LMRDA as a ''virtual dead letter, ignored by employers and consultants and unenforced by the Department of Labor.'' 1980 Subcommittee Report, at 27. The Subcommittee concluded that the ''current interpretation of the law has enabled employers and consultants to shield their arrangements and activities[,]'' and called upon the Department to ''adopt . . . a more reasonable interpretation so the Act can reach consultants who set and control the strategy for employer anti-union efforts but who do not themselves communicate directly with employees.'' Id. at 44.

This recommendation came about, in part, as the result of testimony before the Subcommittee by Assistant Secretary of Labor for Labor-Management Relations William Hobgood, who ''acknowledged that Department [enforcement] activity had 'declined significantly' since the first few years after the enactment of [the LMRDA].'' 1980 Subcommittee Report at 45. Hobgood testified that the Department's interpretation of advice '' 'troubles' him,'' and that the Department was ''reviewing the question of where advice ends and persuasion begins to make sure the Department's position is consistent with the law and adequate to deal with the approaches to persuader activities that have evolved since the law was enacted more than 20 years ago.'' Id. at 44.

Subsequent subcommittee hearings, conducted in 1984, also addressed labor relations consultants' and employers' compliance with the LMRDA's reporting and disclosure requirements. Subcommittee on Labor-Management Relations, H. Comm. on Education and Labor, *The Forgotten Law: Disclosure of Consultant and Employer Activity Under the L.M.R.D.A.* (Comm. Print 1984) (1984 Subcommittee Report). The 1984 Subcommittee admonished the Labor Department for failing to act on its recommendations from 1980 regarding the need for more vigorous enforcement of employer and consultant reporting requirements, 1984 Subcommittee Report at 4, and suggested that lack of robust enforcement of employer and consultant reporting requirements of section 203 ''frustrated Congress' intent that labor-management relations be conducted in the open.'' Id. at 18.

The Department addresses comments concerning the underreporting of persuader agreements in Section V.C.2.

5. Transparency Promotes Peaceful and Stable Labor-Management Relations, a Central Goal of the Statute

The Department views disclosure of third-party persuader agreements, as did Congress, as a key ''to protect employee rights to organize, choose their own representatives, [and] bargain collectively.'' 29 U.S.C. 401(a). The Senate Labor Committee explained why the provision that ultimately became section 203(b) of the LMRDA was necessary, stating that just as ''unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious, designed to interfere with the free choice of bargaining representatives by employees and to provide the employer with information concerning the activities of employees or a union in connection with a labor dispute.'' S. Rep. No. 86–187, at 39–40, 1 LMRDA Leg. Hist., at 435–436. As this passage suggests, section 203(b) requires not only the disclosure of consultant activity that interferes with, restrains, or coerces employees in their protected rights under the NLRA, *i.e.,* constitutes an unfair labor practice, but also requires reporting of activity to persuade employees that involves conduct that is otherwise legal under the NLRA. S. Rep. No. 86–187, at 11, 12, 1 LMRDA Leg. Hist., at 406, 407.[18] Only by providing such information would the interest of workers, the public, and the government be protected. Anything less would deny employees information necessary for them to fully exercise their rights to union representation and collective bargaining.

Although the Department's primary role insofar as Title II of the Act is concerned is to prescribe, administer, and enforce regulations implementing the Act's reporting and disclosure provisions, this role also comes within the Department's charge in its organic statute ''to foster promote, and develop the welfare of the wage earners of the United States, to improve their working conditions, and to advance their opportunities for profitable employment,'' a role congruent with the Department's responsibility to assist in ensuring ''industrial peace.'' Act to Create the Department of Labor, Public Law 426, 37 Stat. 736 (1913), sections 1, 8 (codified as amended at 29 U.S.C. 551). As we have noted, this rule effectuates the intention of Congress to require the disclosure of persuader activity—both direct and indirect. In fashioning this rule, our target has been to achieve this purpose—not to encourage or discourage the use of labor relations consultants, nor to attribute to the industry as a whole the recognized failure by some members of the industry to adhere to responsible, lawful standards.

Insofar as questions concerning employee choice about union representation are concerned, the integrity of the union election certification process is strengthened when voters become better informed—by virtue of union disclosure, as well as by consultant and employer disclosure. Even if the votes of certain workers are not affected by the knowledge of the persuader agreement with a consultant where this information is provided to the employees, they, along with the employer and the public, can be more confident in the integrity of the election process and that the election outcomes reflect the sound and informed intent of

[17] Mr. Levitt's description of the actual practice of labor relations consultants is consistent with prior statements by other consultants. See 1980 Subcommittee Report, at 44 (quoting testimony of labor relations consultant and stating that the ''current interpretation of the law has enabled employers and consultants to shield their arrangements and activities''). See also *Unionbusting in the United States,* at 112, which states that ''most modern union busters employed a standardized three-pronged attack. Cognizant of LMRDA guidelines requiring consultants to report their activity only when engaged *directly* in persuading employees in regards to their right to bargain collectively, most consulting teams utilized supervisory personnel as 'the critical link in the communications network.''' (Italics in original.)

[18] Labor relations consultants may be held liable by the National Labor Relations Board for unfair labor practices committed on behalf of employers. See, *e.g., Blankenship and Associates, Inc.* v. *N.L.R.B.,* 999 F.2d 248 (7th Cir. 1993), enforcing 306 N.L.R.B. 994 (1992). Employers may also be held liable, based on the actions of their consultants. See, *e.g., Wire Products Manufacturing Corp.,* 326 N.L.R.B. No. 62 (1998).

the voters. Such a process for determining union representation issues creates more stable and peaceful labor-management relations. Even if a union is defeated in its efforts to gain representation, an informed workforce will be in a better position to maintain stable labor-management relations.

The need to disclose an employer's use of consultants during an organizing campaign is a pivotal theme in this rulemaking. However, such disclosure also is important where an employer has engaged the persuader services of a consultant following a union's certification while the parties are negotiating a first contract. See 29 U.S.C. 401(a) (a purpose of LMRDA is to protect employees right to bargain collectively); 29 U.S.C. 143 (under the NLRA, it is the declared policy of the United States to ''encourage[ ] the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of their employment''). As further explained in the margin, industrial relations research demonstrates that newly certified unions are much less likely to secure a first contract in cases in which the employer has hired a consultant.[19] See Logan, *Union Free Movement* at 198, citing R. Hurd, *Union Free Bargaining Strategies and First Contract Failures,* in Proceedings of the 48th Meeting of the Industrial Relations Research Ass'n 145 (P. Voos ed. IRRA 1996), and G. Pavy, *Winning NLRB Elections and Establishing Collective Bargaining Relationships,* in Restoring the Promise of American Labor Law 110 (Sheldon Friedman et al. eds. ILR Press 1994); Bronfenbrenner, *Employer Behavior,* at 84 (citing probability of winning first contract declining by 10 to 30 percent in bargaining units in which the employer utilizes a labor relations consultant). See 76 FR 36189. See also note 17 and text accompanying (describing the strategies used by a noted former consultant). Knowing that the employer has engaged the persuader services of a consultant will help employees assess the employer's position on unresolved issues and its characterization of the union's negotiating stance.

Concern about the impact of consultant activity on labor-management relations emanated from the Executive Branch as well. In March 1993, the Secretaries of Labor and Commerce announced the establishment of the U.S. Commission on the Future of Worker-Management Relations (Commission), which was charged with investigating and making recommendations regarding enhancement of workplace productivity and labor-management cooperation, among other areas. The Commission, also called the Dunlop Commission after its chairman, former Labor Secretary and Professor John T. Dunlop of Harvard University, held public hearings and took testimony on the state of labor relations in the early 1990s. The Commission issued a fact-finding report in June 1994 and a final report in December of the same year, and the reports provide further support for the need for the revision of the interpretations involving consultant reporting.

In assessing economic costs that labor and management face in the competition surrounding representation elections, the Commission found that ''[f]irms spend considerable internal resources and often hire management consulting firms to defeat unions in organizing campaigns at sizable cost.'' *Commission on the Future of Worker-Management Relations, Fact-Finding* Report, at 74 (May 1994). Indeed, the Commission concluded, the ''NLRA process of representation elections is often highly confrontational with conflictual activity for workers, unions, and firms that thereby colors labor-management relations.'' Id. at 75.

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

C. History of the Department's Interpretation of Section 203(c)

The ''advice'' exemption of LMRDA section 203(c) is reflected in the Department's implementing regulations, but, historically, the regulations simply tracked the language of the statute and did not set forth the Department's interpretation of the exemption. 29 CFR 405.6(b), 406.5(b). Before this rule, the Department's interpretation of the advice exemption had been communicated primarily in documents intended to guide Department staff in administering the statute. See 76 FR 36179–82.

In 1960, one year after the passage of the Act, the Department issued its initial interpretation (sometimes referred to herein as the ''original interpretation''), which was reflected in a 1960 technical assistance publication to guide employers. In this interpretation, the Department took the position that employers were required to report any ''arrangement with a 'labor relations consultant' or other third party to draft speeches or written material to be delivered or disseminated to employees for the purpose of persuading such employees as to their right to organize and bargain collectively.'' Department of Labor, Bureau of Labor-Management Reports,[20] *Technical Assistance Aid No. 4: Guide for Employer Reporting,* at 18 (1960). The Department also took the position that a lawyer or consultant's revision of a document prepared by an employer was reportable activity. See Benjamin Naumoff, *Reporting Requirements under the Labor-Management Reporting and Disclosure Act,* in Fourteenth Annual Proceedings of the New York University Conference on Labor, at 129, 140–141 (1961).

In 1962, the Department changed its view of what must be reported. It limited reporting by construing the advice exemption more broadly, excluding from reporting the provision of materials to the employer that the employer could then ''accept or reject.'' This interpretation appeared as guidance in section 265.005 (Scope of the ''Advice'' Exemption) (1962) of the LMRDA Interpretative Manual (IM or Manual). The Manual reflects the Department's official interpretations of the LMRDA. The IM was prepared by OLMS predecessor agencies for use by staff in administering the LMRDA. OLMS maintains the IM and makes it available to the public upon request. Section 265.005 of the Manual stated:

> The question of application of the ''advice'' exemption requires an examination of the intrinsic nature and purpose of the arrangement to ascertain whether it essentially calls exclusively for advice or other services in whole or in part. Such a test cannot be mechanically or perfunctorily applied. It involves a careful scrutiny of the basic fundamental characteristics of any arrangement to determine whether giving advice or furnishing some other services is the real underlying motivation for it.

[19] First-contracts are crucial to newly certified unions. Under section 9(c)(3) of the NLRA, no elections may be held within one year of the election of an incumbent employee representative. 29 U.S.C. 159(c)(3). Employers understand that unions that do not show results in bargaining during that first year are more vulnerable to challenges, including decertification petitions. As a result, employers may adopt strategies, with the assistance of consultants, to stall bargaining and prevent the adoption of a first contract. One year after an election in which employees voted in favor of union representation, only 48% of bargaining units with certified representatives have executed an initial collective bargaining agreement. Bronfenbrenner, *No Holds Barred,* at 22. The Department notes that the observed effects may not be entirely attributable to the use of a consultant, as some employers may be less supportive of unionization and may choose certain tactics and strategies independent of the use of a consultant.

[20] The Bureau of Labor-Management Reports is a predecessor agency to OLMS.

[I]t is plain that the preparation of written material by a lawyer, consultant, or other independent contractor which he directly delivers or disseminates to employees for the purpose of persuading them with respect to their organizational or bargaining rights is reportable. . . .

However, it is equally plain that where an employer drafts a speech, letter or document which he intends to deliver or disseminate to his employees for the purpose of persuading them in the exercise of their rights, and asks a lawyer or other person for advice concerning its legality, the giving of such advice, whether in written or oral form, is not in itself sufficient to require a report. Furthermore, we are now of the opinion that the revision of the material by the lawyer or other person is a form of written advice given the employer which would not necessitate a report.

A more difficult problem is presented where the lawyer or middleman prepares an entire speech or document for the employer. We have concluded that such an activity can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer. Consequently, such activity in itself will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. *In a situation where the employer is free to accept or reject the written material prepared for him* and there is no indication that the middleman is operating under a deceptive arrangement with the employer, *the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.*

(Italics added). In later years, the Department reiterated the 1962 position (also referred to herein as the ''accept or reject'' test, or in distinction from the position taken in this rule, the ''prior'' interpretation), sometimes expressing doubts about its soundness. See Subcommittee on Labor-Management Relations, H. Comm. on Education and Labor, *The Forgotten Law: Disclosure of Consultant and Employer Activity Under the L.M.R.D.A.* (Comm. Print 1984) (statement of Richard Hunsucker, Director, Office of Labor-Management Standards Enforcement, Labor-Management Standards Administration, U.S. Department of Labor); Subcommittee on Labor-Management Relations, H. Comm. on Education and Labor, *Pressures in Today's Workplace,* at 4, 5 (Comm. Print 1980) (statement of William Hobgood, Assistant Secretary of Labor for Labor-Management Relations). (The current interpretation ''when stretched to its extreme, . . . permits a consultant to prepare and orchestrate the dissemination of an entire package of persuader material while sidestepping the reporting requirement merely by using the employer's name and letterhead or avoiding direct contact with employees''). More recently, in 1989 the Department revisited the issue, stating in an internal memorandum:

[T]here is no purely mechanical test for determining whether an employer-consultant agreement is exempt from reporting under the section 203(c) advice exemption. However, a usual indication that an employer-consultant agreement is exempt is the fact that the consultant has no direct contact with employees and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees which the employer has the right to accept or reject.

March 24, 1989 memorandum from then Acting Deputy Assistant Secretary for Labor-Management Standards Mario A. Lauro, Jr. As a result of the Lauro memorandum, the approach that limited reporting to ''direct contact'' situations, while not strictly required by the 1962 interpretation, became part of the Department's view of the advice exemption and has been generally followed since 1989 (with the exception of a brief period in early 2001).[21]

In 2001, the Department, without seeking public comment, published a revised interpretation, which expanded the scope of reportable activities, by focusing on whether an activity constitutes ''direct or indirect'' persuasion of employees, rather than categorically exempting activities in which a consultant had no direct contact with employees. See Interpretation of the ''Advice'' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 FR 2782 (Jan. 11, 2001). However, later in 2001 this interpretation was rescinded, and the Department returned to its prior view. See Interpretation of the ''Advice'' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 66 FR 18864 (Apr. 11, 2001).

In its Fall 2009 Regulatory Agenda, the Department stated that it would revisit the interpretation to ensure that agreements involving persuader activities were not improperly excluded from reporting. On May 24, 2010, a public meeting was held on this issue. See 75 FR 27366. On June 21, 2011, the Department published the notice of proposed rulemaking (NPRM) on this issue. The comment period on the proposed rule closed on September 21, 2011.

IV. Revised ''Advice'' Exemption Interpretation

A. Summary of the Revised Interpretation

This final rule adopts with some modifications the interpretation of the ''advice'' exemption outlined in the NPRM. The revised interpretation gives full effect to the statutory language, which requires disclosure of consultant activities that are intended ''directly or *indirectly*'' to persuade employees concerning their organizing or collective bargaining rights. See 29 U.S.C. 433(a)(3) and (b) (emphasis added). Section 203 of the LMRDA is designed, in principal part, to shed light on the hidden activities of persuaders. Activities performed directly by consultants—such as delivering a speech to employees about why they should ''vote no'' in a union election, meeting with employees to dissuade them from joining the union, or sending a letter to employees, under his or her own signature, for the same purpose, have always triggered reporting, even under the Department's prior interpretation of the advice exemption, but that interpretation was so broad that it enabled consultants who undertook indirect persuader activities (such as writing a speech to be delivered by the employer or drafting a letter to employees for the employer's signature)

[21] The Department is aware of two instances where it took the position that indirect persuader activities triggered reporting. In 1975, the Department filed suit against a consultant who directed and coordinated supervisors in a system of gathering information on union sympathies without direct contact. The case was settled after the consultants agreed to file the reports. See Statement of Richard G. Hunsucker on Labor Department Enforcement of Consultant Reporting Provisions of Landrum-Griffin Act, DLR No. 27, G–2 (Feb. 9, 1984) (BNA). In 1981, the Department brought suit arguing that the consultant engaged in indirect persuader activity. In this case, the employer consented to the entry of a court order requiring it to file reports. Id. Additionally, the Department *may* have taken that position in *Martin* v. *Power, Inc.,* Civ. A. No. 92–385J (W.D. Pa.), 1992 WL 252264. Although the opinion on a request to stay the Secretary's enforcement action is not entirely clear on this point, the Secretary may have argued that indirect contact by the consultant, as distinct from direct contact also involved in that case, had to be reported pursuant to section 203. Notwithstanding these actions, the Department's stance since has been that a consultant incurs a reporting obligation only when it directly communicates with employees with an object to persuade them. See *International Union, United Auto., Aerospace, and Agricultural Implement Workers of America, UAW* v. *Donovan,* 577 F. Supp. 398 (D.D.C. 1983), aff'd in part, remanded in part by *International Union, United Auto., Aerospace & Agr. Implement Workers of America* v. *Dole,* 783 F.2d 237 (D.C. Cir. 1986); on remand, *International Union* v. *Secretary of Labor,* 678 F.Supp. 4 (D.D.C. 1988), rev'd, *International Union, United Auto., Aerospace & Agr. Implement Workers of America* v. *Dole,* 869 F.2d 616 (D.C. Cir. 1989). In these cases, the UAW challenged the Department's interpretation that a consultant-attorney's drafting of personnel policies to discourage unionization—an indirect persuader activity—did not trigger a reporting obligation. See *International Union, United Auto., Aerospace & Agr. Implement Workers of America* v. *Dole,* 869 F.2d at 619. These cases are discussed in later sections of the preamble. See Sections V.B.1, .2.a.

to skirt reporting, a result that contravenes the text and purpose of the LMRDA. The revised interpretation now brings to light those indirect persuader activities that have been hidden from public view. This rule adjusts how the Department construes the term ''advice,'' an interpretation that furthers the LMRDA's goals of transparency and labor-management stability. It is also consistent with the Department's initial, 1960 interpretation of the ''advice'' exemption.

Under the revised interpretation, like the prior interpretation, activities that are clearly advice do not trigger reporting. Thus, ''an oral or written recommendation regarding a decision or course of conduct''—what traditionally has been viewed as the role of a consultant or attorney in counseling a client—does not trigger reporting.[22] Agreements under which a consultant exclusively provides legal services or representation in court or in collective bargaining negotiations are not to be reported. ''Advice'' does not include persuader activities, *i.e.,* actions, conduct, or communications by a consultant on behalf of an employer that are undertaken with an object, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively. If the consultant engages in both advice and persuader activities, however, the entire agreement or arrangement must be reported.

No longer exempt from reporting are those agreements or arrangements in which the consultant engages in the indirect persuasion of employees. Such indirect persuader activities are no longer considered to be ''advice'' under LMRDA section 203(c), and, if undertaken, they now trigger reporting under sections 203(a) and (b). With this rule, the Department effectively reverses its prior interpretation of the advice exemption and will, accordingly, no longer utilize the ''accept or reject'' test. See Section III.C.

The revised instructions to the Form LM–10 Employer Report and the Form LM–20 Agreement and Activities Report provide examples of reportable and non-reportable agreements or arrangements. See Section IV.E and Appendices. The revised instructions largely implement those proposed by the Department in the NPRM, but in response to comments received there are six changes: (1) Modifications to the text and layout of the instructions to ensure clarity, such as the inclusion of examples of indirect persuader activities that are now grouped into four categories (directing and coordinating supervisors' activities; providing persuasive materials; conducting union avoidance seminars for supervisors or other employer representatives; and developing and implementing personnel policies or actions); (2) restriction of the term ''object to persuade employees'' to only organizing and collective bargaining rights, and not the larger category of ''protected concerted activity''; (3) clarification regarding the reportability of union avoidance seminars and the elimination of duplicative reporting by employer-attendees; [23] (4) distinguishing between trade associations and other labor relations consultants for some reporting purposes, including the elimination of reporting by trade associations where they merely sponsor union avoidance seminars or select ''off-the-shelf'' persuader materials for member-employers; [24] (5) elimination of reporting for employee attitude surveys and related vulnerability assessments; and (6) clarification that reporting is not triggered by the employer's mere purchase or other acquisition of ''off-the-shelf'' persuader materials from a consultant without any input by the consultant concerning the selection or dissemination of the materials.

This rule also implements changes to the employer and consultant reporting standards on the Forms LM–10 and LM–20 by expanding the reporting detail concerning reportable agreements and arrangements. The Department also modifies the layout of the LM–10 and LM–20 forms and instructions to better set forth the reporting requirements and improve the readability of the information. Finally, this rule requires that Form LM–10 and Form LM–20 reports be submitted to the Department electronically and provides a process to apply for an electronic filing exemption on the basis of specified criteria. These changes to the forms are discussed in more detail in Section IV.D.

This rule supersedes any inconsistent interpretation or other guidance issued by the Department concerning the persuader reporting requirements of the Act insofar as Forms LM–10 and LM–20 are concerned.[25]

The comments submitted on the proposed rule reflected strongly divergent views as to how the reporting requirements of section 203 should be applied, how section 203 and the proposed interpretation squares with the NLRA, whether the proposed interpretation unconstitutionally impedes the First Amendment rights of employers, and whether it is inconsistent with the principles protecting the attorney-client relationship. The Department has carefully considered the comments, which have been helpful in informing the Department's judgment. For the reasons stated in this preamble, however, the Department has concluded that the proposed and final rules correctly effectuate the purposes of section 203 and faithfully adhere to national labor policy, as articulated in the NLRA and the LMRDA, without impeding any constitutional rights of employers or interfering with the attorney-client relationship as properly understood in the context of sections 203 and 204 of the LMRDA.

B. Revised Advice Exemption Overview

This rule restores the focus of section 203 persuader reporting to whether a consultant's activities, undertaken pursuant to an agreement or arrangement with the employer, have an object to persuade employees about their union representation and collective bargaining rights. This focus forecloses an interpretation that allowed non-reporting of most activities simply by avoiding direct contact with employees. The revised instructions, consistent with the language and purpose of sections 203 and 204 of the LMRDA, provide that an agreement or arrangement is reportable if the consultant undertakes activities with an object to persuade employees, for example, by managing a union

[22] As noted, both ''agreements'' and ''arrangements'' whereby the consultant undertakes activities with an object to persuade must be reported. For simplicity, this preamble often refers only to agreements. However, the same obligations attach to arrangements to persuade. Additionally, every ''person'' who, pursuant to an agreement with an employer, undertakes persuader activities is required to report pursuant to section 203(b). For simplicity, this preamble often refers only to ''consultants'' and their obligations to report persuader agreements pursuant to the section, but the same obligations attaches to all persons who enter into such agreements.

[23] Section 406.2 of the Department's regulations, 29 CFR 406.2, has been revised, consistent with the instructions, to accommodate the adjusted filing date for reports concerning union avoidance seminars.

[24] ''Off-the-shelf'' materials refer to pre-existing material not created for the particular employer who is party to the agreement.

[25] Section 265.005 of the IM contains the Department's prior interpretation of the advice exemption, and it therefore is superseded in its entirety. Section 255.600 is inconsistent with the final rule to the extent the former provides in its third example that an indirect persuader activity is non-reportable as ''advice.'' Sections 257.100, 258.005, 260.500, 260.600 of the IM will need to be read in conjunction with the final rule insofar as reporting by a trade association is concerned. Similarly, section 262.005 will need to be read in conjunction with the final rule in addressing the timeliness of reports triggered by presenting a union avoidance seminar. OLMS intends to update these and other sections of the IM to reflect the most current reporting requirements.

avoidance or counter-organizing campaign. In practical terms, employers and consultants must report all direct and indirect activities undertaken by the consultant with an object to persuade employees, exempting only activities that come within the plain meaning of ''advice'' to the employer, as well as the employer representation services enumerated in section 203(c), other legal services for the employer, and other consultant activities that, similarly, do not have an object to persuade employees.

There are five general scenarios in which the underlying test for persuasion is to be applied, one in which the consultant engages in direct contact with employees and four in which the consultant does not engage in direct contact:

Reporting of an agreement or arrangement is triggered when:

(1) A consultant engages in *direct* contact or communication with any employee, with an object to persuade such employee; or

(2) A consultant who has no direct contact with employees undertakes the following activities with an object to persuade employees:

(a) Plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;

(b) provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;

(c) conducts a seminar for supervisors or other employer representatives; or

(d) develops or implements personnel policies, practices, or actions for the employer.[26]

The activity that triggers the consultant's requirement to file the Form LM–20 also triggers the employer's obligation to report the agreement on the Form LM–10, with the exception of union avoidance seminars, as explained below.

1. Categories of Persuasion

Direct Persuasion. Consultants must report if they engage in any conversation or other direct communication with any employee where the consultant has an object to persuade. For example, reporting would be required if the consultant speaks directly with employees (in person or by telephone or other medium) or disseminates materials directly (such as emailing or mailing) with an intent to persuade.

Indirect Persuasion: Planning, Directing, or Coordinating Supervisors or Managers. Reporting is required if the consultant, with an object to persuade, plans, directs, or coordinates activities undertaken by supervisors or other employer representatives. This includes both meetings and other less structured interactions with employees. The following nonexclusive factors are indicia of a consultant using supervisors to engage in indirect persuasion: The consultant plans, directs or coordinates which employees they meet; where they meet them; when they meet; for how long they meet; the topics discussed and the manner in which they are presented; the information gathered from the employees and how they should gather it; debriefing with the supervisor to orchestrate the next steps in the campaign; and identifying materials to disseminate to employees.

Indirect Persuasion: The Provision of Persuader Materials. Reporting is required if the consultant provides, with an object to persuade, material or communications to the employer, in oral, electronic (including, *e.g.,* email, Internet, or video documents or images), or written form, for dissemination or distribution to employees. While a lawyer who exclusively counsels an employer-client may provide examples or descriptions of statements found by the National Labor Relations Board (NLRB) to be lawful, this differs from the attorney or other consultant affirmatively drafting or otherwise providing to the employer a communication tailored to the employer's employees and intended for distribution to them. The latter is reportable; the former is not.

As to a consultant's revision of employer-created materials, including edits, additions, and translations, if an ''object'' of the revisions is to ensure legality as opposed to persuasion, then they do not trigger reporting. An object to persuade is also not present if the consultant merely corrects typographical or grammatical errors or translates the document. In contrast, if such revisions are intended to increase the persuasiveness of the material, then they trigger reporting. The principle here is that the revision of materials is no different than the initial creation of the materials: The consultant still plays a role in completing them. The only issue is whether there is an object to persuade.

As for the provision of ''off-the-shelf'' materials, as explained below, the Department has revised the application of the advice exemption in these situations. As noted, ''off-the-shelf'' materials refer to pre-existing material not created for the particular employer who is party to the agreement. Where a consultant merely provides an employer with such material selected by the employer from a library or other collection of pre-existing materials prepared by the consultant for all employer clients, then no reporting is required. The consultant may provide information concerning the materials, such as explaining their content and origin, but such guidance does not trigger reporting. As mentioned above, the provision of off-the-shelf materials, without more, is not reportable. In contrast, if the consultant plays an active role in selecting the materials for its client's employees from among pre-existing materials based on the specific circumstances faced by the employer-client, then this activity would trigger reporting, because it demonstrates the consultant's intent to influence the decisions of those employees. However, where a trade association selects off-the-shelf materials for its members, no reporting is required. See Section V.E.3, discussing trade associations.

Indirect Persuasion: Conducting a Seminar for Supervisors or Other Employer Representatives. Some labor relations consultants and attorneys hold seminars on a range of labor-management relations matters, including how to persuade employees concerning their organizing and bargaining rights. The types of services offered by the consultants to the employer representatives vary with each seminar, but often include presentations, activities, and the distribution of materials on how to contest or avoid unionization.

Seminar agreements must be reported when the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employers' supervisors or other representatives. In those cases, the consultant is not advising an employer as the term ''advise'' is traditionally defined and understood (*i.e.,* recommending a decision or course of action), but instead is undertaking activities that have as their object influencing that employers' employees in their representation and collective bargaining rights. In contrast, a consultant who, for example, merely

[26] In this connection, the instructions to the forms, which include these scenarios, also provide:

The consultant's development or implementation of personnel policies or actions that improve employee pay, benefits, or working conditions do not trigger reporting merely because the policies or actions could subtly affect or influence the attitudes or views of the employees; rather, to be reportable, the consultant must undertake such activities with an object to persuade employees, as evidenced by the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking.

solicits business by recommending that the employer hire the contractor to engage in persuasive activities does not trigger reporting.

In no case, however, is the employer required to file a Form LM–10 for attendance at a multiple-employer union avoidance seminar. Additionally, see below, under ''Exempt Agreements or Arrangements,'' for specific application to trade associations.

Indirect Persuasion: Developing or Implementing Personnel Policies or Actions. Reporting is required only if the consultant develops or implements personnel policies or actions for the employer that have as an object to, directly or indirectly, persuade employees (*e.g.,* the identification of specific employees for disciplinary action, or reward, or other targeting, based on their involvement with a union representation campaign or perceived support for the union, or implementation of personnel policies or practices during a union organizing campaign). This encompasses two types of activities: (a) Creating persuasive personnel policies; and (b) identifying particular employees (or groups of employees) for personnel action, with an object to persuade employees about how they should exercise their rights to support (or not) union representation or a union's collective bargaining proposal.

As an example, if the consultant, in response to employee statements about the need for a union to protect against firings, develops a policy under which employees may arbitrate grievances, reporting would be required. On the other hand, if the grievance process was set up in response to a request by employees—without any history of a desire by them for union representation—or as a policy developed as part of a company's startup of operations, without any indication in the agreement or accompanying communications that the policy was established to avoid union representation of the employer's workforce, no reporting would be required. The key questions to ask in this situation are: Did the consultant develop the policy? If so, did the consultant develop the policy with an object to persuade employees? To reiterate, one must look at the object of the consultant, as evidenced in the agreement or arrangement, any communication accompanying the policy or action, the timing (including any labor dispute involving the employer), or other circumstances relevant to the undertaking.

For personnel actions, this rule requires reporting if the consultant identifies or assists in identifying specific employees for reward or discipline, or other targeted persuasion, because of the employees' exercise or potential exercise of organizing and collective bargaining rights or the employees' views concerning such rights. Even if another motive for a personnel action is shown, as long as an object is to persuade, then reporting is triggered. In contrast, if a lawyer merely reviews proposed employee actions presented by the employer, drafts notices, and settles any litigation, the lawyer has not triggered reporting.

As a result, the Department clarifies in this rule that the consultant's development of personnel policies and actions is not reportable merely because the consultant develops policies or implements actions that improve the pay, benefits, or working conditions of employees, even where they could subtly affect or influence the attitudes or views of the employees. To be reportable, as with the other categories of persuasion, the *consultant* must undertake the activities with an object to persuade employees, as evidenced by the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking.

2. Exempt Agreements or Arrangements

Agreements or arrangements in which the consultant does not undertake activities with an object to persuade employees are not reportable. A lawyer or other consultant who exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law, offers guidance on employer personnel policies and best practices, or provides guidance on NLRB or National Mediation Board (NMB) practice or precedent is providing ''advice.'' ''Advice'' means an oral or written recommendation regarding a decision or a course of conduct.

The revised instructions also clarify that a lawyer's review of documents, as a general rule, does not trigger the reporting requirements. For example, the revision of an employer-created persuasive document to ensure its legality does not trigger reporting. Further, a consultant explaining to the employer NLRB decisions concerning lawful and unlawful conduct would not trigger reporting. Correcting spelling or grammar mistakes in the document will also not trigger reporting. However, the creation of a speech or flyer by the consultant or revising an employer created document to further dissuade employees from supporting the union, will trigger reporting. Similarly, other services outlined in section 203(c), concerning representation of the employer before a court or similar tribunal or during collective bargaining negotiations, do not trigger reporting, as they also do not evidence an object to persuade employees. Instead, these services involve the representation of employers.

Additionally, as stated, this rule clarifies the reporting of seminars. (Seminars that are reportable are explained above and in this section; differences with the NPRM are explained in ''Changes from the NPRM,'' below, and Part V.E.1 (Seminars).) No consultant report is required for an agreement or arrangement to offer a seminar in which the consultant does not develop or assist the attending employers in developing anti-union tactics or strategies for use by the employers' supervisors or other representatives. Such seminars consist of only guidance to the employers in attendance, and therefore do not demonstrate that the consultant has an object to persuade employees. Moreover, as explained in the next section of the rule focusing on the remainder of the revised instructions, employers will not be required to file reports concerning their attendance at union avoidance seminars.

The Department has also revisited the reportability of employee attitude surveys and, in the larger context, union ''vulnerability assessments,'' in which a consultant evaluates an employer's proneness to union-related activity and offers possible courses of action. The Department concludes that agreements or arrangements for consultants to conduct these types of surveys and assessments are generally not reportable. The use of employee attitude surveys do not ordinarily evince an object to persuade employees, although they may do so in rare circumstances, such as with ''push surveys,'' which seek to persuade employees rather than gather insight into their views. Certain employee attitude surveys could nonetheless trigger reporting as an information-supplying activity, if the feedback more specifically concerns employee activities during a labor dispute. However, generally speaking, such employee attitude surveys are not reportable, as they consist of general guidance and recommendations to the employer.

Also, no reporting is required for an agreement or arrangement that exclusively includes an employer's purchase or acquisition of pre-existing or off-the-shelf persuasive materials, without coordination by the consultant concerning the selection, tailoring, or

dissemination of the materials. (However, the Department notes that this general policy on pre-existing materials applies only to persuasive communications, not information-supplying concerning the employees or union involved in a labor dispute. For example, pursuant to longstanding Departmental policy, if the employer and consultant have an agreement whereby the consultant agrees to provide information on the bargaining practices of a union in connection with a labor dispute involving the employer, the agreement must be reported unless the information is derived solely from public sources). See *Employer and Consultant Reporting, Technical Assistance Aid No. 6,* U.S. Department of Labor, Labor-Management Services Administration (1964), at 12.

Where, however, a consultant drafts for an employer, in whole or part, a persuasive speech or creates a persuasive video or any other communication intended to be disseminated to particular employees, such activity triggers reporting because the activity has an object to persuade. Similarly, if an employer contacts a consultant to coordinate the selection and purchase of pre-existing persuasive materials, or to direct or coordinate the use of the materials by the employer, then this would be evidence of an object to persuade by the consultant, and such an activity would trigger reporting of the underlying agreement or arrangement.

Finally, trade associations are not required to file a report, where by reason of their membership agreements, the associations select off-the-shelf persuader materials for their member-employers, or distribute newsletters addressed to their member-employers.[27] As explained in more depth below in Section V.E.3, there are significant practical difficulties associated with requiring trade associations to report such activities and such reporting would impose substantial burden on such associations without corresponding disclosure benefits to employees and the public. Accordingly, under the final rule trade associations as a general rule will only be required to report in two situations—where the trade association's employees serve as presenters in union avoidance seminars or where they undertake persuader activities for a particular employer or employers (other than by providing off-the shelf materials to employer-members). See Section V.E.3.

3. Changes From the NPRM

As explained in more detail in Part V of this rule, the Department has made several changes to the revised advice exemption instructions, in response to comments received.

First, the Department has made significant changes to the text and format of the instructions in order to ensure clarity. These changes include the categorizing of indirect persuasion; the determination to not infer an ''object to persuade'' from a consultant's development or implementation of personnel policies that merely improve pay, benefits, or working conditions; and other rewording and reorganization, including additional material on information-supplying and further examples in the exempt agreements or arrangements section.

Second, the Department clarifies that consultant-led seminars are reportable if the consultant develops or assists the employers in developing anti-union tactics and strategies to be utilized by their supervisors and other representatives. In this regard, the Department has also limited the reporting of union avoidance seminars sponsored by trade associations and eliminates the obligation for employers to report their attendance. Where reporting is triggered by presenting a union avoidance seminar, a report is not due until 30 days after the date of the seminar. Section 406.2(a) has been revised to reflect this change from the general rule that a report is due within 30 days after a persuader agreement is reached, rather than the date on which the activity undertaken by the agreement occurs.

Third, the Department exempts from reporting agreements or arrangements exclusively involving vulnerability assessments, including employee surveys other than the ''push'' variety. Generally these assessments are not reportable as they provide guidance on an employer's proneness to union-related activity by its employees. Surveys would only trigger reporting if they are persuasive, such as push surveys, or if they are information-supplying activities in the context of a labor dispute, such as information gained through the consultant's use of surveillance technology. See Section V.E.1 (Employee Attitude Surveys/ Employer Vulnerability Assessments).

Fourth, the Department has exempted agreements exclusively consisting of providing pre-existing or off-the-shelf materials, unless the materials were selected by the consultant. (As noted above, a trade association is not required to file a report if it selects such materials for its member-employers.)

Fifth, the Department in this rule distinguishes between trade associations and other labor relations consultants for some reporting purposes, including the elimination of reporting by trade associations where they merely sponsor union avoidance seminars or select off-the-shelf persuader materials for member-employers.

Finally, the Department has dropped the term ''protected concerted activities'' from the definition of ''object to persuade employees.'' Instead, reporting is required only for agreements in which the consultant engages in activities with an object to persuade employees concerning representational and collective bargaining activities, but not ''other protected concerted activities.'' This better comports with the language of section 203, which, in contrast to the NLRA, does not expressly refer to ''concerted activities.''

4. Reportable Information-Supplying Agreements

The final rule does not make any changes to reporting requirements for information-supplying activities, including the information-supplying checklist on Form LM–10 and LM–20. In the revised advice exemption section of the Form LM–10 and LM–20 instructions, however, the Department has added language that explains reporting in such situations, and has included a description of the term ''labor dispute'' from section 3(g) of the statute.

The amended Form LM–10 and LM–20 instructions appear in full in the appendices to this rule.

C. The Statutory Basis for the Revised Interpretation [28]

This rule reflects the language and purpose of sections 203 and 204 of the LMRDA, effectuating the intent of Congress and resolving any tension or ambiguity in those sections, consistent with the authority and discretion embodied in the statute.[29] Section 203(a) requires employers to report to

[27] Where an association publishes a newsletter for *employees* of their member-employers, the inclusion of any material with an object to persuade would trigger reporting as has always been the case under the Department's regulations. See *Master Printers of America* v. *Donovan,* 751 F.2d 700 (4th Cir. 1984) (discussed further in Sections V.E.3. G.1).

[28] This topic is discussed at greater length in Section V.B of the preamble.

[29] That the ''advice'' exemption of LMRDA section 203(c) might pose interpretive challenges was quickly clear to at least some observers. See, *e.g.,* Bureau of National Affairs, *The Labor Reform Law* 36 (1959) (''The exemption applicable to consultants who merely give advice is susceptible of several different interpretations . . . It is questionable whether the exemption would also cover payments to a consultant who drafted anti-union letters and otherwise mapped out a campaign to combat union organizing'').

the Department of Labor ''any agreement or arrangement with a labor relations consultant . . . pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees . . .'' with respect to their organizing and collective bargaining rights. 29 U.S.C. 433(a)(4). Section 203(b) imposes a similar reporting requirement on labor relations consultants and other persons who undertake such persuader activities on behalf of an employer. 29 U.S.C. 433(b).

Section 203(c) exempts any employer, labor relations consultant, or other person from filing a report under section 203(a) or (b) ''covering the services of such person by reason of his giving or agreeing to give advice to such employer.'' 29 U.S.C. 433(c). Section 203(c) makes explicit what is left implicit in section 203(a) and (b): The statute exempts an employer or its labor relations consultant from having to file the Form LM–10 or LM–20, respectively, if the activities undertaken by the consultant on behalf of the employer merely constitute ''advice.''

The Department recognizes, however, as it has in the past, that the LMRDA is ambiguous as to whether the coverage provisions in sections 203(a) and (b) or the advice exemption in section 203(c) control in situations where the consultant undertakes indirect activities to persuade employees. See *International Union* v. *Secretary of Labor,* 678 F. Supp. 4, 6 (D.D.C. 1988) (''The Secretary argues that the juxtaposition of the two provisions creates an ambiguity which he is entitled to resolve and the resolution of which the courts must respect''). This ambiguity arises, in part, because of the statute's silence with respect to the definitions of ''advice'' and ''persuade,'' creating confusion as to what indirect consultant activities can or should be categorized as nonreportable advice or reportable persuasion. A review of the legislative history confirms that Congress did not speak directly, through the statutory text or otherwise, to the application of the reporting requirements in situations involving the indirect persuasion of employees. While Congress intended a ''broad'' exemption for activities constituting the giving of advice, the legislative history confirms that Congress also did not wish to do so at the expense of reporting persuader activities. It did not, by way of example, limit reporting to just situations that constituted unfair labor practices, but, rather, required reporting for the broader category of persuader activity. See discussion herein at Section III.B.

As discussed in the NPRM, the Department originally interpreted section 203 to require reporting of all persuader activities, but it changed that interpretation in 1962 by establishing the ''accept or reject'' test, which over time essentially limited reporting to activities involving direct communication between consultants and employees. 76 FR 36180. In this rule, we have identified both direct and indirect persuader activities and distinguished these from activities that constitute non-reportable ''advice.'' ''Advice'' ordinarily is understood to mean a recommendation regarding a decision or a course of conduct. See, *e.g.,* Merriam-Webster's Collegiate Dictionary (10th ed. 2002) (defining ''advice'' as ''recommendation regarding a decision or course of conduct: counsel''); Black's Law Dictionary (online) (8th ed. 2004) (defining ''advice'' as ''guidance offered by one person, esp. a lawyer, to another''); The Oxford English Dictionary (2d ed. 1989) (defining ''advice'' as ''opinion given or offered as to action; counsel. spec. medical or legal counsel''). This common construction of ''advice'' does not rely on the employer's ability to accept or reject materials obtained from the consultant, an element viewed as significant under the prior interpretation. As noted in the NPRM, a consultant's preparation and supply of persuader materials to an employer goes beyond offering a recommendation or counsel about an issue to the employer; instead its services provide the means by which the employer communicates its views to employees in order to persuade them how to exercise their choice on matters affecting representation and collective bargaining rights. See 76 FR 36183.

The prior ''advice'' standard in section 265.005 of the IM treats as advice not only the situation in which a lawyer consultant reviews drafts of persuasive material for compliance with the NLRA—actions which under this rule continue to not trigger reporting—but also covers the preparation of persuasive material to be disseminated or distributed to employees—actions which under this rule do trigger reporting. As discussed in the NPRM, the Department views preparation of material designed to persuade employees as ''quintessential persuader activity.'' See 76 FR 36183.

Under this rule, reporting is required when, pursuant to an arrangement or agreement, the consultant does not limit its activities to advising the employer, but engages in activities, either directly or indirectly, aimed at persuading or influencing, or attempting to persuade or influence, employees as to how to exercise their union representation and collective bargaining rights. See discussion in Section V.B.

The Department notes that section 203(c) exempts from the reporting requirement a consultant's services ''*by reason of* his giving or agreeing to give advice'' (emphasis added), indicating that reporting would be required *by reason of* other consultant activities that do have an object to persuade. Further, sections 203(a) and (b) specifically require reporting when a consultant undertakes activities with an object to ''directly or indirectly'' persuade employees, indicating that indirect methods of consultant persuasion also trigger reporting. The statute also specifies that *an* object of the consultant's activity must be to persuade, not *the* object, thus further supporting the view that the coverage provision applies in the case of indirect activities.

The Department has carefully considered the comments that discussed the interpretative questions presented in this rulemaking, and we conclude that the prior interpretation of the advice exemption, while permissible, was not the best interpretation. The Department remains of the view that its revised approach is faithful to the language and purpose of the LMRDA. This approach restores a more appropriate balance between reportable persuader activities and those that are properly characterized as ''advice'' than achieved under the Department's prior interpretation. The prior interpretation largely exempted from reporting persuader agreements that exclusively involved indirect persuasion. As a consequence, despite the widespread growth of the labor relations consultant industry—and its extensive involvement in all but a small and shrinking number of campaigns to persuade employees to reject union representation—very few reports are being filed by consultants or employers. Further, the literature discussed in this preamble and the NPRM and the experiences related by many commenters indicate that this practical impact is quite large because most employers hire consultants to manage anti-union campaigns or programs, with most of these consultants using exclusively indirect persuasion. This information illustrates why the prior interpretation did not implement the full persuader-reporting regime envisioned by Congress. The prior interpretation therefore resulted in underreporting of persuader agreements, to the detriment of an informed workforce, collective bargaining rights, and stable labor relations.

D. Revised Form LM–20, LM–10, and Instructions

The Department has not revised the Form LM–20 and Form LM–10 since the republication of the forms in 1963. See 28 FR 14381. With these changes to the interpretation of the advice exemption of section 203(c), the Department revises Form LM–20 and Form LM–10 and their instructions. The Department is also revising §§ 405.5 and 405.7 of title 29 of the Code of Federal Regulations to update cross-references in those sections to the instructions.

While some of the revisions are minor stylistic and layout modifications there are four significant changes: (1) The revised interpretation of the advice exemption, including examples of activities that will trigger reporting and those that do not; (2) the mandating of electronic filing for each form, with language in each set of instructions depicting such process and guidance concerning the application for a hardship exemption from such electronic filing; (3) the addition of a detailed checklist that Form LM–20 and Form LM–10 filers must complete to disclose the scope of activities that consultants have engaged, or intend to engage, in under a reportable agreement or arrangement; (3) the changes to the Forms LM–20 and LM–10 and their instructions, including the requirement for filers to report their Employee Identification Number, as applicable, and explanations for terms ''agreement or arrangement'' and ''employer''; and (4) a revamped layout for the Form LM–10, which divides the report into four parts, each presenting aspects of the reportable transactions, agreements, and arrangements required by sections 203(a)(1)–(5) of the LMRDA, in a more user-friendly manner.

Unless otherwise noted in this preamble, each of these changes is identical to what the Department proposed in the NPRM.[30] See 76 FR 36193–96. In addition to the changes to the ''advice'' interpretation instructions, the other significant area of substantive change concerns consultants' reporting of seminars on the Form LM–20. (Note: employers are not required to report attendance at union avoidance seminars on the Form LM–10.) The Department's response to comments is discussed below, in Section V, and the complete, revised Forms LM–20 and LM–10, including instructions, are contained in the appendices to this rule.

1. Mandatory Electronic Filing for Form LM–20 and Form LM–10 Filers

This rule requires that employers and consultants file Form LM–20 and Form LM–10 reports electronically. An electronic filing option is planned for all LMRDA reports as part of an information technology enhancement. Electronic reporting contains error-checking and trapping functionality, as well as online, context-sensitive help, which improves the completeness of the reporting. Electronic filing is more efficient for reporting entities, results in more immediate availability of the reports on the agency's public disclosure Web site, and improves the efficiency of OLMS in processing the reports and in reviewing them for reporting compliance. In contrast, paper reports must be scanned and processed for data entry before they can be posted online for disclosure, which delays their availability for public review.

Currently, labor organizations that file the Form LM–2 Labor Organization Annual Report are required by regulation to file electronically, and there has been good compliance with this requirement. Like labor unions, employers and consultants have the information technology resources and capacity to file electronically. Further, OLMS has improved the technology utilized in its electronic filing process and eliminated the expenses formerly associated with such filing.

The revised forms will be completed online, signed electronically, and submitted with any required attachments to the Department using the OLMS Electronic Forms System (EFS). The electronic forms can be downloaded from the OLMS Web site at *www.olms.dol.gov*.

The revised Form LM–20 and Form LM–10 instructions outline a process for seeking an exemption from the electronic filing requirement that is identical to the Form LM–2 process. See Form LM–2 Instructions, Part IV: How to File, located at: *www.dol.gov/olms/regs/compliance/EFS/LM-2_InstructionsEFS.pdf*. A filer will be able to file a report in paper format only if the filer asserts a temporary hardship exemption or applies for and is granted a continuing hardship exemption. The temporary hardship exemption process, which is currently in place for Form LM–2 filing,[31] will be applied to mandatory electronic filing of the Forms LM–20 and LM–10. The process is set out in full in the instructions. See Appendices.

2. Detailing the Activities Undertaken Pursuant to a Reportable Agreement or Arrangement

The prior instructions to the Form LM–20 and Form LM–10 did not provide detailed guidance to the filer concerning how to report the nature of the activities undertaken by a consultant pursuant to an agreement or arrangement to persuade. For example, the prior Form LM–20 instructions[32] for Item 11, Description of Activities, stated:

For each activity to be performed, give a detailed explanation of the following:

11a. *Nature of Activity.* Describe the nature of the activity to be performed. For example, if the object of the activity is to persuade the employees of Employer X to vote ''no'' on a representation election, so state.

Similarly, the prior Form LM–10 instructions[33] in Item 12, Circumstances of all Payments, states:

[You] must provide a full explanation identifying the purpose and circumstances of the payments, promises, agreements, or arrangements included in the report. Your explanation must contain a detailed account of services rendered or promised in exchange for promises or payments you have already made or agreed to make. Your explanation must fully outline the conditions and terms of all listed agreements.

In practice, the Department received only vague descriptions of persuader or information-supplying activity, such as ''employed to give speeches to employees regarding their rights to organize and bargain collectively'' and ''presented informational meetings to company employees relative to the process of unionization, the role of the NLRB, and collective bargaining.''

As the review of the literature above has demonstrated, a wide range of activities and tactics have been utilized by employers, and employees and the public have a need to know in detail the types of activities in which consultants engage.[34] Vague and brief narrative

[30] The Department has also made minor, non-substantive changes throughout the revised Form LM–20 and Form LM–10 instructions, as compared with the proposed instructions.

[31] See *http://www.dol.gov/olms/regs/compliance/GPEA_Forms/LM-2_Instructions4-2015_techrev.pdf*, at 2.

[32] The prior Form LM–20 form and instructions are available on the OLMS Web site at: *http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-20p.pdf* and *http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-20_Instructions_3_2015.pdf*.

[33] The prior Form LM–10 form and instructions are available on the OLMS Web site at: *http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-10p.pdf* and *http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-10_instructions_3_2015.pdf*.

[34] Various studies reflect the types of activities typically used by employers (as noted above, usually working with consultants) in response to union organizing campaigns: Between 82% and 93% of employers held ''captive audience'' meetings; between 70% and 75% of employers

descriptions and characterizations that have been permitted on the prior Form LM–20 serve little utility, and a checklist of activities is the best way to ensure more complete reporting of such persuader activities. Additionally, filers are provided an ''Other'' box on the checklist, and will be required to check this box and separately identify any other persuader or information-supplying activities that are not listed in the checklist. In the Department's view, the use of the checkboxes and the revised instructions for completing the form will make it easier for filers to comply with their reporting obligation.

3. Revised Form LM–20 and Instructions

The revised Form LM–20 and instructions (see Appendix A) largely follow the layout of the prior form and instructions, although the style has been altered. The revised form is two pages in length and contains 14 items. The first page includes the first five items, which detail contact and identifying information for the consultant: The file number (Item 1.a.) and contact information for the consultant (Item 2), including information detailing alternative locations for records (Item 3), the date the consultant's fiscal year ends (Item 4), and the type of filer (Item 5), *i.e.,* an individual, partnership, or corporation. The revised new Item 2 requires the consultant to provide, if applicable, its Employer Identification Number (EIN), which assists the Department and the public in identifying and analyzing other filings by the consultant and any individuals and entities reported on the form. The new Items 1.b. and 1.c. are for the filer to indicate if the report is filed pursuant to a hardship exemption from the electronic filing requirement or is amended, respectively. These items were not in the previous form.

Additionally, the first page includes three items describing the employer agreement: The employer's contact information, which adds the requirement to report the employer's EIN (Item 6), the date the agreement was entered into (Item 7), and the person(s) through whom the agreement was made (Item 8). Item 8 has been amended to distinguish between the employer representative through whom the reported agreement or arrangement has been made and a prime consultant through whom an indirect party entered the agreement or arrangement. As revised, an indirect party to an employer-consultant agreement or arrangement must identify in a new Item 8.b the consultant with whom he or she entered into the reportable agreement or arrangement. This specificity is added to clarify the reporting that continues to be required on the Form LM–20 when such indirect parties, or ''sub-consultants,'' are engaged by a primary consultant to assist in implementing a reportable agreement or arrangement. The primary consultant would report the employer representative in a new Item 8.a. This requirement has been included in the Form LM–20 Instructions in Part II, Who Must File, but its addition on the form itself will enable the Department, employees, and the public to more easily understand the nature of the activities conducted pursuant to the agreement or arrangement and determine if additional reports are owed.

In response to comments received on the NPRM, the revised Form LM–20 instructions also clarify, in Items 6–8, the manner in which the consultant reports agreements or arrangements concerning reportable union avoidance seminars, webinars, and conferences. The consultant is not required to file separate Form LM–20 reports for each employer attendee to a seminar. Rather, the consultant will identify each employer attendee in Item 6 by checking the box indicating that the report covers a reportable union avoidance seminar. The consultant will be able to either enter the necessary information manually, or it can import the data through a CSV file. For seminar reporting, the consultant is not required to provide the EIN for each attending employer, because there is no corresponding Form LM–10 reporting for the employers. While more employers may register for a seminar than actually attend, the consultant must identify each *attendee* to the seminar, through whatever tracking system it uses for such purposes. Further, the instructions clarify that only the seminar presenter needs to file the Form LM–20 report, not the organizer. If the presenter is a trade association, then it is not required to complete Item 8.

As proposed, the front page also includes the signature blocks for the president (Item 13) and the treasurer (Item 14), including the date signed and telephone number.

The second page provides more detail concerning the agreement. Items 9 and 10 are unchanged. Item 9 requires the filer to indicate if the agreement called for activities concerning persuading employees, supplying the employer with information concerning employees or a labor organization during a labor dispute, or both. Item 10 asks for the terms and conditions of the agreement, and requires written agreements to be attached. In response to comments received on the NPRM, information has been added to the instructions for Item 10 concerning the reporting of persuader seminars, webinars, or conferences, as well as clarification on the scope of the ''detailed explanation'' required in this item. For example, the instructions now state that filers must explain whether the consultant was hired to manage a union-avoidance campaign, to provide assistance to an employer in such a campaign through the persuader activities identified in Item 11, or conduct a union avoidance seminar. An attorney who provides legal advice and representation, in addition to persuader services, is only required to describe such portion of the agreement as the provision of ''legal services,'' without any further description.

Item 11 calls for the provision of certain details concerning any covered agreement or arrangement, and a new Item 11.a, as described above in Section IV.B, requires filers to check boxes indicating specific activities undertaken as part of the agreement or arrangement. There is also an ''Other'' box, which requires the filer to provide a narrative explanation of any other reportable activities planned or undertaken that are not specifically contained on the list.

Additionally, Items 11.b, 11.c, and 11.d, respectively, require the consultant, as before the proposed revisions, to indicate the period during which activity was performed, the extent of performance, and the name and address of the person(s) through whom the activity was performed. Item 11.d. has been revised to ask filers to specify if the person or persons performing the activities is employed by the consultant or serves as an independent contractor. In the latter scenario, the person or persons performing the activities is an indirect party to an employer-consultant agreement or arrangement, who would owe a separate Form LM–20 report. This requirement is not new, and it has been incorporated in the Form LM–20 instructions in Part II, Who Must File, but this addition on the form itself will enable the Department, employees, and

distribute leaflets in the workplace; between 76% and 98% of employers utilize supervisor one-on-one sessions; between 48% and 59% of employers promised improvements; and between 20% and 30% of employers granted unscheduled raises. See Logan, U.*S. Anti-Union Consultants,* at 5, Table 1, compiling and citing results from Bronfenbrenner, *Employer Behavior,* at 75–89; Kate Bronfenbrenner, U.S. Trade Deficit Review Commission, *Uneasy Terrain* (2000); Rundle, *Winning Hearts and Minds,* at 213–231; and Mehta and Theodore, *Undermining the Right to Organize.*

the public to more easily understand the nature of the activities conducted pursuant to the agreement or arrangement and determine if additional reports are owed. Finally, Items 12.a and 12.b require the consultant to identify the employees that are targets of the persuader activity and the labor organizations that represent or are seeking to represent them, respectively. To achieve more specificity, Item 12.a as proposed would include a description of the department, job classification(s), work location, and/or shift(s) of the employees targeted. In response to comments received on the NPRM, information has been added to the instructions for item 12 concerning the reporting of persuader seminars, webinars, or conferences.

The revised Form LM–20 instructions are similar to the previous version, and they follow the layout of the revised form. There are five significant modifications. First, a clarification of the term ''agreement or arrangement'' has been added to Part II, Who Must File. As there stated: ''The term 'agreement or arrangement' should be construed broadly and does not need to be in writing.'' Second, as discussed above, the revised form would be submitted electronically, and the Department has made changes to the instructions describing the signature and submission process, as well as a procedure for filers to apply for an exemption from the electronic filing requirement. This procedure is modeled on the procedure for filers of the Form LM–2, Labor Organization Annual Report. Third, the revised instructions include guidance on the application of the ''advice'' exemption, in the general guidance on reporting agreements, arrangements, and activities section. The revised instructions provide examples, beyond those contained in the proposed rule, of activities that would trigger reporting requirements and those that will not. Fourth, as discussed, the revised instructions refer to the new checklist of activities undertaken pursuant to the reportable agreement or arrangement (see Item 11.a). Fifth, the instructions address new exceptions from certain reporting requirements applicable to trade associations, franchisors and franchisees, and special reporting procedures for union avoidance seminars.

Additionally, the Department has clarified in Part V (When to File) that, for reporting of union avoidance seminars, reporting is not required until 30 days after the conclusion of the seminar. Section 406.2(a) of the Department's regulations, 29 CFR 406.2(a), has been revised to reflect this change from the general rule that a report is due within 30 days after a persuader agreement is reached, rather than the date on which the activity undertaken by the agreement occurs.[35] Similarly, as explained in Section V.E.3 concerning trade association reporting, the association and its member-employers are not required to report simply by reason of the membership agreement with member-employers, but only if they engage in the limited activities that will trigger reporting by them (which must be reported within 30 days of entering into agreements to engage in the reportable persuader activities). The Department has also made other, non-substantive changes throughout the instructions to ensure clarity or consistency with the OLMS electronic reporting system.

4. Revised Form LM–10 and Instructions

The revised Form LM–10 and Instructions (see Appendix B) are significantly different in layout and style from the previous form and instructions, although the reporting requirements have been altered only in two respects: The interpretation of the ''advice'' exemption is now included, and the form now requires detailed information regarding specific activities undertaken pursuant to the agreement or arrangement.

The revised form is four pages in length and contains 19 items. It is to be filed electronically. The first page includes the first seven items (and the signature block), which provide the contact information for the employer. This information includes the file number (Item 1.a.), fiscal year covered (Item 2), contact information for the employer (Item 3), employer's president or corresponding principal officer (Item 4), any other address where records necessary to verify the report will be available for examination (Item 5), at which of the listed addresses records are kept (Item 6), and type of organization that the employer is, such as an individual, partnership, or corporation (Item 7). Item 3 is revised to require the employer to provide its EIN, which will assist the Department and public in identifying the employer and analyzing the employer's filings. Item 1.b. is for the filer to indicate if the report is filed pursuant to a hardship exemption from the proposed electronic filing requirement and Item 1.c. is for the filer to indicate whether the filing is an amended report. These items were not on the previous form. The front page also includes the signature blocks, for the president (Item 18) and the treasurer (Item 19), including the date signed and telephone number.

The remainder of the revised form is divided into four parts: Parts A, B, C, and D. This layout is designed to clarify Item 8, which had required the filer to check those box(es) (Items 8.a–8.f) that depicted the reportable transaction, arrangement, or agreement, and required in a Part B to detail the transaction, arrangement, or agreement. The Department views the steps required by Item 8 in the prior form as unnecessary and confusing. Part B in that form added to the confusion, because it applied a ''one size fits all'' approach to reporting the diverse information required by section 203(a). To remove this confusion, the Department has adopted a more convenient four-part structure to capture the required information.

Revised Part A requires employers to report payments to unions and union officials. The employer must report on the form the contact information of the recipient in Item 8. In Item 9, the employer must report detailed information concerning the payment(s), including: The date of the payment (Item 9.a), the amount of each payment (Item 9.b), the kind of payment (Item 9.c), and a full explanation for the circumstances of the payment (Item 9.d). There are no changes to the substantive reporting requirements for payments in Part A, which are required pursuant to LMRDA section 203(a)(1).

Revised Part B requires employers to report certain payments to any of their employees, or any group or committee of such employees, to cause them to persuade other employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing. The employer must report the contact information of the recipient of the payment in Item 10. In Item 11, the employer must report detailed information concerning the payment(s): The date of the payment (Item 11.a), the amount of each payment (Item 11.b), the kind of payment (Item 11.c), and a full explanation for the circumstances of the payment (Item 11.d). There are no changes to the substantive reporting requirements in Part B, which are required by LMRDA section 203(a)(2).

[35] In the NPRM, the Department had proposed to update and revise the authority citations to section 406.2. Since the NPRM was published, however, the Department has updated various authority citations in numerous regulations administered by the Department, including those pertaining to LMRDA reports, thereby obviating any need to revise this part of section 406.2. See Final Rule, Technical Amendments Relating to Reorganization and Delegation of Authority, 78 FR 8022, February 5, 2013.

Revised Part C requires employers to detail any agreement or arrangement with a labor relations consultant or other independent contractor or organization in which the consultant, contractor, or organization undertakes activities with the object to persuade employees or supply information regarding employees and a labor organization involved in a labor dispute. The employer must indicate whether the agreement or arrangement involves one or both of the above purposes by checking the appropriate box in Part C. Next, the employer must provide contact information for the consultant in Item 12. A revision to Item 12 requires the employer to provide the consultant's EIN, if applicable. In response to comments received, the revised instructions exempt employers from filing Form LM–10 reports for attendance at multiple-employer persuader seminars, webinars, or conferences. The date of the agreement or arrangement and a full explanation of its terms and conditions would be reported in Items 13.a and 13.b, respectively. In response to comments received on the NPRM, the instructions for Item 13.b concerning the scope of reporting required in this item have been clarified. The instructions now state that filers must explain whether the consultant was hired to manage a union-avoidance campaign or to provide assistance to an employer in such a campaign through the persuader activities identified in Item 14. An attorney who provides legal advice and representation, in addition to persuader services, is only required to describe such portion of the agreement as the provision of ''legal services,'' without any further description.

Item 14 calls for detail concerning the agreements undertaken. Item 14.a, as described above in Item 11.a. for the revised Form LM–20, requires filers to check boxes indicating specific activities undertaken or to be undertaken. There is also an ''Other'' box, which requires the filer to provide a narrative explanation for any activities not specified on the list provided on the form. Items 14.b, 14.c, and 14.d, respectively, require, as before, the employer to indicate the period during which the activity was performed, the extent of performance, and the name and address of persons through whom the activity was performed. As with Item 11.d of the revised Form LM–20, Item 14.d requires filers to specify whether the person performing the activity is employed by the consultant or works as an independent contractor. Items 14.e and 14.f require the consultant to identify the employees and any labor organization that are targets of the persuader activity. Item 14.e requires a description of the department, job classification(s), work location, and/or shift of the employees targeted. Finally, the employer must provide detailed information concerning any payment(s) made pursuant to the agreement or arrangement: The date of each payment (Item 15.a), the amount of each payment (Item 15.b), the kind of payment (Item 15.c), and a full explanation for the circumstances of the payment(s) (Item 15.d). Information reported in Part C is required by LMRDA sections 203(a)(4) and (5).

Revised Part D requires employers to report certain expenditures designed to ''interfere with, restrain, or coerce'' employees regarding their rights to organize or bargain collectively, as well as expenditures to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such an employer. The employer must indicate the object of the expenditure by checking a box. The employer must report the contact information of the recipient of the expenditure in Item 16. In Item 17, the employer must report detailed information concerning the expenditure(s): The date of each expenditure (Item 17.a), the amount of each expenditure (Item 17.b), the kind of expenditure (Item 17.c), and a full explanation for the circumstances of the expenditure (Item 17.d). There are no changes to the substantive reporting requirements in Part D, which are required by LMRDA section 203(a)(3).

The revised Form LM–10 instructions follow the layout of the revised form. Insofar as the reporting of persuader activities is concerned, the revised instructions correspond with the changes discussed above in connection with the Form LM–20.

V. Review of Comments Received

A. General Comments

The Department received approximately 9,000 comments on the proposed rule. The vast majority focused on general observations. The supportive comments came largely from labor unions, union officials, and law firms, as well as public policy organizations and Members of Congress. Commenters opposing the rule included business associations, public policy organizations, law firms and labor relations consultants, as well as numerous businesses, and a senator and congressman. General comments are discussed immediately below.

Most of the comments submitted by labor organizations, law firms representing unions, public policy organizations, and private citizens expressed general support for the proposed rule and the increased disclosure it would provide. Some of these commenters stated that the proposed changes will finally give employees the information that Congress intended. Others described the Department's proposal as a ''common-sense interpretation'' that would close the ''advice loophole'' that has led to circumvention of employer-consulting reporting requirements. One commenter stated that the rule would restore a balance to election campaigns where, in its view, companies have long held an unfair advantage. This commenter stated that employees have a right to organize unions, and that they should be given more information that would aid them in their organizing efforts. Another commenter voiced support of the proposed interpretation, which, in its view, would increase transparency in a way that would be beneficial to employees, unions, and employers. Some private citizens submitted brief statements in support of the proposal. Other commenters submitted examples of consultant-prepared materials that have been used by employers in campaigns against unions.

Many employer and trade associations, law firms representing employers, labor relations consultants, and public policy groups provided substantive comments, almost all uniformly calling for the proposed rule to be withdrawn or at least substantially modified to reduce the proposed scope of the reporting requirement and what they viewed as an undue burden. Some law firms and local and national bar associations focused their comments on what they viewed as an improper intrusion on attorney-client relationships and potential concerns that the proposed rule, if adopted, would impede employers in exercising their free speech rights under the NLRA and pose substantial First Amendment and other constitutional issues. Many commenters stated that the proposed changes would hamper job creation and result in job losses. Other commenters expressed the view that the proposed rule was too vague. The vast majority of the comments received in response to the proposed rule, however, were either templates (*e.g.,* sets composed of hundreds of identical, or nearly identical, comments from private citizens opposing the rule) or brief, individual statements expressing general opposition.

Several commenters framed their opposition in terms of their own experience with union organizing campaigns at their companies. One such commenter stated that the proposed rule tilts in favor of unions, stating that employers need a fair opportunity to educate their employees about unionization and dispel any false information disseminated by the union organizers. In this commenter's view, the proposed rule impeded this opportunity. Many other commenters opposed to the proposed rule simply expressed general anti-union and anti-regulation sentiments, others voiced general criticism of the current administration, claiming that the rule is a ''political payback'' to unions. Further, some commenters voiced concern about publicly disclosing companies' financial information. Other commenters urged that the LMRDA be abolished. Some commenters apparently confused the proposed rule with other rules proposed by NLRB or proposed or contemplated legislation, and others submitted comments consisting of general statements that were not germane to any aspect of the proposed rule.

The Department disagrees with the general points made by those opposing the proposed rule. Simply put, the commenters offered no persuasive argument that the Department's revised reporting requirements for persuader activities will hamper job growth or reduce jobs. As explained in Section VI, there is minimal burden on individual filers and the economy as a whole. Further, several commenters that supported the Department's proposal referenced the large amount of money that employers spend on consultants, which greatly exceeds the cost for employers and consultants to publicly disclose their agreements.

The Department also disagrees with the suggestion made by some commenters that the revised interpretation is motivated to advance efforts by unions to organize employees or to somehow impede the ability of employers to advance any lawful arguments designed to persuade employees in the exercise of their union representation and collective bargaining rights. Rather, this rule is an effort by the Department to fairly and effectively administer the LMRDA, a statute passed with bipartisan support in 1959, which requires reporting of both sides in labor-management relations. This rule will improve disclosure from employers and consultants. The Department plainly understands the right of employers to express, in robust fashion, their views on the advantages and disadvantages of union representation or collective bargaining issues, and to hire consultants to implement that goal. This rule does not encourage or discourage employer speech or involvement in organizing campaigns and representation elections. Apart from requiring reporting in prescribed situations, it regulates no speech or conduct.

The Department is also well aware of the primacy of the NLRB in resolving representation issues and investigating and resolving charges of unfair labor practices. This rule is in no way at odds with the statutory scheme administered by the NLRB, nor does it concern any proposed legislation. Instead, the rule effectuates the Department's limited, complementary role assigned to it by Congress in the LMRDA to provide workers with information that is helpful to them in assessing communications from their employers, provide the public information about the administration of these statutes, and provide the Government with information that will better enable it to secure compliance with these statutes. As noted in Sections I.A., III.B, and V.C of the preamble, it is critically important that workers, as recognized by Congress in crafting section 203, are provided this information.

This rule and its interpretation of section 203 advance these purposes. The Department's prior interpretation of this section effectively denied employees, as well as the public and the Government, most of the information about labor relations consultants that Congress wanted to be publicly disclosed. This rule, consistent with the intent of Congress, will make known to employees information that will allow them to more thoughtfully and effectively exercise their right to support or refrain from supporting a union as their collective bargaining representative. Under the rule, employees will learn, many for the first time, that their employer has hired a labor relations consultant to help it to persuade them how to exercise their individual and collective rights to union representation and collective bargaining. With this information, employees will be better able to assess the extent to which their employer's spokesperson is conveying the employer's own take on union representation and its ideas about what is truly best for the company and its employees, or instead making arguments that other employers have successfully used to defeat union representation; the extent to which the employee's supervisors are conveying their full and honest opinions about union representation (such as whether there is a need for an ''outsider'' to look out for employee interests) or merely following the direction of the company's own behind the scenes ''outsider.'' It will be up to each individual employee to make his or her own choice about the merit of the claims articulated by the employer (just as each must make a similar assessment about the union's claims). This rule does not restrict the claims that may be made, their timing, or the person or means by which they are made. Instead, the rule only requires employers that engage labor relations consultants in order to persuade employees about how they should exercise their workplace rights and the consultants that engage in these activities to disclose to employees, the public, and the Government the terms of their agreements. Such disclosure is required under the LMRDA and necessary to actualize the rights accorded employees under the LMRDA and the NLRA—a requirement ill served by the Department's prior interpretation of section 203.

In the sections that follow the Department summarizes and addresses comments on particular aspects of the rule: Textual analysis of the statutory language; the Department's policy justification for revised interpretation; the clarity of revised interpretation; activities that trigger persuader reporting; the asserted bias in favor of unions; particular aspects of the revised forms and instructions; asserted constitutional and statutory infirmities with the revised interpretation; and the asserted conflict between the revised interpretation and the attorney-client privilege and an attorney's duty to protect confidential information.

B. Comments on the Statutory Analysis of LMRDA Justifying the Revised ''Advice'' Exemption Interpretation

The NPRM proposed additions to the Form LM–20 and LM–10 and corresponding instructions that would implement the revised interpretation of the ''advice'' exemption. The revised interpretation focused on the plain meaning of the term ''advice'' in the statute's text, and contrasted that plain meaning with those activities undertaken by consultants that have an object, directly or indirectly, to persuade employees with respect to their statutory rights. The revised interpretation defined reportable ''persuader activities'' as all actions, conduct, or communications that have an object, directly or indirectly, to persuade employees. The Department proposed this interpretation to replace the prior interpretation. The prior interpretation distinguished between

direct and indirect contact by consultants, exempting indirect contact by consultants from triggering the reporting requirements. See 76 FR 36190–93.

1. Comments That the Revised Interpretation Is Contrary to Statute

Several commenters provided their views on whether the proposed reporting requirements were consistent with the statutory provisions. Only a relatively small number, however, addressed the interpretative issues in detail, most simply stating that the proposed interpretation properly applied the provisions or that the prior interpretation reflected the sole reasonable construction of the provisions.

The following key aspects of the Department's proposed interpretation provide context for the comments and discussion below:

- ''Advice'' means an oral or written recommendation regarding a decision or a course of conduct.
- ''Persuader activity,'' in contrast, refers to a consultant's providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively.
- Reporting is required whenever the agreement or arrangement, in whole or part, calls for the consultant to engage in persuader activities, regardless of whether or not advice is also given.

See the Department's NPRM (76 FR 36192).

These aspects of the proposal have been revised in the final LM–10 and LM–20 instructions to read as follows:

An agreement or arrangement is reportable if a consultant undertakes activities with an object, directly or indirectly, to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing (hereinafter ''persuade employees''). Such ''persuader activities'' are any actions, conduct, or communications with employees that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights. Under a typical reportable agreement or arrangement, a consultant manages a campaign or program to avoid or counter a union organizing or collective bargaining effort, either jointly with the employer or separately, or conducts a union avoidance seminar.

* * * * *

No report is required covering the services of a labor relations consultant by reason of the consultant's giving or agreeing to give advice to an employer. ''Advice'' means an oral or written recommendation regarding a decision or a course of conduct. For example, a consultant who, exclusively, counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law, offers guidance on employer personnel policies and best practices, or provides guidance on National Labor Relations Board (NLRB) or National Mediation Board (NMB) practice or precedent is providing ''advice.''

* * * * *

Note: If any reportable activities are undertaken, or agreed to be undertaken, pursuant to the agreement or arrangement, the exemptions do not apply and information must be reported for the entire agreement or arrangement.[36]

Commenters in favor of the revised interpretation, principally unions, endorsed the proposed rule's focus on the object of the activities performed under an agreement between a consultant and an employer. They generally viewed this approach as natural and best suited to meeting the intent of Congress. In their view, this approach is consistent with the Department's original (until 1962) and its proposed 2001 interpretations of the reporting requirements. These commenters strongly objected to the view that required persuader reporting only when a consultant directly persuaded employees on how to exercise their protected rights. Commenters supporting the rule argued that the *UAW* decision does not prevent the Department from revising its interpretation. In their view, the interplay between reportable persuader activities and exempt advice is ambiguous, and the Department's revised interpretation is a permissible and better interpretation of the reporting provisions.

Opponents of the proposed rule embraced the prior interpretation. According to them, the prior interpretation better comports with the statutory language and provides a more practical approach because it sets forth a ''bright-line'' standard for consultants and employers to understand and apply. The proposed rule, in their view, was ambiguous. Some commenters read *UAW* v. *Dole,* 869 F.2d 616 (D.C. Cir. 1989), to preclude the Department from revising its prior interpretation that only direct persuader activities are reportable under section 203.[37] Most, however, recognized that the decision did not foreclose the Department from taking a different approach so long as it is reasonable. In their view, however, the Department's proposal was unreasonable.[38] Similarly, some commenters stated that the proposal essentially ignores section 203(c) because the interpretation requires reporting where activities, properly characterized as ''advice,'' are intertwined with persuader activities. Other commenters opposed to the rule focused exclusively on the term ''advice''—some objecting to the

[36] The instructions have been modified to identify and discuss the reportability of several activities often undertaken by consultants under an agreement with an employer. The modifications address the concerns of some commenters that the instructions would benefit from greater clarity.

[37] *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Dole,* 869 F.2d 616 (D.C. Cir. 1989) is one of four related opinions (the others include *International Union* v. *Secretary of Labor,* 678 F. Supp. 4 (D.D.C. 1988); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Brock,* 783 F.2d 237 (1986); and *International Union* v. *Donovan,* 577 F. Supp. 398 (D.D.C. 1983)) in a suit brought by UAW to challenge two aspects of the Department's prior interpretation of section 203: (1) That a law firm and the employer that it had hired as a consultant were not required to report certain persuader activities because they involved supervisors (not direct persuasion of employees) and (2) that the employer was not required to report extra compensation it had provided supervisors for advocating the employer's position against union representation. See 678 F. Supp. 4, 7–8. The second issue is not germane to this rulemaking. On the first issue, the appeals court held only that the Department's interpretation of the advice exemption was permissible, limiting its ruling to the particular facts and the Department's ''right to shape [its] enforcement policy to the realities of limited resources and competing priorities.'' 869 F.2d at 620. Further, on the first appeal in the case, the D.C. Circuit expressly recognized that the ''Department may, of course, reverse its interpretation at some future date.'' 783. F.2d 237. The commenters failed to note that the appeals court left undisturbed the district court's conclusion that section 203 was better read to require reporting the activities at issue in that case, wherein the district court noted ''that Congress was concerned with behind-the-scenes manipulations of employees by consultants.'' In any event, these decisions do not constrain the Department from revising its interpretation. See, *e.g., Home Care Association of America* v. *Weil,* 799 F.3d 1084, 1094–1095 (D.C. Cir. 2015), petition for cert. docketed, ** U.S.L.W. *** (U.S. Nov. 24, 2015) (No. 15–683).

[38] Some commenters also argued that the Department's proposal is inconsistent with the court's observation in *UAW* v. *Dole* about section 203(e) (concerning the absence of reporting by an employer's own staff), *i.e.,* that ''the LMRDA's domain is persuader activities. No exemption is needed for activities that fall outside the Act's domain.'' 869 F.2d at 618. By analogy, the commenters argued that the ''advice'' exemption of section 203(c) must also exempt from reporting ''persuasive'' activities, and thus cannot be limited to legal advice and representation. The commenters ignore that the court there was only addressing the reportability of persuader activity engaged in by supervisors, not consultants. Id. at 620. Section 203(e), unlike section 203(c), operates to exclude a whole category of individuals from reporting (individuals employed by the employer engaged in persuader activities). In contrast, section 203(c), by exempting ''advice,'' does not eliminate the need to distinguish between ''advice'' and persuader activities, an irrelevant consideration under section 203(e).

Department's interpretation and others embracing the definition but not its application. In their view, if an employer uses the consultant-provided ''advice'' in its effort to persuade employees, then such ''advice'' would be characterized as ''persuader activity'' by the proposed rule. Thus, according to the commenters, the proposed rule eliminates the exemption. Others took the position that the Department's proposed interpretation ignores that the term ''advice'' is broader than the term ''legal advice,'' an impermissibly narrow view of ''advice'' and contrary to the language of section 203(c).

However, several commenters expressed their view that the LMRDA covers ''direct and indirect'' persuasion. They argued that the Department's prior interpretation, by limiting reporting to activities involving only ''direct contact'' with employees, is ''illogical'' because it ignores the statute's direction that ''indirect'' activities must be reported and leaves unreported activities specifically intended to persuade employees.

One international union declared that the statute, properly construed, requires that any ''affirmative act'' with an object to persuade be reported. That union stated that the common and ordinary understanding of ''advice'' provides a ''principled distinction'' between exempt advice and reportable persuasion. The union stated the proper inquiry focuses on the ''nature and object'' of the consultant's activities, not whether the employer accepts or rejects the consultant's ''work product.'' In this regard, according to the commenter, a ''recommendation regarding a decision or course of conduct'' does not have an object to persuade employees. Any ''affirmative act,'' in the commenter's view, with an object to persuade should trigger reporting. This commenter also emphasized its support for the Department's original 1960 interpretation. In its view, the Department's original interpretation, unlike the interpretation adopted in 1962, did not restrict the scope of persuader activities to narrow, direct contact situations. Rather, the original interpretation required reporting of a consultant's preparation of persuader materials as well as any other circumstance in which ''the consultant's activity went beyond the mere providing of such advice or where it was impossible to separate advice from persuader activity.''

An international union asserted that the prior interpretation allowed consultants to avoid reporting by hiding activities under the ''guise'' of ''advice.'' This union contended that activities such as creating videos, Web site content, or fully-scripted presentation materials, and planning or conducting meetings with supervisors and managers are not normally considered to be advice. Instead, it asserted that these activities are nothing less than ''pre-packaged, full-service anti-union campaigns'' designed to defeat employee efforts to organize and bargain collectively and, as such, are reportable under a correct reading of the statute. In its view, the fact that these activities may be carried out without any direct contact with employees makes them no less activities with an object to persuade; thus, these activities should trigger reporting. A federation of unions similarly contended that a consultant directing an employer's supervisor to distribute persuasive material to employees does not transform the materials or their content into advice for the employer, particularly when the underlying motive is clearly not to advise the employer but to persuade employees.

Another international union endorsed the revised interpretation because it ensured that the advice exemption did not ''swallow the rule requiring disclosure of direct and indirect persuader activity.'' Instead, in the union's view, the Department properly construed section 203(c) in a manner that effectuates the purposes of the statute. It emphasized that reporting is triggered where ''*an*'' object of the consultant's activities is to persuade employees, not ''*the*'' object or even a primary object of the activities. Otherwise, indirect persuader activities would go unreported. To further support coverage in such situations, the commenter stated that the language ''by reason of'' in section 203(c) indicates that reporting is required if a consultant engages in an activity with an object to persuade, even if the activity also relates to, or is intermingled with, an element of advice, or the agreement calls for both types of activities. As a result, according to the commenter, coverage in indirect contact situations better meets the statutory language, than enlarging the advice exemption to include ''all activity that may occur in the context of giving advice.''

In contrast to these views, multiple commenters opposed the Department's revised interpretation. Although most commenters were untroubled by the definition of ''advice,'' they were concerned that the Department's proposed rule would deny the term its broad intended reach.

Several commenters described the Department's revised interpretation as a ''catch-all,'' sweeping in all activities that are ''related'' to persuasion, including advice, thus conflating ''advice'' and ''persuasion.'' Several relied on their reading of the legislative history, as reported in judicial decisions, to support their position. In challenging the Department's analysis, some commenters argued that the Department's proposed interpretation was the opposite of the approach required by the statute. As stated by one law firm, the reporting requirements in sections 203(a) and (b) cannot be reasonably interpreted without giving full play to the broad exemption established by section 203(c). Thus, as it reads the statute, any and all advice, even advice combined with persuader activity, is within the exemption. Another law firm commented that the Department's proposed interpretation was improper because the exemption would no longer have a ''broad scope,'' as intended by Congress. Instead, in its view, the proposed interpretation was ''probably the *narrowest possible* exemption'' from reporting, rendering the exemption a ''nullity'' (italics included in comment). Another commenter explained that the Department confused (perhaps deliberately so) the term ''advice'' (recommendations) with ''conduct'' (supply of materials that can be rejected).

Several commenters stressed that a ''recommendation'' implies the ability of the employer to ''accept or reject'' the recommendations or suggestions offered (*i.e.,* no ''advice'' without a ''recommendation,'' and no ''recommendation'' without the ability of the recipient to ''accept or reject''). One commenter emphasized that ''strategy'' is included within the definition of ''advice,'' noting that lawyers strategize routinely.

Another commenter asserted that the Department was mistaken in thinking that ''advice'' could be limited to just ''yes or no,'' without also including the preparation of materials. In its view, labor law is a complicated area and that the only ''practical'' way of advising the employer is to draft materials for the employer's use. In any event, the commenter argued, the materials simply constitute ''recommendations'' for the employer to accept or reject; the material is still advice if the employer, and not the consultant, does the persuasion.

An employer association stated that ''advice'' is provided by consultants, including attorneys, trade associations, and other third parties, in a variety of forms, such as seminars, ''fully drafted documents,'' ''tactics and communications tools'' to be used in

persuading employees, and other employment-related documents. It is therefore proper to treat such activities as advice.

Some commenters suggested that the interpretation as applied would be too narrow, limiting the advice exemption to just ''legal advice.'' These comments cited the three examples provided in the first paragraph of the proposed instructions under ''Exempt Agreements''—''exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law or provides guidance on NLRB practice or precedent.'' 76 FR 36191. In their view, these examples demonstrate that the Department is misreading the intended reach of ''advice,'' which they believed extends well beyond the bounds suggested by the examples. One commenter claimed that the Department ''craftily avoids'' making explicit its position that the ''proposed rule limits advice to 'legal advice,' '' while at the same time narrowly defining and taking a ''jaundiced view'' of what may constitute such advice. In its view, the Department seeks to narrow the advice exemption to legal advice in its purest and most technical form.

Another commenter suggested that the Department's revised interpretation renders section 203(c) superfluous, because section 204 would encompass the same activities. Some commenters viewed ''legal advice'' by a consultant as not having an object to persuade, regardless of the circumstances, even if the advice was used by the employer in its persuasion of employees. As a result, ''advice'' must mean more than ''legal advice,'' the commenters assumed, or otherwise section 203(c) would be rendered meaningless. A national bar association contended that section 203(c) clearly contemplates that at least some of the advice that a lawyer provides to the employer client will be designed to help the employer to persuade employees on unionization issues. This is self-evident, in the association's view, because if all of the lawyer's advice to the employer-client was unrelated to persuader activities, it would not be covered by the statute at all, with or without an advice exemption, and no exemption would be needed.

Several commenters stated that the requirement to report in situations in which ''legal advice'' is ''intertwined'' with persuader activity misapplies the concept of attorney-client privilege under which legal advice intertwined with non-legal advice (including ''specific tactics'' and ''alternative strategies'') is privileged. In the opinion of one commenter, the Department's revised interpretation renders the exemption ''meaningless'': ''Legal advice is never given in a vacuum, but is always provided to support a client's desired goals. For example, an attorney who reviews an employer's speech to employees regarding a union organizational drive, but only comments on the legality or illegality of its content (rather than suggesting lawful means to enhance its persuasive content) may violate his/her ethical responsibilities.''

Other commenters challenged the Department's statement in the NPRM that the employer is a ''conduit for persuasive communication.'' See 76 FR 36183. In their view, it is the employer that chooses to accept, reject, or modify the advice and materials provided by the consultant. As one commenter put it, to suggest that a consultant who provides such advice and materials without any personal interaction with employees is engaged in persuader activities ''is preposterous.'' A law firm made a similar point, albeit less emphatically: ''[T]he persuasive message given by the employer is the employer's message, not the consultant's sent through a conduit or middleman. The giving of the message is the employer's 'decision or course of action' based on the 'recommendation' of the consultant—a recommendation that is plainly 'advice' within the [accepted] definitions [of the term].'' [39]

[39] This law firm stated summarily that the Department had misconstrued the term ''indirect.'' In its view, the language is intended to cover only those situations in which a ''prime'' consultant uses a third party, not affiliated with the employer, to directly persuade employees. The Department finds no merit to this contention. The pertinent language in section 203 is ''every person who . . . undertakes activities where an object thereof is, directly or indirectly, to persuade employees.'' The words ''directly or indirectly'' neither narrow nor enlarge the persons who are potentially subject to reporting. Thus, regardless of the ''directly or indirectly'' language, a third party acting pursuant to a persuader agreement, *i.e.,* ''any person,'' as well as the consultant and employer, is required to file a report if he or she undertakes an activity with an object to persuade. Therefore, ''directly or indirectly'' must have been used to describe the activities undertaken, and intended, similar to other provisions in the statute, to make plain that reporting cannot be avoided by artifice, device, or indirection. See sections 202(a)(1), (3), (4), and (6). This view of the statute better harmonizes section 203's provisions than the commenter's reading of the section, which would largely deny any effective meaning to ''indirectly persuade employees.'' Additionally, the Department notes that its view regarding the application of ''indirectly'' to the full scope of actions by consultants (not restricted to the prime consultant's use of third parties) was not questioned by any other commenters.

2. Department's Response to Comments on the Textual Analysis

a. General Response

In response to these comments, the Department first notes the ''undisputed'' requirements prescribed by sections 203 and 204 of the LMRDA:

- A report shall be filed by a labor relations consultant who has agreed with an employer that the consultant will undertake activities that have an object, directly or indirectly, to persuade employees in the exercise of their union representation or collective bargaining rights. This report must contain a statement of the terms and conditions of the agreement or arrangement and must be filed within 30 days after entering into such agreement or arrangement.
- Both the consultant and the employer shall each file, later, an annual report showing payments made and received under the agreement or arrangement (Form LM–10 by an employer; Form LM–21 by a consultant).
- Nothing in section 203 shall be construed to require a report by reason of a consultant's giving or agreeing to give advice to the employer or representing or agreeing to represent the employer in a court, administrative, or arbitration proceeding or engaging in or agreeing to engage in collective bargaining on behalf of the employer.
- Nothing in the LMRDA shall be construed to require an attorney to include in a report any information lawfully communicated to him by his clients in the course of an attorney-client relationship.

Neither the language of the statute nor the legislative history provides clear direction about where Congress intended the line to be drawn between reportable persuader activities and nonreportable advice.[40] The ambiguity

[40] The varying interpretations by the Department over the years to delineate between what is reportable and what is not underscore the statute's ambiguity. The commenters are incorrect in stating, without qualification, that the ''direct contact'' test has been around for 50 years. Although it derives from the 1962 IM interpretation, the strict formulation of the ''direct contact'' aspect of the prior interpretation stems from a statement of reasons the Department submitted in *UAW v Dole,* which the Department established as policy in 1989. Further, as a federation of unions observed, IM section 265.005 could be read to require ''indirect contact'' reporting, in certain circumstances. Indeed, the 1962 test states that, ''the question of application of the 'advice' exemption requires an examination of the intrinsic nature and purpose of the arrangement to ascertain whether it essentially calls exclusively for advice or other services in whole or in part. Such a test cannot be mechanically or perfunctorily applied. It involves a careful scrutiny of the basic fundamental

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within section 203 has been evident since the earliest appellate decisions construing this section. See *Wirtz* v. *Fowler,* 372 F.2d 315, 330–332 (5th Cir. 1966), rev'd in part on other grounds, 412 F.2d 647 (1969); *Douglas* v. *Wirtz,* 353 F.2d 30, 32 (4th Cir. 1966). As stated in *Wirtz* v. *Fowler:*

> The exemption is not, as [the attorney-consultant] contends ''as broad as the reporting requirement itself.'' Almost consistently, the purpose of § 203(c) was explained [in the legislative history] not to carve out a broad exemption of activities which would otherwise be covered by § 203(b), but to make explicit what was already implicit in § 203(b), to guard against misconstruction of § 203(b). Generally, it was felt that the giving of legal advice was something inherently different from the exertion of persuasion on employees, and section 203(c) was inserted only to remove from the coverage of § 203(b) those grey areas where the giving of advice and participation on legal proceedings and collective bargaining could possibly be characterized as exerting indirect persuasion on employees, . . . not to remove activities which are directly persuasive, but indirectly connected to the giving of advice and representation.
>
> For the purposes of this case, it is unnecessary for us to ascertain the precise location of the line between reportable persuader activity and nonreportable advice. . . . We conclude only that not everything which a lawyer may properly, or should, do in connection with representing his client and not every activity within the scope of the legitimate practice of labor law is on the nonreportable side of the line. At least some of the [consultant-attorney's] activities . . . no matter how traditional, ethical, or commendable—were those of a persuader.

372 F.2d at 330–31 (footnotes omitted). More recently in *UAW* v. *Dole,* the court described the statute as ''silent or ambiguous,'' noting the evident tension between the Act's ''coverage provisions'' and the ''exemption for advice.'' 869 F.2d at 617–18.[41]

In proposing a revised interpretation that returns to the Department's original view about where the line separating reportable persuader activities and exempt advice is properly drawn, the Department rejects the position under the prior interpretation that a consultant's activities would be reportable only if they involved face-to-face, or other direct, contact with employees. There is nothing in the statutory language that compels this reading. While the legislative history specifically enumerates some of the types of improper actions which might be avoided if employers were required to report their persuader agreements with consultants, such as coercion, bribery, surveillance of employees, and unfair labor practices undermining employee rights, it sheds little light on what *specific* activities by a consultant should trigger reporting under the LMRDA. At the same time, however, the legislative history is clear that reporting was not to be limited to the disclosure of unlawful practices by consultants. See Section III.B.1 of the preamble to this rule.

The prior interpretation did not represent the best reading of the statute, as it left unreportable indirect persuader activities, with the attendant loss of transparency intended by Congress. Commenters supporting the prior interpretation have shed no new light on the interpretative challenges posed by the statutory language. In particular, they have failed to explain how the prior interpretation better satisfied the requirement that both indirect and direct persuader activity must be reported. Their arguments are based on threads taken from reported opinions in the case law, which have underscored the tension between reportable activities and advice. For example, while in *UAW* the court upheld the Department's prior interpretation as reasonable, it did not hold that this interpretation was compelled by the statute and did not construe the statute in a way that would caution the Department against its present view about how best to effectuate the purpose of disclosing persuader activities. Some commenters relied on observations in the *UAW* opinion (''[T]he term 'advice,' in lawyers' parlance, may encompass, *e.g.,* the preparation of a client's answers to interrogatories [or] . . ., the scripting of a closing or an annual meeting.'' 869 F.2d at 619 n. 4,). While such activities ''may encompass'' advice, as viewed under the prior interpretation, the court did not view this as the only permissible construction.

The Department disagrees with the suggestion by some commenters, relying by analogy on language in *UAW,* 869 F.2d at 618, that section 203(c) must also exempt from reporting ''persuasive'' activities. The commenters ignore that the court in *UAW* was only addressing the reportability of persuader activity engaged in by supervisors, not outside consultants. Id. at 620. Section 203(e), unlike section 203(c), operates to exclude a whole category of individuals from reporting (individuals regularly employed by the employer, even if engaged in persuader activities). In contrast, section 203(c), by exempting ''advice,'' does not exempt any person from reporting agreements with employers, but, rather, clarifies the need to distinguish between the outside consultant's provision of ''advice'' to the employer from their undertaking of ''persuader activities,'' an irrelevant consideration under section 203(e).

Further, as stated, agreements to exclusively provide advice do not trigger reporting. Thus, even where an employer, who has an agreement with a consultant for providing legal services, itself undertakes actions to persuade employees to vote against union representation, such as by delivering a speech the employer has prepared to employees, no reporting is required where the consultant has only reviewed the speech for legality and has refrained from preparing materials, scripting supervisor interaction with employees, or otherwise undertaking activities with an object to persuade.

b. How to Read Section 203(c)

Section 203(c) provides, in relevant part: ''Nothing in this section shall be construed to require any employer or other person [*e.g.,* a consultant] to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer.'' This provision stands in juxtaposition to the requirement that employers and consultants must file reports, providing detailed information relating to activities and payments under any agreement or arrangement where an object thereof is, directly or indirectly: (1) To persuade employees to exercise or not to exercise, or how to exercise, their union representation and collective bargaining rights; or (2) to supply an employer with information

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characteristics of any arrangement to determine whether giving advice or furnishing some other services is the real underlying motivation for it.'' Although not the best formulation of the statute, the flexibility of the prior rule demonstrates the breadth of permissible constructions.

[41] Several law review articles have addressed the tension between the obligation to report persuader activities and the exemption for advice, and the scope of a consultant's obligation to report other activities once it has engaged in persuader activities. See, *e.g.,* Terry A. Bethel, *Profiting From Unfair Labor Practices: A Proposal to Regulate Management Representatives,* 79 NW. U. L. Rev. 506 (1984); Jules Bernstein, *Union-Busting: From Benign Neglect to Malignant Growth,* 14 U.C. Davis L. Rev. 1 (1980); Jonathan G. Axelrod, *Common Obstacles to Organizing under the NLRA: Combatting the Southern Strategy,* 59 N.C.L. Rev. 147 (1980); James Farmer, *Keynote Address: Union Busting,* 1 Gonz. L. Rev. 3 (1980); James R. Beaird, *Some Aspects of the LMRDA Reporting Requirements,* 4 Ga. L. Rev. 696 (1970); James R. Beaird, *Reporting Requirements for Employers and Labor Relations Consultants in the Labor Management Reporting and Disclosure Act of 1959,* 53 Geo. L. J. 267 (1965). For the first impressions of the reporting obligation and the interpretative questions presented, compare the articles by two prominent commenters on labor relations matters, Russell Smith, *Labor Management Reporting and Disclosure Act,* 46 Va. L. Rev. 195 (1961)); Benjamin Aaron, *Labor Management Reporting and Disclosure Act of 1959,* 73 Harv. L. Rev. 85 (1960).

about ''the activities of employees or a labor organization in connection with a labor dispute involving such employer. . . .'' Section 203(b), 29 U.S.C. 433(b).[42] This provision establishes the consultant's reporting obligation. The equivalent obligation of the employer, who has additional reporting obligations, independent of any agreements or arrangements with consultants, is prescribed by section 203(a), 29 U.S.C. 433(a).

Section 203(c), by providing a rule of construction, serves to clarify that sections 203(a) and (b) establish which types of employer-consultant agreements are reportable and which are exempt. This language is similar to other sections of the LMRDA, which serve to make explicit what is already implicit. See section 202(c) (clarifying that union officials are not required to report unless they hold a reportable interest); 203(d) (accord for employers or ''other persons''). It also should be noted that each of these sections uses introductory language similar to that used in section 203(c) (''Nothing shall be construed to require''). However, unlike section 203(c), other LMRDA provisions use language that creates ''blanket'' exemptions from their reporting requirements for particular activities. Compare with section 202(b) (exempting from reporting by union officials their holdings in exchange-traded stock) and section 203(b) (requiring reporting of agreements in which consultants supply certain information to employers, ''except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding''). See also sections 202(a)(5) (excepting from reporting by union officials payments received as a bona fide employee and purchases or sale of goods in the regular course of business); and section 203(a)(1) (excepting from employer reporting loans and other payments made by banks).

Section 203(c) does not contain language creating a blanket exemption. Unlike the provisions just cited, section 203(c) contains language that limits the availability of the exemption to instances where a consultant acts ''*by reason of* his giving or agreeing to give advice.'' At a minimum, this language indicates that a person who gives advice is not exempt from filing a report on this basis alone; instead, by exclusively giving or agreeing to give advice, a consultant does not trigger a reporting obligation. If he or she undertakes other activities that do have an object to persuade, the exemption is unavailable.[43] Further, the statute specifically requires reporting when a consultant undertakes activities with an object to ''directly or indirectly'' persuade employees, as noted by some commenters, indicating that indirect methods of consultant persuasion also triggers reporting. Moreover, the statute specifies that *an* object of the consultant's activity must be to persuade, not *the* object, thus supporting the coverage provision in the case of indirect persuasion. See sections 203(a) and (b).

Thus, section 203(c) is best understood as making explicit what sections 203(a) and (b) make implicit: That consultant activity undertaken without an object to persuade employees, such as advisory and representative services for the employer, do not trigger reporting.[44] In the Department's view, this reading best harmonizes the tension between the ''coverage'' and ''exemption'' provisions. Moreover, this reading gives effect to the requirement that indirect persuader activities be reported, an element almost entirely missing from the prior interpretation.

In contrast, the prior interpretation framed the reporting obligation to exclude indirect persuader activities from reporting by characterizing them as ''advice,'' even where the consultant engaged in an activity with an object to persuade employees, as long as the activity had any tenuous connection with advice. As noted approvingly in a form letter opposing the Department's proposed interpretation rule, under the prior rule ''[a]s long as my company was free to accept or reject *anything* prepared by the third party, it was *considered* advice, not persuasion'' (emphasis added). Even though, for example, the consultant drafted a captive audience speech that was delivered verbatim by the employer or implemented for the employer a system whereby supervisors delivered a scripted message to employees, such activities were excluded from reporting because the employer was free to decide whether to use the consultant's materials or its directions.[45]

In contrast, as noted in both the NPRM and the final rule, the Department gives ''advice'' its ordinary meaning: ''an oral or written recommendation regarding a decision or course of conduct.'' The preparation of persuader materials is more than a recommendation to the employer that it should communicate its views to employees on matters affecting representation and their collective bargaining rights. See 76 FR 36183. Although some commenters stated that they disagreed with the Department's interpretation of the term ''advice,'' it appears that their disagreement lies primarily or entirely with the Department's proposed application, which would expand the reporting obligation beyond the direct contact trigger under the prior interpretation and would include the preparation of persuader material.

Some commenters have suggested that if an employer, not the consultant, is the ''final'' actor under the parties' agreement, the consultant has no reporting obligation. A consultant drafting persuader materials as part of an anti-union campaign for the employer is also likely providing advice to the employer (which by itself would not trigger reporting). However, by engaging in a persuader activity, the consultant has triggered a reporting

[42] Section 203(a) places ''is,'' differently, stating a report is required ''where an object thereof, directly or indirectly, is to persuade employees.'' No commenter mentioned this distinction in the statutory language and the Department attaches no significance to the varied phrasing of the declaration.

[43] In this regard, the Department disagrees with the commenters who opposed reporting in situations in which an agreement or arrangement included among multiple activities only some that constitute persuader activities. As noted in the NPRM, 76 FR 36192, n. 16, this application of the statute stems from the initial Form LM–10 and LM–20 reports issued in 1962 and is not being altered by this rule. This view flows from the statutory language which states that reporting should not be required *by reason of* the giving of advice and engaging in the other enumerated activities. See section 203(c). The Department continues this approach in this rule.

[44] The legislative history of section 203 confirms this view: ''Although this [that attorneys and other consultants that confined their activities exclusively to those described in Section 203(c) would not trigger reporting] would be the meaning of the language of Section 103(a) and (b) [what became LMRDA Section 203(a) and (b)] in any event, a proviso to Section 103(b) [what became Section 203(c)] guards against misconstruction.'' S. Rep. No. 85–1684, at 9. See also *Humphreys, Hutcheson, and Moseley* v. *Donovan,* 755 F.2d 1211 (''[T]his court agrees with the majority of courts that find the purpose of section 203(c) is to clarify what is implicit in section 203(b)—that attorneys engaged in the usual practice of labor law are not obligated to report under section 203(b)'').

[45] Some commenters asserted that ''advice'' may be defined to include a recipient's ability to ''accept or reject'' recommendations, suggestions, or opinions offered. Although the term may be used in this sense, the Department has concluded that the ability of the employer ''to accept or reject'' is not the relevant inquiry in establishing the scope of the advice exemption. In any event, even if ''advice'' is read to encompass ''an accept or reject'' element, here the issue is not whether the consultant is attempting to influence or advise the *employer* concerning the exercise of rights belonging to the employees, or the employer's own rights, but rather whether the consultant pursuant to its agreement with the employer is undertaking an activity with an object, directly or indirectly, to persuade *employees.*

obligation even though the employer, as the ''final'' actor in this scenario, actually delivers the anti-union message.

Some commenters took the view that the Department has misread section 203(c) because, in their view, it can be given effect only if persuader activities are exempted as advice. Otherwise, they assert, there would be no obligation to report and no need to provide an exemption. Thus, in their view, the prior interpretation of section 203(c) recognized that Congress intended to ''carve out'' activities that would otherwise be reportable. For this reason, they contended that the proposed rule created a ''false dichotomy'' between advice to the employer and persuasion of employees. In the commenters' view, sections 203(a) and (b) require consultants to report upon all agreements, and the proposed interpretation treats section 203(c) as mere ''surplusage.''

The Department disagrees. What the commenters overlook is that section 203(c) is still given effect as a rule of construction if it is read, as put forth in this rule, to underscore that advice *qua* advice (from a consultant to an employer) does not trigger a reporting obligation simply because it arguably concerns a potential employer action that has an object to persuade. Section 203(c) serves as a check on the outer bounds of consultant actions that are only tenuously connected to persuasion. It makes plain that a consultant has not undertaken a reportable activity by counseling an employer that a tactic is lawful under the NLRA; section 203(c) thus ensures reporting is not triggered by an activity simply because the employer's subsequent action may ultimately affect the employees' views on the need for a union. Similarly, the approach taken by the Department ensures that a consultant is not required to report an agreement to develop employer personnel policies or best practices without an object to persuade the employees. Section 203(c) continues to provide a broad exemption for numerous types of employer-consultant agreements, even those in which the employer, rather than the consultant, ultimately engages in the persuasion of its employees. See Section IV.B.2. The Department therefore disagrees that the revised rule establishes a ''false dichotomy'' between ''advice'' and ''persuasion,'' and renders section 203(c) ''superfluous.''

Section 202(c), which addresses financial reporting by union officials, serves a similar role under the statute, by emphasizing that a union official is not required to file an annual report unless he or she has engaged in a particular financial matter during the reporting period. Section 202(a) for union officials, like sections 203(a) and (b) for employers and consultants, prescribes that only particular financial payments are to be reported. Thus, section 202(c), like section 203(c), was not necessary to ''exempt'' officials from a reporting obligation. Nonetheless, its inclusion shows that the statute's drafters wanted to not only articulate reporting requirements but also to plainly demonstrate when reporting was not required.

Many commenters criticized the Department for failing to give ''advice'' the breadth that they believe the term demands. As noted, the Department does not interpret section 203(c) as a blanket exemption from reporting by a consultant. Instead, the Department reads this provision in conjunction with the general reporting requirement prescribed by sections 203(a) and (b)—to require the reporting by an employer and a consultant of any agreement or arrangement under which a consultant ''undertakes activities where an object thereof, directly or indirectly, is to persuade employees'' in their exercise of their representation and collective bargaining rights. Further, the Department only characterizes as ''advice'' those activities that meet the term's plain meaning. The Department's reading of section 203(c) gives effect to all the statute's provisions and is consistent with the common sense and interpretative canons that an exemption should not swallow the rule.

c. Legislative History

A few commenters provided arguments that the Department's revised interpretation was inconsistent with the statute's legislative history, which they read to create a broad or sweeping exemption from reporting. In this regard, they advance two separate points: first, that Congress explicitly characterized the exemption as broad; and second, that the legislative history demonstrates Congress intended that reporting would be limited to activities of the notorious-type of middlemen identified by the McClellan Committee. We here address the first argument; the second is discussed later in Section V.C.1.d.

Commenters drew on the legislative history, as discussed in a handful of cases in which persuader reporting has been an issue, including *UAW,* 869 F.2d 616; *Humphreys, Hutcheson and Mosely* v. *Donovan,* 755 F.2d 1211 (6th Cir. 1985); *Wirtz* v. *Fowler,* 372 F.2d 315 (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 (4th Cir. 1965). In addition, a few commenters quoted from the conference committee report on the LMRDA: ''Subsection (c) of the conference substitute grants a broad exception from the requirements of the section with respect to the giving of advice.'' H. R. Rep. No. 86–1147, at 33 (1959), reprinted in 1 Leg. History at 937. The Department agrees with this characterization, and notes that section 203(c) continues to operate as a broad exemption, leaving unreportable a wide range of agreements commonly entered into by employers and consultants. Indeed, this rule exempts from reporting agreements involving exclusively the following activities:

- Counseling on NLRB, NMB, or similar agency practices;
- legal services (as distinct from persuader activities undertaken by a lawyer);
- guidance on employer personnel policies and best practices, as well as the development of such policies and practices except where undertaken with an object to persuade (such as by introducing a particular benefit at issue in an organizing campaign or reassigning union supporters to jobs where they have less contact with co-workers);
- employee surveys (other than push surveys);
- vulnerability assessments;
- off-the-shelf material (where selected by a trade association for its member-employers or in other circumstances where selected by the employer without assistance by the consultant);
- trade association newsletters addressed to member-employers; and
- conducting a seminar for employers in which the consultant does not develop or assist the attending employers in developing anti-union tactics or strategies.

The commenters additionally relied on the following passage from the legislative history, quoting Professor Archibald Cox's testimony on the proposed legislation:

> Payments for advice are proper. If the employer acts on the advice it may influence the employees. But when an employer hires an independent firm to exert the influence, the likelihood of coercion, bribery, espionage, and other forms of interference is so great that the furnishings of a factual report showing the character of the expenditure may be fairly required. . . . 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 [NLRA], an attorney or other consultant who confined himself to giving advice, taking part

in collectively bargaining and appearing in court and administrative proceedings nor [sic] would such a consultant be required to report.[46]

In the Department's view, these statements and those referenced in note 46 merely reflect that attorneys and others providing advice would not be required to file reports. Indeed, under this rule no reporting is triggered by attorneys who exclusively engage in legal services, or by any consultants who merely provide recommendations or suggestions. The statements provide no support for the position that Congress intended that the particular activities, identified as reportable under this rulemaking, would be exempted from reporting as ''advice.'' The general statement that advice by ''responsible'' advisers would not be reportable is not a useful guide in distinguishing among particular activities undertaken by consultants, nor does it signal that exempt advice includes within it consultant activities that have an object to persuade. In any event, the rule recognizes that consultant activities that exclusively constitute the giving of advice do not trigger reporting.

d. ''Advice'' or ''Legal Advice''

The commenters here advanced two arguments. First, they argued, in effect, that the Department misconstrues ''advice'' by limiting it to ''legal advice,'' and, in the process, fails to properly consider section 204, which they view as providing protection for ''legal advice.'' Second, they argued that the Department arbitrarily defines ''legal advice'' in a stilted fashion, effectively ignoring both the manner in which attorneys conduct their management law practices and how they must conduct their practices as a matter of ethics.

The Department disagrees with the commenters who asserted that the revised interpretation limits the advice exemption to just legal advice. As stated, the Department defines ''advice'' by its plain meaning: ''an oral or written recommendation regarding a decision or course of conduct.'' Only those activities that fall outside that definition trigger reporting, such as those activities listed on pages 3–4 of the instructions to Form LM–20 (see Appendix A) and on page 6 of the instructions to Form LM–10 (see Appendix B). For example, a consultant is not required to report his or her activities in *recommending* that the employer retain the consultant's services to develop a union avoidance program that would include the consultant's development of persuader materials and a system whereby supervisors undertake activities to detect employees' sympathies towards union representation and how to shape such views. Reporting is triggered only when the employer and the consultant agree that the consultant should undertake such activities. Moreover, as discussed above, counseling an employer regarding personnel policies and practices will not trigger reporting.

Additionally, the commenters are also mistaken in their suggestion that the few examples they cited from the proposed instructions were intended by the Department to constitute the entire universe of activities that are within the scope of ''giving advice'' to an employer. Rather, they are merely examples illustrative of the term, and they are not meant to be exhaustive. For instance, if a consultant merely recommends that the employer conduct employee surveys or hold meetings, then no reporting is required because such recommendations are ''advice.'' On the other hand, if the consultant, after having recommended a meeting, then prepares the persuasive speeches and presentations for the employer to present at the meeting, or identifies which employees to meet with at a certain location and time (see factors in Section IV.B.1), then the consultant has gone beyond providing advice to the employer and has engaged in the indirect persuasion of employees. Reporting would then be required under this rule. In addition, certain consultant undertakings, such as conducting vulnerability assessments and revising materials for legality and grammar, are not considered persuader activities. See discussion above in Section IV.B.2. As we have explained, recommendations regarding best practices in matters of personnel management do not, by themselves, trigger reporting. Rather, the consultant must develop such best practices with an object to shape employees' views against union representation. A consultant advising businesses on personnel management practices, therefore, becomes subject to reporting only if developing such practices with that object present, hardly a likely occurrence unless the consultant has been hired to deter union representation, which is often a question of timing. Therefore, while legal advice and other services do not trigger the reporting requirements, the advice exemption is not limited to legal advice under the revised interpretation.

Furthermore, several commenters stated that the requiring of reporting in situations in which legal advice is ''intertwined'' with persuader activity misapplies the common law definition of ''advice,'' which states that legal advice intertwined with non-legal advice (including concerning ''specific tactics'' and ''alternative strategies'') is privileged under the attorney-client privilege. The Department disagrees with these comments and reiterates that all consultant activity that meets the plain definition of advice does not trigger reporting, whether legal or non-legal. Further, the advice exemption of section 203(c) determines whether or not an agreement is reportable, while section 204 states that privileged information is not required to be reported. See Section V.H. In this regard, the Department notes that—consistent with the interpretation that section 204 has received from the courts—it always has construed section 204 as roughly equivalent to the limited attorney-client privilege under the common law. The Department has never embraced the view that section 204 creates a broad, separate exemption for attorneys that supplants section 203(c). The Department proposed no change to this interpretation of section 204.

Finally, commenters are mistaken that the Department's proposal would impede a consultant's ability to provide an employer with documents that not only comply with the law but also best convey the employer's position on union and collective bargaining related materials. In support of their position, they rely on case law defining ''advice,'' or explaining an attorney's legal duties. As noted above, some also rely on *UAW* v. *Dole,* which, they asserted, is inconsistent with the Department's proposal. The Department's interpretation does not interfere in any way with an attorney-consultant's ability to provide employers with legal services that, presumably, the employers are owed by entering into their relationship with the attorney-consultant. Nor does the interpretation impede an attorney's ability to prepare and revise ''legal documents,'' such as collective bargaining agreements, or documents prepared in connection with a grievance, administrative or judicial proceeding. Under the interpretation, however, reporting is triggered by a consultant's preparation of documents, such as scripting ''captive audience speeches'' or preparing anti-union flyers

[46] *Wirtz* v. *Fowler,* 372 F.2d at 327, n. 25, quoting Testimony of Archibald Cox, *Hearing on Labor-Management Legislation,* Subcomm. on Labor and Public Welfare, 86th Cong., 1st Sess. 128 (1959). Commenters rely on two other statements in opinions discussing the legislative history—''Generally it was felt that the giving of legal advice to employers was something inherently different from the exertion of persuasion on employees . . .'' and ''Congress recognized that the ordinary practice of law does not encompass persuasive activities.'' (quoting *Humphreys,* 755 F.3d at 1216, n. 9).

for distribution to employees, or activities such as instructing supervisors and managers about how to detect their employees support for a union and steer them against the union, and so forth—documents and other activities, including the revision of documents (other than to ensure legality), that have as their purpose the persuasion of employees about how to exercise their rights to representation and collective bargaining.

In contrast, agreements that have their sole purpose to provide guidance to an employer, as distinct from having a purpose to persuade employees, do not trigger reporting. No reporting is required where the consultant has reviewed for legality a speech prepared by the employer to dissuade employees from giving their support to the union. The typical situation in which a consultant must report its activities will be where the consultant has orchestrated the employer's union opposition campaign, prepared materials designed to persuade employees or enhanced their persuasive value, scripted supervisor interaction with employees, undertaken surveillance of employees engaged in union activities, or otherwise undertaken concrete actions with an object to persuade. Neither the proposed nor final rule prevents an employer from taking actions to persuade its employees to oppose union representation or to hire a consultant for this purpose. The content, timing, and mode of the message to employees remain entirely within the control of the employer and the labor relations consultant. The rule requires only that if the consultant engages in persuader activities the consultant and the employer must file Forms LM–10 and LM–20 to disclose such activities and the underlying agreement. See further discussion of this and related points in Section V.H.

Indeed, although not limited to just legal advice and representation, the Department's interpretation preserves the exemption for activities traditionally performed by attorneys. As explained by the Fourth Circuit:

> Primarily, . . . the [disclosure] requirement is directed to labor consultants. Their work is not necessarily a lawyer's. Indeed, for a legal adviser, it would be extracurricular. True, a client may desire such extra-professional services, but, if so, the attorney must balance the benefits with the obligations incident to the undertaking.

Douglas v. *Wirtz,* 353 F.2d at 33. That today, attorneys often fill the consulting role that was performed by a balanced mix of legal and non-legal professionals does not change the meaning of ''advice'' as used in section 203(c). That some lawyers now perform roles that were once outside the traditional ''legal advice'' field and therefore subject them to additional reporting responsibilities is an issue separate from the meaning to be given ''advice'' in section 203(c). See *Price* v. *Wirtz,* 412 F.2d at 650 (''Since a principal object of the 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 within § 203(c) but who wanted also to wander into the legislatively suspect field of a persuader''). The statute, not the business model followed by some law firms, determines whether certain activities are reportable.

C. Comments on Department's Policy Justification for Revised Interpretation

In the NPRM, the Department outlined its justification for its revised interpretation for reporting consultant agreements that provide for direct and indirect persuader activities. The policy reasons for revising the interpretation are largely restated in the preamble to this rule. In discussing the comments received on the Department's policy reasons underlying the interpretation, we follow the order used in the NPRM: The needed disclosure of persuader agreements to enable employees to make informed decisions about their representation and collective bargaining rights; the significant underreporting under the prior interpretation where only agreements involving a consultant's direct contact with employees were reported; and the deterrent impact of transparency on practices harmful to peaceful and stable labor-management relations.

1. Benefit to Workers

In the NPRM, the Department explained that many employers engage consultants to manage ''union avoidance'' or ''counter-organizing'' efforts to prevent workers from successfully organizing and bargaining collectively. See 76 FR 36187. These efforts include the dissemination of persuader material to workers, whether conveyed verbally or in written or electronic formats, as well as the development and implementation of personnel policies and actions with an object to persuade workers. The Department also explained that its proposed interpretation would require that agreements involving indirect persuasion of employees be reported, not merely those involving direct contact between consultants and employees. Reporting both types of agreements better informs employees as they choose how to exercise their protected rights to organize and bargain collectively. Such disclosure informs workers about the underlying source of the information they are receiving, helps them in assessing its content, and assists them in making decisions about union representation and collective bargaining issues.

a. Comments in Support of NPRM

Commenters that expressed support for the revised interpretation explained the need for workers to have more information concerning persuader agreements in deciding whether to support or oppose union representation. These commenters noted that workers are often unaware that employers are relying on the services of an outside consultant and that the disclosure of their involvement would allow workers to better assess the frequent position taken by employers to depict the union as an unwanted or unnecessary ''third party'' or ''outsider'' intruding between the employer and the workers.

A national union provided an example of a counter-organizing campaign where the consultant produced the employer's anti-union campaign literature and speeches, coached management on conducting ''captive audience meetings,'' and used materials and arguments that ''repeatedly and consistently'' referred to the union as an ''outsider.'' The national union supported the proposed rule, stating that requiring employers to disclose their relationships with consultants ''would allow employees to scrutinize the source of the bogus information they receive about the merits of collective bargaining and let them decide . . . which party in the organizing campaign is the true outsider: a democratic federation of their fellow workers or paid outside consultants and attorneys.'' To emphasize the importance of disclosure, the commenter quoted Justice Louis Brandeis, ''Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants.'' See Louis Brandeis, *What Can Publicity Do?,* Harper's Weekly, Dec. 20, 1913.

According to another international union, disclosure of information about consultants allows workers to know who is behind a campaign so they can ''cast an educated vote'' on union representation. Another international union noted that such disclosure provides workers with ''the opportunity to determine who is running an employer's anti-union campaign and

which messages are heartfelt expressions versus paid propaganda.'' Similarly, a senator and congressman argued that workers, in voting for or against union representation, need to know the source of information in order to evaluate its credibility, analogizing to public elections where the identity of those who paid for political advertisements must be disclosed.

Union commenters asserted that consultants routinely run anti-union campaigns for employers, through the employer's supervisors. They provided examples of some of these indirect persuader activities. A national union noted that supervisors are used as the conduit to convey the consultant's message. As a result, the commenter agreed with the Department's characterization of supervisors in the NPRM as ''the conduit for persuasive communications or material developed by an outside consultant or lawyer.'' See 76 FR 36183. Similarly, a senator and congressman stated that consultants frequently are a ''shadow management at a facility, making disciplinary decisions and drafting scripts for mid-level management to read.''

A federation of unions stated that modern campaigns rely heavily on supervisors as ''the consultant's trusted intermediaries.'' It also cited an industrial relations study that states that ''consultants typically script supervisors' conversations, train them how to read employees' verbal and non-verbal reactions, and have them ask indirect questions without explicitly asking employees how they will vote.'' Lafer, *Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections,* American Rights at Work Report, at 3 (July 2007). The commenter also quoted Martin Jay Levitt, a former persuader consultant, who asserted: ''The entire campaign . . . will be run through your foremen. I'll be their mentor, their coach. I'll teach them what to say and make sure they say it. But I'll stay in the background.'' Levitt, *Confessions of a Union Buster,* at 10. Similarly, a public policy organization presented two examples of such practice, a ''confidential memorandum'' from an employer instructing managers to attend a mandatory meeting involving a labor attorney who would address ''preventive labor relations''; and a manual produced by a law firm to be used by the employer to counter an organizing effort. As quoted by the commenter, the manual states: ''As a supervisor or manager, your role in an organizing attempt is a key one. You are in the best position to communicate the message to employees that unionization is not in the best interest of the individual employees, the organization, or the community.'' An international union stated that management attorneys often will attend ''captive audience'' meetings with the employer's representatives, avoiding direct contact with employees but prompting the employer's spokesperson as he or she addresses the employees. The union described persuader services advertised on law firm Web sites, where the firms portrayed themselves as experts in developing ''comprehensive and strategic union avoidance tactics,'' and boasted about their ''extensive union avoidance practice'' and the availability of their ''union avoidance attorneys'' to represent employers ''who wish to establish and/or maintain a union-free workplace.'' The commenter noted that these law firms publicize services to provide ''supervisory union avoidance training,'' ''develop[ing] strategies for election campaigns,'' and ''inform[ing] employees'' about the company's positions. Further, the law firm touted that it has ''a proven record of success in running campaigns and winning elections.''

One commenter reported its experience that the written and video materials used in these campaigns employ anti-union rhetoric, warning employees not to sign union authorization cards, asserting the union is a ''third party,'' describing the union as a business (out to make a profit, not serve its members), and warning about strikes. The commenter stated that although the consultant was careful not to trigger a reporting requirement under the current interpretation of the advice exemption by meeting with employees face-to-face, employees see unidentified strangers meeting with management officials and first-line supervisors during anti-union campaigns. An international union argued that Congress intended for workers to know that the source of persuader messages is a ''paid agent'' hired to persuade them. In its view, Congress knew and wanted employees to know that these agents may coach employers on the ''spontaneous'' formation of employee committees and design tests to identify pro-union workers. Disclosure of these tactics, according to the commenter, provides workers with information ''important to assessing the credibility and motivations behind what they are seeing and hearing and thereby facilitates informed decision making.''

A national union presented examples of indirect persuasion by consultants during several recent union representation elections. The consultants created persuader handbills, posters, videos, and other materials. Literature was placed in ''strategic places'' such as employee changing rooms, the time clock area, and hallways that workers pass through when going to the polling area. Workers were often required to view videos portraying unions in a negative light and, like other messaging, encouraging employees, explicitly, to vote against the union. Another national union provided examples of indirect persuader activity from four separate campaigns. It explained that the consultants in those instances issued a manual for supervisors and trained them in conducting one-on-one and group meetings with employees designed to persuade them against supporting the union, and drafted emails, letters, and other literature for distribution by management.

A law firm representing unions submitted documents used by consultants to influence employee choice. It included campaign literature, a document outlining campaign strategies to defeat union representation, ''captive audience'' and other speeches opposing union representation, and training materials for supervisors.

A public policy organization provided several examples of consultant activities. It stated that a law firm had managers call workers at home and ''turned supposed training seminars into anti-union captive audience meetings.'' The commenter stated that another consultant developed anti-union literature that was circulated to employees, along with a calendar of anti-union events. The commenter described a law firm's extensive activities in directing and scheduling the employer's first four weeks of a campaign: sending nine letters to employees' homes; placing four notices on bulletin boards; passing out six leaflets to employees in the workplace; making three anti-union speeches in mandatory all staff meetings; holding one vote demonstration; and conducting five days of small group meetings where immediate supervisors tell employees that unions are bad. According to the commenter, another consultant encourages its clients to hold a '' 'Vote No' saturation carnival,'' which involves all supervisors wearing ''Vote No'' buttons, shirts, etc., and handing them out to employees. According to the commenter, these consultant-driven messages often use the following types of ''selling points'': ''Give the employer another chance; the union will take you out on strike; unions charge dues, fines, and assessments; unions cannot guarantee anything; the union is a third party that interferes in the employment

relationship; unions need your money to survive; and the employer will never agree to union demands.'' Quoting Mehta, Chirag & Theodore, Nik, *Undermining the Right to Organize: Employer Behavior During Union Representation* Campaigns, Washington, DC: American Rights at Work (2005).

Local labor union officials also provided examples of ''formulaic'' campaigns managed by law firms. For example, a commenter discussed the mailing of 12 letters to employees that appealed to employees as a ''family,'' while characterizing unions as ''third-parties'' or ''outsiders.'' The letters also included a ''give us another chance'' theme, followed by letters ''explaining'' the law, and stating that unions operated on a ''blank slate'' and could promise nearly anything. The letters progressed to include a more negative anti-union tone, with direct references to ''union corruption'' and crime. The commenter noted that these would be followed by letters about the salaries of union officers, the amount of dues, and potential penalties against members for violating union bylaws. The final letter, the commenter described, would combine themes and ''invariably'' predict a strike.

Multiple commenters suggested that workers would benefit from knowing how much money employers spent on third-party consultants. A public policy organization cited a study estimating that the union avoidance industry was a $1 billion industry, with employers hiring individuals at, for example, $500 per hour to run a counter-organizing campaign, with one employer taking out a $100,000 loan to fund the campaign.

A senator and congressman stated that employees would be stunned at the amount of money employers pay anti-union consultants, especially when bombarded with anti-union rhetoric that a company lacks resources to offer raises, or that unionization may drive the company into bankruptcy. As an example, the commenters pointed to litigation documents revealing that a company paid a prominent law firm $2.7 million in fees to prevent employees from unionizing. They explained that this kind of information is of particular interest to employees whose motivation to unionize is ''because they feel that management is denying them a fair share of the profits of their labor.'' Further, the commenters stated that workers would ''surely be interested'' in knowing that management is ''paying lavish fees for consultants to run'' a counter-organizing campaign. The commenters concluded that the revised interpretation will ''finally bring transparency to labor-management relations and will help ensure that employees are fully informed when they make a decision to exercise or not to exercise their rights. Another commenter suggested that such disclosure might also affect decision making by employers when faced with union representation or collective bargaining issues. The commenter stated that employers would have the ability to compare the costs of offering benefits and/or raises to their workers against the high fees charged by law firms to defeat union representation. In its view, if provided with this information, some employers, particularly smaller employers, might decide to negotiate in good faith rather than to pay law firms that have a strong interest in opposing unions, suggesting that ''the harder law firms fight the union, the more they earn.''

b. Comments in Opposition to NPRM

The comments opposing the proposed rule put forth several policy arguments against the disclosure of indirect persuader agreements. First, the commenters contended that the source of persuader activities was not relevant in indirect persuasion situations. Second, the commenters maintained that Congress intended for the disclosure of ''middlemen,'' who, in the commenters' view, did not include indirect persuaders. Third, the commenters rejected the analogy between persuader disclosure and other public disclosure regimes. Finally, the commenters argued that the proposed reporting would not timely apprise employee voters about the source of the persuader materials. These comments are addressed in the following sections.

c. Comments on the Disclosure of the Source of Persuader Communications

Despite disagreeing with the Department on the need for workers to have information concerning persuader agreements involving indirect persuasion by consultants, many commenters suggested or acknowledged that workers should have ''accurate'' and ''balanced'' information available to them when exercising their rights. For example, one commenter asserted its primary concern was to meet its ''employees' interest in and right to [receive] full and complete information from both the union and the employer, in order to have an opportunity to understand and make a meaningful choice about representation.''

A congressman that opposed the Department's proposal stated that once employers disseminate a speech or deliver a speech, employees ''know the employer stands by the material,'' and the source of the material is ''irrelevant.'' In one commenter's view, the success of the employer's ''campaign'' relies upon its ''reputation, demeanor, and actions.'' According to the commenter, employees would have no reason to ''care'' about any influence a consultant or other third party exerted on the message, as it will not affect the ''credibility'' assigned by the employees to the employer and its representatives delivering the message. In another commenter's view, the reporting of agreements involving exclusively indirect persuasion would ''mislead'' workers as to the employer's intentions.

These commenters suggested that reporting should focus on the person who delivers the message, and not the person who drafts the remarks. A law firm and a trade association disagreed with the NPRM's purported assumption that positions expressed in the consultant-created persuader materials are not those of the employer. One trade association commenter disagreed with the notion that the consultant is a third party, since, in its view, the only ''parties'' to a collective bargaining agreement are the employer, the employees, and the union. Another trade association similarly rejected the Department's view.

In responding to these comments, both those in support of the proposed rule and those opposed to its adoption, it is the Department's view that workers need to know the source of information that is conveyed to them either directly by consultants—such as in ''face-to-face encounters,'' where the consultant openly acknowledges its role in opposing union representation—or indirectly, where the employer is delivering the message, without acknowledgment of the consultant's role in preparing the persuader materials.

The Department disagrees with the commenters who contend that workers do not need to know the source of the persuader materials directed at them in *indirect* persuasion situations. Workers should be informed that the employer, who has stated its opposition to employees organizing or joining a union (often portrayed by the employer as an ''outsider'' or ''third-party interloper)'' has itself hired a consultant to persuade them how to exercise their representation and collective bargaining rights. The employer's relationship with the consultant and the associated fee arrangement have bearing on the workers' analysis of both the content and merit of the message being delivered to them.

Knowledge that the consultant may not be on the scene to help them understand their legal rights under the

NLRA, but has been hired by the employer to persuade employees against supporting the union, may also affect how employees assess the ''credibility'' of the employer, or its ''reputation, demeanor, or actions,'' as workers may react differently if they know that the employer engaged in a campaign against the union, through a third party. Indeed, Congress observed that ''middlemen have acted in fact if not in law as agents of management,'' a situation whereby workers would naturally assume that their employer has adopted the views disseminated directly or indirectly by the consultant. S. Rep. No. 86–187, at 10, 1 LMRDA Leg. Hist., at 406. Knowledge of the background of the third party allows employees to evaluate not just whether their interests vis-à-vis the union align with those of the employer, but also how, if at all, the self-interests of the consultant align with either those of the employer or employees.[47] Such information is relevant to both direct and indirect persuader situations.

Indeed, at least one commenter who opposed the revised reporting requirements recognized that, like advertising, workers must similarly ''consider the source'' when making a decision on exercising their rights. The commenter asserted that, in evaluating the source, workers can make an independent decision and assume that ''pro-union'' arguments are ''bias[ed]'' in favor of unionization and vice versa. The Department disagrees with this conclusion because it conflates perspective with actual knowledge of the source of the information. The issue is not whether workers will understand the perspective of the message, but whether they should know the source of the message, *i.e.,* whether it is formulated by the employer's management officials or an outside source. For example, if an employer tells employees that they should oppose unionization because it will make the company less competitive, employees know that the employer opposes unionization regardless of whether they know that that message was scripted by a consultant. If employees know, however, that the message was scripted by a consultant, they may then question the employer's intent in making the statement—to convey a genuine concern about the consequences of unionization or to advance a strategy supplied by a consultant as the most expedient or effective argument against unionization, regardless of the employer's actual belief in the verity of the statement. This knowledge will assist workers in determining the extent to which the message directed at them reflects the genuine views of their employer, of the employees, or of the consultant.

A law firm representing employers acknowledged that many employers who have ''consulted outside experts'' inform their employees about their use of consultants, and noted that unions will often publicize an employer's use of consultants to shape an employer's anti-union message so that workers can weigh that fact in considering the employer's message. This comment underscores the value of such information to all workers. Further, even if the employer discloses that it has retained an outside party, without knowing the identity of the outside party and the terms of its agreement with the employer, employees may be deceived into thinking that the consultant has been retained merely to advise the employer on its legal obligations—and not to persuade them against supporting the union. Some employers may be open about their use of consultants; employees or unions, on their own, may become aware (or at least suspect or assume) that the employer has sought the assistance of a consultant in waging its campaign against union representation. However, the suggestion that employees typically possess such knowledge is belied by the rulemaking record, which indicates that employees are *unaware* that:

- The employer had hired a labor relations consultant to manage its campaign against the union
- the consultant had scripted the speeches, letters, and leaflets used to deliver the employer's message during the campaign
- the consultant had instructed supervisors that they must address questions in a particular way without regard to whether that view reflected the supervisor's actual beliefs or the employer's independent views about particular questions that arise during representation or collective bargaining, and
- the employer used a formulaic message typical of that crafted by labor relations consultants, espousing a view antithetical to representation by a union, rather than one that appeared to have been drafted to respond to workplace-specific issues that had arisen during the campaign.

Many of the commenters supporting the rule submitted comments making these and similar points. We have credited those comments in fashioning this rule. OLMS also relies on its experience in generally administering the LMRDA. Union officers and union members, who have interacted with OLMS investigators, have expressed an interest in learning about consultant activities and agreements. At compliance assistance sessions conducted by OLMS in which attendees receive training on how to access and use the OLMS online public disclosure room (where reports filed by unions, union officers, employers, and consultants are available for viewing), attendees often raise questions about ''missing reports,'' referring to the absence of reports filed by employers and consultants. According to the attendees, they are aware of situations in which known and unknown third parties are involved in the employers' counter-organizing efforts, but no reports have been filed. Explanations from OLMS investigators on the ''direct contact'' rule did not satisfy their curiosity. Nor did it reduce their interest in seeing reports about the use of third-party consultants by employers.

Disclosure of indirect persuader agreements allows workers to know the actual source of the persuasive information provided to them by their supervisors, individuals that the workers may find more credible than higher-level management officials. As stated by some commenters, consultants utilize supervisors to disseminate the consultant-prepared persuader message. Thus disclosure will allow workers to better evaluate comments made by their supervisors (as the supervisor's own, or scripted, view about union representation) and other forms of communication.

When a consultant is used to indirectly persuade employees and such use is not disclosed to employees, that, per se, deprives the employees of being fully informed about all the circumstances regarding their decision on representation. In making this assessment, the Department is not questioning employers' intentions or making a judgment about employers' use of consultants, nor does it take a position on employers' exercise of their rights under the NLRA. The Department

[47] In the situations discussed in the text at Sections III.B.1 and Section V.C.1.c, employees would have been better able to exercise their protected rights if they had known of the consultant's role in crafting the employer's message to them. Although the commenters appear to criticize at least some of the activities as deceptive and/or improper, the Department has not made a judgment on the propriety of these actions. It is not the role of this Department to make such determination. It is also not the role of this Department to comment on the tactics of organizing and counter-organizing campaigns, their legality under the NLRA, or the content of the messages conveyed in those campaigns. This Department's interest is solely to implement the command of section 203 to require appropriate disclosure where consultants undertake persuader activities, both direct and indirect.

is simply stating its position that employers and consultants should publicly disclose their arrangement so workers can know the source of persuader materials in order to better evaluate them.

Furthermore, the nature of the persuader arrangement is relevant. The persuader represents the employer, and never the employees whose decision to decide on union representation is the focus of the parties' concern. Where the consultant is involved in persuading employees about how they exercise this right, it has differentiated itself from the employer insofar as section 203 is concerned. By virtue of section 203(e), no reporting is required if the employer itself undertakes persuader activities. In such situation, workers may assume, correctly, that its employer, through its representatives, drafted the material. Workers are thus able to evaluate the employer's message on its face. In the absence of persuader reporting, workers have no independent means of determining whether the message truly derives from the employer or from a third-party source, and any assumptions they make about the source and its credibility may be incorrect.

In sum, as further discussed below, the issue is not just the activity itself (*e.g.,* drafting a persuasive document), but the source of material and the agreement pursuant to which it was drafted: If the employer is the author, it is not generally reportable; if a third party drafts the material, it is reportable.

d. Comments on the Term ''Middlemen'' in the Legislative History

Multiple commenters stated that the Department's focus should be on deceptive ''middlemen'' employed to spy on employees or otherwise ''unlawfully and deceptively'' interfere with their rights and defeat their organizing efforts. They suggested that Congress did not intend that labor relations consultants, as a general matter, would have to report what to these commenters are routine activities—whether done openly or not—but only to require ''middlemen,'' as unique-outliers among consultants, to report agreements to engage in ''nefarious conduct.'' They rely on the LMRDA's legislative history to advance their contention that the proposed rule does not address what they see as the congressional intent for section 203 to apply only to these types of middlemen who interacted directly and deceptively with employees. Further, these comments imply that such middlemen are an historical anomaly and, accordingly, the proposed rule addresses a problem that no longer exists.

Many of the commenters argued that the LMRDA's legislative history clearly evinces that reporting is only required in instances where a labor relations consultant is interacting directly with employees as a middleman for the employer. These commenters contended that it was the sole intent of Congress to curb abuses of unscrupulous middlemen, as opposed to the work of legitimate consultants and attorneys. One commenter noted that the evidence presented before the McClellan Committee was ''largely focused'' on the deceptive practices of Nathan W. Shefferman and his labor consulting firm. The commenter quoted the following excerpt from the Senate Report on the bill that became the LMRDA: ''These middlemen have been known to negotiate sweetheart contracts. They have been involved in bribery and corruption as well as unfair labor practices. The middlemen have acted, in fact if not in law, as agents of management.'' See S. Rep. No. 86–187, at 10, 1 LMRDA Leg. Hist., at 406. Another commenter noted that the practices targeted in the legislative history centered on the hiring of middlemen to spy on employee organizing activity, induce employees to join company unions, negotiate sweetheart contracts, and commit acts of bribery and corruption. The commenter claimed that the LMRDA has effectively eliminated these practices.

Other commenters contended that section 203 was never intended to regulate situations involving the indirect persuasion of employees, such as where ''an employer accepts advice and materials prepared for them, applies that advice it received on its own behalf, adopts that advice and materials as its own, and itself delivers the message to its employees.'' Another commenter, a public interest organization, stated that the term ''middlemen'' means ''persons acting in the *middle, i.e.,* between the employer and its employees, such as through faux employee committees.'' Therefore, the organization argued, attorneys who do not interface with employees cannot be considered middlemen.

Likewise, a trade association commented that Congress sought to expose labor consultants acting as middlemen who engaged in the direct persuasion of employees without revealing their true connection to the employer, essentially acting as ''fronts for the employer's anti-union activity.'' The trade association stated that the Department, in the NPRM, had failed to identify any legislative history to show that Congress intended to target consultants who merely advised employers on ways in which the ''*employers themselves*'' could campaign against union organizing. Several of the commenters also recited the following testimony from Professor Archibald Cox before the Senate Subcommittee that discussed the bill prior to the LMRDA's passage:

> Payments for advice are proper. If the employer acts on the advice it may influence the employees. But when an employer hires an independent firm to exert the influence, the likelihood of coercion, bribery, espionage, and other forms of interference is so great that the furnishing of a factual report showing the character of the expenditure may fairly be required.

See Hearings before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on Labor-Management Legislation, 86th Cong., 1st Sess., at 128 (1959). The commenters construed this testimony as an indication that reporting should be required only when an employer hires a consultant to directly ''exert the influence'' on employees. According to another commenter, the legislative history confirms that Congress wanted only for employees to know whether a middleman was acting on behalf of the employer, and not whether the employer had consulted with a labor relations consultant or lawyer.

The Department accepts that some of the legislative history focuses on the deceptive and surreptitious activities of ''middlemen'' such as Shefferman. The Department disagrees, however, with the suggestion that Congress intended for the persuader reporting provisions of section 203 to be limited to persuasion that amounted to unlawful conduct by middlemen. Instead, section 203 is worded broadly to require both employers and consultants to report consultant activities where an object thereof, directly or indirectly, is to persuade employees, as well as the attendant details regarding their agreements or arrangements. The activities of individuals like Shefferman and his ilk provided the most blatant examples of the conduct to be regulated through reporting and disclosure, but nowhere in the legislative history was it suggested that Congress intended to exempt or exclude from reporting those persuader activities that do not rise to the level engaged in by Shefferman and his consulting firm.[48] Indeed, as

[48] See IM Section 263.005 (Purposes of Arrangement) (1960): ''The purpose which would make an arrangement subject to the reporting requirements of section 203(a)(4) and 203(b)(1) need not be unfair labor practices or otherwise in violation of law. These suggestions speak of

discussed earlier in the preamble, at Section III.B.1, Congress recognized that reporting of both direct and indirect persuader activity by consultants is necessary and desirable to promote transparency without regard to whether the persuader activity is illegal or not.

As explained further in Section V.C.3, the LMRDA is designed, in large part, to rely on reporting and disclosure in order to promote lawful, constructive activities that bring stability and harmony to labor-management relations. Disclosure promotes the full exercise by individuals of their rights as employees and union members and discourages improper financial arrangements between unions, their officials, and employers (as provided by the NLRA and the various titles of the LMRDA). In its crafting of section 203, there is nothing to indicate that Congress sought to exclude from disclosure any agreements between an employer and a consultant under which a consultant agrees to undertake *any* activity, lawful or otherwise, with an object to persuade employees regarding their organizing and collective bargaining rights. Although many commenters opposed to the rule have argued that Congress only intended that reports be filed in situations with conduct that is patently corrupt, they have provided no evidence of such intent. Narrow language could have been easily drafted to accomplish this result if that was the intent of Congress, yet Congress instead chose the expansive language contained in section 203.

In *Humphreys, Hutcheson and Moseley,* 755 F.2d 1211, 1215 (6th Cir. 1985), the Sixth Circuit explained that Congress ''did not distinguish between disclosed and undisclosed persuaders or between legitimate and illegitimate activities. Rather, Congress determined that persuader activities were impeding the exercise of employee rights and that disclosure and reporting might be sufficient to redress this problem. In that case, the law firm whose activities were at issue argued that section 203(b) was inapplicable to the firm because it did not engage in ''covert'' activities. The firm essentially made the same argument raised by many commenters in response to the NPRM; as stated by the appeals court: ''[The firm] contends that the LMRDA is aimed at covert management middlemen who engage in activities such as spying, bribery and influence peddling rather than at persuaders who openly engage in 'legitimate' persuasive activities such as the speeches given by the partners of the firm who were disclosed persuaders.'' Id. The court disagreed with this argument, finding instead that ''the fact that the attorneys identified themselves to the . . . employees did not remove them from the ambit of LMRDA section 203(b).'' Id.

The Department disagrees with the contention that Congress intended for section 203 to apply only to middlemen who *directly* persuade employees. The Department agrees with the assertion by a trade association opposing the proposed rule that there is no data showing that employers who hire consultants to engage in direct persuasion (and file LM reports under the prior rule) are more or less likely to interfere with employee rights than employers who hire consultants to engage in indirect activities. As explained in this section of the preamble, Congress focused on ''surreptitious'' activities designed to influence employees, thus requiring reporting and disclosure to workers of the source of persuasive communications or policies. Concerning direct persuasion, as one commenter stated, the source of the material in such situations is often ''patently obvious,'' in contrast to where the consultant's actions are indirect and thus hidden behind the employer's role as ''spokesperson.'' Without required disclosure, employees may assume that the employer, not a consultant whose profit depends on persuading employees against the union, is voicing its own, unscripted position on union representation.

An employer association contended that the Department's conclusion that the reporting of both direct and indirect persuasion will further employees' ability to make informed choices concerning their bargaining rights is a policy judgment to be made by Congress, not the Department. Further, the commenter argued that such reporting provides no benefit to workers and interferes with employer rights. A law firm similarly asserted that ''true persuaders'' are currently required to report, and the NLRB's rules adequately protect employee rights in organizing campaigns.

The Department rejects these assertions. As discussed above, the legislative history and the wording of section 203 support the Department's interpretation that both lawful unlawful persuader activities are reportable and that such reporting is beneficial to employees. This rule furthers Congress's intent that section 203 supplement the NLRA in protecting the representation and collective bargaining rights of employees. See *Humphreys,* 755 F.2d at 1222 (disclosure of third-party persuader agreements ''enable[s] employees in the labor relations setting, like voters in the political arena, to understand the source of the information they are given during the course of a labor election campaign.''); see also testimony of an attorney for the NLRB before the McClellan Committee (''[The NLRA] is not adequate to deal with such activities.'' S. Rep. 86–187, at 10, 1 LMRDA Leg. Hist., at 406.

Furthermore, nothing in the legislative history supports the commenters' view that section 203 was enacted to apply only to middlemen interacting directly with employees. As stated above, the broad language of section 203 suggests otherwise. Moreover, regardless of the broad or narrow scope of the term ''middlemen,'' the Department notes that the term ''middlemen'' is not mentioned in the text of the LMRDA and that no specific persuader activities are identified in the text. Section 203(a)(4) uses the phrase ''labor relations consultant or other independent contractor or organization,'' a phrase more inclusive than ''middlemen.'' Section 203(b), rather than identifying particular reportable activities, simply states that ''[e]very person'' who engages in persuader activities through an agreement or arrangement with an employer must report. 29 U.S.C. 433. Further, many of the activities cited in the legislative history are not strictly examples of ''direct'' persuasion, such as efforts to induce employees to form or join company unions through such devices as ''spontaneous'' employee committees, essentially fronts for the employer's anti-union activity. S. Rep No. 85–1417, at 255–300 (1958). The ''middlemen'' also engaged in other activities discussed in the legislative history, involving direct or indirect contact with employees, including organizing ''vote no'' committees during union campaigns and designing psychometric employee tests designed to weed out pro-union workers. Id.; see also S. Rep. No. 86–1139, at 871 (1960). Indeed, the legislative history discusses

activities to ''persuade'' employees in the exercise of their collective bargaining rights, in significant contrast with section 203(a)(3) which requires reporting by employers of expenditures where the object is ''to interfere with, restrain, or coerce employees'' in the exercise of these rights. The legislative history supports this conclusion. The provision corresponding to section 203(a)(4) in the House Bill as reported (section 203(a)(4) of H.R. 8342) would have required reporting only in the case of an agreement to provide an employer with the services of a person or firm engaged in the business of ''interfering with, restraining, or coercing employees in the exercise of rights guaranteed'' by the Reporting Act, the National Labor Relations Act, or the Railway Labor Act. This provision was replaced by the present section 203(a)(4) with its test of persuasion.''

none of the activities typically viewed as reportable under the prior interpretation, such as a consultant delivering a persuasive speech to employees or disseminating a persuasive letter to employees on the consultant's own letterhead. The Department also notes that it has historically viewed consultants, whether acting directly or indirectly, as ''middlemen.'' [49]

e. Comments on Comparisons of Persuader Disclosure to Other Disclosure Regimes

Drawing upon the disclosure requirements applicable to unions under the LMRDA and various individuals and entities in other settings, several commenters objected to the need to identify the consultant as the source of persuader materials, arguing that such disclosure provides little or no benefit to workers. First, as a general matter, commenters argued that disclosure should focus on the person who delivers the message, and not the person who drafts the remarks. Referring to presidential speeches and regulatory documents as examples, one commenter asserted that it is the ''oratory or signatory'' who ''owns'' the words delivered, even if others assist in drafting or reviewing. This commenter argued that if an employer delivers remarks prepared by a consultant, the employer has adopted the remarks as his own and that the drafter thus, in effect, serves only an inconsequential role insofar as employees are concerned.

Other commenters disagreed that employer-consultant reporting is similar to union reporting, stating that union reporting was required to show how a union maintained their finances, a rationale unrelated to the reasoning underlying the Department's proposed rule. Another commenter suggested that the rule is not necessary to ''even the playing field'' between labor and management, as unions have won the majority of elections in recent years. An employer association suggested that the Department sought, without authority, to ''redress the balance of 'contemporary labor relations.' ''

A trade association, citing *Buckley* v. *Valeo,* 424 U.S. 1 (1976), criticized the Department's comparison of employer-consultant reporting to reporting under Federal election campaign law. The commenter acknowledged that an analogy is appropriate between campaign disclosure laws and reporting of *direct* persuasion, as reporting will provide employees with knowledge of ''whose behalf the middleman is acting and the true source of the message being relayed.'' In contrast, the commenter contended, this risk is not present where the employer delivers the message, as ''there is no danger that the employees are being deceived with regard to the interests of the messenger or the risk that the messenger is somehow beholden to an undisclosed interest.''

The Department disagrees with these commenters. Initially, we disagree with the idea that whether an employer or its spokesperson delivers a persuader message prepared by a consultant—thereby, in the commenter's view, ''owning'' its content—is material to the question whether the consultant's involvement must be reported. By creating the message to be given by the employer, the consultant has engaged in indirect persuasion, which, as the statute requires, must be reported. Putting aside this statutory requirement, it remains our view, as expressed throughout the preamble, that workers benefit by knowing that a message is being scripted by a third party. For example, when the issue in a union election context is whether the workers want a representative, often portrayed as an unwanted ''outsider'' by the employer, then it is relevant that the employer's message opposing the union is crafted by an outsider. When, unknown to employees, a supervisor's day-to-day interactions and comments with the employees he or she supervises are scripted to defeat union representation, employees may view the message differently. If employees are unaware that a labor relations consultant has been hired to persuade them to oppose unionization, they may never learn that their supervisors may not be sharing their own, usually trusted, views about matters in the workplace. Thus, without disclosure, there is an unacceptable risk that employees may alter their decision concerning the exercise of their rights based upon the scripted message of ''trusted'' supervisors or those managers with whom the employees regularly interact—one part of a professional persuader's campaign strategy. See Part III.B.3 and V.C.1.c of the preamble.

With regard to the suggestion that the Department's proposed persuader rules have no analog in the Act's provisions relating to union reporting, the Department notes that the general disclosure principles are roughly analogous for section 201 and section 203 reporting, even if not all of the specific reporting goals or requirements are identical. Indeed, the Senate Committee that drafted what became section 203 indicated its belief that ''if unions are required to report all their expenditures, including expenses in organizing campaigns, reports should be required from employers who carry on, or engage such persons to carry on, various types of activity, often surreptitious.'' S. Rep. 187 at 39–40, 1 LMRDA Leg. Hist., at 435–436. Thus, the Department's goal in this rule is not to take sides in labor-management disputes, or promote ''parity,'' but, rather, to advance the interests of Congress in labor-management disclosure that benefits workers choosing to exercise their protected rights. As such, union success rates are not relevant. Further, the fact that the primary rationale for union disclosure does not apply strictly to employer and consultant disclosure has no bearing on the underlying merits of such disclosure. Disclosing this information, as stated, provides beneficial information to workers.

With regard to the comments that there are important differences between the disclosure proposed by the Department and the disclosure rules applicable to public elections, the Department recognizes such distinctions. However, the Department disagrees with these commenters to the extent they suggest there is no analogy between the benefit derived by voters under campaign disclosure laws and the benefits derived by workers from the disclosure provided by this rule. See *Humphreys,* 755 F.2d at 1222 (disclosure of third-party persuader agreements ''enable[s] employees in the labor relations setting, like voters in the political arena, to understand the source of the information they are given during the course of a labor election campaign.'')

To illustrate, while voters are selecting among various candidates for office in the larger, political context, workers are choosing whether to be represented by a union, or they are choosing from among rival unions seeking their support. Although the dynamics differ, in each situation, outside parties use persuasive

[49] See IM section 265.005, which states in relevant part: ''A more difficult problem is presented where the lawyer or *middleman* prepares an entire speech or document for the employer. We have concluded that such an activity can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer. Consequently, such activity in itself will not ordinarily require reporting unless there is some indication that the underlying motive is not to advise the employer. In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the *middleman* is operating under a deceptive arrangement with the employer, the fact that the *middleman* drafts the material in its entirety will not in itself generally be sufficient to require a report.'' (Emphasis added.)

communications in an attempt to influence the process in support of a particular candidate or choice. Knowledge about those outside parties helps individuals assess the merits of the arguments and make effective decisions. While employers are not strictly candidates in representation elections, they have a stake in election outcomes, and they have a right under the NLRA to put forth their views. Indeed, many of the opposing comments emphasize the fundamental role that management should play in the representation election process, with one law firm stating that ''the NLRB election process is an example of workplace democracy and, as a microcosm of our democracy, it is sometimes messy.''

Thus, in the Department's view, analogizing between the source of an employer's position and the sources that fund candidates' campaigns, and their related political action committees, is justified. Just as knowledge of special interests and campaign donors helps voters formulate opinions on candidates' positions, knowledge of employer reliance on outside parties can assist workers in evaluating the merit of employer positions. The benefit of knowing the source of persuader materials and other activities is apparent for either direct or indirect persuasion. Under the other reporting regimes, the contribution of money from an individual or entity may influence the candidate's position on an issue—and thereby affect a citizen's evaluation of the candidate—thus animating the need for disclosure. This contrasts with the situation that arises under the LMRDA; here, it is the contractual arrangement between the employer and the consultant to undertake persuader activities—without any apparent divergence of views between the consultant as agent and the employer, as principal—that would be significant to an employee. In the political sphere, a candidate's position on an important issue may be ''bought'' by a donation. In the union election context, an employer's general views about the union may be shaped and made coherent by a professional consultant. In each instance, however, the purpose served by disclosure is to provide information that allows the public (under the campaign analog) and the employees (under the LMRDA's) to exercise important governance duties (exercising their franchise and related ''oversight'' duties). In each situation, it is the risk that actions by third parties may impede voting rights if they are not disclosed that makes disclosure important. Although the political spheres and the nature of the relationship between donors and candidates, on the one hand, and consultants and employers, on the other, are different, Congress decided that disclosure is necessary to ensure that individuals can fully exercise their rights in an informed manner.

Finally, one law firm also objected to the Department's reference in the NPRM to ''laboratory conditions'' that the NRLB promotes in its representation elections, a test which ensures that employees have full and accurate information during campaigns. See *General Shoe Corp.,* 77 NLRB 124 (1948); 76 FR 36189. The commenter asserted that the proposed rule incorrectly stated that the NLRB seeks to ''police the truth or falsity of campaign communications'' by parties involved in representation elections. The commenter also asserted that workers know that their interests and employers diverge at times, and that they are capable of assessing information and evaluating the merits before making decisions. The Department disagrees with the comments. This rule is not concerned with monitoring the ''accuracy'' of communications, which is left to the parties. Further, the Department also acknowledges the ability of workers to make decisions and evaluations, but in doing so they need to know the source of the information designed to persuade them about how they should exercise their protected rights.

f. Comments on the Timeliness of Disclosure

Several commenters suggested that workers could not benefit from this increased disclosure, because the statutory deadlines for reporting are later than the 38-day median timeframe between the filing of an NLRB petition and the ensuing election (additionally noting that 90% of the elections are held within 56 days). Further, much of the information from submitted reports would be available only 90 days after the conclusion of the filer's fiscal year. Additionally, some commenters stated that if the NLRB expedites representation elections, it will be even less likely that workers will actually benefit from the Department's proposed changes.

The Department rejects these contentions. The Department recognizes that the NLRB in December 2014 issued a final rule amending its representation case procedures. See 79 FR 74307. Critics of that rule argue that the time between the filing of a certification petition and the holding of the representation election will be significantly reduced. In the Department's view if this result is achieved, the rule will remain highly beneficial to employees and the public; it in fact makes the need for transparency even more compelling. Initially, the Department notes that section 203(b) requires consultants to file Form LM–20 reports within 30 days of entering into the persuader *agreement or arrangement,* not 30 days from the union's filing the petition. Thus, since the rulemaking record suggests that employers engage consultants at the first signs of union organizing, *i.e., before* a petition is filed, the commenters' concerns about the timing of disclosure are unwarranted. Moreover, even apart from when the information is actually received by employees, workers and the public will have the additional benefit of information about a particular consultant from its past Form LM–20 reports, which would complement the information available to them in the Form LM–20 for the present employer.[50]

2. Underreporting of Persuader Agreements and Research Studies

As stated in the NPRM, while most employers utilize consultants to conduct counter-organizing campaigns, most persuader agreements are unreported because most consultants engage only in indirect—not direct—persuasion. This lack of reporting has persisted, despite the growth of the persuader industry and its widespread use by employers since the enactment of the LMRDA. See 76 FR 36185–87. As stated in the NPRM, the Department estimated that 75% of employers utilize labor relations consultants to manage union avoidance campaigns. 76 FR 36186. The widespread use of consultants to indirectly persuade employees has been documented in congressional hearings, executive branch commission reports, and industrial and labor-management relations research. Id. The NPRM also cited these sources to illustrate the practical effect of the prior interpretation and to demonstrate that it did not lead to the full reporting necessary for workers to effectively exercise their representation and collective bargaining rights as intended by Congress. 76 FR 36190.

[50] See *Humphreys,* 755 F.2d at 1222 (''Requiring disclosure, even after the fact, will inhibit and expose illegal and unethical actions by persuaders that hamper employees in the exercise of their rights guaranteed by the NLRA. . . . Past reports that disclose the interests of persuaders serve as a valuable source of information in current elections'').

a. Review of Comments Received

Many commenters opposed to the revised interpretation criticized the Department's use of industrial relations research to support its position that the prior interpretation failed to provide the reporting intended by Congress. In response, the Department emphasizes that the proposed interpretation, embodied in this rule, is rooted in the statutory language and congressional intent. To reiterate points earlier made in this preamble, the text of section 203 is better read to require reporting of employer agreements with consultants who engage in both direct *and* indirect persuasion of employees. This view of the statutory language better promotes the public interest than the prior interpretation, by achieving greater transparency of such agreements and activities, thereby allowing workers to make better informed decisions about their union representation and collective bargaining rights. This, in turn, promotes public confidence that election outcomes reflect the informed choice of the workers. The Department's use of independent studies illustrates the practical benefits that would be served by increased transparency. More specifically, the research studies describe employers routinely engaging in anti-union campaigns through their mid-level managers and supervisors, supported at large costs by outside consultants without the knowledge of the employees, while employers simultaneously argue that the union is an unwanted ''third party.''

Notwithstanding their criticism of the research cited in the NPRM, these commenters did not controvert the fundamental propositions concerning indirect consultant activity made in the NPRM. The commenters did not contest the Department's basic description of how employers routinely rely upon labor relations consultants, including lawyers, who work behind the scenes (engaging in legal and non-legal services) with supervisors and other employer representatives, who then directly persuaded employees. The commenters did not contradict the contention that workers are generally unaware of the extent to which consultants are involved in the ''indirect activities'' designed to affect how they make their choices about matters involving union representation and collective bargaining. Moreover, many of the commenters who supported the proposed rule concurred with the researchers' observations and the Department's determinations regarding the growth of the consultant industry and employers' routine reliance on consultants in persuading employees about how they should exercise their representation and collective bargaining rights. And, none contested that indirect persuader activities have gone unreported.

b. Comments on Research Studies

Several commenters voiced support of the research studies cited in the NPRM. Many more commenters (all opposed to the proposed rule) took issue with the studies cited, variously criticizing the research as outdated, unreliable, lacking credible analysis, flawed, and arbitrary. Other commenters criticized the research as having a pro-union bias and lacking objectivity. One commenter argued that the cited research does not address the problems identified by Congress in the enactment of the LMRDA. Another commenter called the studies cited in the NPRM ''discredited,'' and stated that they have been refuted by counter-studies (citing U.S. Chamber of Commerce, *Responding to Union Rhetoric: The Reality of the American Workplace—Union Studies on Employer Coercion Lack Credibility and Integrity* (U.S. Chamber of Commerce White Paper 2009).

Multiple commenters specifically criticized Bronfenbrenner's *No Holds Barred* study, arguing that it was flawed because it was based on interviews and surveys of union organizers and lacked objectivity. Another commenter criticized Bronfenbrenner's failure to obtain data from employees or employers, even anonymously. Further, a trade association commenter stated that the study is based on allegations of unfair labor practices by union organizers, a far less meaningful data source than one involving actual findings that the allegations had merit.

Other commenters criticized the studies by John Logan, stating that they are based on qualitative analyses and interviews with union officials and union avoidance consultants, and that they lack credibility because Logan did not distinguish between legal and illegal campaign tactics when describing employers' consultant use. Another commenter took issue with Logan's *The Union Avoidance Industry in the USA* and criticized the study as ''one-sided.'' The same commenter countered Logan's assertions about consultants' ''extreme language'' with examples of union rhetoric, suggesting that both consultants and unions employ rhetoric to suit their respective purposes.

A law firm criticized Bronfenbrenner and Logan for not fairly portraying changes in union strategies for conducting representation campaigns. An employer association stated that labor unions and certain academic professionals believe that employers should refrain from playing any role in response to union organizing efforts, or at least that any employer actions should be subject to stringent regulation.

Further, a law firm stated that the Department should have provided its own evidence in support of its policy justification for the proposed rule, or, at a minimum, verified the authenticity or reliability of the data from the research cited in the NPRM. Another commenter urged the Department to conduct its own research and hold hearings to obtain stakeholder input and assess the need to change the current interpretation. The commenter argued that a ''thorough, non-partisan review of the labor relations climate will demonstrate that labor relations consultants are in most, if not all, cases assisting employers in a lawful manner to respond to potentially devastating economic attacks by unions.''

In addressing these comments, the Department first wants to make clear that the foundation for this rule is the statutory language chosen by Congress to require the disclosure and reporting of agreements between employers and labor relations consultant to persuade employees about the exercise of their union representation and collective bargaining rights. Thus, we are not relying on research findings to establish whether it is appropriate to require reporting—Congress has answered the question in the affirmative. The chief value in the research findings, as discussed in the preambles to the NPRM and this final rule, is to show that the conduct that Congress intended to address by requiring disclosure and reporting persists.

In response to those commenters that stated the Department should have conducted its own research, the Department, as discussed below, had no basis to question the soundness of the research cited. While some may argue about some of the specific findings and recommendations in the studies cited, the studies firmly establish that labor relations consultants are heavily relied upon by employers in contesting union representation efforts, that consultants are heavily involved in persuader activities, and that many of these activities have had a negative impact on labor-management relations. Further, with regard to the criticism that the Department should have relied on its own data, its review of Form LM–10 and Form LM–20 reports would have revealed no useful information about the extent of indirect persuader activities because, under the prior

interpretation, only *direct* persuader activities triggered the filing of information about persuader agreements. Review of the reports would not yield information that would allow useful inferences about the extent of *indirect* persuader activities, which is the area this rule principally addresses.

Despite these criticisms, no commenter introduced a single academic study that offered any reliable evidence that meaningfully controverted the Department-cited studies' conclusions regarding the labor relations consultant industry. While the commenters rely on a review of the literature prepared by an employer association that challenges some of the studies cited by the Department, this review presented no new data or peer-reviewed studies to refute those cited by the Department in the NPRM. Nor did the comments cite data more contemporaneous than the post-2001 studies in the NPRM.[51] Furthermore, the criticism that the research cited in the NPRM is not objective, reflects a pro-union bias, and is funded by unions does not withstand scrutiny, because the cited research is peer reviewed and often published in respected academic journals.

Regarding the assertion that the NPRM failed to take into account the tactics of unions, the Department disagrees with this contention, as this rule concerns reporting for persuader agreements between employers and their consultants pursuant to section 203. Reporting and disclosure requirements for labor unions and their officials are covered by sections 201 and 202, and provide for much more comprehensive and detailed reporting. The Department also considers the reaction of employers and consultants to union tactics to be irrelevant to section 203 reporting, as the focus of this rule is on the agreements and activities that trigger employer-consultant reporting, and the purposes served by such disclosure.

In response to the commenters who criticized Bronfenbrenner's *No Holds Barred* study and took issue with her presentation of evidence obtained from surveys of union organizers, the Department notes Bronfenbrenner also relied on extensive NLRB case documentation. With respect to the comments on the research of John Logan, the Department notes that Logan's articles include a review of the available academic literature and cited works by other well-regarded industrial relations scholars. See Section III.B.2. The Department also conducted a thorough search of relevant literature before proposing the revised interpretation and remains of the view that the cited studies best reflect the existing research. Furthermore, in proposing the revised interpretation, the Department additionally relied on two House Subcommittee Reports (1980 and 1984), and the published work of the joint labor-management U.S. Commission on the Future of Worker-Management Relations chaired by Harvard Professor (and former Labor Secretary) John Dunlop, along with union, management, government representatives, and several industrial relations scholars.

Commenters criticized John Logan's research on the grounds that it failed to distinguish between legal and illegal conduct. Logan's listing of both lawful and unlawful tactics, however, fails to undermine the soundness of his reasoning in the article, the clear purpose of which, as stated by the author, is ''to provide[] a qualitative analysis of the services that the consultants have offered employers and an account of the campaign tactics of several superstars of the union free movement.'' See John Logan, *Consultants, Lawyers, and the ''Union Free'' Movement,* 33 Industrial Relations Journal, at 198 (2002). Moreover, as stated, Congress intended for persuader reporting regardless of whether the consultant's activity constituted unlawful conduct. Even conceding for purposes of argument that the commenters' criticism is valid, it remains incontrovertible that labor relations consultants continue to be engaged by employers to conduct campaigns to oppose union representation, largely behind the scenes and without public disclosure, as had been the case, on a smaller scale, when the LMRDA became law. There is nothing in the rulemaking record to suggest that the use of consultants is an isolated activity or a historical phenomenon that is absent from contemporary labor-management relations and thus undeserving of regulation.[52]

In response to commenters arguing that the Department has not independently verified the authenticity or reliability of data and methodology used in the studies cited in the NPRM, the Department again notes it has now, and had then, no reason to question the soundness of the data and methodologies used by the academic researchers. In fact, additional studies referenced by commenters in opposition to the rule utilized the very methodologies that the commenters had previously criticized. Several commenters referenced the Chamber of Commerce's white paper that leveled criticism at Bronfenbrenner and Logan's respective bodies of research. Yet, the Chamber of Commerce did not conduct its own research, publish its article in an academic journal, or produce any alternate research data that meaningfully contradicted that of Bronfenbrenner and Logan. In attempting to refute Bronfenbrenner's and Logan's research, it used many of the same methodologies as those researchers. Moreover, the document was not published in an academic journal, which further diminishes its analytical strength. Commenters' critique of a lack of data in fact only makes a stronger case for the need for the rule; because the advice exemption has in effect swallowed the reporting requirements, a neutral government source of information that all parties might access is entirely lacking. The studies that exist are the only possible source of information—the opposite of what the statute intended.

c. Comments on the Underreporting of Persuader Agreements

Multiple commenters agreed with the Department's determination that persuader activities were relatively underreported despite a substantial growth in the labor relations consultant industry. These comments were from local and international unions, a law firm representing unions, Congressional leaders, and a public policy organization.

A law firm representing unions stated that the majority of organizing efforts

[51] John Logan, *The Union Avoidance Industry in the U.S.A.,* 44 British Journal of Industrial Relations 651 (2006); Kate Bronfenbrenner, Economic Policy Institute, *No Holds Barred: The Intensification of Employer Opposition to Organizing* (2009); Chirag Mehta and Nik Theodore, American Rights at Work, *Undermining the Right to Organize: Employer Behavior during Union Representation Campaigns* (2005); John Logan, *Consultants, Lawyers, and the* '*Union Free' Movement,* 33 Industrial Relations Journal 197 (2002); John Logan, *'Lifting the Veil' on Anti-Union Campaigns: Employer and Consultant Reporting under the LMRDA, 1959–2001,* 15 Advances in Industrial and Labor Relations (2007).

[52] A trade association questioned the NPRM's reference of two memoirs written by former labor relations consultants (Nathan W. Shefferman, *The Man in the Middle* (New York: Doubleday 1961) and Levitt, *Confessions of a Union Buster*), and argued that these two consultants ''do not represent the majority of law abiding lawyers and consultants.'' See 76 FR 36184, 36187. The Department did not claim, nor intend to suggest, that these books provide an accurate portrayal of a typical labor relations consultant. The books, however, do identify some indirect activities that are typically undertaken by consultants during a campaign to contest a union's efforts to represent a company's employees. It is for that limited purpose that we cited to the books in the NPRM and in the preamble to this rule.

involve indirect persuader activities. This commenter stated that the number of Form LM–20 reports filed each year is disproportionately small compared to the number of representation matters in which consultants are involved. Further, the commenter pointed out that, since many union organizing efforts are stopped after consultants' initial involvement, no NLRB or NMB election petitions would be filed, apparently suggesting that underreporting may be even greater than estimated in the NPRM.

Two international unions concurred with the Department's assessment that underreporting is a significant problem. The unions stated that, by limiting reporting to direct persuader activities, the prior interpretation has led to the increased retention of attorneys and other consultants to provide union avoidance services. A public policy organization concurred with the Department's underreporting estimates in the NPRM, and also provided examples (from its own research) of indirect persuader activities that were not reported.

Multiple commenters disagreed with the Department's claim that the underreporting of employer-consultant reports provides any justification for the proposed rule. A large employer association disagreed with the Department's claim of an underreporting problem, on the grounds that such claim is based on the views of pro-union academics who describe and criticize activities beyond the purview of the proposed rule.

Similarly, a trade association argued that an underreporting problem cannot exist, since, if consultants' activities do not by law have to be reported, then they do not qualify as reportable activities. Other commenters echoed the theme that employer-consultant reports are not being underreported since reports, which are being submitted under the current (not proposed) ''advice'' interpretation, are being filed exactly as they should be. Another commenter refuted the NPRM's underreporting claim on the grounds that it is based on what the commenter calls a ''false connection'' between the number of consultants and the number of reports that they should be filing.

Several commenters questioned the Department's determination that the prior interpretation has led to significant underreporting. A consulting firm argued that the Department has simply created the new category of ''indirect'' persuasion activity, which is considered ''advice'' under the prior interpretation. Another commenter stated that, even if consultants are hired in a majority of union organizing campaigns, the consultants are not necessarily hired for the purpose of engaging in persuader activity at all. Instead, they may be engaged in activities that the Department would concede would be exempt as advice. A public policy organization stated that the Department failed to justify its claim that the number of reports filed is 7.4% of those expected, and indicated that it is just as likely that most consultants have complied with the law and only provided advice, which is exempt from reporting. The commenter characterized the Department's reporting expectations as ''grossly inflated.''

Multiple commenters stated that the Department did not provide adequate evidence that persuader activity is underreported. One law firm commenter argued that the underreporting claims were based on anecdotal evidence from biased sources. A trade association commenter disagreed with the Department's analysis of NLRB/NMB representation cases and levels of LM–20 reporting (76 FR 36186), and stated that the NPRM's analysis failed to prove the existence of an underreporting problem.

A law firm stated that the Department did not explain why it only looked at NMB and NLRB representation cases from 2005 through 2009, and questioned the Department's estimate of how many Form LM–20s should have been filed, based on that NMB and NLRB data. It asserted that there is no evidence that those consultants engaged in persuader activity, and also stated that there is no evidence that the Department's reporting expectations are reasonable and realistic.

One commenter argued that the cited studies did not substantiate that the 75% figure is an accurate estimate for elections conducted by the NMB in the airline and railroad industries. The commenter states that airline and railroad industries already have high unionization rates, so labor relations consultants are not hired as often, and employers in these industries respond differently to organizing campaigns.

In the Department's view, as reflected in the NPRM and reiterated here, the LMRDA, properly interpreted, requires the reporting of consultants' direct *and* indirect persuasion of employees. Both the data used and the cited research illustrate the extent to which indirect persuasion, several decades after the enactment of section 203, continues to be relied upon by consultants to influence employees about how they should exercise their union representation and collective bargaining rights. The Department has separately demonstrated, as a matter of textual analysis, congressional intent, and public policy, that indirect persuasion should be reported to the same extent as direct persuasion. As such, the vast scope of indirect persuader activity by consultants supports the expansion of reporting beyond merely direct persuasion, in order to ensure the full reporting of persuader agreements envisioned by Congress, and to ensure adequate transparency.

The Department also notes that this rule does not establish retroactive obligations or penalties. Further, the Department has not created a new category of persuader activity. Rather, indirect persuasion activities (including orchestration of counter-organizing campaigns through the use of employer representatives or supervisors), practiced by consultants in the name of ''advice,'' come within the plainly-described category of activities reportable under section 203. Employees need to know about persuader activities in order to make informed decisions on whether to organize and collectively bargain.

In response to the comments stating that the NPRM did not provide sufficient evidence or analysis to justify its claims of underreporting, the Department notes that it did not purport to specify an exact reporting (or underreporting) rate. Rather, the Department, first, sought to develop an estimate of the underreporting of persuader agreements by generating a hypothesis from industrial relations research. The Department reiterates that such research is based on sound methodology and provides a solid basis for the Department's estimate that 75% of employers retain consultants to manage counter-organizing campaigns.

Second, the Department analyzed NLRB and NMB data to determine the number of election petitions filed.[53] Data for the most recent five-year period available (2005–2009) was used in order to reduce the effect of single-year spikes in the number of elections.[54] Data for earlier years is less reliable, and could

[53] The 75% estimate is based on available research that did not distinguish between NLRA and Railway Labor Act union organizing campaigns, so the Department is not able to separately calculate the estimated number of reports for counter-organizing campaigns in the railroad and airline industries. The Department utilized data from both agencies in an effort to be comprehensive in scope. The Department also notes that this rule utilizes the the mean rate (78%) of employer utilization of persuaders, rather than the median rate (75%) used in the NPRM, for the purpose of statistical consistency.

[54] As discussed in Sections VI.G, the Department has relied on updated data for FYs 10–14 (09–13 for the NLRB) to assess the burden associated with this rule.

potentially skew the average, because both agencies experienced significant decreases in the number of representation elections.

Third, the Department developed its estimate for the number of reports covering consultants managing counter-organizing campaigns by applying the 75% percentage figure to the number of NLRB and NMB election petitions filed. The Department also took into account the number of reports received by OLMS in recent years in arriving at this estimate. This data supported the conclusions reached in congressional hearings, executive branch commission reports, and labor-management relations research—that information Congress intended to be reported has not been reported.

The commenters actually did not dispute the underlying factual premises of the Department's conclusion. That is, they did not reject the assertion that approximately 75% of employers' counter-organizing campaigns involve the use of outside consultants engaging largely in indirect activities. Rather, they disputed the Department's conclusion that indirect activity undertaken by consultants should be reportable. The Department emphasizes that the cited research characterized the consultants' activities as constituting the management or direction of the employer campaigns, and that many of the comments supporting the proposed rule concurred with that reading of the research and the conclusions of the studies.

Finally, multiple commenters suggested that the Department need only increase its enforcement initiatives and compliance assistance efforts under the current ''advice'' interpretation to achieve an increase in reporting rates. A consulting firm stated that the Department has not adequately demonstrated why simply following current reporting rules could not solve the underreporting problem. A law firm argued that if there is currently underreporting, there is no reason to assume that those who do not report would suddenly do so if the Department broadened the scope of reportable persuader activity. This commenter argued that the proposed changes would adversely impact employers who are not underreporting, and who are already in compliance with the LMRDA. This commenter also asserted that the Department underestimated the potential effectiveness of the prior interpretation, and argued that the current rules would allow for investigation and enforcement of some of the examples described in the NPRM. The commenter suggested attempting to apply the prior interpretative standards before rejecting them in favor of new ones.

In response to these comments, the Department acknowledges the importance of strengthening enforcement in all provisions of the LMRDA. However, increased enforcement alone would not be a sufficient substitute for the Department's revised interpretation of the reporting requirements. Limiting enforcement initiatives to those that address employer-consultant reporting under the prior interpretation would fail to secure reporting of indirect persuader activities (which predominate the persuader services provided by consultants). As a result, the ''underreporting'' referred to in the NPRM exists in relation to the reporting necessary to achieve the aims envisioned by Congress in enacting the LMRDA, not in relation to the full reporting of only direct persuasion. Although the Department received several comments anecdotally suggesting that some direct persuasion was going unreported, there is little support in the rulemaking record that non-compliance by consultants with regard to direct persuasion in some way indicates that they should be relieved from an obligation to disclose their indirect persuasion.

The Department remains committed to providing effective compliance assistance for employers, consultants, and unions subject to LMRDA reporting requirements, and will continue to do so with this rule. Further, the Department notes that ''failure to file'' situations would be handled by various enforcement mechanisms, similar to those routinely used to enforce labor unions' reporting obligations. The Department's robust reporting regime that has long been in place for labor unions has yielded ''best practices'' that will be helpful in establishing enforcement methods in the employer-consultant reporting realm.

d. Comments on Consultant Industry Growth

As stated above, several commenters supported the Department's conclusions regarding the underreporting of persuader activities despite the growth of the persuader industry. Comments from several international unions and one public policy organization reported that hiring labor relations consultants has become a prevalent practice whenever an employer faces a representation election.

Multiple commenters argued that the Department had insufficient justification for its claim of growth in the labor relations consulting industry. One law firm commenter stated that the various studies citing percentages of consultant use over the years did not provide adequate evidence of significant industry growth. This commenter argued that the cited studies did not provide evidence of the number of consultants who actually engaged in reportable persuader activities, and did not provide data on the number of consultants or consulting firms in the United States.

A law firm stated that the supposed increase in consultant use does not sufficiently justify the proposed rule, and argued that if no reporting is now occurring the Department has no way to measure an increase in the use of union avoidance consultants. Further, a trade association stated that the Department claimed that the current ''advice'' interpretation itself has led to an increase in the union avoidance consulting industry. Another commenter claimed that the Department's goal is to reduce the number of consultants, regardless of their conduct, and argued that the fact that a majority of employers hire consultants during organizing campaigns is not germane to the Department's analysis. A trade association offered the interpretation that employers' increased use of consultants may simply mean that employers are working harder to ensure that they do not violate the Labor Management Relations Act (LMRA).

In response to these comments, the Department repeats its earlier statements in this preamble that the purpose of this rule is not to criticize the use of labor relations consultants or in any way to curtail or interfere with their use by employers.[55] In fact

[55] Some commenters have suggested that the issuance of this rule will lead to a reduction in the number of firms in the industry because the required reporting will lead to employers opting to refrain from hiring consultants or consultants choosing to no longer offer their services. As we discuss further in section V.G.1 of the preamble, the Department is highly skeptical of such claims. Indeed, no commenter submitted any persuasive argument in support of that prediction. We think it more likely that, as an incidental result of the reporting, there may be greater competition within the industry, with some winners and losers, as employers review the reports to see which consultants are ''leaders'' within a particular business segment and the variety and the range of costs for services offered by the consultants. Given the prevalent and increasing use of consultants in representation campaigns over time and the significance that most employers attach to opposing union representation, it seems improbable that this rule will have even a marginal impact on the well-established practice whereby employers routinely seek the services of consultants when facing the prospect that the company's employees may choose union representation.

consultants that limit their actions to providing legal services, distinct from persuader activities, incur no reporting obligation under this rule. This rule does not posit the growth of the labor relations consultant industry as justification for the proposed rule. In issuing this rule the Department is unconcerned about the outcome of particular elections or the overall number or rate of wins and losses. Our concern is that employees are provided the information that they need, as prescribed by Congress, in making choices about union representation and collective bargaining matters. With this information, it is up to the employees to sort through and resolve the competing positions of unions and employers in representation campaigns. As mentioned previously, the contemporary, prevalent use of labor relations consultants demonstrates the continuing need to ensure compliance with the reporting requirements prescribed by Congress. The size of the industry provides a useful backdrop to underscore the relative paucity of persuader reports filed with the Department. Since section 203 requires disclosure of employer-consultant agreements or arrangements whereby the consultants undertake activities with an object to persuade employees concerning their rights to organize and bargain collectively, the low Form LM–20 reporting levels are especially striking when viewed in the context of consultant industry growth. It is this disparity that underscores the course taken by this rule, and the path earlier taken by the Department that failed to ensure the disclosure of persuader activities undertaken by labor relations consultants, behind the scenes, to influence employees in the exercise of their protected rights. Clarifying the ''advice'' exemption will allow the Department to more effectively and accurately administer and enforce section 203, and to secure the type of disclosure that Congress intended.

On a more particular point, several commenters expressed confusion about the NPRM's discussion of the number and size of consulting firms. See 76 FR 36204–36206. In response to these comments, the Department notes that it was required to analyze financial burdens to covered employers and consultants in order to comply with the requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* Executive Order 13272, and the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* and the PRA's implementing regulations, 5 CFR part 1320. Accordingly, the Department used quantitative methods to conduct its analysis, which was subsequently used to assess the rule's impact on small entities for the purposes of RFA compliance. In making this assessment, the Department presented an analysis of data from the U.S. Census Bureau's North American Industry Classification System Codes (NAICS) for ''Human Resources Consulting Services,'' which includes ''Labor Relations Consulting Services,'' to determine the number of labor relations consultants and similar entities that can be classified as ''small entities'' affected by the Form LM–20 portion of the proposed rule.[56] Additionally, the Department utilized the Small Business Administration's (SBA) ''small business'' standard of $7 million in average annual receipts for ''Human Resources Consulting Services,'' NAICS code 541612.[57]

e. Comments on Election Outcomes

A law firm stated that the Department is suggesting that unions would win more elections if more Form LM–20s were filed, and then argued that historical union success rates in representation elections contradict that point, since union success rates have been higher in the past decade than at any time since the 1970s. This commenter stated that the NPRM did not explain why unions' success rates in representation elections would be increasing during a time of growth in employers' hiring of consultants. Characterizing the NPRM as asserting that employers' increased use of consultants has an impact on the success of union organizing efforts, this commenter stated that the Department has not adequately shown how increasing employer-consultant reporting requirements would produce a change in representation election outcomes.

One labor relations consulting firm questioned why the Department cited studies that suggest that losses by unions in representation elections are the result of anti-union tactics by consultants, given that ''unions win nearly 70% of contested elections each year.'' A law firm representing employers noted an increase in union win rates, stating that ''unions won 48% of NLRB elections in 1996 and nearly 68% in 2010.'' A trade association stated that the Department has not provided sufficient evidence that current employer-consultant reporting levels have any correlation to decreased unionization rates, noting that unions won 67.6% of elections in 2010. *Number of NLRB Elections Held in 2010 Increased Substantially from Previous Year,* Daily Labor Report (BNA), No. 85, at B–1, May 3, 2011. This commenter stated that the proposed changes are not supported by union election success rates.

Further, a labor relations consulting firm argued that ''union tactics as a group play a greater role in explaining election outcome than any other group of variables, including employer characteristics and tactics.'' Additionally, a construction-related trade association commented that the unionization in the construction industry has declined because of union failures, and noted that there is no evidence to show that consultants' LMRDA violations are responsible for the decline. Finally, another trade association asserted that the proposed rule fails to specify the types of persuader activities that have increased and that have resulted in union election losses.

Contrary to some commenters' assertions, the Department did not claim in the NPRM that the increasing usage of consultants has had a specific impact on unions' organizing success rates. Moreover, the issuance of this rule does not have an object to tilt the balance in favor of unions or against employers in representation matters. The object of the rule is to provide information that employees need, as intended by Congress, to be able to consider the extent to which an employer's choice to hire a labor relations consultant to manage the employer's campaign should affect their choice to accept or question the arguments presented in opposition to union representation. It seems beyond dispute that upon receipt of this information, workers will be better able to exercise their representation and collective bargaining rights, a particular benefit to them and a general benefit to the public.

In response to the commenters that stated that the Department did not adequately explain how unions could have increased success rates in representation elections during a time of growth in employers' use of consultants, the Department reiterates that election outcome is not germane to this rule. The Department concurs with commenters stating that consultants are hired by

[56] See Statistics of U.S. Businesses: 2012: NAICS 541612—Human resources & executive search consulting services, United States, accessed at: *www.census.gov/econ/susb/.*

[57] The NPRM referred to the U.S. Small Business Administration's Table of Small Business Size Standards Matched to the North American Industry Classification System Codes (2007). As discussed later in the text, the 2012 NAICS shows $14 million in average annual receipts for ''Human Resources Consulting Services,'' accessed at: *www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf* (at p. 32).

employers for purposes beyond counter-organizing persuader activities. As previously mentioned, consultants can be hired for a variety of purposes beyond orchestration of counter-organizing campaigns (*e.g.,* to provide strictly legal advice or general management consultation, vulnerability assessments, or to provide services related to general union avoidance, first-contract avoidance services, or decertification).

3. Disclosure as a Benefit to Harmonious Labor Relations

In the NPRM, the Department, referring to several research studies, expressed its view that there is strong evidence that the undisclosed activities of some labor relations consultants are interfering with workers' protected rights and that this interference is disruptive to effective and harmonious labor relations. The research included findings that some consultants counsel their employer-clients to fire union activists for pretextual reasons other than their union activity, or engage in other unfair labor practices, particularly because the penalties for unlawful conduct are typically delayed and may be insignificant, from the employer's viewpoint, compared to the longer-term obligation to deal with employee representatives. See 76 FR 36189–90 and Section III.B.1 of the preamble to this rule. This is not a new phenomenon. It is not the Department's intent in referring to this research to suggest that the increased use of consultants is the cause of, or an accelerator to, unlawful conduct by employers during organizational campaigns. At the same time, however, it cannot be ignored that Congress was concerned about and reacted to what it considered to be conduct by some consultants that, even if lawful, was viewed as disruptive to stable and harmonious labor relations. The Department recognizes, as we presume Congress did, that in most instances employers and labor relations consultants will adhere to the requirements of the NLRA and other laws.

After a review of the pertinent comments, the Department continues to believe that its revised interpretation of consultant persuader activities will have a positive impact on labor relations.

A number of commenters applauded the proposed rule as a long-needed response to what they viewed as the disruptive effect consultants have on labor-management relations, especially during representation campaigns. Several commenters viewed consultants as their chief antagonists in attempting to secure employee rights and appeared to view consultants as the root cause of most unlawful conduct by employers. Many of these commenters supported the rule, and several provided examples of the consultant activities they have witnessed. Other commenters, however, were critical of the Department's assessment of consultant and employer practices, arguing that the studies cited were inadequate to make such an assessment. Two commenters also argued that the rule is superfluous, contending that unlawful consultant activities are already governed by the NLRA and enforced by the NLRB.

Several commenters opposing the revised interpretation disputed the idea that consultants have a harmful impact on labor relations. Many of these commenters challenged the research referenced in the NPRM and maintained that the Department has not provided sufficient evidence to justify this rule. For instance, the Department received a comment from an individual with more than thirty years of experience as a human resource and labor relations professional. This person stated that he had never intentionally committed an unfair labor practice, advised anyone to do so, nor received advice to do so from a labor relations consultant or attorney.

Two associations representing small businesses stated that their members do not have any interest in deceiving employees or committing unfair labor practices. A trade association for manufacturers contended that the NPRM contained no ''substantial evidence'' to support a change in the Department's prior interpretation and that the Department failed to provide any evidence that contemporary consultants engage in the types of activities to which the LMRDA was intended to deter.

Another trade association asserted that the NPRM, if implemented, would actually result in more election interference charges, despite the Department's stated goal of reducing improper conduct in representation elections. The association criticized the NPRM's reliance on the research of Kate Bronfenbrenner, Chirag Mehta, and John Logan. While the association admitted that certain consultants and lawyers engage in ''shady'' activities, it did not think the cited studies presented any evidence that ''all, most, or even many'' consultants engage in unlawful or unethical conduct.

Many commenters appear to have misunderstood the Department's position. Several commenters read the Department's proposal to reflect a finding *by the Department* that labor relations consultants as a class, or the growth of their industry, have caused an increase in unfair labor practices by employers, that labor relations consultants, not employers, are chiefly responsible for such unfair labor practices, that labor relations consultants are disreputable, or that the reporting of indirect persuader activities will have a substantial or direct effect on deterring employers from undertaking actions that constitute unfair labor practices or other unlawful conduct. The Department did not adopt these observations of researchers as its own. The Department's conclusion was narrower. As stated in the NPRM: ''The Department concludes that, as was true in in the 1950s, the undisclosed use of labor relations consultants by employers interferes with employees' exercise of their protected rights to organize and bargain collectively and disrupts labor-management relations. The current state of affairs is clearly contrary to Congressional intent in enacting section 203 of the LMRDA.'' 76 FR at 36190. That is the key finding to this rulemaking.

As we have reiterated throughout the rule, its purpose is to provide information to employees, consistent with section 203, where an employer has hired a consultant to engage in persuader activities, including those indirect, behind-the-scenes activities, that are currently left unreported. With this information, the employees can better assess the message they are receiving, including its content and tone, and the extent to which the message accurately reflects the employer's (or its supervisors') actual, concrete beliefs. Employees are entitled to receive this information under section 203 and this rule effectuates that provision without regard to whether the consultant, as we expect will be the norm, is fully compliant with the law.

Some commenters stated that many consultants have never employed any unlawful or unethical tactics. Although these specific commenters, like most other labor relations consultants and employers, may have never engaged in these types of tactics, there are some consultants that are less scrupulous and whose actions unfairly tarnish the reputation of others. In addition, the Department cannot ignore the research that establishes that a significant number of tactics used in union avoidance and counter-organizing campaigns, whether lawful or unlawful, are disruptive of harmonious labor relations when not fully disclosed, as many commenters attested. For example, an international union commented that some consultants operate behind the scenes by coaching

employers on how to facilitate the ''spontaneous'' formation of employee committees, which are used as fronts for the employer's anti-union activity. Other consultants, according to this commenter, design tests and surveys to help in identifying pro-union workers.

Several commenters recounted their experiences with consultants during union organizing campaigns, noting particular activities they had observed and noting that these activities had been left unreported. One commenter recounted his past experience with a law firm's tactics to oppose representation, explaining that the consultants conducted face-to-face and group meetings with employees where literature, clearly not authored by the employer, was distributed. Another commenter described a consultant's effort to contest the union's efforts to organize a nonprofit health provider. He described the consultant's emphasis on indirect persuasion by educating managers about their role in the organizing campaign and training supervisors and coordinating their efforts to prevent unionization. The commenter stated that the consultant told managers to pull nurses from their patient-care duties to attend mandatory union avoidance meetings.

A counsel for a labor organization stated that in the ''hundreds'' of organizing campaigns he has observed, consultants go far beyond merely advising employers. As he explained, consultants have undertaken the following activities: engaging in direct contact with employees in captive audience speeches and one-on-one meetings; routinely drafting and disseminating anti-union propaganda documents; interrogating employees about union sympathies; conducting polling and surveillance of employees; helping employers identify and fire union supporters; and bribing employees to vote the union down.

A law firm representing unions stated that in its 50-plus years in existence it has seen how the LMRDA reporting requirements have been largely ignored because of the prior interpretation of reportable activities. The firm listed numerous indirect persuader activities that it has observed over the years. In addition, the firm stated that managers and supervisors are taught many other activities and tactics, some of which are unlawful under the NLRA and others which are not. The firm noted, however, that virtually none of these activities is reported.

The Department recognizes that these comments in support of the NPRM, like the ones in opposition, are largely anecdotal. Nonetheless, the Department believes that these experiences from union members, organizers, and attorneys serve to confirm and buttress the research discussed in the NPRM and the preamble to this rule. Moreover, many of the commenters' experiences are akin to those heard before the Senate Subcommittee on Labor-Management Relations in 1980. The Subcommittee described as ''distressing'' a consultant's activities during a hospital organizing campaign, including the use of a captive audience meeting and staff changes, caused a decline in the quality of patient care. See 1980 Subcommittee Report at 42. The comment above concerning the recent efforts of a nonprofit health care provider to discourage its nurses from unionizing involved similar circumstances. This comment lends support to the Department's position that many consultant activities, hidden from employee view, which prompted the need for section 203, continue to be problematic in more contemporary times.

In addition, the Department finds unpersuasive the criticism leveled by some commenters that the revised interpretation will actually result in more interference charges before the NLRB. A consultant merely engaging in legal services does not trigger reporting, so the Department is not persuaded that this rule will reduce the ability of employers to receive legal counsel. See Sections V.G and H discussing the rule's potential impact on free speech and the attorney-client privilege. Without any supporting data or analysis, the theory that this rule would lead to an increase in unfair labor practice charges is purely speculative and conclusory.

Other commenters opposing the rule also challenged the Department's premise, as stated in the NPRM, that there is some correlation between ''the proliferation of employers' use of labor relations consultants'' and ''the substantial utilization of anti-union tactics that are unlawful under the NLRA.'' 76 FR 36190. A trade association for the construction industry contended that this premise is not supported by any empirical data. According to the commenter, the fact that employers are engaging legal counsel more frequently does not indicate a desire to act unlawfully, but rather, is merely a means for them to maximize their right to educate and inform employees.

Likewise, a law firm submitted comments disputing the view that the use of consultants is the cause of unfair labor practices or objections filed in NLRB-conducted elections. The firm pointed to the NLRB's well-established policy of requiring that elections be conducted under ''laboratory conditions.'' The firm then noted that objections are filed by parties in only approximately 5% of all NLRB elections, and of the cases in which objections are filed, the NLRB has found that 50% have no basis in fact or law. The firm also noted the low number of ''test of certification'' cases filed with the NLRB, which, in its view, is at odds with the Department's perception that a new interpretation was needed. In contrast, a national labor union commented that the available evidence shows a strong correlation between the hiring of a consultant and unlawful behavior by supervisors, thereby undercutting the assertion by some commenters that consultants are merely instructing supervisors on how to comply with the law.

As previously discussed, the Department finds no persuasive reason to doubt the studies cited in the NPRM, insofar as they conclude that the proliferation of employers' use of labor relations consultants has been accompanied by the substantial utilization of unlawful tactics. The Department clarifies, however, that it did not intend to conclude that a causal relationship exists between the use of consultants and unlawful activity. The Department also concurs with the comment by the trade association opposing the proposed rule, who asserted that there is no data showing that employers who hire consultants to engage in direct persuasion (and file LM reports under the prior rule) are more or less likely to interfere with employee rights than employers who hire consultants to engage in indirect activities.

The Department also does not find the NLRB statistics cited by the law firm above to be persuasive. Many unknown variables may factor into a union's decision to file an election petition, withdraw that petition prior to an election, or file or not file an election objection. That objections were filed in only about 5% of all NLRB elections has very little, if any, correlation with the number of improper activities undertaken by many consultants on behalf of employers. The rate of ''test of certification'' cases are even less related to the number of improper activities, as many of those cases challenge NLRB decisions on which persons can or cannot vote in an election.

Finally, a labor consulting company argued that the revised interpretation of the advice exemption would not address the Department's concerns about improper consultant activities. A significant number of identical or nearly

identical comments came from other companies, organizations, and individuals using this labor consulting company's form letter. According to the commenters, alleged improper conduct by labor relations consultants (*e.g.,* bribing employees, firing organizers, or spying on workers) are more properly investigated and enforced by the NLRB. A different commenter similarly stated that the NLRA already contains ample remedies for addressing unfair labor practices and that it is not the Department's role to address lawful labor practices that it finds ''offensive.'' As such, these commenters argued that new reporting requirements under the LMRDA would do nothing to reduce unlawful or egregious activities discussed in the NPRM.

The Department rejects the contention that because unfair labor practices are already illegal under the NLRA and enforced by the NLRB, that this rule is unnecessary. The LMRDA is a companion statute to the NLRA. Disclosure helps employees understand the source of the information that is distributed. This type of exposure also discourages potential unlawful acts and reduces the appearance of impropriety. Id. at 708.

That the NLRA works toward those same goals by offering procedures to remedy unfair labor practices does not diminish the Department's responsibility or ability to fulfill its congressional mandate under the LMRDA. The LMRDA requires the reporting of direct and indirect consultant persuasion of employees without regard to whether these activities are unfair labor practices. ''When enacting the LMRDA, Congress did not distinguish between disclosed and undisclosed persuaders or between legitimate and other types of persuader activities. Rather, Congress determined that persuasion itself was a suspect activity and concluded that the possible evil could best be remedied through disclosure.'' *Humphreys, Hutcheson and Moseley,* 755 F.2d at 1215.

D. Comments on Clarity of Revised Interpretation

Multiple commenters contended that the revised interpretation is ''subjective'' and ''vague,'' unlike the ''clear,'' ''objective,'' and ''bright-line'' test described in the prior interpretation. They advocated retaining the prior interpretation, which focused on whether the employer could accept or reject advice or materials offered by the consultant. Under the prior interpretation, reporting was required only if the consultant had ''direct contact'' with employees.

One commenter contended that the proposed rule would inject ''subjectivity'' and would create ''inconsistent and arbitrary outcomes.'' Another commenter argued that the Department is ignoring the complexity of today's workplaces, in which the line between ''union avoidance'' and ''positive employee relations'' has been blurred, as employers may have one or both purposes attached to a single activity, making it difficult to determine the underlying purpose. A consultant expressed concern that the proposed rule would require employers and consultants to always look at the ''intent behind consultant or attorney activities,'' adding unwarranted complexity and cost to reporting. Another commenter, a trade association, argued that the ''arbitrariness'' of the proposal was exemplified by the requirement that persuasive communication submitted orally to the employer would not trigger reporting, but written ones would. This commenter also inquired into what the ''evidentiary standard'' would be for determining the intent of a consultant's activity, suggesting that the standard would unfairly impose a ''strict liability'' test.

The Department disagrees with the assertion that this rule exchanges a clear, bright-line test for one that is subjective and vague. Contrary to commenters' assertions, reporting under both the prior interpretation and this rule rests upon whether the consultant undertakes activities with an object to persuade employees, which is determined, generally, by viewing the content of the communication and the underlying agreement with the employer.[58] Indeed, at least one commenter who opposed the proposed rule acknowledged that the ''object to persuade'' test is identical under both reporting regimes. What differs with this rule is the context in which this test is applied. The prior rule administratively limited the application of the underlying test to direct, employee-contact situations; this rule requires that indirect persuader activities also be reported.

In response to the commenters' concerns that the indirect persuasion category is too amorphous, the Department notes that the term ''persuade'' is not ambiguous, uncertain, or vague. The Fourth Circuit in *Master Printers of America,* in construing section 203(b), stated that a statute is not vague if ''it conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.'' 751 F.2d at 711 (citing *United States* v. *Petrillo,* 332 U.S. 1 (1947)). The court determined that the term ''persuade,'' based on its common meaning and as used within the context of the LMRDA, is neither ambiguous nor confusing. Id. Further, in an effort to provide greater clarity, this rule groups the list of indirect persuader activities from the NPRM into four specific categories: The directing or coordinating of supervisors and other employer representatives; the preparation of persuader materials; presenting a union avoidance seminar; and the development and implementation of personnel policies and actions. Thus, not only is the underlying test (considering the object of the consultant's activity) consistent with the statute and the prior interpretation, it is also easily articulated and applied.

Further, the test is not ''subjective,'' as has been suggested. To determine reportability of an employer-consultant agreement or arrangement, the consultant must engage in or agree to engage in direct or indirect persuasion of employees. The analysis has two parts: (a) Did the consultant engage in the direct and indirect contact activities identified in the instructions; and (b) did the consultant do so with an object to persuade employees? The latter does not require a review of all the actions undertaken for the employer. What is required is a consideration of specific, objective facts: [59] The content of any communication created or provided by the consultant; the context in which a policy is established or action occurs; the labor relations environment (*e.g.,* if there is an organizing effort ongoing, election pending, or other labor dispute); [60] and the explicit and implicit

[58] See IM section 265.005, which states, in relevant part, ''it is plain that the preparation of written material by a lawyer, consultant, or other independent contractor which he directly delivers or disseminates to employees *for the purposes of persuading them* with respect to their organizational or bargaining rights is reportable.'' (emphasis added).

[59] A mental state, such as ''object to persuade,'' is an objective fact. The ''state of a man's mind is as much a fact as the state of his digestion.'' *Merck & Co., Inc.* v. *Reynolds,* 130 S. Ct. 1784, 1796 (2010) (quoting from *Edgington* v. *Fitzmaurice,* 29 Ch. Div. 459, 483 (1885)).

[60] The presence of a labor dispute is not a necessary condition to trigger the reporting of a persuader agreement; however, its existence can be an important fact to consider when evaluating the content of a communication and determining a consultant's objective in undertaking an activity. See IM section 261.005 (Existence of Labor Dispute) (1961), which states, in pertinent part, ''Agreements with an employer to persuade his employees as to their rights to bargain collectively should be reported irrespective of whether there is a labor dispute.'' Moreover, section 203(c) explicitly

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terms of the agreement or arrangement pursuant to which the consultant activities are undertaken. Application of the underlying test in ''indirect'' situations is no different than with ''direct'' situations.[61]

The ''object to persuade'' analysis focuses on whether the communication, explicitly or implicitly, disparaged unions, sought to demonstrate that a union is not needed, provided ways to defeat or remove a union, explained promises or threats made or benefits provided to the employees in connection with the exercise of their rights, or otherwise sought to affect employees' exercise of their rights. One would also look to see if the communication provided the employer's views, argument, or opinion concerning the exercise of employee rights to organize and bargain collectively, which would demonstrate persuasive-content. See IM 263.100 (Speech by Consultant).

In such cases, every communication from the consultant to the employer would not be analyzed; rather, only communications created by the consultant and intended for dissemination or distribution to employees. Similarly, where a consultant directs or coordinates the supervisors' activities, the object is inferred from the content of the supervisors' communications and actions. Further, as explained in more detail in Section IV.B and Section V.E.1.e, the Department has made clear that personnel polices developed by the consultant will not trigger reporting merely because they improve employee pay, benefits, or working conditions, absent evidence of an object to persuade employees in the agreement, accompanying communication, timing, or other circumstances relevant to the undertaking.

Regarding the commenter's inquiry concerning the ''evidentiary standards'' imposed by this rule, the commenter appears to be improperly conflating two principles: The reporting trigger created by section 203 and the criminal liability standard in section 209. Reporting is triggered by section 203(a)(4) and (b) by a showing that an employer and a consultant have entered into a persuader agreement or arrangement. Such an agreement involves the third-party undertaking activities with an object to persuade. This is the triggering mechanism for reporting, not a standard for civil or criminal liability. Section 209 imposes criminal liability if the employer or the third party willfully violates the statute. As a result, the consultant would not incur any criminal liability unless it willfully fails to report or otherwise willfully violates the Act. In either case, there is no ''strict liability'' standard.

E. Comments on Scope of Persuader Activities and Other Provisions of Section 203

1. Comments on Specific Persuader Activities and Changes Made to Proposed Advice Exemption Instructions

In this section of the preamble, the Department further responds to comments concerning specific consultant activities and whether such activities trigger reporting. In response to these comments and to simplify reporting, the Department has revised the instructions to separately address direct and indirect persuader activities and to differentiate them from other activities undertaken by consultants that do not trigger reporting. To better address concerns about activities engaged in by consultants with an object, *indirectly,* to persuade employees, the instructions group such activities into four categories, illustrating those that will trigger reporting and those that will not. An in-depth overview of each of the persuasion categories (direct and indirect), as well a discussion of non-reportable activities appears earlier in the preamble at Section IV.B. In that section, the Department also explains other changes made to the proposed advice exemption instructions.

a. Direct Interaction by Consultant With Employees

Reporting is required, as it had been under the prior interpretation, whenever a consultant meets face-to-face with an employee or employees, or directly communicates with them in some manner in order to influence them concerning how they exercise their representation and collective bargaining rights. Reporting is also required where the consultant engages the services of a third party to directly communicate with an employee or employees.

b. Planning, Directing, or Coordinating Supervisors and Other Employer Representatives

Reporting is triggered when the consultant directs the employer representatives' meetings with employees or the consultant plans or coordinates such meetings. If the consultant establishes or facilitates employee committees (groups of bargaining unit or potential bargaining unit employees that advocate a particular position concerning organizing and collective bargaining), either directly or indirectly through the directing or coordinating of supervisors and similar employer representatives, reporting is triggered. If the consultant trains the supervisor to engage in union avoidance (lawfully or otherwise), reporting is triggered. As stated more fully in Section IV.B, consultants must report if they plan, direct, or coordinate activities undertaken by supervisors or other employer representatives with an object to persuade, including their meetings and interactions with employees. Merely advising supervisors or other employer representatives to comply with the NLRA or other laws, however, does not itself trigger reporting.

The Department disagrees with the suggestion that the NPRM focused on the persuasion of supervisors as opposed to employees. The Department clearly stated, at 76 FR 36191, and repeats here, that reporting is triggered by indirect persuasion of *employees* through the planning, direction, or coordination of the supervisors or other employer representatives. Commenters inquired into potential reporting stemming from materials, such as those contained in a newsletter, provided to train supervisors or other representatives of their member organizations on how to improve their communication with employees. The mere provision of such material to employer-members does not trigger reporting. However, the Department cautions that any tailoring of existing training material by a consultant for a particular employer triggers reporting, as does a selection by a consultant of training material designed to instruct supervisors in the persuasion of employees about their representation and collective bargaining rights. Training or other directing of supervisors to persuade triggers

provides that a consultant does not incur a reporting obligation by representing an employer in collective bargaining. Drafting a collective bargaining agreement does not indicate an object to persuade and thus, by itself, is no indication that a consultant has engaged in other activities that would be reportable.

[61] Even to the extent that the test, in its application, presents some borderline situations does not render it vague and subjective. Indeed, even the 1962 interpretation states that, ''the question of application of the 'advice' exemption requires an examination of the intrinsic nature and purpose of the arrangement to ascertain whether it essentially calls exclusively for advice or other services in whole or in part. Such a test cannot be mechanically or perfunctorily applied. It involves a careful scrutiny of the basic fundamental characteristics of any arrangement to determine whether giving advice or furnishing some other services is the real underlying motivation for it.'' This rule provides a firm basis for making this evaluation, consistent with the text and intent of the statute.

reporting regardless of the format (oral, written, electronic, or otherwise).

For purposes of clarity, in the final rule the Department has modified the checkbox item, ''Planning or conducting individual or group employee meetings,'' by separating this activity into two items: ''planning or conducting individual employee meetings'' and ''planning or conducting group employee meetings.''

c. Providing and Revising Materials

The provision of materials includes—drafting, revising, or providing persuasive speeches, written material, Web site, audiovisual or multimedia content for presentation, dissemination, or distribution to employees, directly or indirectly (including the sale of generic or off-the shelf materials where the consultant assists the employer in the selection of materials). Obviously, the same information may be conveyed orally; to ensure consistent reporting, the Department requires reporting regardless of how the consultant chooses to convey the material.

Many of these activities were listed in the instructions to the proposed rule and were addressed in comments. See 76 FR 36225. They are also addressed in the instructions published as part of this rule. See Appendices.[62]

Counseling an employer's representatives on what they can lawfully say to employees does not trigger reporting because it is ''advice.'' A consultant may provide services to an employer in any manner contemplated by their agreement; this rule imposes no restrictions on any such activities. This rule only affects whether certain activities undertaken by the consultant will trigger reporting. So long as the consultant engages only in advice, no reporting is triggered. Typical advice situations would include—providing the client with an overview of NLRB case law relating to the right of employees to organize and bargain collectively, including a recitation of examples of communication that has been found to be lawful and unlawful by the NLRB or other body; and reviewing and revising—to ensure legality or to correct typographical or grammatical errors—employer-prepared speeches, flyers, leaflets, posters, employee letters, or other materials to be used in presenting the employer's position on union representation or collective bargaining issues.[63] In contrast, adding to or revising the document to make it more persuasive, or providing or selecting persuasive communications for use by the employer, intended for distribution to employees, triggers reporting by the consultant, whether provided to the employer in oral, written, or electronic form.

One law firm questioned the reportability of communications in connection with the collective bargaining process. The Department emphasizes that the presence of a labor dispute is not a prerequisite for reporting of persuader agreements, although it may provide important context to determine if the consultant engaged in persuader activities. Section 203 exempts from reporting activities involved in negotiating an agreement, or resolving any questions arising from the agreement. An activity, however, that involves the persuasion of employees would be reportable. For example, a communication for employees, drafted by the consultant, 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, would trigger reporting.

This rule, as described above in Section IV.B, makes clear that the provision of pre-existing, ''off-the-shelf'' materials does not evidence a consultant's object to persuade employees, therefore is not itself reportable, without any communication between the employer and consultant. However, the Department cautions that any tailoring of existing persuasive documents by the consultant for a particular employer triggers reporting, as does the consultant's communication with the employer to select the appropriate persuasive materials for that employer. However, as noted below, trade associations are not required to file a report by reason of their membership agreements, or by reason of selecting off-the-shelf persuader materials for individual member-employers.

On a different point, some commenters inquired about the reportability of communications, prepared by consultants or other persons, which do not have an object to persuade an employer's employees, such as those directed at vendors or customers of an employer that have engaged the consultant's services, or members of the public. Such communications would not trigger reporting because they do not involve the persuasion of employees. In contrast, for example, newspaper, Internet, or similar advertisements created by a consultant and targeted for employees will trigger reporting because they have an object to persuade. See IM Section 255.600 (Newspaper Ads of Employers' Views) (1960, rev. 1962), Example 4.

d. Seminars

In the NPRM, seminars for supervisors or other employer representatives undertaken with an object to persuade employees are listed among the reportable activities identified on the proposed Forms LM–10 and LM–20. See 76 FR 36208, 36218. The preamble to the NPRM stated that such seminars, as well as webinars, conferences, and similar events offered by lawyers and consultants to multiple employer attendees concerning labor relations services, are reportable, to the extent that they involve a consultant undertaking activities with an object to persuade employees. See 76 FR 36191.

Commenters opposed the reporting of seminars, arguing that they should be exempt as ''advice'' and that, even if not exempt, such reporting would be overly burdensome. One law firm stressed that, in many cases, there was no ''agreement or arrangement'' in place for the presenter at the seminar. This law firm also inquired into whether it mattered if the consultant trained the employer attendees on what materials to disseminate to employees, or presented a ''campaign in a can,'' as opposed to a consultant reviewing materials communicated by employers in past campaigns. The comment also discussed the consultant's difficulty in determining whether it must report the seminar, particularly if the consultant merely volunteered to be a presenter at

[62] The proposed instructions stated that the following activities would trigger reporting: ''Drafting, revising, or *providing* a persuader speech, written material, Web site content, audiovisual or multimedia presentation, or other material or communication *of any sort,* to an employer for presentation, dissemination, or distribution to employees, *directly or indirectly.''* 76 FR 36211 (emphasis added). The italicized language was intended to broadly encompass persuasive communications provided by the consultant to the employer orally or in writing, as well as communications intended to be disseminated to the employees orally or in writing. To avoid the perception that persuader activities communicated orally are exempt from reporting, the final rule has been clarified on this point. The instructions now state that reporting is triggered if the consultant, with an object to persuade, ''provides material or communications to the employer, *in oral, written, or electronic form,* for dissemination or distribution to employees.'' See Revised Form LM–20 Instructions in the Appendix to this rule (emphasis added).

[63] It is the agreement to undertake or provide persuader activities that triggers reporting. A consultant who merely solicits business from an employer by offering to provide the employer with persuader services or merely provides off-the-shelf materials requested by the employer, does not trigger reporting.

the seminar, and expressed uncertainty about how to report employers who may have attended the seminars if a roll of attendees is not maintained. This comment suggested that the Department should either remove multi-employer seminars from reportability, or state that they would only be reportable if there is a ''specific 'arrangement or agreement' '' in place. A business association stated that seminar providers do not know what the attendees will do with the information offered. Another commenter argued that the reporting of such activities ''essentially imposes a penalty on the employer for attending such a session, because the employer must then devote additional staff time to understanding, completing, and filing the Form LM–10.''

Several commenters noted that presenters may lack some information about the employer attendees at a union avoidance seminar. One policy group stated that, ''absent mind reading skills, it will be impossible for a law firm, consulting firm, . . . or other entity to comply with the rule unless they report all attendees to their events and the fees that they paid.'' This requirement, stated the commenter, constitutes a grave violation of privacy and a tremendous administrative burden on providers and will reduce the number of informational programs and will increase their cost. It added that the proposed rule will lead to a less informed business and inevitably result in less, not more, compliance with the law. Additionally, a commenter stated that there is no textual or historical support to assert such coverage, and that the requirements could apply even where the instructor of the seminar has no familiarity with any individual employer and no knowledge of the employees. Further, it stated there is no evidence that programs of this type are sponsored with the promoters' advance knowledge that any materials or messages are being distributed specifically to any set of employees.

In response to comments received, the Department has modified and clarified the reporting of such union avoidance seminars. Initially, a trade association must report a seminar only if its own officials or staff members actually make a presentation at the event that includes employee persuasion as an object, as distinct from merely sponsoring or hosting the event. Further, in no case would an employer attending the seminar be required to file a Form LM–10 for attendance at a seminar. See Sections IV.B and D for more guidance concerning the reporting of seminars.

The Department acknowledges that seminars presented by labor relations consultants may provide guidance and recommendations to the employer attendees on a variety of labor relations topics, including the persuading of employees. Thus, some seminars may exclusively involve advice to employers, without the consultant intending any persuasion, direct or indirect, of employees. However, if the consultant develops or assists the employer with developing anti-union tactics and strategies to be used by the employers' supervisors or other representatives, such activity triggers reporting. In such cases, the consultant clearly has the goal of indirectly persuading similarly situated employees by helping their employers to direct or coordinate their supervisors and other representatives to engage in tactics designed to prevent union organizing. Such activities clearly involve more than merely providing recommendations to the employers, but, rather, are intended to assist the employers in persuading their employees.

Additionally, the Department shares the commenters' concerns about the potential reporting burden on the seminar organizer and presenter, as well as on the employer attendees. However, the Department disagrees with the suggestion by one commenter that requiring seminars to be reported is intended or operates as a penalty for attendance. Initially, the Department notes that only union avoidance seminars trigger reporting. Such seminars typically involve the development of persuader tactics that the employer and its supervisors and other representatives can use to persuade employees. These seminars do not include those focusing exclusively on maintaining a legally compliant workplace, one that is better for workers, more productive, efficient, tolerant, or diverse—nor do they include efforts to merely solicit business by recommending persuader services. Thus, this rule will not require reporting from lawyers and consultants who offer seminars that provide guidance to employers on labor law and practices. Further, this rule exempts employers from filing reports for agreements concerning attendance at union avoidance seminars, thus reducing burden for the thousands of employer representatives that commenters suggested attend such events. Moreover, trade associations will not need to report if they merely organize the seminar, and those entities that do file will only need to file one report for each seminar, listing employer attendees, as described in Section IV.E.

While these changes depart from the general approach that all parties to the agreement or arrangement must report persuader activities, the change, in the Department's view, is appropriate due to the unique characteristics of trade associations and the nature of seminars attended by multiple employers. Because an agreement arising from the seminar will be identical for all employers, there is little utility served by requiring separate reports for each employer attending the seminar, and any benefit from requiring each employer to file a report in such circumstances (potentially affecting thousands of employers in the view of some commenters) would be outweighed by the cumulative burden on employers. With regard to seminars that are sponsored or hosted by trade associations, requiring them to require reports would largely duplicate the information that will be reported by presenters. Importantly, this information will include the names of employer attendees, ensuring that this important information will be disclosed to employees and the public, as well as a description of the seminar. Furthermore, requiring the presenter to file the single Form LM–20 report, rather than the organizer, ensures that the most comprehensive information concerning the seminar is disclosed, such as which employees of the consultant made the presentation. See Form LM–20 Item 11.d in Appendix A.

Because persuader agreements stemming from attendance at seminars will arise when an employer registers for the seminar, thereby under the general rule triggering the 30-day deadline for filing a Form LM–20 upon entering into a persuader agreement, consultants could be faced with having to file a series of forms, a potentially significant burden. To ameliorate such burden, the instructions and § 406.2 of the Department's regulations, 29 CFR 406.2, have been amended so that a single Form LM–20, compiling information related to the employers that attend the seminar, may be filed. Such filing is due within 30 days after the date of the seminar.

Finally, the Department notes that the seminar presenter(s) would be required to report as indirect parties to the agreement, regardless of whether they volunteer or receive compensation for their services. In this regard, they incur the same obligation as they would in any circumstance in which they agree to provide persuader services.

e. Personnel Policies

Several commenters expressed a concern that under the proposed rule any personnel practice proposed by a consultant would be reportable. A consultant firm stated that ''virtually any positive employee relations practice'' could be reportable; even ''facially neutral'' activities could still trigger reporting if their ''intent is to reduce the likelihood'' of unionization. A trade association expressed concern that any communication from an attorney or consultant to the employer-client, which ''could have any influence'' on employer's communication with employees, would be reportable. A commenter expressed concern that even a seminar offered by a bar association on the drafting of employee handbooks would have to be reported.

A trade association expressed its view that under the Department's proposal a lawyer would be required to file a report if he or she drafted an employee handbook that contains policies supportive of the right of employees to choose whether or not to join a union through NLRB-conducted secret ballot elections. Another commenter expressed concern that under the proposal a report would be required whenever a consultant drafted a handbook that contained an open-door policy or other ''employee-friendly'' policies that encourage positive and lawful labor-management relations. The same commenter also thought that reporting would be required if a consultant made an audio-visual presentation for use in training employees about the employer's anti-discrimination or harassment policies. A law firm similarly expressed concern about the potential reporting requirements for employee handbooks, acknowledging that consultants often draft or revise such handbooks with the intent to cast the employer in a positive light and thus ''persuade'' employees. Another commenter stated that, on occasion, an employer asks a consultant to draft a ''union-free'' statement expressing the employer's policy against unions.

A law firm suggested that the proposed rule would require reporting from anyone whose work ''affects employees,'' including any communications between a lawyer and an employer, which could be viewed as an ''indirect attempt'' to persuade employees. It offered examples from the human relations industry, such as ''benchmarking'' best practices and other measures designed to ensure employee satisfaction, as well as the drafting of legally-compliant documents that meet the client's business purposes. The commenter also posed a number of hypothetical questions, which it proffered to illustrate the alleged compliance difficulties posed under the Department's proposal. Another law firm and a public policy organization also presented multiple hypothetical situations.[64]

As stated in Section IV.B, reporting is not required merely because a consultant develops policies that improve the pay, benefits, or working conditions of employees, even where the policies or actions may subtly influence or affect the decisions of employees. However, reporting is triggered if the consultant undertakes the development of such policies with an object to persuade, as evidenced by the agreement, any accompanying communication, the timing, or other circumstances relevant to the undertaking.

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. Further, even outside of an organizing drive reportable events can occur if the consultant enters into a union avoidance agreement with the employer and then develops a policy in which employees can come to management to grieve certain matters, or otherwise establishes an ''open door'' policy. In this situation, the open door policy was implemented to dissuade employees from exercising their rights to seek a union, and thereby secure, through collective bargaining, a grievance procedure. It is not determinative if the consultant develops a personnel policy proactively or in response to employee complaints. The inquiry will focus on whether or not the consultant developed the policy with an object to persuade employees.

This position is consistent with prior Departmental policy. In IM section 261.120 (Management Consulting Service) (1959), the Department advised: ''While the fact that a management consulting service is engaged in the development of 'Company Policy Manuals' and 'Job Evaluation and Classification' and 'Wage Administration Plans' intended to improve employee-employer relations does not, alone and in itself, bring that service within the reporting requirements of section 203(b), if the purpose of the service were in fact, directly or indirectly, to persuade employees in relation to collective bargaining, then it would [be reportable].'' Similarly, the fact that a management consulting service is engaged in the development of policies intended to improve workplace productivity or efficiency does not, alone and in itself, bring that service within the reporting requirements.

A consultant who develops a series of pay or benefit increases would not, merely because of this activity, trigger the reporting requirements, without some evidence that this was intended by the consultant to show the employees that a union is unnecessary. Communications explaining the reasons for the increase, drafted by the consultant, would not trigger reporting, unless circumstances indicated that the object was to persuade employees, such as how they should vote in an upcoming election. Merely providing advice on industry pay, FLSA classifications, NLRB posters, the use of surveillance cameras, or any other matter does not trigger reporting, as it is not undertaken with an object to persuade employees about their protected rights. For the same reason, if a consultant-lawyer's activities are limited to advice—such as reviewing personnel actions by the employer to ensure legal compliance, drafting documents unintended to influence the exercise of employee rights, or handling litigation or grievances—then the lawyer's activities will not trigger reporting. If the consultant-attorney, instead, identifies employees for targeted personnel actions as part of the strategy to defeat the union, then reporting is required.

If the consultant develops or revises a policy on the employer's use of social media or solicitation or distribution in the workplace—without doing so in a manner designed to influence employee decisions concerning union representation—then reporting would not be required. However, if there is evidence in the underlying agreement or accompanying communications that the policies were not established neutrally, but instead to affect the rights of employees to organize, then reporting would be required. That such a policy may potentially violate the NLRA is not relevant; it would trigger reporting because it was undertaken with an object to persuade.

[64] The Department has addressed herein numerous inquiries about particular activities that may or may not trigger reporting. This preamble, however, cannot respond to all, hypothetical situations that could arise under agreements between consultants and employers. In implementing this rule, the Department will provide compliance assistance and additional guidance as questions arise. Such assistance and guidance will benefit from inquiries that are based on more complete and concrete facts than provided by hypothetical situations presented by some commenters.

Merely drafting an employee handbook without some evidence in the handbook or any accompanying communication of an object to persuade, such as language that explicitly or implicitly disparages unions, will not trigger reporting.[65] For example, if the handbook includes statements such as—the employer's business model does not allow for union representation (regardless of how cleverly phrased), discussion among co-workers (or with ''outsiders'') with problems in the workplace is disapproved, or an employee must alert the employer if approached by a person advocating for a union, especially if the handbook is created or revised during an organizing campaign—then the consultant's development of such a handbook would trigger reporting. On the other hand, the development by consultants of personnel policies concerning plant moves, relocations, or closures, as well as workforce reductions, outsourcing, and subcontracting, do not, per se, trigger reporting, absent evidence showing an object to persuade employees.

Similarly, in response to a hypothetical posed by one commenter, an employer who hires an interior decorator to improve the working conditions at its facilities would not trigger a reporting requirement, per se, merely because a possible effect of such workplace change could be the subtle influencing of employees concerning their right to organize. Rather, to trigger reporting the interior decorator, like any third party, must undertake its activities with that object in mind. That such a scenario would be reportable is highly unlikely. That an agreement between the parties would call for the design of a workplace –layout, furnishings, wall coverings, lighting, fixtures, and so forth—to create an anti-union ambience seems a remote prospect.

With regard to personnel actions, the key to the analysis, to be made in the first instance by the consultant and employer, is whether the employer and consultant have agreed that the consultant will undertake an activity or activities with an object to persuade employees about how they should exercise their union representation and collective bargaining rights. Timing, content, and context will be important factors in making this determination. As mentioned previously, it is unlikely that a particular task, by itself, will be the sole consideration in making this determination. Reporting, however, would be triggered where a consultant identifies a specific employee or group of employees for reward or discipline, or other targeted persuasion, because of the exercise or potential exercise of organizing and collective bargaining rights or his or her views concerning such rights. In assessing a complaint that a consultant or employer has engaged in persuader activity but failed to file the required reports, OLMS will consider the nature of the agreement between the consultant and employer, any accompanying documents or communications, the timing, such as whether the hire occurred in connection with a labor dispute, and any statements by persons with firsthand knowledge about the allegations in the complaint.

For purposes of clarity, the Department has modified the two personnel policies and actions checkbox items. In the NPRM, the proposed checklist included: ''Developing personnel policies or practices'' and ''Deciding which employees to target for persuader activity or disciplinary action.'' The checklist in this rule modifies these to read: ''Developing employer personnel policies or practices'' and ''Identifying employees for disciplinary action, reward, or other targeting.''

f. Employee Attitude Surveys/Employer Vulnerability Assessments

Multiple commenters opposed to the NPRM expressed concern that employee attitude surveys are routine products offered by consultants to employers, products that seek to gain general insight in employee attitudes on compensation, benefits, and other employee concerns and complaints, without necessarily seeking to persuade employees or gather information on employee attitudes to unions. These surveys often do not mention unions, and the consultant may not be aware of the employer's interests concerning possible unionization.

One trade association asserted that given a concept as vague as ''union . . . proneness,'' almost any kind of survey could be characterized as persuasion. The proposal would deter employers from conducting employee surveys intended to improve working conditions and other initiatives related to positive employee relations (for example, opinions on benefits). Employers regularly survey their employees to assess overall job satisfaction, perceived effectiveness of management, and employees' attitudes toward current and potential new benefits.

In response to comments, the Department has removed this item from the list of persuader activities. The Department concurs with the comments stating that such surveys do not generally evidence an object to persuade, and therefore should not be separately listed. Further, the Department has added language to the revised instructions stating that, more broadly, vulnerability assessments conducted by the consultant are not reportable persuader agreements, as the consultant is merely providing advice concerning the employer's proneness to organizing, and possible recommended courses of conduct, but is not engaging in persuader activities. They may evidence such an object, however, if they are ''push surveys'' with leading questions designed to influence the views of the survey taker rather than ascertain the employees' views, or otherwise are intended to persuade employees. In such a case, the consultant (and employer) would check the appropriate box for the provision of persuasive materials.[66]

2. Comments on the Scope of Employee Labor Rights Included in Section 203

In describing the reporting threshold in the NPRM, the Department stated that reporting would be required if a consultant, pursuant to an agreement or arrangement with an employer, ''engages in activities that have as a direct or indirect object, explicitly or implicitly, to *influence the decisions of* employees *with respect to forming, joining or assisting a union, collective bargaining, or any protected concerted activity* (such as a strike) in the workplace.'' 76 FR 36192 (emphasis added). The Department discusses

[65] As for a seminar offered by a bar association on the drafting of employee handbooks, such an event would not trigger reporting unless it was part of a union avoidance seminar (in which the consultant develops or assists the attending employers in developing anti-union tactics and strategies for use by the employers' supervisors or other representatives). Moreover, as discussed above, it is unlikely that in such setting there would be an object to persuade employees in their exercise of their protected rights. See later discussion in the text for more guidance on seminars.

[66] Some surveys, however, may trigger reporting of an information-supplying agreement, if the information gathered concerns the activities of employees or unions in connection with a labor dispute involving the employer. See IM Section 264.006 (Employee Survey). Section 264.006 states: ''During an effort by a union to organize his employees, an employer hired an 'Employee Opinion Survey' firm to take a survey of his employees. Each employee was asked one question: 'Do you feel a union here would help or harm you?' 'Why?' Employees did not put their names on the forms. After the forms were returned, the survey firm tabulated the results. After tabulation, the forms were destroyed by one of the employees of the survey firm. The results were then turned over to management.'' It continues; ''Since these activities were designed to gather information and to supply it to the employer for use in connection with a labor dispute, the survey organization must file reports under the provisions of section 203(b)(2).''

below comments that address specifically the italicized language.

Numerous commenters argued that section 203 should not be read to require reporting unless consultant activities relate to union representation and collective bargaining rights of employees, not other employee rights to engage in ''any protected concerted activity.'' These commenters noted that unlike section 7 of the NLRA, section 203 does not refer to ''concerted activity.''

The Department concurs with the views expressed by these commenters. Section 203 requires reporting when consultants, pursuant to an agreement or arrangement with employers, undertake activities with an object 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.'' Thus, to be reportable, the persuasion must be keyed to organizing and collective bargaining, specifically, and not the larger ''bundle'' of employee rights protected by section 7 of the NLRA. As a result, the Department has revised the instructions in this rule by removing the ''protected concerted activity'' language. To avoid any ambiguity on this point, the Department also has deleted the language ''forming, joining, or assisting'' a union, terms which more closely resemble the text of section 7 of the NLRA.

The Department stresses, however, that the rights expressly protected by section 203 that trigger reporting—relating to union representation and collective bargaining—are not to be narrowly construed and would include, for example, actions regarding strikes over representation issues. Moreover, the reporting obligations imposed by section 203 are not limited to activities involving employers covered by the NLRA, but extend to activities undertaken by a consultant to persuade employees about their union representation and collective bargaining rights under the Railway Labor Act (RLA), or another statute that protects the rights of private sector employees to organize and bargain collectively.

Regarding the use of the term ''influence,'' the Department did not use that term in the proposed instructions based on its connection with the larger universe of NLRA section 7 rights that had been proposed for inclusion in the LMRDA, but was not enacted as part of the statute. Rather, its use was intended to further explain the term ''persuade.'' Moreover, the Department notes that reporting is triggered when the consultant undertakes activities *with an object* to persuade or influence, not merely undertakes activities that could influence employees. Thus, as explained, the Department has clarified that not all personnel policies developed by the consultant would trigger reporting. Rather, only those that were developed with an object to persuade employees.

3. Comments on the Scope of ''Agreement or Arrangement''

A law firm suggested that the proposed rule was overbroad in describing the scope of the terms ''agreement or arrangement'' and ''undertakes activities.'' It cited to the proposed instructions, which state that the term agreement or arrangement ''should be construed broadly and does not need to be in writing'' and that ''a person undertakes activities not only when he/she performs the activity but also when he/she agrees to perform the activity or to have it performed.''

The Department declines to narrow the scope of the terms ''agreement or arrangement'' or ''undertakes activities.'' In this respect, the proposed instructions repeated the existing interpretation regarding the application of the term to oral agreements or arrangements. See prior Form LM–20 Instructions, Part X—Completing the Form LM–20, Item 10 (Terms and Conditions). The use of ''agreement or arrangement'' in the statute, without any limiting language, rather than the use of ''contract,'' or any other arguably less inclusive term, suggests that Congress intended the term to be broadly construed, including any informal understanding between the parties, and regardless of whether the agreement or arrangement is in writing. This broad construct of the term is consistent with the Department's longstanding reading of the statute. See IM Section 260.500 (Written Agreement Not Necessary) (1962) [67] and 261.300 (Oral or Supplementary Agreement or Arrangement) (1961).[68]

Regarding the term ''undertakes,'' the prior instructions also state that the term includes both the actual performance of the activity and the agreement to perform it. See the prior Form LM–20 Instructions, Part II—Who Must File. This is consistent with the concept that reporting is based upon the agreement itself. Moreover, a narrower construction would enable persuaders to delay reporting the agreement or arrangement, beyond the statutory 30-day period, thus thwarting the statute's goal of transparency for workers. See response to comments on issue of timing in Section V.C.1.f.

Multiple commenters inquired about the reporting obligations of employer and trade associations and similar membership organizations composed of employers. In such organizations, employers pay annual dues and receive a variety of services, including persuader services; as well as employee relations videos, webinars and seminars; and materials and newsletters intended to advise member companies how to improve employee relations and lawfully respond to union organizing. Similarly, a human resources association inquired into the coverage of franchisors that provide persuader and similar services as described above for their franchisees.

In response, the Department clarifies that because these organizations agree to provide persuader services to their members, an employer's membership in those organizations constitutes an ''agreement or arrangement.'' The association provides services by virtue of the membership agreement, even if no fee is charged.[69] The Department,

[67] IM Section 260.500 states: ''It is not necessary that an agreement or arrangement be formal or in writing in order to be within the scope of section 203(b). There may be no more than an understanding between an employer and an employer council that reportable services will be performed as necessary by the council. For example, both parties may understand perfectly that if an attempt is made to organize the employees of the employer, the council will provide material assistance (beyond the mere giving of advice) in persuading employees as to the manner of exercising their collective bargaining rights. Where such an understanding exists, both parties are required to report the terms of their arrangement or agreement, the employer's report being required by section 203(a)(4) of the Act. If periodic membership dues are paid by the employer to the association, annual reports would be required from each party for as long as the understanding continued to exist.''

[68] IM Section 261.300 states: ''Any decision or mutual accord between a firm and its attorney that the attorney was to render services which are described by section 203(b) of the Act would be reportable. Such an arrangement may be oral and may supplement a previous arrangement establishing the attorney's relationship with his client.''

[69] See IM Section 260.600 (Associations as Consultants), which states: ''Reports must be filed by an employers council which provides, as a regular service to its members, discussion meetings with the employees of the member employers which are intended to persuade such employees in the exercise of their bargaining rights. A report must be submitted by the council within 30 days after each employer entered into membership with the council, since the discussion meeting service is part of the membership agreements of the council. In addition the council would have to file an annual financial report within 90 days after the end of the council's fiscal year. The employers who are members of the council would also be required to report the arrangement under section 203(a).'' See also *Master Printers of America* v. *Donovan,* 751 F.2d 700 (4th Cir. 1984) (holding that employer association that distributed persuasive newsletters

Continued

however, emphasizes that under the final rule reporting is triggered only where the association engages in persuader activities, not by virtue of the membership agreement itself. This point is specifically included in the instructions to the reporting forms. Further, as discussed earlier in this preamble, the Department has clarified the instructions to address three other points affecting reporting by trade associations. First, the mere distribution of a newsletter addressed to its member-employers does not trigger reporting. Second, sponsoring or hosting a union avoidance seminar will not trigger a reporting obligation for the association. Third, the Department has exempted trade associations from the general requirement that reporting is required by the selection of pre-existing, off-the-shelf persuader materials for an employer. See Section X of the instructions, in Appendix A. However, trade associations that, in whole or part, manage union avoidance or counter-organizing campaigns for member-employers, by engaging in other persuader activities, will be required to report. Therefore, meaningful transparency is ensured while reducing unnecessary burden.

If engaged in reportable persuader activities for an employer, the trade association must file a separate report for each agreement that it enters into with a member-employer to engage in such persuader activities, with the employer filing a separate Form LM–10.

Additionally, in response to comments received, this rule modifies the Form LM–20 and LM–10 instructions to limit reporting for franchisor-franchisee arrangements. Although such franchise relationships would constitute an agreement or arrangement between separate legal entities, the Department considers that this relationship is substantially the same as would exist within a single corporate hierarchy (for which, generally, no reporting would be required for ''in-house'' activities by virtue of section 202(e)). In the Department's view, there would be limited utility in requiring disclosure of these activities by the franchisor, franchisee, or both. Employees and the public would generally know of the relationship between the parties, and they would naturally assume that the franchisee will follow the franchisor's approach to employment matters, including its views on union representation and collective bargaining matters. Limiting reporting in such fashion would therefore reduce burden on employers while not frustrating needed transparency. The Department cautions that this limitation does not affect the obligation of franchisors and franchisees (or their outside consultants) to report persuader agreements or arrangements with such consultants.

4. Comments on the Scope of ''Labor Relations'' Consultant and the Perception by Some Commenters That the Proposed Rule Favors Unions

The consultant reporting requirements of section 203(b) cover ''every person'' who enters into a reportable agreement, and the Department did not propose any changes affecting this coverage. Some commenters, however, suggested that the Department's proposal could be read to require reporting by an employer's in-house labor relations specialists. Others expressed the view that the Department also should have required labor relations consultants who provide ''persuader services'' to unions to report their activities on behalf of the union. Other commenters expressed the view that certain industries would be particularly burdened by the reporting requirements, as proposed, stating that circumstances in these industries demonstrated a central flaw in the proposal. Additionally, other commenters addressed coverage of the reporting requirements to consultants engaging with employers covered by the RLA, as well as those employers and consultants who engage in activities outside of the U.S.

a. Reporting by Employer's ''In-House'' Labor Relations Staff

As stated in Section V.E.4 of this rule, the Department did not propose any substantive changes to the Form LM–10 reporting requirements prescribed by sections 203(a)(1)–(3), and this rule does not implement any changes. The changes concerning those sections relate only to the layout of the form and instructions. Nevertheless, the Department received comments regarding reporting pursuant to section 203(a)(2), expressing concern that employers would have to report certain payments made to their own employees related to persuader activities. In response, the Department clarifies that the changes in this rule do not affect the reporting requirements pursuant to section 203(a)(2), or Part B of the revised Form LM–10, and that employers are not required to file a report covering expenditures made to any regular officer, supervisor, or employee of the employer as compensation for service as a regular officer, supervisor, or employee of such employer. See section 203(e). See also IM section 254.300 (Industrial Relations Counselor) (1960), which states in part, ''an employer will not be required to report in those parts payments made to an industrial relations counselor in his capacity as full-time director of industrial relations.'' Rather, this rule implements changes to the employer reporting requirements pursuant to sections 203(a)(4) and (5), where employers must report on Part C of the revised Form LM–10 concerning agreements or arrangements with consultants and other third-party independent contractors or organizations. The Department also has retained language in the instructions to Form LM–20 to make clear that in-house employer representatives, who qualify as regular officers, supervisors, or employees of the employer, are not required to complete the Form LM–20 report in connection with services rendered to such employer. See LMRDA section 203(e), 29 U.S.C. 433(e).

b. Industry-Specific Reporting Requirements

Several commenters highlighted particular facets of certain industries, such as construction, healthcare, and higher education, as evidence of the particularly burdensome nature of the proposed rule. The Department is unpersuaded that the rule will unreasonably burden any particular industry. With the limited exception of some requirements applicable to trade associations and franchisees, the Department does not see any factual, legal, or policy reason why particular businesses or industries should be treated differently than the norm. See Section V.E.3, concerning trade associations and franchises.

c. Perceived Bias Between Reporting Requirements for Employers and Those for Unions

Several commenters expressed the view that the proposed rule demonstrates that the Department applies the LMRDA more stringently to employers and consultants than to unions. In this regard, commenters expressed two principal arguments. First, the commenters asserted that the proposed rule fails to require consultants that advise unions on representation and collective bargaining matters (or, presumably, to persuade employees on such matters) to report such activities on the Form LM–10 and LM–20, even though unions may be employers and should be required, they assert, to file the same reports required

to employees of member employers must submit consultant reports).

of other employers and consultants. Second, the commenters argued that the proposed rule requires employers on the Form LM–10 to disclose how they conduct their strategy relating to union representation and collective bargaining, while unions are excepted from reporting such information on the labor organization Form LM–2 report due to a confidentiality exception. See the Instructions for the Form LM–2 Labor Organization Annual Report, concerning Procedures for Completing Schedules 14–19.

Regarding the first point, several commenters suggested that the employer-consultant reporting requirements would cover labor organizations that qualify as ''employers'' under the statute. According to these commenters, because unions are often employers, they and their consultants should also be covered by the section 203 reporting requirements. One law firm cited the Department's recent Form LM–30 rulemaking that exempted reporting by union officials for certain payments from unions as similarly contrary to the plain language and structure of the LMRDA. The commenter argued that the Department's justification for persuader reporting, *i.e.,* that it provides employees with essential information, applies equally to unions. A public policy organization similarly argued that the proposed rule should apply to unions and provided examples of union use of consultants from an international union's publicly-disclosed Form LM–2 report. One labor organization concurred with the Department's view in IM section 260.005 (Consultant for Labor Organization) (1961) that labor organizations and their consultants are not covered by section 203, and requested that the Department reiterate this view in this rule.

The Department has previously determined that the term ''employer'' in section 203(a)(1) does not include a ''labor organization,'' and this rule confirms this understanding with respect to the other subsections of 203. See 76 FR 66465–66. Section 260.005 of the IM provides that no report is required for activities performed by an attorney on behalf of a union (distinct from activities performed for an employer), even though the attorney meets the definition of ''labor relations consultants'' under section 3(m), because the only section of the Act which requires reports from labor relations consultants is section 203(b), which provides for reports from every person who has an agreement with an *employer* for certain purposes. In this rule, the Department confirms the interpretation in IM section 260.005, and notes that this position also reduces redundancy in the reporting requirements and burden on unions, as payments from labor organizations to third parties, including consultants, are reportable on the Form LM–2.

Although unions are not required to file the Form LM–10 and their consultants incur no Form LM–20 obligation for providing union representation and collective bargaining services to the union, union members and the public receive information relating to such activities. The Form LM–2, filed by unions that have $250,000 or more in total annual receipts, provides detailed and itemized information, including separately identified disbursements of $5,000 or more, as well as all disbursements to any person or entity receiving a total of $5,000 or more from that union in that fiscal year. Such itemized disclosure reveals the amount and nature of the disbursement, the name and contact information of the recipient, as well as the purpose of the disbursement, in a variety of categories, including representational activities. See Form LM–2 Instructions, Schedules 14 through 19. This information reveals disbursements of $5,000 or more, or totaling more than $5,000 within a year to any person or entity, and the nature and purpose of the payments in a variety of categories, including representational activities. These disbursements would thus include payments to consultants hired by the union.

Additionally, unions must report all disbursements to their own internal staff on the Form LM–2, and they must provide functional reporting that details the percentage of time devoted to a variety of tasks, including organizing and representational activities. See Form LM–2 Instructions, Schedules 11–12 (All Officers and Disbursements to Officers; Disbursements to Employees). Furthermore, union members, for just cause, may view the Form LM–2 report's underlying documents. See section 201(c); 29 U.S.C. 431(c). Employers do not have to provide this level of detail, particularly concerning their internal staff, in this rule or the previous rule, nor are they required to disclose underlying documents.

Regarding the second point, that the confidentiality exception in the Form LM–2 allows union filers to avoid itemized disclosure of certain payments and information that would be required on the Form LM–10, the Department disagrees with the contention that its reporting requirements for persuader agreements should provide a similar exception. In contrast to section 201, which is silent on the question whether Congress intended that unions would have to specifically identify financial expenditures relating to their organizational efforts, the language of section 203 specifically targets reporting by employers and labor relations consultants of their efforts to persuade employees about their representation and collective bargaining rights. Notwithstanding this clear mandate to require such reporting, the Department has fashioned this rule in a manner consistent with the overall intent of Congress to balance the twin goals of labor-management transparency and the prevention of unnecessary intrusion into labor relations. See 74 FR 52405–06. Indeed, as explained further below, the exemptions in sections 203(c), 203(e), and 204 serve largely the same purpose and effect as the confidentiality exception in the Form LM–2 Instructions, with labor organizations reporting much of the same information concerning consultants as do employers. Further, in many cases, labor organizations report greater information than do employers, such as information concerning payments to their in-house staff. For example, unions are mandated to file initial and annual reports by virtue of their status as labor organizations, which disclose almost all payments of $5,000 or more, while employers and consultants are only required to file as a result of entering into particular agreements or arrangements or, for employers, making certain payments or entering into certain transactions. Compare sections 201 and 203.

More specifically, this rule protects the exemptions that promote employer free speech, the attorney-client relationship, and the role of management in labor relations. In the preamble to the 2003 rule that expanded the reporting required on the Form LM–2 report, the Department responded to comments that it was imposing more stringent reporting requirements on unions than for employers by stating: ''[U]nlike the situation with regard to labor organizations, for over 40 years employers and their consultants have been statutorily required (29 U.S.C. 433(a) and (b)) to include particular 'persuader' information in their annual reports, while labor organizations have not. Implementation of this statutory scheme by the Department cannot be considered as evidence of either antiunion or anti-employer bias, and the suggestion of a double standard is unwarranted.'' See 68 FR 58397.

Under the Form LM–2, unions can avoid itemized reporting of certain

confidential information, such as information that would expose the reporting union's prospective organizing strategy. This exception ensures that the reporting requirements do not impair workers' rights to organize and bargain collectively or otherwise ''weaken unions in their role as the bargaining representatives of employees.'' Similarly, too stringent reporting requirements—such as requiring that a report be filed whenever a labor relations consultant enters into an agreement with an employer to provide any services if the agreement is entered into during a union organizing campaign (on the presumption that the agreement had persuasion as an object)—could restrict employer speech or weaken the attorney-client relationship. However, the statute and this rule, as stated, protects against these dangers, while ensuring the protection of workers' rights by providing them with information that enables them to effectively exercise their rights to union representation and collective bargaining. Through these provisions, a generally analogous exemption is maintained. Thus, employers are not required to report agreements with consultants in which the consultant provides a vulnerability assessment or other services, such as employee surveys designed to inform the employer about employee attitudes about workplace issues (as distinct from trying to influence employees against union representation), or a consultant's sales pitch, in anticipation of a union organizing effort, employer counter-organizing, or other union avoidance efforts by the employer.[70] Moreover, other provisions of the Form LM–2 confidentiality exception provide for similar protections as does the LMRDA employer-consultant reporting provisions. For example, section 203(c) provides an exception for representation, while the Form LM–2 protects against itemization of payments that would provide a tactical advantage to certain parties in negotiations; and section 204's exception concerning attorney-client communications is similar to the Form LM–2 exception regarding information pursuant to a settlement that is subject to a confidentiality agreement, or that the union is otherwise prohibited by law from disclosing.

Further, unions can avoid itemized reporting of information in those situations where disclosure would endanger the health or safety of an individual. This provision is in the Form LM–2 instructions because commenters to the proposed changes to the form in 2002 indicated such itemization in certain cases could endanger the lives of foreign labor activists supported by the union. In response, the Department agreed that in ''the extremely rare situation where disclosure would endanger the health or safety of an individual, the information need only be reported in the'' aggregate, not itemized. 68 FR 58387. Concerning this rule, there is no indication in the rulemaking record that the lives of employer or consultant representatives may be endangered. As in all cases, however, individuals with questions or concerns about filing procedures or matters to be reported, including health and safety issues, should contact OLMS for assistance.

d. Railway Labor Act

One commenter expressed the view that the rule is focused only on labor relations governed by the NLRA, as opposed to the RLA or other statutes. The Department rejects this contention, as the text of section 203's reporting obligations concerning the persuading of employees regarding their collective bargaining rights is not limited to the NLRA. Rather, it is written broadly to include, without qualification, the ''right to organize and bargain collectively. . . .'' As such, these collective bargaining rights include the RLA and any other statutes concerning these rights for private-sector employees.

e. Extraterritorial Application

One commenter, an international law firm, contended that persuader activities undertaken outside of the territorial United States need not be reported. The firm cited to *EEOC* v. *Arabian American Oil Co.,* 499 U.S. 244 (1991) for the principle that federal laws do not have extraterritorial effect unless Congress expresses an intention for them to apply to activities occurring outside the U.S. The firm noted that many of the persuader activities addressed in the NPRM can be and are often performed outside the U.S. According to the firm, it is important to consider where the employer and consultant execute their agreement or arrangement, where the consultant performs the persuader activities, and where payment for such activity occurs. Therefore, the firm suggested that the Department state in the LM–10 and LM–20 forms and instructions that the LMRDA's reporting requirements do not apply to activities that take place outside of the U.S. or its territories. The firm provided several hypothetical extraterritorial scenarios in which it believed reporting should not be required.

The Department recognizes the general presumption against reading a statute to have extraterritorial effect, absent congressional intent, as described in *Arabian American Oil Co.* This principle is consistent with the Department's long-standing position with respect to labor organization and union officer reporting under the LMRDA to not regulate the activities of foreign labor organizations carried on under the laws of countries in which they are domiciled or maintain their principal place of business. 29 CFR 451.6(a); IM section 030.670 (Foreign Locals) (1959). The Department, however, does not agree that this principle necessarily extends to the hypothetical factual scenarios posed by the above law firm in its comments. Instead, the Department finds instructive its position with regard to reporting for union officers based outside the U.S.:

> While the Department takes the position that the reporting provisions of the LMRDA are limited to ''activities of persons or organizations within the territorial jurisdiction of the United States,'' its application in any particular case will depend on whether there is a substantial relationship between the transactions in question and United States property or interests which are the objects of the Act's protection.
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> * * * * *
>
> In other words, each case would require evaluation of the substantiality of the official's contacts with the United States and of the impact on United States interests.

IM section 240.200 (Union Officers Based Outside the United States) (1966). The Department believes that a case-by-case evaluation is the better approach in determining the extraterritorial application of section 203's reporting requirements for employers and consultants. This approach more closely aligns with the spirit of the LMRDA's transparency goals while adhering to the presumption against extraterritorial effect. As a result, the Department declines to add specific language to the LM–10 and LM–20 forms and instructions concerning persuader activities performed outside of the U.S.

F. Comments on Revised Forms and Instructions

The Department proposed revisions to the layout and structure of the Form LM–20 and instructions, as well as the Form LM–10 and instructions. See 76 FR 36193–96 and Appendices. As described in Section IV.D of this rule,

[70] If the consultant and an employer reach an agreement by which the consultant will undertake activities with an object to persuade, then that agreement, however, will be reportable.

the Department has largely adopted its proposed revisions to the forms and instructions, unless otherwise noted within that section and the description in Section IV.B of the ''advice'' exemption instructions.

Commenters supportive of this rule, as well as commenters opposed to it, provided feedback and offered suggestions on the proposed LM–20 and LM–10 forms and instructions. Multiple commenters voiced strong support of the revisions to Forms LM–20 and LM–10.

One international union commenter stated that the proposed changes to the Form LM–20 will improve both the quantity of reports received and the quality of the reports that are filed. An additional international union commenter urged the Department to make the Form LM–20 reports available online as soon as possible, so that workers can have the information when it will be relevant to them (*i.e.,* before the conclusion of an organizing campaign).

More specific comments are addressed below:

1. Proposed Form LM–20/Form LM–10, Part C

a. Contact and Identifying Information

In the NPRM, the Department proposed to require employers and consultants to identify their employer identification number (EIN) and that of the other party, if applicable. Several commenters supported the requirement, stating that the EIN will help the Department and the public determine whether employers are complying with their own filing obligations. The Department concurs with these comments and retains this requirement in this rule.

Additionally, the Department proposed that under Item 8 of the Form LM–20 (Person(s) Through Whom Agreement or Arrangement Made) filers would identify the ''prime consultant,'' if the filer is a ''sub-consultant'' who entered into the agreement with the employer as an indirect party. Several commenters offered support for the requirement that the primary consultant be identified on the Form LM–20, stating that it will aid the Department in determining whether additional reports must be filed. One commenter added that disclosure of the primary consultant helps employees better understand the persuader activities at play. The Department concurs with these comments and adopts this proposal in the final rule.

b. Hardship Exemption

In the NPRM, the Department proposed mandatory electronic filing for Form LM–20 and LM–10 filers, with a hardship exemption process modeled after the existing requirement for Form LM–2 labor organization filers. Several international union commenters supported the electronic filing requirement for employer-consultant reporting, stating that it will improve efficiency, facilitate more timely public disclosure, and provide a simpler filing method. One of these international union commenters urged the Department to limit electronic filing hardship exemptions, and stated that the proposed exemption language lacks adequate explanation of the required elements for demonstrating hardship. The commenter suggested that the Department not excuse electronic filing without a ''compelling demonstration of serious technical difficulty, burden, or expense.''

After considering this suggestion regarding filing hardship exemptions, the Department has determined to retain the originally proposed language in order to maintain consistency with other the Form LM–2 hardship exemption guidelines, which have worked well in practice. The Department also notes that Forms LM–20 and LM–10 filers will benefit greatly from OLMS's new, web-based, and free Electronic Forms System (EFS), which, based upon Form LM–2 experience, will greatly ease burdens on filers and reduce hardship applications and exemptions. As such, the Department will not grant a continuing hardship exemption without a ''compelling demonstration of serious technical difficulty, burden, or expense,'' and under no circumstances would the exemption equal or exceed one year. Thus, all filers must file an electronic report via EFS, even if, under this stringent standard, they are granted a continuing hardship exemption of less than one year.

c. Reporting the Terms and Conditions of the Agreement or Arrangement

As with the prior Forms LM–20 and LM–10, the Department proposed that filers must provide a detailed statement concerning the terms and conditions of the persuader agreement or arrangement, including attaching a copy of any written agreement. A law firm representing unions concurred with this requirement, commenting that workers are entitled to know how much consultants charge for the activities they perform.

Some commenters raised questions about the reportability of particular arrangements. For example, a consulting firm raised questions about how to report the drafting of a ''union free'' statement in an employer handbook and how to report the fee associated with the reportable activity when drafting the ''union free'' paragraph may have required comparatively little time. A law firm provided a hypothetical example of an attorney who was primarily retained to represent an employer in an NLRB hearing, but also spent 15 minutes drafting a letter that the Department subsequently determined to be reportable because it was prepared with an object to persuade employees. The commenter queried how the fee for representing the employer in the NLRB hearing should be reported, and if the filer would need to report (in Item 10 of Form LM–20) the terms and conditions of the arrangement to represent the employer in both the hearing and the campaign. The commenter asked if the filer would need to select under Item 11.a all of the services performed for the NLRB hearing, or just the 15 minutes spent drafting the letter for the employer. The commenter also remarked that the form seems to be drafted for labor relations consultants who are retained to perform persuader services, and not for attorneys who provide primarily legal services for the employer. Further, the consulting firm questioned how fees should be reported since the firm does not track the billable hours worked by its attorneys and human resources advisers. The firm also asked if actual monthly membership dues paid by the firm's member companies to the firm would need to be calculated.

The Department reiterates in this rule that filers must provide a detailed explanation, in Item 10 of the Form LM–20 and Item 13.b in the Form LM–10, of the fee arrangement of the agreement or arrangement, as well as all other terms and conditions of the agreement. If the agreement or arrangement provided that the consultant would engage in persuader services, among other services, the filer must explain the full fee arrangement for all services required by the agreement or arrangement and describe fully the persuader services, regardless of the duration or extent of the persuader services in relation to other services provided. Regarding membership organizations, if they and their member-employers are required to file reports, then the membership organizations must explain all fee arrangements such as the details of membership dues. The explanation

must fully describe the nature of the persuader services provided. For example, a filer must plainly state if it was hired to manage a counter-organizing or union-avoidance campaign, to conduct a union avoidance seminar, or to provide assistance to an employer in such a campaign through the persuader activities identified in Form LM–20, Item 11.a or Form LM–10, Item 14.a. The Department added language in the Instructions to clarify this point.

Insofar as non-persuader services are concerned, the filer need provide only a brief, general description of the non-persuader services in Form LM–20, Item 10 or Form LM–10, Item 13.b; a description, such as ''legal services were also provided,'' will suffice.[71] In all cases, however, a copy of any written agreement should be submitted as an attachment to the form. For a reportable union avoidance seminar, this includes a single copy of the registration form and a description of the seminar provided to attendees.

Concerning reporting by business associations and similar employer membership organizations, in response to comments received and as explained in Section V.E.3 of this rule, trade associations are not required to file a report by reason of their membership agreements, or by reason of selecting off-the-shelf persuader materials for employers, or for distributing an employer newsletter to member-employers. Trade associations as a general rule will only be required to report in two situations—where the trade association's employees serve as presenters in union avoidance seminars or where they undertake persuader activities for a particular employer or employers (other than by providing off-the shelf materials to employer-members).

d. Identifying Persuader Activities

In the NPRM, the Department proposed to simplify reporting by allowing filers to describe reportable activities by using a checklist of common persuader and information-supplying activities. Filers are required to identify other persuader activities not appearing on the checklist by providing a narrative description. See proposed Form LM–20, Item 11, and proposed Form LM–10 Item 14, 76 FR 36207–36230.

Several commenters supported the checklist approach on Forms LM–20 and LM–10. These commenters stated that the checklist will allow for more ''detailed'' and ''accurate'' disclosure of persuader activities, and that the checklist will assist filers in accurately completing the forms. Commenters stated that the current forms allow filers to provide only vague descriptions of their activities that are unhelpful to employees who seek information about consultants' participation in counter-organizing campaigns. Another union commenter mentioned firsthand experience with the persuader reporting ''loophole'' used by consultants, and supports the form revisions because filers will be required to identify specific persuader and information-supplying activities, as opposed to only providing general information lacking details on a consultant's actions.

Other commenters voiced opposition to the proposed changes to Forms LM–20 and LM–10, describing them as ''burdensome'' and needing additional clarification. One commenter objected to the new questions about specific types of persuader activities, and, for example, described requiring specific information concerning employees identified for persuasion as ''intrusive.'' Several commenters opposed the addition of the checklist on Forms LM–20 and LM–10. One commenter criticized the list as being ''specifically non-exhaustive.'' Another commenter did not oppose the checklist concept, but suggested that the checklist be limited to items that are currently considered to be persuader activities under the prior interpretation.

One law firm took issue with the checklist item 14.a on Form LM–10, expressing concern that every time an employer revises work rules, the employer would need to guess whether the drafting consultant recommended a course of action for business reasons or to prevent employees from discussing collective bargaining. This commenter also took issue with the fact that the checklists on the proposed forms (Item 11.a on Form LM–20 Item and 14.a on Form LM–10) do not include a reference to the advice exemption. The commenter stated that an employer or consultant might provide ''unnecessary and/or misleading information'' without clarification that the activities need not be reported if they involved advice, as opposed to persuasion. Similarly, the commenter suggested that the information-supplying exemption (regarding information used solely in conjunction with an administrative, arbitral, or judicial proceeding) be added to Items 11.a and 14.a of Forms LM–20 and LM–10, respectively.

In response to these comments on the checklist, the Department retains the checklist format in the final rule, with some modifications of the checklist items, as explained in Section V.E.3. The checklist items were intended to cover the most common categories of persuader activity—not to represent an exhaustive list of all possible persuader services. Further, the checklist is specifically designed to include both direct and indirect persuader activities—not merely direct persuader services. To limit the checklist items to activities that are currently considered persuader activities—namely, only direct persuader activities—would defeat the purpose of this rule. Moreover, the Department disagrees with the suggestion that the list is burdensome or intrusive. Rather, it is less demanding than a narrative description and only focuses on persuader and information-supplying activities (as opposed to advice or other activities). The Department has also clarified in this rule what triggers reporting and how to determine if the consultant undertook activities with the object to persuade employees. See Section IV.B. In particular, the Department has explained the four sub-categories of indirect persuasion; the non-exhaustive list of persuader activities all fit within these four sub-categories or the category of direct persuasion. If an activity fits within those categories and is not on the list, then the filer must check ''Other'' and identify the activity. Filers will also have an opportunity to more fully explain a checked item in a narrative format, if they so choose.

In response to the commenter who suggested that the checklist include a reference to the ''advice'' exemption (and that the information-supplying exemption be added to Items 11.a and 14.a of Forms LM–20 and LM–10, respectively), an activity is not reportable unless it is undertaken by the consultant with an object to persuade employees or supply information to the employer. As such, persuader activities do not overlap with tasks that may constitute advice to the employer. The instructions to each form explain this point clearly, and the forms themselves alert filers that they should ''read the instructions carefully before completing the form.'' See Appendices.

A law firm suggested deleting the phrase ''their right to engage in any protected concerted activity in the workplace'' from Item 11.a in Form LM–20 and Item 14.a in Form LM–10. The

[71] In the example provided by the commenter, the law firm would have to fully report in Form LM–20, Item 10 the details of the agreement to assist the employer in its anti-union efforts by drafting the persuader letter. Regarding the representation at the NLRB hearing, the firm would provide a brief description stating that ''legal services were also provided.'' The firm would also have to report the full details concerning the actual amount paid for all services.

commenter argued that, since this phrase is not in the LMRDA, the Department is unable to require reporting on such activities. As explained in Section V.E.2, the Department has deleted the phrase ''their right to engage in any protected concerted activity in the workplace'' from Item 11.a in Form LM–20 and Item 14.a in Form LM–10.

e. Identifying Information-Supplying Activities

Several commenters offered support for the Department's revisions to the form concerning reporting of information-supplying activities by consultants, with several union commenters offering examples of such activity. One union stated that an attorney-consultant posed as a union member and asked questions of workers. Another union stated that consultants secretly took photos of individuals attending a union meeting attended by potential members. Another union stated that during a union organizing drive the consultant provided ''significant research for management,'' publicized union staff salaries, prepared persuader letters to be sent to employees, and conducted meetings with the employer's staff.

Several commenters contended that the Department's proposal expanded, without explanation, the Department's historical interpretation of the reporting obligations for ''information supplying activities.'' A commenter asserted that the Department's ''silence'' concerning the ''intended scope'' of this reporting area suggests that it is limited to past statements on ''direct surveillance and spying'' by outside consultants. One commenter argued that the Department proposed to expand the reporting requirements beyond exposing ''labor spies'' and surveillance of union activities, meetings, and communications.[72] The commenter suggested that the proposed rule expands such reporting to include ''research from publicly available sources,'' as well as ''general research services, including research within publicly available sources and databases.'' This increased reporting, it contended, is not supported by the statute or its legislative history.

One commenter requested that the Department amend the proposed instructions to make clear that there is no reporting for ''information that is generally available to the public,'' such as ''newspaper clippings, law review articles, LM–2 reports, etc.'' Thus, according to the commenter, it should not be reportable for the consultant to copy such material and supply it to the employer, pursuant to the Form LM–20 or Part C of the Form LM–10, nor should it be reportable on Part D of the Form LM–10 by the employer if it acquires such materials itself.

These commenters have mischaracterized the proposed rule. The revised forms merely provide a format to report consultant activities that have an object to supply information to the employer concerning the activities of employees or a labor organization in connection with a labor dispute. The format requires filers to check boxes indicating if the consultant supplied information obtained from the source categories: (1) Research or investigation concerning employees or labor organizations; (2) supervisors or employer representatives; (3) employees, employee representatives, or union meetings; (4) surveillance of employees or union representatives (video, audio, internet, or in-person). Filers can also check the ''Other'' box and provide information concerning any other information-supplying activity engaged in by the consultant.[73] Contrary to the commenters' conclusions, these categories are consistent with the legislative history and existing Department policy, which are not as limited as suggested by the commenters.

The first category concerns any information about employees or the union involved obtained through research or investigation. In this rule, the Department clarifies that this category would not include the mere provision of public documents, such as publicly-available collective bargaining agreements or LM reports. This is consistent with existing Department policy. See *Employer and Consultant Reporting, Technical Assistance Aid No. 6,* at 12 (1964) where non-reportable activities are discussed (''obtain[ing] copies of a public document and transmit[ting] it to the employer'').[74] While the Department has in the past exempted the provision of such public documents, and continues to do so in this rule, this exemption does not preclude reporting of the provision of private documents or information obtained from private sources. In contrast, expenditures for ''inside'' information concerning the bargaining demands of a union involved in a labor dispute with the employer are reportable. Id. at 8.

The second category concerns information that the consultant helped to acquire, indirectly, through the employer's supervisors and other representatives. For example, the category includes situations where the consultant has coached the supervisors in methods of acquiring information via informal conversations with employees, or undertaken efforts to convince employees to provide the information to the supervisors. Such reporting is consistent with past Department policy, which requires the reporting of agreements in which the consultant handles ''all phases of labor-management relations,'' if such agreements include activities whereby the consultant furnishes the employer, ''*directly or indirectly*'' (italics included in the original), information concerning employees or the union. Id. at 9. Another reportable example, derived from the legislative history, would include designing psychometric employee tests designed to weed out pro-union workers. S. Rep. No. 85–1417, at 255–300 (1958).

The final two categories generally encompass the types of surveillance mentioned by the commenters, as well as other activities that the Department has long considered reportable, such as any attempt to get information directly from the employees or their representatives or through a survey.[75] See IM section 264.006 (Employee Survey); see also *Technical Assistance Aid No. 6,* at 12 (The consultant must report if it convinces ''an employee to report to [the consultant] on the bargaining tactics of a union in the employer's plant''). Thus, the Department did not expand or otherwise alter the existing reporting requirements in this area.

[72] The comment cited IM sections 256.100 (Labor Spying), 257.205 (Example of Consultant ''Spying''), and 257.210 (Surveillance in Connection with Labor Dispute) (1963).

[73] The Department also notes that Form LM–10 filers completing Part D must note the method of obtaining such information in Item 17.d (''Explain fully the circumstances of the expenditure(s).'').

[74] A law firm suggested that ''Research in public or other sources outside the employer concerning the employees or labor organizations'' should be added to the checklist as an ''information-supplying activity.'' As noted in the text, reporting of public documents is not required. With regard to the checklist suggestion, the Department believes that the existing checklist language under the ''Information-Supplying Activities'' heading (''Research or investigation concerning employees or labor organizations'') provides sufficient disclosure for workers and the public.

[75] While the Department has explained in this rule that employee surveys generally do not trigger reporting as persuader activities, see Section IV.B and Section V.E.1.f, these surveys do trigger reporting as information-supplying activities if designed or implemented by consultants to supply information to the employer about a union or employees in conjunction with a labor dispute. Surveys that gather information about the proneness of employees to an organizing effort as part of a vulnerability assessment, entirely outside of a labor dispute, would not trigger reporting.

Of particular concern to one commenter was its utilization of closed circuit television surveillance cameras for customer safety purposes and to detect and stop theft and other types of crimes in grocery stores, warehouses and outside premises. The commenter noted that the surveillance tapes invariably include video footage of employees at work including some who are union members. The commenter suggested that employers who utilize this or similar technology, such as computers, point-of-sale equipment, and the internet, to monitor for this or similar purposes, such as productivity and job performance, should not have to report those types of activities.

In response to these comments, the Department notes first, that neither these commenters nor others have made a persuasive showing for any industry-specific exceptions to the reporting requirements. Further, the installation or use of surveillance technology would not, by itself, be viewed as an information-supplying activity pursuant to the revised Form LM–20 or Part C or D of the revised Form LM–10. To be reportable, the installation or use must have an *object* of supplying or obtaining information about the activities of the employer's employees or a labor organization.[76] Such an object could be discerned from the agreement or arrangement with the consultant, as well as the context surrounding the use of the technology, such as the proximity of its installation to the onset of the labor dispute, the location of the technology in relation to where the employees work or congregate, and whether information concerning the activities of the employees or union is used. However, the installation of additional cameras, as well as the use of camera surveillance or similar technology by a retail store, prior to the onset of a labor dispute, would be a reportable information-supplying activity if the employer or consultant had the object to supply or obtain information about the activities of the employees or labor union and the information was supplied or obtained during a labor dispute.

For purposes of clarity, the Department modified the checklist item to state that the surveillance of employees or union representatives can either be ''electronically or in person,'' rather than ''video, audio, internet, or in person,'' as provided in the NPRM.

[76] See IM section 264.200 (Surveillance ''In Connection'' with Labor Dispute'') (1963).

f. Identifying Targeted Employees

Several commenters stated that filers should not have to provide detailed information about employees that consultants have targeted for persuasion, as proposed in Item 12.a on the Form LM–20, and in Item 14.e. on the Form LM–10. Filers are instructed to identify, by department, job classification(s), work location, and/or shift(s) of the employee(s) who are to be persuaded or concerning whose activities information is to be supplied to the employer. Filers should not identify targeted employees by name.

One commenter asserted that the LMRDA does not authorize the Department to require disclosure of this type of information, and added that the statute only requires filers to identify the persuader agreement and the financial arrangement and payments that were made. The commenter stated that requiring disclosure of information about employees, job titles, and shifts creates privacy and confidentiality concerns. Another commenter asserted that disclosing details about subject employees would reveal privileged information. Another commenter noted that the current Form LM–10 does not require this information, and that the current Form LM–20 only asks the filer to ''identify subject groups of employees.'' Asserting that the Department did not explain why this additional information on subject employees is being requested and that the employers and consultants who file these forms might not know the identity of the targeted employees, the commenter suggested that the Forms LM–20 and LM–10 should be left unchanged. The commenter also inquired into whether another report would be required if a different group of subject employees is identified after the initial report is filed.

In response to these comments, the Department notes that the current Form LM–20 (Item 12.a) already requires filers to identify subject employees. The new form promulgated by this rule simply asks for more detail concerning the department, job classification(s), work location, and/or shift(s) of the employees targeted. See Section IV.D. Section 203(b) requires a ''detailed statement of the terms and conditions of such agreement or arrangement.'' The Secretary has the authority to determine how to capture such a detailed statement on Forms LM–20 and LM–10. Under section 208 of the LMRDA, 29 U.S.C. 438, the Secretary of Labor is authorized to issue, amend, and rescind rules and regulations to implement the LMRDA's reporting provisions.

The information required by the proposal includes details concerning the job classifications of employees targeted for persuasion, so that employees can identify persuader activities that affect them in the workplace. Therefore, the commenter's concern about intruding upon worker's privacy is misplaced. Further, as explained in the burden analysis in Section VI of this rule, filers typically will know the category or type of targeted employees, whether or not this includes all employees in a potential bargaining unit. Additionally, as explained in Section IV.D of this rule, the Department has revised the instructions to simplify the reporting of this information for union avoidance seminars.

Finally, in response to the comment concerning amended reports, an amended report is only required if the information in the submitted report is incorrect, although new reports are required for any agreement or arrangement that has been modified.

2. Comments Received on Other Aspects of Form LM–10

The Department did not propose any substantive changes to the Form LM–10 reporting requirements pursuant to sections 203(a)(1)–(3); and this rule, like the NPRM, only affects the layout of the form and instructions that concern those reporting provisions. The Department, however, received comments expressing concern that under the proposal employers would have to report certain payments made to their own employees related to persuader activities. In response, the Department explicitly states that employers are not required to file a report covering expenditures made to any regular officer, supervisor, or employee of the employer as compensation for service as a regular officer, supervisor, or employee of such employer. See section 203(e), 29 U.S.C. 433(e). See also IM section 254.300 (Industrial Relations Counselor), which states in part, ''an employer will not be required to report in those parts payments made to an industrial relations counselor in his capacity as full-time director of industrial relations.'' Rather, this rule implements changes to the employer reporting requirements pursuant to sections 203(a)(4) and (5), where employers must report on Part C of the revised Form LM–10 concerning agreements or arrangements with consultants and other third-party independent contractors or organizations.

The Department also received comments concerning reporting of expenditures pursuant to section 203(a)(3) on Part D of the revised Form

LM–10. One commenter argued that ''virtually none'' of the expenditures used to commit unfair labor practices committed under the NLRA are currently reported, as can be illustrated by the number of reported cases and settlements by the NLRB concerning such conduct and the lack of reporting with the Department of expenditures for such activity. The commenter praised the design of the revised form for its ease in aiding compliance in this regard, and it also encouraged the Department to coordinate with the NLRB in ensuring reporting pursuant to section 203(a)(3).

A law firm suggested that Part D (Item 17.d) of the proposed Form LM–10 should require a statement of how the expenditure had the object ''to interfere with, restrain or coerce employees in the right to organize and bargain collectively through representatives of their own choosing.'' The commenter stated that requiring the purpose of the expenditure to be reported would create more meaningful disclosure. The commenter also suggested replacing ''and'' with ''and/or,'' to read as follows: ''. . . in the right to organize *and/or* bargain collectively through representatives of their own choosing.'' (Emphasis added.)

Upon consideration of this suggestion, the Department has decided to not modify the proposed Part D of the Form LM–10 instructions. In the Department's view, the language in Part D, Item 17.d of the form and instructions requires filers to fully explain the circumstances of the expenditure, which includes how the expenditure had as an object ''to interfere with, restrain or coerce employees in the right to organize and bargain collectively through representatives of their own choosing.'' More specifically, the form states, ''Explain fully the circumstances of the expenditure(s), including the terms of any oral agreement or understanding pursuant to which they were made.'' The instructions for Item 17.d, further provides that, in part, ''Your explanation must clearly indicate why you must report the expenditure.'' Additionally, the phrase ''organize and bargain collectively'' will be retained without modification, as it derives from the statute. See LMRDA section 203(a)(3), 29 U.S.C. 433(a)(3).

G. Comments Asserting Constitutional Infirmities With Revised Interpretation, Including First Amendment Concerns, and Alleged Inconsistency With Employer Free Speech Rights Under NLRA

The Department received numerous comments contending that the proposed interpretation of the advice exemption would violate employers' free speech rights guaranteed under the First Amendment of the U.S. Constitution or, by extension, section 8(c) of the National Labor Relations Act (NLRA). Many of these comments stated that the proposed reporting requirements would have a ''chilling effect'' on employers' ability to exercise their free speech rights.[77] Several commenters asserted that this chilling effect extends to employees by effectively denying them balanced information on unionization. Some commenters that supported the proposed rule expressed the view that the reporting requirements would not impermissibly burden employer speech, nor conflict with the NLRA. These and related comments are discussed below.

1. Comments Involving First Amendment Concerns

The Department received numerous comments asserting that the Department's proposed rule was constitutionally infirm. Many of these commenters attempted to distinguish the instant rule, with its focus on the required disclosure of indirect persuader activity, from the longstanding interpretation requiring only the reporting of direct persuader activities, an interpretation that has survived constitutional challenges. We discuss below the comments addressing this issue and the judicial precedent that upheld the constitutionality of the Department's interpretation. In short, it is the Department's position that the principles established or applied in those cases provide a firm constitutional basis for this rule, even though they dealt with direct persuader activity. Commenters opposing the rule also took issue with the Department's reliance, as support for the rule, on analogous disclosure regimes under other statutes that have withstood attack on First Amendment grounds. These commenters have failed to persuade the Department that its reliance on these disclosure statutes and precedent was mistaken. Similarly, the Department has not been persuaded by the argument, seemingly without regard to whether the LMRDA requires the disclosure mandated by the rule, that the Government's interest in requiring disclosure is insufficient to survive constitutional scrutiny.

In the NPRM and earlier in the preamble to this rule, the Department explained the legal and policy bases for the rule, and the Department's intent to remedy its longstanding failure to effectuate the purpose of section 203 of the LMRDA—whereby it allowed consultants and employers to withhold information about consultant persuader activities from employees. Such information if known to employees may have affected their assessment of the employer's campaign message against representation and their choice whether to support or oppose representation. Based on the comments received on the NPRM, consistent with the Department's own experience, this information is a necessary component to national labor policy that aims to achieve stability and harmony among employees, employers, and unions. See Sections V.C.1.a, b, c. We have pointed out that employees often are unaware that their employer has hired a consultant to manage its campaign, including scripting the employer's message in speeches, letters, and other documents, and that the consultant is directing the employer's supervisors to provide a uniform position in opposition to representation—which may be contrary to the actual views of individual supervisors—denying the employees information that would reasonably affect their assessment of the employer's message. In this regard, we pointed out the situations in which this information would be particularly important to employees—where a central theme of a company's anti-union message is that the company's supervisors, managers, and employees have functioned as a harmonious family, a relationship that is put in jeopardy by bringing in a union, an outside third-party, or where an employer, while claiming the need for fiscal responsibility, is spending what to some employees may seem like an exorbitant sum to hire a consultant to sway the employees against representation. As we discuss below, the need to provide employees with this essential information, a need met by this rule, demonstrates the compelling governmental interest served by this rule.

Notwithstanding the large number of commenters that hold a contrary view, the Department remains convinced that its interpretation of the Act's reporting requirements, both as proposed and modified in this rule, fully satisfies constitutional requirements.

[77] The Department received a few comments concerning the impact of this rule on the consultants' reporting requirements on the Form LM–21, Receipts and Disbursements Report. According to these commenters, the free speech issues are compounded because an LM–20 filer must also file the annual LM–21, which requires the reporting and public disclosure of clients and fees on account of any labor relations advice or services, even if unrelated to persuader activity. Similar comments were raised in connection with the proposal's impact on attorney-client relationships. See Section V.H.

It is important to emphasize at the outset of the constitutional discussion the purposes served by the disclosure required by the rule, combined with the *absence* from the rule of any constraints on the content, timing, or methods that consultants use in their efforts to shape how employees exercise their rights to union representation and collective bargaining. The Department is obliged under section 203 to require the disclosure of persuader agreements between employers and labor relations consultants whenever the agreement provides for direct or indirect persuader activities to be undertaken by the consultant. In enacting the LMRDA's disclosure requirements, Congress determined that in order to ensure a properly functioning labor-management relations system, employees must be informed if their employer chooses to hire a labor relations consultant to assist it in persuading them about how to exercise their rights under the NLRA.

In the NLRA, Congress chose to regulate directly the conduct of employers and unions by establishing duties upon both and sanctions (for engaging in unfair labor practices). In contrast, under the LMRDA generally, and section 203 specifically, Congress simply chose to require disclosure. This rule implements this congressional disclosure regime mandate. Under the final rule, the Department does not regulate in *any way* the content of any communications by the consultant or the employer, the nature of such communications, or their timing. The Department emphasizes that nothing in this final rule or in section 203 requires employers to file disclosure reports merely by virtue of engaging in speech, or by engaging the services of an attorney or outside consultant. Thus, the rule in no way regulates speech, and, apart from requiring reporting in prescribed situations, it does not regulate conduct at all. Under the proposed rule, as before, a labor relations consultant remains in control of whether he or she engages in persuader activities and thus whether, as a consequence, a report must be filed.

With that factual understanding in place, the constitutional validity of the proposed rule is independently supported by two related lines of First Amendment precedent: Cases sustaining the validity of the direct persuader rule and cases sustaining the validity of disclosure requirements under other statutes against First Amendment attack. We address both here.

a. First Amendment Precedent Sustaining the Direct Persuader Rule

Section 203's reporting requirement has uniformly withstood First Amendment challenges in court.[78] The reporting and disclosure requirements meet the ''exacting scrutiny'' standard applied under governing Supreme Court precedent in those cases because they are tailored to effectuate the purposes of the LMRDA and bear a ''substantial relation'' to ''sufficiently important'' governmental interests. See *Doe* v. *Reed,* 130 S. Ct. 2811, 2818 (2010) (holding that signatory disclosure requirements in state referendum petitions are not unconstitutional because the State has an interest in preserving the integrity of the electoral process). Similarly, these requirements have survived First Amendment associational challenges in federal appellate cases involving LMRDA reporting requirements (discussed below) under the ''deterrent effect'' standard articulated in *Buckley* v. *Valeo,* 424 U.S. 1, 64–74 (1976) (involving disclosure requirements under the Federal Election Campaign Act, in which the court opined that exacting scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure) (citing to *NAACP* v. *Alabama,* 357 U.S. 449, 464–65 (1958), in which the court concluded that the State of Alabama failed to show a controlling justification for the deterrent effect that would result from a statute requiring disclosure of the NAACP membership lists).

In *Donovan* v. *Master Printers Association* 532 F. Supp. 1140, 1148, 1150 (N.D. Ill. 1981), aff'd 699.F2d 370, 371 (7th Cir. 1983) (adopting district court's opinion), cert. denied, 464 U.S. 1040 (1984), the court held that the statute survived both the ''deterrent effect'' and the ''exacting scrutiny'' standards articulated by the Supreme Court in *Buckley* v. *Valeo.* With respect to the deterrent effect standard, the court concluded that the associational claims amounted to nothing more than employers ''fear[ing] criticism of . . . dealing with a labor relations consultant and possible economic harm.'' These failed to ''make out a claim under the first amendment'' because they ''fall far short'' of the concrete harm required by *NAACP* v. *Alabama.* Id. at 1148 & n. 11. Examining both the legislative history of section 203 and the similarities between political and workplace elections, the court concluded that the required disclosure furthers the goals of the statute by exposing the suspect activities of persuaders to the ''disinfectant'' effects of sunlight, id. at 1149 (quoting *Buckley,* 424 U.S. at 67), and by ensuring proper enforcement of the statute, id. at 1150. ''The disclosure permits employees in a labor setting, like voters in an election, to understand the sources of the information being distributed.'' Id.

Similarly, the Fourth Circuit in *Master Printers of America* determined that the challenger had not met its burden of showing that the section 203 disclosures had exposed its members to economic reprisal, loss of employment, threat of physical coercion and other manifestations of public hostility directed at specific individuals necessary to establish a ''deterrent effect'' under *Buckley* v. *Valeo* and *NAACP* v. *Alabama.* 751 F.2d at 704–705. The Fourth Circuit considered both the legislative history of section 203 and the overall goals of the LMRDA, and noted the similarity between union certification and political elections. Based on that analysis, the court concluded that the Department had demonstrated the disclosure required by section 203 served the governmental interest to deter unlawful conduct and to facilitate its interest in securing compliance with federal labor laws. 751 F.2d at 707. The court also identified a third governmental interest in the section 203 disclosure requirement, to maintain ''antiseptic conditions in the labor relations context.'' Id. at n. 8. The Fourth Circuit not only held that the statute serve these important government interests, it acknowledged ''the precision with which section 203(b) has been tailored to serve its purpose.'' Id. at 709.

In *Humphreys,* the Sixth Circuit also rejected First Amendment challenges to the prior interpretation of the disclosure obligation under section 203. The court concluded that the persuader law firm had failed to meet the ''deterrent effect'' standard for demonstrating an unconstitutional violation of its right to freely associate. 755 F. 2d at 1220–1222. The court rejected the persuader's free speech claim, ruling instead that the disclosures ''are unquestionably 'substantially' related to the

[78] See *Humphreys, Hutcheson and Mosely* v. *Donovan,* 755 F. 2d 1211 (6th 1985); *Master Printers of America* v. *Donovan,* 751 F.2d 700 (4th Cir. 1984); *Master Printers Association* v. *Donovan,* 699 F.2d 370, 371 (7th Cir. 1983)), cert. denied, 464 U.S. 1040 (1984) (adopting district court's opinion, 532 F. Supp. 1140 (N.D. Ill. 1981)). See also *Marshall* v. *Stevens People and Friends for Freedom,* 669 F.2d 171, 176–177 (4th Cir. 1981), cert dismissed sub. nom. *J.P. Stevens Employees Education Committee* v. *Donovan,* 455 U.S. 930 (1982), cert. denied sub. nom. *Ramsey* v. *Donovan,* 455 U.S. 940 (1982).

government's compelling interest'' in preventing improper activities in labor-management relations. 755 F. 2d at 1222. In support of that conclusion, the court observed that the required disclosures would help employees exercise their right to support or not support a union, ''enabl[ing] employees in the labor relations setting, like voters in the political arena, to understand the source of the information they are given during the course of a labor election campaign.'' Id.

These cases support the validity of this rule concerning indirect disclosure requirements. While as many commenters have emphasized, these cases involved direct persuader activities by consultants, this difference does not render that precedent inapplicable to the indirect persuader disclosure requirement. As discussed above, like the disclosure requirement for direct persuader activities, the requirement at issue here provides information to employees about the source of statements relevant to a decision about how to vote in a union election. This rule addresses the need to understand the true source of messages that might otherwise appear to have been crafted by an employer's representative (like a supervisor), which, for the reasons stated above, will materially affect the statement's credibility and the context in which it is placed. The Department's final rule provides clear instruction to employers and consultants about the kinds of activities that must be reported and, most importantly, better aligns the reporting obligation with the essential governmental interest to establish an effective and fair national system of labor-management relations. This final proposed rule does not present any circumstance that would alter the constitutional analysis in those precedential cases, which rejected the argument that such reporting was constitutionally infirm.

b. First Amendment Precedent Sustaining Disclosure of the Source of Speech

The constitutional validity of this rule is independently supported by the U.S. Supreme Court's case law sustaining analogous disclosure requirements from other statutory contexts against First Amendment attack. The Department remains of this view after carefully reviewing the comments that have argued otherwise.

In the NPRM, the Department explained that the LMRDA's provisions requiring the disclosure of consultant participation in representation elections have close analogs in Federal election campaign law. 76 FR 36188. The Department cited to *Buckley* v. *Valeo,* 424 U.S. 1, 60–84 (1976), in which the Supreme Court found ''no constitutional infirmities'' in the reporting and disclosure requirements under the Federal Election Campaign Act (FECA). The FECA imposed reporting obligations on political action committees and candidates receiving contributions or making expenditures over a certain threshold. Id. at 62. As the Department explained in the NPRM, 76 FR 36188, *Buckley,* in assessing whether these disclosure requirements served a substantial government interest, noted that FECA's disclosure requirements:

> provide[ ] the electorate with information ''as to where political campaign money comes from and how it is spent by the candidate'' in order to aid the voters in evaluating those who seek Federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

Id. at 66–67, quoting H.R.Rep. No. 92–564, p. 4 (1971). This governmental interest, the Court held, was substantial, and the disclosure requirements were constitutional. Id. at 68.

The NPRM also referenced the recent Supreme Court opinion in *Citizens United* v. *Federal Election Commission,* 558 U.S. 310, 371 (2010), for the proposition that ''disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.'' 76 FR 36188. *Citizens United,* in upholding the disclosure requirements of the statute there at issue, discussed *Buckley* and the Court's later opinion in *McConnell* v. *Federal Election Commission,* 540 U.S. 93 (2003) and instructed that: ''Disclaimer and disclosure requirements may burden the ability to speak, but they . . . ''do not prevent anyone from speaking''; they help citizens to ''make informed choices in the political marketplace.'' 558 U.S. at 367 (internal citations and quotations omitted). The interests served by requiring labor relations consultants to report on persuader services are also congruent with those interests served by disclosure provisions in federal and state laws regulating lobbyists.[79]

As discussed earlier in the preamble, at Section V.C.1.e., the Department acknowledges that the campaign financing and lobbying disclosure regimes differ in some respects from the LMRDA's reporting system. Under the Supreme Court's decisions, it is the source of the speech (the lobbyists or donors) that is important for the public to know in evaluating candidates for public office.

Understood in this regard, the fit between the Court's campaign finance disclosure cases and the speech analysis governing the required disclosures here is sound. Just as the Court in *Citizens United* v. *Federal Election Commission,* 558 U.S. 310, 371 (2010), recognized that ''disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages''—and therefore required that the identity of the donor be disclosed—in the indirect persuader context, the ''voter'' may find it highly material to know who besides the employer is actually speaking by developing the script, the strategy, and other tools of persuasion, and that is why the rule is constitutionally valid.

The Department has fully considered that, in the context of union representation campaigns, one might argue that the consultant's arrangement with the employer is of less interest to

[79] See *United States* v. *Harriss,* 347 U.S. 612, 625–626 (1954) (holding that ''those who for hire attempt to influence legislation'' may be required to disclose the sources and amounts of the funds they receive to undertake lobbying activities); accord, *e.g., Florida League of Prof'l Lobbyists, Inc.* v. *Meggs,* 87 F.3d 457, 460 (11th Cir. 1996) (upholding state lobbyist disclosure statutes in light of state interest in helping citizens ''apprais[e] the integrity and performance of officeholders and candidates, in view of the pressures they face''). See also *National Ass'n of Mfrs.* v. *Taylor,* 582 F.3d 1, 9–10 (D.C. Cir. 2009) (upholding requirement that registered lobbyists disclose the identity of organizations that made monetary contributions and actively participated in or controlled the registrant's lobbying activities); *Kimbell* v. *Hooper,* 164 Vt. 80, 85–88, 665 A.2d 44 (1995) (upholding state lobbying statute against First Amendment challenge); *Gmerek* v. *State Ethics Commission,* 569 Pa. 579, 595, n. 1, 807 A.2d 812, 822 (2002) (dissent) (collects cases in which state lobbying disclosure laws upheld against First Amendment and other challenges). *Harriss,* which serves as a touchstone for later Supreme Court precedent on the constitutionality of disclosure requirements, involved a challenge to a statute that required disclosure by ''any person . . . who by himself, or through any agent, or other person in any manner whatsoever, *directly or indirectly,* solicits, collects, or receives money . . . to be used . . . to influence *directly or indirectly,* the passage or defeat or any legislation.'' (emphasis added). 347 U.S. at 619 (quoting section 307 of the Federal Regulation of Lobbying Act, 60 Stat. 812).

an employee who is evaluating whether to support or oppose a union as his or her representative or to consider the employer's stance in negotiations with a union. The thought might be that the consultant is only operationalizing the employer's position against representation and, whether the consultant is directing the campaign and crafting the message, it remains the employer's message. However, as the legislative history to the LMRDA, certain persuasive comments submitted, and this Department's experience in administering and enforcing the LMRDA make clear, the hiring of a labor relations consultant by an employer, and the consultant's role in the representation campaign, are important factors to be considered by employees as they weigh their choice for or against union representation. In particular, knowledge of the consultant's role will enable employees to more accurately assess the credibility, and put into the proper context, statements that might be made by representatives of the employer. Though the financial and lobbying disclosure statutes occupy a different political sphere than the LMRDA, each seeks to provide pertinent information to voters as they make their choices.

Commenters have raised a variety of related points, none of which the Department finds persuasive. A public policy organization's comments criticized the analogy to campaign disclosure laws; it explained that the Federal Election Campaign Act (FECA) grew out of concerns over voter inequality and the undue influence of special interests. A trade association similarly criticized the Department's position, as, in its view, there is no potential ''influence-peddling'' concerning employer agreements with consultants as there could be with election contributions. In contrast, the interests of the employer and the consultants are ''coterminous and obvious,'' and do not highlight to the employee an outside party that may have divergent interests from the employer. The commenter argued further that FECA involves donations to candidates and not attorney-client relationships. Similarly, a law firm argued that campaign disclosure rules and the LMRDA's reporting requirements would be analogous if there was a requirement for political candidates to disclose the public relations or law firms that they hire. The commenter stated that there is no ''public interest'' in such disclosure because these persons ''are not running for office.''

The Department disagrees with these contentions. First, the benefits to workers, as voters in a representation election, from disclosure about persuader communications are analogous to the benefits from campaign disclosure laws to voters in a political election. And the governmental interest in disclosure in the campaign finance context was recently upheld by the Supreme Court in *Citizens United* against First Amendment attack on the grounds that it ''can provide shareholders and citizens with the *information needed* to hold corporations and elected officials *accountable for their positions* and supporters. This transparency enables the electorate to make *informed decisions and give proper weight to different speakers and message . . .*'' 130 S. Ct. at 916 (emphasis added). Second, while the precise nature of the disclosure and election dynamics are different in this context from the campaign finance context, the fundamental point that transparency facilitates informed decisionmaking does not depend on the particular political setting. In this case, the dynamics of union elections make the use of third parties relevant to the ultimate issue of whether or not employees choose a representative for purposes of collective bargaining. Ultimately, while the dynamics and structures of elections differ, the use of third-party persuaders, whether using direct or indirect contact, is relevant to decisionmaking in union elections.

Other federal statutes center their regulatory focus on reporting and disclosure. The reporting and disclosure requirements in the LMRDA closely resemble those in other statutes, which similarly seek to create a more informed electorate. As discussed in greater detail in Section V.G.1.a and c, courts that have addressed challenges by attorney-consultants that refused altogether to report direct persuader activities or to provide only limited disclosure of other activities after engaging in direct persuasion have pointed out the congruent purposes served by the LMRDA and federal statutes regulating campaign financing and lobbying activities. While direct and indirect persuader activity differ, in that the former involves face-to-face contact between the consultant and the worker while the latter does not, disclosure in both instances serves the same core compelling governmental purpose: Disclosing to workers the source of the persuader campaign and communications, which serves to ''[empower] voters so that they use their vote effectively,'' thus increasing voter competence. See Garrett, Elizabeth, *The William J. Brennan Lecture in Constitutional Law: The Future of Campaign Finance Reform Laws in the Courts and in Congress,* 27 Okla. City U.L. Rev. 665, 675 (2002). ''Just as disclosure in the corporate realm improves confidence in the economic system and demonstrates values undergirding the economy, disclosure can serve the same function in the political realm.'' Id. at 691.

c. Addressing Additional Commenter Points

In *Master Printers of America* and *Humphreys,* the Courts of Appeals for the Fourth and Sixth Circuits focused on four factors in determining whether section 203(b) of the LMRDA violated the respective appellants' free speech rights: (1) The degree of infringement on free speech; (2) the importance of the governmental interest protected by the LMRDA; (3) whether a ''substantial relation'' exists between the governmental interest and the information required to be disclosed; and (4) the closeness of the fit between the LMRDA and the governmental interest it purports to further. *Master Printers of America,* 751 F.2d at 704; *Humphreys,* 755 F.2d at 1220.[80]

With respect to the first factor examined in *Master Printers of America* and *Humphreys,* the degree of infringement on free speech, the Department concludes that any potential reduction in employer speech that might result from the rule, as raised in the comments, is speculative and not of the sort that amounts to a substantial chill on free speech. Commenters have argued that the proposed rule will have a chilling effect on employers and consultants. As several commenters noted, this argument has been raised before—under the LMRDA as well as in analogous contexts—and rejected by all the federal courts of appeals to have decided this question.

Many of the commenters contended that the rule would infringe on First Amendment rights by severely limiting the ability of employers to retain qualified labor attorneys and

[80] The ''outlier'' among the courts of appeal to have considered constitutional issues posed by persuader reporting, *Donovan* v. *Rose Law Firm,* 768 F.2d 964, 975 (8th Cir. 1985), did not concern the obligation of a labor relations consultant to report persuader activities in which the consultant had engaged. Instead, its focus was on whether a consultant that had engaged in persuader activities was required, by virtue of that activity, to disclose information about non-persuader labor relations services provided to other employer clients. The court, concluding that Congress did not intend that consultants would have to report such non-persuader services performed for other clients, did not reach the constitutional issue.

consultants to provide the guidance necessary to lawfully navigate the federal laws on union organizing campaigns. They claimed that the revised interpretation of the advice exemption would lead many labor law firms to cease providing advice to employers due to the new disclosure requirements. As a result, they claimed, employers would be forced to either remain silent or risk inadvertently violating complicated labor laws if they attempt to navigate the organizing effort without adequate guidance. These commenters contended that the rule would essentially deprive employers of their right to counsel with regard to labor relations matters. Some of the commenters asserted that, in effect, employers' ability to communicate with their employees would be impaired, thereby depriving employees of information to balance out the pro-unionization message. For instance, one local chamber of commerce commented that employers, lacking access to legal advice, would inadvertently make statements or engage in conduct that results in unfair labor practices, which in turn may result in intervention by the NLRB to compel recognition of and bargaining with the labor union. Other commenters, including a law firm and a trade association, argued that employers cannot be expected to know and understand the complexities involved in labor relations laws. Therefore, according to several commenters, this rule would result in more costly re-run elections, NLRB investigations, hearings, bargaining orders, delays, interference charges, and litigation.

The Department is not persuaded by these arguments. The Supreme Court rejected a similar contention under the federal lobbying act, holding that it would not strike down a statute based on speculative arguments, particularly those relating to assertions that amount to ''self-censorship.'' The Court stated:

> Hypothetical borderline situations are conjured up in which such persons choose to remain silent because of fear of possible prosecution for failure to comply with the Act. Our narrow construction of the Act, precluding as it does reasonable fears, is calculated to avoid such restraint. But, even assuming some such deterrent effect, the restraint is at most an indirect one resulting from self-censorship, comparable in many ways to the restraint resulting from criminal libel laws. The hazard of such restraint is too remote to require striking down a statute which on its face is otherwise plainly within the area of congressional power and is designed to safeguard a vital national interest.

United States v. *Harriss,* 347 U.S. 612, 626 (1954). Moreover, the courts in *Master Printers of America* and *Humphreys* determined that a showing of threats, harassment, or reprisals to specific individuals must be shown to prove that government regulation will substantially chill free speech. *Master Printers of America,* 751 F.2d at 704; *Humphreys,* 755 F.2d at 1220. The courts were able to weigh proffered evidence in reaching their conclusions. Neither the Department nor the commenters, of course, have at this stage of the final rule the benefit of any actual evidence to review the effects of requiring the disclosure of indirect persuader activities.

Earlier in the preamble, at Section V.C.2.d, we discussed our strong skepticism about the claims that this rule would discourage employers from continuing to rely on labor relations consultants in contesting union representation efforts or that it would drive some consultants out of the industry because they would have to report indirect persuader activities. In our view, given the importance that most employers attach to defeating union representation, the use of labor relations consultants will remain prevalent. Thus, we do not foresee a decline in industry business. While, as noted, an incidental effect of disclosure may be to increase competition within the consultant industry—as the particular persuader activities of consultants, along with the cost of their services, become better known, this informational gain can hardly be characterized as chilling. Further, while we recognize that the predictive value of information about experience under the Department's Form LM–2, required by the Department's LMRDA regulations—where unions are required to report particular information on their payments of $5,000 or more per year to attorneys, consultants, and others—has some limitations, the Department has seen no drop off in the reported amounts expended by unions on such matters between 2005 (the first year in which unions had to report such payments) and 2014 (the most recent complete year for which such reports are available). Nor has the Department received complaints that such disclosure has hampered unions in obtaining the services of attorneys or others. See 68 FR 58374, 58391 (Oct. 8, 2003) (noting that a union must report the recipient's name and address, the nature of its business, the purpose or reason for making the disbursement, the amount of the disbursement, and its date).

The principles provided in *Harriss, Master Printers of America,* and *Humphreys* lead the Department to conclude that the commenters' contentions are too speculative to set aside or substantially modify the proposed reporting requirements. See also *Donovan* v. *Master Printers Association,* 532 F. Supp. at 1148–49. Indeed, in some respects, the commenters have bootstrapped their argument on the Department's mistaken view that section 203 could be effectuated without requiring reporting by employers and consultants where the consultant agreed to stay behind the scenes. Their position at bottom is that the disclosure prescribed by Congress in enacting the LMRDA, which the Department proposed in the NPRM and requires under the final rule, will impose a filing burden on them and, perhaps, make their jobs a little more difficult because the consultant's role in persuading employees will become publicly known. But their position—from a constitutional vantage—is no stronger under the final rule than it was under the prior interpretation. The information to be reported—the agreement and the particular persuader activities to be undertaken—are materially the same, whether the agreement provides for direct communication by the consultant with the employees or the consultant conducts the organizing campaign behind the scenes.

The Department is not persuaded that the revised interpretation will substantially chill employers from retaining counsel. As stated earlier, reporting is only triggered when a law firm chooses to perform a persuader activity. Thus, a law firm exclusively providing advice, representation or other legal services is under no obligation to file a report, eliminating any concerns that the law firm or the employer may have with regard to disclosing their relationship. The Department rejects the contention that the revised interpretation, or the statute itself, limits the ability of an employer to retain counsel. Moreover, the rule provides guidance that further clarifies the kinds of direct and indirect activities that trigger reporting, minimizing the possibility that reporting will be triggered by an inadvertent action by the lawyer or vague boundaries between reportable and non-reportable activities. See Section IV.B and Section V.E.1. Law firms will know the test for determining when reporting is triggered and when to apply it, and that legal services themselves do not trigger reporting. Thus, as stated, there is no limitation on the ability of an attorney to provide persuader services in addition to legal services, by virtue of the statute or this

rule, because an attorney is not required to disclose any privileged communication nor is the attorney encumbered by any ethical restrictions that prevent disclosure. See Section V.H.

The commenters have not provided any substantive indication that all, some, or even any law firms would cease representing clients as a result of the broadened reporting requirements under the final rule, or even that they would cease to provide persuader services in addition to legal services. Even assuming that some labor law firms might decline to offer persuader services, in addition to advising or representing certain employers, due to required disclosure, the commenters do not adequately explain why employers would be unable to retain competing firms that offer persuader services.

Indeed, one law firm pointed out in its comments that an employer must weigh a number of different factors in deciding whether or not to communicate with its employees regarding unionization. Which factors are assessed and how much weight to be given to each are entirely speculative because these considerations will surely vary depending on the circumstances. As the Supreme Court concluded, the possibility of significant self-restraint, as the commenters maintained is the case here, is simply too remote for the Department to justify rejecting the proposed rule, especially given the important purposes served by disclosure. See *Harriss,* 347 U.S. at 626.

On the present rulemaking record, we see no reasonable probability that the fears raised by commenters will be realized. If questions arise about perceived infringement of an employer's rights, the Department will answer these queries on a case-by-case basis through interpretive letters or other compliance assistance activities.[81]

In addition, the potential effects on expressive activity discussed in the comments do not constitute the sort of threat of physical harm and loss of employment that would give rise to a finding of a substantial chill on free speech. See *Master Printers of America,* 751 F.2d. at 704 (citing *NAACP* v. *Alabama,* 357 U.S. 449, 462–63 (1958)). In *Humphreys,* for example, the Sixth Circuit reviewed the evidence provided by the plaintiff-appellant law firm to determine whether the alleged infringement on First Amendment rights would result in ''threats, harassment, or reprisals.'' In an affidavit, the appellant had claimed that if it were compelled to report the required information, the firm's disclosed clients would suffer reprisals and retaliation from private parties and government officials. The appellant claimed that a labor union would use the information to embarrass the firm's clients, to compile an ''enemies list,'' and to urge its members to boycott the publicly-disclosed firms. The appellant also asserted that the Department of Labor might harass the disclosed clients. The Court of Appeals, however, found these allegations to be speculative and held that the reporting requirements in section 203(b) do not substantially burden the appellant's First Amendment rights. *Humphreys,* 755 F.2d at 1220–21; see also *Citizens United,* 558 U.S. at 370 (''Citizens United, however, has offered no evidence that its members may face similar threats or reprisals. To the contrary, Citizens United has been disclosing its donors for years and has identified no instance of harassment or retaliation'').

The types of infringement speculated upon by the commenters, such as the rule's effect on the ability of employers to retain counsel and the potential for employers to ''muzzle'' or ''gag'' themselves, do not constitute the sort of infringement that would result in physical threats, harassment, or reprisals that are necessary for a finding of an impermissible chilling effect. For example, a local chamber of commerce submitted comments contending that employers, fearing the risk of committing unfair labor practices, would alternatively simply remain neutral during a union organizing campaign. A few commenters stated that union organizers would use the financial information required to be disclosed under the revised LM–10, LM–20, and LM–21 forms as more ammunition in their organizing campaigns. Even assuming this holds true, however, such tactics would not rise to the level of unconstitutional infringement.

Similarly, as mentioned above, some commenters suggested that the rule effectively deprives employees of balanced information, denying them the full exercise of their speech rights under the NLRA. The Department disagrees with this position, considering that a primary purpose of this rule is to provide employees with more information regarding the role of consultants in anti-union campaigns, without chilling the speech of employers. Moreover, as set out in *Master Printers of America,* 751 F.2d at 710, disclosure laws unlike other types of restrictive laws actually promote speech by making more information available to the public, thereby bolstering the ''marketplace of ideas.'' The court in *Humphreys* similarly determined that the ''disclosure requirements aid employees in understanding the source of the information they receive.'' 755 F.2d at 1222.

The second factor examined in *Master Printers of America* and *Humphreys* involves the importance of the governmental interest protected by the LMRDA. See Sections III.B.2 and V.C (Policy Justification for Revised Interpretation). The governmental interests that were considered in *Humphreys* and *Master Printers of America* as constitutionally appropriate bases for persuader reporting continue to undergird the interpretation embodied in this final rule. In *Humphreys,* 755 F.2d at 1221–22, the Sixth Circuit, focusing on the government's compelling interest in maintaining harmonious labor relations, determined that this interest justified the burden on the appellant's exercise of its First Amendment rights. The court explained that reporting persuader activities ''aid[s] employees in understanding the source of the information they receive,'' and that this information would ''enable employees in the labor relations setting, like voters in the political arena, to understand the source of the information they are given during the course of a labor election campaign.'' Id. at 1222. In *Master Printers of America,* 751 F.2d at 707, the Court of Appeals, after an extensive review of the LMRDA's legislative history, acknowledged that section 203 was enacted to serve two compelling governmental interests: To deter actual corruption in the labor management field and to bolster the government's ability to investigate in order to act and protect its legitimate and vital interests in maintaining sound and harmonious labor relations. As explained earlier in the preamble, the final rule, by increasing transparency and fairness during the organizing process, promotes the government's compelling interest in ensuring that employees receive information about persuader activities

[81] The Department declines in this final rule to respond specifically to comments that pose hypothetical situations in an attempt to illustrate how application of the final rule would violate employers' free speech rights. The Department is guided by the *Harriss* decision, in which the Supreme Court discounted hypothetical borderline situations as the basis upon which to evaluate a general challenge to a statute's constitutionality. Id. The Eleventh Circuit answered a similar question in *Meggs,* 87 F.3d at 461. Citing to *Harriss,* the *Meggs* court established that it was unwilling to accept the appellant's hypothesized, fact-specific worst-case scenarios. 87 F.3d 461. See *Center for Competitive Politics* v. *Harris,* 784 F.3d 1307, 1317 (9th Cir. 2015), petition for cert. docketed, 84 U.S.L.W. 3080 (U.S. Aug. 3, 2015) (No. 15–152).

that is necessary for them to assess anti-union messages directed at them so they may make informed decisions about union representation and collective bargaining, and in bolstering the government's investigative ability, and maintaining stable and harmonious labor relations. See Sections III B.3–.5, and V.C. The position taken in this final rule is fully justified. It is supported not only by the language of section 203 and its legislative history, but also the lessons drawn by the Department from its own administration of the LMRDA and the substantial research findings on the widespread, contemporary use of labor relations consultants to influence employees in the exercise of their representation and collective bargaining rights. See *National Association of Manufacturers* v. *Taylor,* 582 F.3d 1, 16 (D.C. Cir. 2009) (state and federal disclosure laws may be justified upon a legislative determination that good government requires transparency, no empirical showing is required); see also *Edwards* v. *District of Columbia,* 755 F.3d 996, 1005 (D.C. Cir. 2014) (noting that unlike the regulation there at issue, a constitutional challenge will fail where the regulation is supported by a legislative record and contemporary accounts that explain ''the ills at which the law was aimed'').

With respect to the third factor—whether there is a substantial relationship between the governmental interests and the information to be disclosed—the *Master Printers of America* court understood that disclosure requirements are an effective means of protecting employee rights under the NLRA. The court further reasoned that the LMRDA's scheme ensures that the Department has the means to gather data and detect violations. In *Humphreys,* the Sixth Circuit also concluded that the requirements in section 203 are substantially related to compelling governmental interests: To assist employees in understanding the source of the information they receive, to discourage unlawful labor practices, reduce the appearance of impropriety, and supply information to the Department that will aid in detecting violations. In contrast to the court's findings, one commenter claimed that most of the information required to be reported under the final rule is unlikely to have any relation to persuader activity, resulting in a false and misleading picture of employers' practices and intentions with respect to labor relations. The Department disagrees. The final rule will help employees better understand the source of information that is designed to persuade them in exercising their union representation and collective bargaining rights, as it will reveal that the source of the persuader materials is an anti-union campaign managed by an outsider. See *Evergreen Association, Inc.* v. *City of New York,* 740 F.3d 233, 247–248 (2d Cir. 2014), cert. denied, *Pregnancy Care Center of New York* v. *City of New York,* 135 S. Ct. 435 (U.S. 2014) (the government has a strong ''interest in informing consumers and combating misinformation'').[82] Further, the Department's experience administering the persuader reporting requirements indicates that the amended Forms LM–10 and LM–20 will provide more information to employees. The Form LM–10 and LM–20 provide transparency as to the terms of the agreement between the employer and the consultant. A properly completed form will include the fees the employer will pay the consultant and the services the consultant will perform. In many senses, this data is neutral. Depending on the worker reading the report, the disclosures may benefit a union attempting to organize or, on the other hand, it may benefit an employer seeking to avoid a union. Despite the uncertainty of predicting how the worker will interpret and react to the disclosed information, the information is generally the type that an involved worker will consider relevant.

A worker who is weighing the pros and cons of unionization, for example, will be interested in knowing the depth of his or her employer's attitude toward union representation. One employer may hire a consultant for $85,000 per year. Another may choose to pay as little as $25 an hour. It will, of course, already be clear to the employee that both employers oppose unionization. But the amount of money an employer actually invests in the endeavor is nevertheless informative. The axiom that actions speak louder than words applies here. One worker may reasonably conclude that an employer willing to commit substantial sums to avoid a union, will enter into a bargaining relationship with greater reluctance and prove to be a more intransigent negotiator. That worker may deem unionization too difficult a path for him or her to support. Conversely, a different worker, one who believes that collective bargaining is a zero sum game, may infer that the employer correctly understands that it might have to make major concessions at the bargaining table. This worker may conclude that union representation has potential for substantial increases in compensation and benefits. Whichever conclusion is reached, both workers will consider the information valuable in making their determination.

The increased transparency, by requiring that both direct and indirect activities be reported, will also serve a prophylactic effect, discouraging and preventing corruption and other improprieties in the midst of organizing campaigns or collective bargaining controversy. Moreover, given that the proposed rule, adopted with some modification in the final rule, better effectuates the statute's mandate that both direct and indirect persuader activity be reported, there is no merit to the suggestion that the link between the purposes served by disclosure and the particular information to be disclosed is less strong than the link approved in *Humphreys* and *Master Printers of America.*[83]

The fourth factor examined in *Master Printers of America* and *Humphreys* involves the closeness of the fit between section 203 and the governmental interest it purports to further. One commenter, a law firm association, averred that the statute must be narrowly construed because it places a burden on free expression. A law firm commenter stated that the Department's proposed interpretation is not narrowly tailored to a compelling purpose. The firm analogized the Department's rulemaking with what the City of Chicago attempted to accomplish in *Police Dep't of City of Chicago* v. *Moseley,* 408 U.S. 92 (1972), where the city enacted an ordinance that prohibited certain types of picketing or demonstrating within 150 feet of a secondary school. The firm also cited to the Supreme Court's decision in *Sorrell* v. *IMS Health, Inc.,* 131 S. Ct. 2653 (2011). The circumstances in those cases are distinct from those posed by this rule. While the law firm suggests, in effect, that the Department cannot require employer consultants to disclose activities without requiring the same for consultants providing similar assistance

[82] In that case, the court of appeals upheld a state law requiring that a pregnancy services center publicly disclose, by postings and otherwise, whether it had a licensed medical provider, information which the state deemed important for consumers to know upfront when considering whether to use the provider's services.

[83] Following the Court's opinions in *Buckley* and *Citizens United* upholding disclosure requirements of the statutes there at issue, litigants have continued to assert, without success, in various statutory contexts, that disclosure provisions impede the exercise of their First Amendment rights. See cases cited in this section of the preamble. These decisions indicate that the tests applied in *Masters Printers of America* and *Humphreys,* and the results reached there, fully accord with more recent precedent.

to labor unions, the law firm ignores that the LMRDA contains separate reporting requirements for consultants, employers, and unions and that the proposed regulation conforms to these statutory requirements. Even assuming that the regulation affects consultant free speech rights, it does so in a way that permissibly advances a substantial government interest—a critical factor which the Supreme Court found wanting in *Moseley* and *Sorrell.*

The analysis in *Master Printers of America* is more analogous to the present circumstances than the cases relied upon by the commenters. In examining whether section 203 of the LMRDA is carefully tailored to achieve its purpose, the Fourth Circuit emphasized that Congress foresaw that full disclosure of persuader activities was needed to achieve the Act's purposes. *Master Printers of America,* 751 F.2d at 708. In the court's view, full financial disclosure is appropriate. The court also noted that it was Congress's intent to require the disclosure of a wide-ranging number of employers and activities, even if it meant reporting activities that were not improper. Id. With these legislative aims in mind, the court determined that section 203(b) is tailored with ''precision'' to serve its purpose. The revised interpretation of the advice exemption indeed broadens the scope of reporting in sections 203(a)(4) and 203(b), but the broadened disclosure requirements are still within the confines of Congress's goals when it enacted the LMRDA. The Department believes that the final rule more closely aligns section 203 with the legislative aim of full, detailed exposure of persuader activities, direct or indirect. It ensures that workers know the source of all materials provided by outside parties and generally promotes the various harmonious aspects of labor-management relations, not just the limited circumstances involving direct persuasion by consultants. The Department thus finds no reason to believe that revising the interpretation of the advice exemption, even though it broadens the scope of what was previously required to be reported, in any way renders section 203 overbroad. Congress established a comprehensive scheme to ensure transparency in the field of labor-management relations; it created various reporting and disclosure requirements on the parties engaged in union representation campaigns and collective bargaining, including the disclosure of agreements between employers and labor relations consultants, in the limited situations where the consultant agrees to undertake persuader activities.

The Department's final rule is the least restrictive means by which this important governmental interest can be achieved. Indeed, commenters have failed to articulate an alternative approach that would effectuate the congressional determination that an effective and fair labor-management relations system requires the reporting of both direct and indirect persuader activities. Cf. *Dole* v. *Shenandoah Baptist Church,* 899 F.2d 1389, 1398 (4th Cir. 1990) (recognizing that even restrictions on conduct that impair the exercise of religion may constitutionally be imposed where necessary to establish uniform requirements under the Fair Labor Standards Act). In sum, the Department believes section 203, as interpreted in this final rule, is narrowly and constitutionally tailored to achieve its purpose and will not unlawfully infringe on employers' or consultants' free speech rights under the First Amendment.[84]

2. Comments on Revised Interpretation's Impact on NLRA Section 8(c)

Many of the commenters contended that the Department's proposed interpretation of the advice exemption violates employers' free speech rights under section 8(c) of the NLRA. This provision guarantees that the ''expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of [the NLRA], if such expression contains no threat of reprisal or force or promise of benefit.'' 29 U.S.C. 158(c).

In support of their argument, the commenters cited primarily to three Supreme Court cases: *Chamber of Commerce* v. *Brown,* 554 U.S. 60 (2008); *NLRB* v. *Gissel Packing Co.,* 395 U.S. 575 (1969); and *Linn* v. *United Plant Guard Workers of America, Local 114,* 383 U.S. 53 (1966). These cases are referenced for the proposition that the enactment of section 8(c) manifested a congressional intent to encourage free debate and a policy judgment ''favoring uninhibited, robust, and wide-open debate in labor disputes.'' *Brown,* 554 U.S. at 67–68. In essence, the commenters asserted that the proposed rule either violates section 8(c) outright or runs counter to its purpose by limiting the opportunity for uninhibited, robust debate, or both. Implementation of the proposed rule would, according to one local chamber of commerce, eviscerate section 8(c) by virtually eliminating the reasonable opportunity for employers to communicate with their employees about union organizing campaign issues. Another commenter, a national law firm, posed the question of how an employer's section 8(c) rights can even be exercised when the employer is restricted from accessing competent legal counsel to ensure it does not inadvertently make statements deemed to be a threat or promise.[85] The Department disagrees with these challenges to the proposed rule; the disclosure required by this rule in no way inhibits ''robust and wide-open debate'' over union representation and collective bargaining issues. Both the proposed and final rules expressly state that a consultant's guidance about whether a statement constitutes a threat or promise does not trigger reporting.

The Department notes first that section 203(f) states that ''[n]othing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 8(c) of the National Labor Relations Act, as amended.'' 29 U.S.C. 433(f). One law firm commented that section 203(f) of the LMRDA obligates the Department to uphold employers' section 8(c) rights. Notwithstanding our obligations under section 203(f), the Department believes that the commenters' reliance on section 8(c) in this context is misplaced. Since 1963, the Department, through its regulations, has unequivocally stated that while nothing contained in section 203 of the LMRDA shall be construed to amend or modify the rights protected by section 8(c) of the NLRA, activities protected by section 8(c) are not exempted from the

[84] In addition to raising the free speech concerns, a few commenters objected on the grounds that the rule violates employers' freedom of association guaranteed under the First Amendment. The Department disagrees that the revised interpretation of the advice exemption infringes on employers' associational rights. The courts in *Buckley,* 424 U.S. at 657, *Master Printers of America,* 751 F.2d at 704, and *Humphreys,* 755 F.2d at 1219, addressed both free speech and associational rights using the same principles and analytical framework. Therefore, for the same reasons articulated above with respect to the free speech issue, the Department concludes that the rule does not infringe on employers' First Amendment associational rights.

[85] In contrast, one labor organization submitted comments pointing out that employers' section 8(c) free speech rights must be balanced against employees' section 7 rights to associate freely. The labor organization cited to the Supreme Court's reasoning in *Gissel Packing Co.,* 395 U.S. at 617, that any balancing of these rights ''must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear.'' Neither the proposed nor final rule alters the balance struck under the NLRA.

reporting requirements of section 203(a) of the LMRDA, and, if otherwise subject to such reporting requirements, are required to be reported. 29 CFR 405.7. With respect to the reporting obligations of labor relations consultants, the Department's regulations are also unequivocal. Although nothing contained in section 203 of the LMRDA shall be construed to amend or modify the rights protected by section 8(c) of the NLRA, activities protected by section 8(c) are not for that reason exempted from the reporting requirements of the LMRDA, and, if otherwise subject to those reporting requirements, are required to be reported. Therefore, information required to be included in Forms LM–20 and 21 must be reported regardless of whether that information relates to activities which are protected by section 8(c) of the NLRA. See 29 CFR 405.7; 29 CFR 406.6.

Sections 405.7 and 406.6 make clear that persuader activities, even if they constitute protected speech under section 8(c) of the NLRA, are nevertheless subject to the reporting and disclosure requirements of sections 203(a)(4) and 203(b) of the LMRDA. Moreover, the Department in this rule does not encourage workers to take any position concerning the exercise of their rights to organize and bargain collectively, nor does it take any position concerning whether or how an employer should exercise its rights under section 8(c). Rather, as stated, the Department contends that this rule promotes peaceful and stable labor relations, in part through disclosure to workers of information that assists them in making decisions regarding their rights, while simultaneously protecting the section 8(c) rights of employers. The Department thus concludes that this final rule, which merely interprets section 203 of the LMRDA and imposes broader reporting and disclosure requirements, does not violate employers' rights of expression under section 8(c) of the NLRA.

3. Comments Alleging Vagueness of Revised Interpretation

The Department received a few comments contending that the final rule would render section 203 impermissibly vague, especially in light of the possibility for criminal penalties. For example, one trade association claimed that the rule would sacrifice the clarity of the previous interpretation of the advice exemption in favor of an unworkable redefinition. Another commenter argued that the proposal is unconstitutionally vague because the disclosure requirements are not carefully tailored under any reasonable definition of ''persuasion activity.'' The commenters relied on several federal cases in support of their argument that the final rule is too vague. However, almost all of these commenters cited to the Supreme Court opinion in *Grayned* v. *City of Rockford,* 408 U.S. 104 (1972), which addresses this issue as follows:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute 'abut(s) upon sensitive areas of basic First Amendment freedoms,' it 'operates to inhibit the exercise of (those) freedoms.' Uncertain meanings inevitably lead citizens to '' 'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked.' ''

Id. at 108–09 (citations omitted).

As discussed below, the final rule provides clear guidance to filers about their reporting obligations, easily meeting the *Grayned* standard for statutes and regulations. Essentially, the commenters' vagueness argument—that is, the apparent difficulty in categorizing an activity as nonreportable advice or reportable persuasion—boils down to their claimed confusion regarding when and how to apply the rule in indirect persuasion situations. However, as the Department explained above, reporting is triggered when a consultant enters into an agreement with an employer under which the consultant undertakes activities that have an object to persuade employees about whether and how they should exercise their representation and collective bargaining rights. See Section IV.B and Section V.E.1. While the scope of reporting under the proposed and final rule is broader than under the Department's prior interpretation, the trigger for reporting remains the same—the object for which the activity is undertaken. Further, contrary to the view of some commenters, the Department believes that the term ''persuade'' has an easy to understand meaning, and the term ''object,'' like similar terms such as ''intent'' or ''purpose,'' is measured by objective factors that consultants and employers can take into account in guiding their actions. See *Master Printers of America,* 751 F.2d at 710–12; see also *Yamada* v. *Snipes,* 786 F.3d 1182, 1187–1188 (9th Cir. 2015), petition for cert. docketed, 84 U.S.L.W. 3092 (U.S. Aug. 18, 2015) (No. 15–215) (ambiguity should not be allowed to chill protected speech, but ''perfect clarity and precise guidance'' are not required for a disclosure requirement to survive scrutiny). The proposed rule included checklists and examples to assist filers in identifying reportable activities, and the final rule provides additional clarity by grouping the list of indirect persuader activities from the NPRM into four specific categories: the directing or coordinating of supervisors and other employer representatives; the preparation of persuader materials; the conducting of union avoidance seminars; and the development and implementation of personnel policies and actions. See discussion above at Section IV.B. In short, the final rule adopts clear reporting requirements, eliminating any of the concerns articulated in *Grayned.*

H. Comments Alleging Conflict Between Revised Interpretation and Attorney-Client Privilege and Attorney's Duty To Protect Confidential Information

1. Comments Involving the Attorney-Client Privilege and LMRDA Section 204

In the NPRM, the Department stated that section 204 of the LMRDA exempts attorneys from reporting any information protected by the attorney-client privilege. 76 FR 36192. By this provision, Congress intended to afford to attorneys the same protection as that provided in the common-law attorney-client privilege, which protects from disclosure communications made in confidence between a client seeking legal counsel and an attorney. The Department explained that as a general rule information such as the fact of legal consultation, clients' identities, attorney's fees, and the scope and nature of the employment are not deemed privileged. The Department further explained that the section 204 privilege is operative only after the attorney has engaged in persuader activity. Therefore, attorneys who engage in persuader activity must file the Form LM–20, which requires information about the fact of the persuader agreement with an employer-client (including the parties' fee arrangements), the client's identity, and the scope and nature of the

employment.[86] The Department further noted, consistent with its prior interpretation, that, to the extent that an attorney must report his or her agreement or arrangement with an employer, any privileged communications are protected from disclosure. Id. In support of its position, the Department cited to the Sixth Circuit's opinion in *Humphreys, Hutcheson and Moseley* v. *Donovan,* 755 F.2d 1211, 1216 (6th Cir. 1985) and the Restatement (Third) of the Law Governing Lawyers section 69. Id.

Several commenters rejected the analysis in the NPRM, maintaining that the proposed rule was inconsistent with section 204 by requiring the disclosure of confidential client information protected by the attorney-client privilege. The American Bar Association (ABA) stated its view that ''[b]y 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 legal services relating to the clients' '' persuader activities, the proposed rule would ''seriously undermine the confidential client-lawyer relationship.'' Characterizing these reporting requirements as ''unfair reporting burdens,'' the ABA stated that the rule could discourage employers ''from seeking the expert legal representation that they need, thereby chilling their ability to obtain counsel.'' [87] Another commenter, a trade organization for the construction industry, stated that the rule would require employers and their clients to reveal, for public dissemination, information long considered to be privileged, such as information concerning the existence of the relationship, the terms and conditions of the engagement (including written agreements), the nature of the advice provided, payments made, receipts from all clients, and disbursements made by the firm in connection with labor relations advice or services rendered, among other things. Similarly, a law firm commented that information that has for decades been treated as privileged now risks being disclosed.

On the other hand, a number of commenters, including two labor organizations, supported the Department's revised interpretation of the advice exemption. The commenters believed that the rule, as proposed, would not violate the attorney-client privilege. In part, they relied upon the court's observations in *Humphreys* and various authorities rejecting the defense of attorney-client privilege and attorney-client confidentiality where disclosure of information is required by law.

Before responding to the comments, the Department notes the limited information required to be reported under this rule:

- A copy of the persuader agreement between the employer and consultant (including attorneys);
- the identity of the persons and employers that are parties to the agreement;
- a description of the terms and conditions of the agreement;
- the nature of the persuader and information-supplying activities, direct or indirect, undertaken or to be undertaken pursuant to the agreement—information provided by simply selecting from a checklist of activities;
- a description of any reportable persuader and information-supplying activities: the period during which the activities were performed, and the extent to which the activities have been performed as of the date of the report's submission; and
- the name(s) of the person(s) who performed the persuader or information-supplying activities; and the dates, amounts, and purposes of payments made under the agreement.

After a review of the comments submitted and based on the following reasons, the Department affirms its position in the NPRM that the revised interpretation of section 203(c) does not infringe upon the common law attorney-client privilege, which is still preserved by section 204, nor an attorney's ethical duty of confidentiality. Although the ABA and the other commenters expressed strong opposition to any reporting as a matter of principle, notably lacking from the submissions is any discussion of the types of activities that labor relations consultants, including attorneys, routinely engage in while providing their services to employer-clients seeking to avoid representation. Similarly lacking is any persuasive argument that the ''soup to nuts'' persuader services offered by attorneys should be shielded from employees and the public while the very same activities would be reported by their non-attorney colleagues in the union avoidance industry. See discussion at Section III.B of this preamble. As noted earlier, law firms have engaged in the same kinds of activities as other consultant firms, providing services similar to practices advocated by Nathan Shefferman, the face of the ''middlemen,'' mentioned in the McClellan hearings and the LMRDA's legislative history. Logan, *The Union Avoidance Industry in the United States,* at 658–661. In the Department's view, none of the information required to be reported under the revised interpretation is protected as a general rule by the attorney-client privilege. Only copies of or details about persuader aspects of the agreement are reportable. To the extent the agreement provides confidential details about services other than reportable persuader/information supplying activities, the principles of attorney-client privilege would apply and such information is not reportable. While some of the comments submitted in response to the NPRM concern issues that may arise in connection with the Form LM–21, such as the scope and detail of reporting about service provided to other employer clients, that report is not the subject of this rulemaking.[88] The Department has publicly stated its intention to revisit these requirements in rulemaking. While it would be premature to address the form that such rulemaking may take, the Department briefly summarizes and discusses those comments at the close of this section.

As noted above, several commenters claimed that the revised interpretation infringes upon the common law attorney-client privilege and attorneys' ethical duty of confidentiality. Although several commenters acknowledged that these principles are separate, others did not differentiate between the two. As explained by the ABA in its Model Rules of Professional Conduct:

> The evidentiary attorney-client privilege is closely related to the ethical duty of confidentiality. They are so closely related that the terms ''privileged'' and ''confidential'' are often used interchangeably. But the two are entirely separate concepts, applicable under different sets of circumstances. The ethical duty, on the one hand, is extremely broad: it protects from disclosure all ''information relating to the representation of a client,'' and applies at all times. The attorney-client privilege, on the other hand, is more limited: it protects

[86] The Form LM–21 requires the attorney-consultant to provide additional information about the financial arrangements concerning the persuader agreement, including the recipient and purpose of any disbursement, *e.g.,* payment to Quickprint, Inc. for printing ''vote no'' pamphlets for distribution to Acme's employees. See discussion later in the text.

[87] The assertion that the rule could chill employers' ability to obtain counsel is discussed in greater detail near the end of this section and in Section V.G.

[88] The agenda for the Form LM–21 rulemaking is set out in the Department's *Semiannual Unified Agenda and Regulatory Plan,* viewable at *www.reginfo.gov.* The Department currently estimates that a proposed rule on the Form LM–21 will be published in September 2016.

from disclosure the substance of a lawyer-client communication made for the purpose of obtaining or imparting legal advice or assistance, and applies only in the context of a legal proceeding. See Model Rule 1. 6, cmt. [3]; Restatement (Third) of the Law Governing Lawyers §§ 68–86 (2000).

Annotated Model Rules of Professional Conduct, Seventh Edition Annotated Model Rules of Professional Conduct (7th ed. 2011), available on Westlaw at ABA–AMRPC S 1.6. To a large extent, the policy reasons under each principle are similar—to facilitate the relationship between the attorney and client by allowing the client to freely communicate matters relating to the legal issue for which the attorney's service has been engaged. However, both principles recognize that this general non-disclosure policy is subject to various exceptions and that ''external law'' controls over the profession's preference for non-disclosure.

Indeed, the tension between disclosure of persuader agreements and the general attorney non-disclosure principle is largely illusory because this principle recognizes many exceptions that directly apply to the reporting required by this rule. Further, attorneys who restrict their activities to legal services are not required to file any report; only those attorneys who engage in persuader services are required to file a report. The information that would be disclosed in filing the LM–20 report, principally the identity of the employer-client, the amount to be paid for the persuader activity, and a general description of the services, are not ordinarily protected by the attorney-client privilege. While this information could not be released as a matter of course under codes requiring the preservation of client confidences, such information is routinely disclosed where sought by subpoena or required by law. The LMRDA and the Department's rule requiring disclosure stands in the same stead. Moreover, the Department's rule recognizes that there may be rare occasions when some information should not be disclosed, *e.g.,* where disclosure would reveal confidential client information unrelated to persuader activity. Thus, commenters are mistaken in suggesting that particularly sensitive client information will be disclosed.

The Department agrees with those commenters who stated that the attorney-client privilege does not protect from disclosure ''the fact of legal consultation or employment, clients' identities, attorneys' fees, and the scope and nature of employment.'' *Humphreys,* 755 F.2d at 1219. At issue in *Humphreys* was whether a consultant-law firm had to file a report disclosing receipts and disbursements relating to labor relations advice and services because it had engaged in persuader activities. There were no particular documents discussed.

The court noted that the ABA had sought a broader disclosure exemption from Congress than that provided by section 204. This broader exemption would have barred the disclosure:

> 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, and any advice or activities of the attorney on behalf of his client which fall within the scope of the legitimate practice of law.

Id. at 1218 (internal quotations omitted). The court rejected the law firm's argument that Congress intended to provide a broad disclosure exemption such as that sought by the ABA, holding instead that Congress, in enacting section 204, intended to provide the same protection against disclosure as the traditional attorney-client privilege. The court recognized that Congress rejected such an approach during its consideration of competing legislative proposals concerning the breadth of the reporting exception for attorneys. Id. at 1216, 1218.

The court further explained that ''the attorney-client privilege does not envelope everything arising from the existence of an attorney-client relationship,'' emphasizing that ''the attorney-client privilege is an exception carved from the rule requiring full disclosure, and, as an exception, should not be extended to accomplish more than its purpose.'' Id. at 1219. (internal quotations omitted). The court made the additional points:

- ''The attorney-client privilege only precludes disclosure of *communications* between attorney and client and does not protect against disclosure of the facts underlying the communication.''
- ''[I]n general, the fact of legal consultation or employment, clients' identities, attorney's fees, and the scope and nature of employment are not deemed privileged.''
- ''[T]he amount of money paid or owed by a client to his attorney is not privileged except in exceptional circumstances [not present in the LMRDA context].''

Id. (italics in original). The court continued:

> We conclude that none of the information that LMRDA section 203(b) requires to be reported runs counter to the common-law attorney-client privilege. Any other interpretation of the privilege created by section 204 would render section 203(b) nugatory as to persuader lawyers.

Id. at 1219. The conclusions reached by the *Humphreys* court are consistent with the earlier rulings in *Wirtz* v. *Fowler,* 372 F.2d 315, 332 (5th Cir. 1966), overruled in part on other grounds, *Price* v. *Wirtz,* 412 F.2d 647 (1969) (en banc). There, the court considered the particular information required to be reported on the Form LM–21, in light of section 204, concluding:

- ''[A]ny such reports to be meaningful must include as a bare minimum the name of the client, the terms of the arrangements, and the fees.''
- ''[The consultant-attorneys] must report [the] names and the fees received for any persuader arrangements.''
- ''They must also describe the general nature of the activities they undertook pursuant to such arrangements.''
- ''The terms of the agreement or arrangement, without more, might well be considered a ''privileged communication'' from the client to the attorney. But where, as here, the agreement has been executed, partially or completely, the nature of the activities actually performed by the attorney can hardly be characterized as a ''communication'' from his client.''

372 F.2d at 332. The court in *Humphreys* examined the legislative history of section 204 in reaching its conclusion. 755 F.2d at 1216–19. Tellingly, it discussed the rejection by Congress of the position that the ABA had taken on the proposed legislation:

> *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, and any advice or activities of the attorney on behalf of his client which fall within the scope of the legitimate practice of law.* . . .

(emphasis added). The court explained that the version of section 204 reported in the House bill contained an attorney-client exclusion almost identical to the ABA proposal, as quoted above. Id. at 1218. The court noted that the report accompanying H.R. 8342 stated ''[t]he purpose of this section is to protect the traditional confidential relationship between attorney and client from any infringement or encroachment under the reporting provisions of the committee bill.'' Id. (quoting H.R. Rep. No. 741, 86th Cong., 2d Sess. 37 (1959), U.S. Code Cong. & Admin. News 1959, 2459).

The Court of Appeals found it significant that Congress ultimately rejected the broader House version,

which would have protected from disclosure such information as the existence of the attorney-client relationship, attorneys' fees, and the scope and nature of the representation. The Department finds significant that the ABA's comments about the Department's proposed interpretation reflect the same position, in essence, that was rejected in *Humphreys.*

The commenters who were critical of the proposed rule did not present any argument or authority that would cause the Department to question the *Humphreys* court's construction of section 204. One law firm, though, found *Humphreys* to be inapposite with regard to the proposed rule's impact on the attorney-client privilege. The firm noted that *Humphreys* involved attorneys who had communicated *directly* with employees, in contrast to the Department's proposal that would also include *indirect* communications with employees. The commenter is mistaken. The distinction it makes ignores that the question before the court was not *what triggers* reporting under section 203, but rather, *what information* is protected from disclosure once reporting has already been triggered. Indeed, pursuant to this rule, the information required to be reported on a Form LM–20 for a consultant who drafts a persuasive speech and directly delivers it to employees is identical to that of the consultant who drafts such a speech and provides it to the employer or its representatives for dissemination to the employees.[89]

A legal trade association asserted that in virtually every other context, attorneys are not required to disclose to the public the identity of their clients and how much they are paid for what kinds of work performed. The association, though, disregards the fact that attorneys who engage in direct persuader activities pursuant to an agreement with an employer have, since the inception of the LMRDA, been compelled to report information concerning such agreements, as was the case in *Humphreys.* The association also overlooks that attorneys must file the Form LM–10 in certain circumstances where they make payments to unions and union officials. See *Warshauer* v. *Solis,* 577 F.3d 1330 (11th Cir. 2009) (upholding application of section 203(a)(1) reporting, which requires designated legal counsel of certain labor organizations to report non-exempt payments to such unions and their officials). Similarly, the commenter overlooks that unions who file the Form LM–2 Labor Organization Annual Report must report payments to law firms (as well as other vendors and service providers) of $5,000 or greater during a reporting year. See Form LM–2 Instructions, at pages 21–22; see also the 2003 final rule making revisions to the Form LM–2, 68 FR 58388, which discussed such reporting of payments to law firms, and the non-privileged nature of such payments and related purpose. As stated in the 2003 Form LM–2 rule: ''The Department disagrees with the comment that a union's compelled disclosure of information relating to legal fees associated with an organizing campaign would improperly intrude upon the union's attorney-client privilege. This privilege does not generally extend to the fact of consultation or employment, including the payment and amount of fees. *See McCormick on Evidence,* § 90, (5th ed. 1999, updated 2003).'' 68 FR at 58388. The Forms LM–2, LM–10, and LM–20 share the LMRDA's general purpose to add transparency to the national labor-management relations system, providing employees and the Government with information necessary for them to exercise their rights under the system. Although the specific purposes served by these forms may differ from each other (*e.g.,* the Form LM–2 has its focus the overall financial affairs of the union, whereas the Forms LM–10 and LM–20 focus on particular kinds of payments and agreements), it is notable that legal matters must be disclosed where necessary to achieve the purposes served by the forms.

Other commenters who supported the Department's proposal described two analogous arenas where attorneys or consultants would have to disclose client information similar to that required by the proposal. A labor organization stated that the Lobbying Disclosure Act requires attorneys with a legislative practice to disclose much more information than what is mandated under this rule. The organization noted that the required content of a lobbying registration under 2 U.S.C. 1603(b) and a quarterly lobbying report under 2 U.S.C. 1604(b) includes not only the activities undertaken on behalf of a client, but also information about non-client parties and the legal or equitable interests these parties may hold in the client. Another commenter referenced the reporting and disclosure requirements in IRS Form 8300, noting that courts have rejected challenges that the Form 8300 violates the attorney-client privilege.

A few commenters acknowledged the general rule that the underlying facts of an attorney-client communication, including the existence of the attorney-client relationship, the client's identity, fee arrangements, and the scope and nature of the agreement, are not protected by the federal common-law attorney-client privilege. Nonetheless, the commenters maintained that disclosure of this information might reveal the client's motive in seeking representation, the advice sought, or the specific nature of the services provided, all of which are privileged. For example, one law firm noted that, in practice, agreements between attorneys and clients often extend beyond persuader activities and may include privileged information. According to the commenter, disclosure of the reasons and purposes behind such legal engagements would make public business decisions, sensitive strategic planning information, and other private employer information. Similarly, another law firm provided hypothetical scenarios to illustrate how requiring an attorney to disclose the identity of clients would reveal not only the existence of the relationship, but also the client's motives or the advice sought, which the client may not want to disclose.

Some commenters also asserted that it would be improper for law firms to disclose documents that would reveal clients' motives regarding legal representation or the legal advice sought because these documents would be privileged information under section 204. The Department agrees that such information, as distinct from other information in a document, ordinarily would be privileged but notes that this information is an exception to the general rule favoring disclosure. See, *e.g., Humphreys,* 755 F.2d at 1219 (''[T]he attorney-client privilege does not protect the identity of a client except in very limited circumstances . . . [T]he amount of money paid or owed by a client to his attorney is not privileged except in exceptional circumstances not present in the instant case''); *Avgoustis* v. *Shinseki,* 639 F.3d 1340, 1345 (Fed. Cir. 2011) (''[R]equiring such disclosures does not violate the attorney-client privilege absent unusual circumstances''); and *In re Grand Jury Subpoenas (Anderson),*

[89] Pursuant to the revised Form LM–20, the information required to be reported would be identical for both types of filers, the direct persuader and the indirect persuader. Concerning the checklist in Item 11.a, both filers would need to check the box indicating that they had drafted, revised, or provided a speech for presentation to employees. The direct persuader would also need to check the box indicating that he had planned or conducted the individual or group employee meeting in which it presented the speech, as would the indirect persuader, if it also planned such meeting.

906 F.2d 1485, 1488 (10th Cir. 1990) (''It is well recognized in every circuit, including our own, that the identity of an attorney's client and the source of payment for legal fees are not normally protected by the attorney client privilege'') (citations omitted). Further, as discussed below, only information pertinent to the persuader activities would be reportable and therefore information that is material to other motives for engaging a consultant's services is not reportable under the rule.[90]

The final rule does not require the disclosure of any particular documents, apart from the persuader agreement. While receipt and disbursement information must be disclosed under the rule, the rule does not require that the billing, voucher, or other documents that includes this information be publicly disclosed. Further, the only other information that is to be reported identifies only the specific persuader activity or activities provided to the employer by the lawyer or other labor relations consultant, activities that must be reported under section 203 of the Act. The court in *Humphreys* recites the general rule that the existence of the attorney-client relationship, the client's identity, fee arrangements, and the scope and nature of the agreement are not protected by the federal common-law attorney-client privilege. Indeed, even the cases cited by many of the commenters opposed to the rule recognize that the underlying facts of an attorney-client communication are not privileged. In issuing this final rule today, the Department maintains that the information required to be reported and disclosed on Form LM–20 is consistent with the weight of authority.

At the same time, the Department acknowledges that there may be exceptional circumstances where the disclosure of some information would be privileged from disclosure. For this reason, in the NPRM, the Department stated that to the extent an attorney's report about his or her agreement or arrangement with an employer may disclose privileged communications, the privileged matters are protected from disclosure. 76 FR 36192. If the written agreement that is required to be included as part of the Form LM–20 filing contains sensitive, privileged client information, wholly unrelated to the persuader activities, direct or indirect, such information may be redacted. Thus, information that may reveal client motives regarding exclusively legal advice or representation sought would generally be redactable, but information concerning client motives related to the persuasion of employees is not privileged and would remain reportable. The Department, however, disagrees with those commenters who simply recommend that the Department withdraw its proposed interpretation because of the possibility that, in certain limited circumstances, the information required to be disclosed might reveal employers' motivations, business strategies, the advice sought, or the specific nature of the legal services provided.[91] For the Department to decline to issue this rule on that basis would be tantamount to allowing the rule's exception to consume the rule itself.

Furthermore, the Department brings attention to three principles found in *Humphreys* and other cases cited by the commenters. First, as emphasized in *Humphreys,* 755 F.2d at 1219, the attorney-client privilege is '' 'an exception carved from the rule requiring full disclosure, and as an exception, should not be extended to accomplish more than its purpose.' '' [92] Accordingly, the attorney-client privilege, as embodied in section 204, should be narrowly construed. Id. Second, blanket assertions of the attorney-client privilege are disfavored by the courts. Instead, the privilege must be proven as to each item sought to be protected from disclosure. *Clarke,* 974 F.2d at 129 (citing to *In re Grand Jury Witness (Salas and Waxman),* 695 F.2d 359, 362 (9th Cir. 1982) and *United States* v. *Hodgson,* 492 F.2d 1175, 1177 (10th Cir. 1974)). And finally, the burden of establishing that the attorney-client privilege applies to the specific documents or items in question rests with the party asserting the privilege. Id. These principles provide additional reasons for the Department to proceed with this final rule. By criticizing this rule because of the possibility that the required disclosures might infringe on the attorney-client privilege, the commenters would have the Department absolve them of their burden to establish that the privilege even applies. The Department, however, declines to do so.

[90] One commenter cited to a number of federal cases to support its contention that normally non-privileged information may be deemed to be privileged if its disclosure reveals a client's motives in seeking representation, advice sought, or the specific nature of the services provided. These cases, however, do not conflict with *Humphreys* nor do they diminish the Department's position with regard to the applicability of the attorney-client privilege recognized in section 204. These cases, instead, stand for the unremarkable proposition that the disclosure of particular documents, without appropriate redaction, would reveal privileged information.

[91] The Department has not been persuaded that the limited reporting required under the rule will require a lawyer who becomes subject to the reporting requirement by engaging in a persuader activity to confront a true dilemma in considering whether reporting such information violates any ethical obligations to his or her client. If there are instances where such question arises, the consultant should seek compliance assistance from OLMS. The Department notes that it has taken this approach with Form LM–10 filers. See, *e.g.,* Form LM–10 FAQ 3(A) and 24 at *www.dol.gov/olms/regs/compliance/LM10_FAQ.htm.* Form LM–10 FAQ 24 states:

There is no exemption for confidentiality clauses in the LMRDA. The only confidentiality recognized by the LMRDA is that of attorney-client privilege, contained in Section 204 of the LMRDA, which states that ''nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.'' 29 U.S.C. 434. If an employer believes that completing Form LM–10 will result in the disclosure of sensitive, confidential or proprietary information that could cause substantial harm to the employer's business interests, the issue should be discussed with OLMS prior to the filing of the report.

[92] See the Restatement (Third) of the Law Governing Lawyers section 69, Attorney-Client Privilege—''Communication'' (comment):

g. Client identity, the fact of consultation, fee payment, and similar matters. Courts have sometimes asserted that the attorney-client privilege categorically does not apply to such matters as the following: The identity of a client; the fact that the client consulted the lawyer and the general subject matter of the consultation; the identity of a nonclient who retained or paid the lawyer to represent the client; the details of any retainer agreement; the amount of the agreed-upon fee; and the client's whereabouts. Testimony about such matters normally does not reveal the content of communications from the client. However, admissibility of such testimony should be based on the extent to which it reveals the content of a privileged communication. The privilege applies if the testimony directly or by reasonable inference would reveal the content of a confidential communication. But the privilege does not protect clients or lawyers against revealing a lawyer's knowledge about a client solely on the ground that doing so would incriminate the client or otherwise prejudice the client's interests.

See also ABA Rule 1.6. (comment):

[B]illing information and fee agreements are generally not protected by the evidentiary attorney-client privilege unless disclosure would reveal the substance of confidential communications between a lawyer and a client. See, *e.g., Chaudry* v. *Gallerizzo,* 174 F.3d 394 (4th Cir. 1999) (bills that revealed identity of statutes researched were privileged); *Clarke* v. *Am. Commerce Nat'l Bank,* 974 F.2d 127 (9th Cir. 1992) (privilege did not protect billing statements containing client identity and fee amount, but would protect ''correspondence, bills, ledgers, statements, and time records which also reveal the motive of client in seeking representation, litigation strategy, or the specific nature of the services provided, such as researching particular areas of law''); *Mordesovitch* v. *Westfield Ins. Co.,* 244 F. Supp. 2d 636 (S.D.W.Va. 2003) (fee information and engagement letters not protected by attorney-client privilege); *Hewes* v. *Langston,* 853 So. 2d 1237 (Miss. 2003) (simple invoice normally not protected by attorney-client privilege, but ''itemized legal bills necessarily reveal confidential information and thus fall within the privilege'').

The Department also received a number of comments contending that specific items in Form LM–20 compel disclosure of privileged client information. For instance, one company asserted that the information required to be disclosed in proposed Item 10 ''Terms and conditions'' of Form LM–20 is protected by the attorney-client privilege. The company argued that this requires disclosure of the reason for the agreement or arrangement between employer and client, which is protected communications. The Department disagrees. With respect to Item 10, the proposed instructions state as follows:

> Provide a detailed explanation of the terms and conditions of the agreement or arrangement. . . . If any agreement or arrangement is in whole or in part contained in a written contract, memorandum, letter, or other written instrument, or has been wholly or partially reduced to writing, you must refer to that document and attach a copy of it to this report . . .

76 FR 36213. Thus, Item 10 requires the disclosure of the terms and conditions, typically reduced to writing in a contract, of an agreement or arrangement for the consultant to undertake persuader activities. As explained above, the terms of a fee agreement and the details regarding the scope and nature of the relationship between employer and consultant, required to be reported under this rule, are not subject to the attorney-client privilege. The Department, therefore, disagrees with the contention that Item 10 of Form LM–20 requires the disclosure of privileged attorney-client communications. Accordingly, the Department is adopting these proposed instructions to Item 10 in the final rule.

Other commenters claimed that the level of detail required to be reported on the revised Form LM–20 would call for the disclosure of privileged information. A law firm contended that requiring attorneys to indicate whether they have engaged in communications with the purpose of persuading employees conflicts with case law, which, in its view, uphold the proposition that the ''motivation of the client in seeking representation'' and descriptions of the ''specific nature of the services provided'' are protected by the attorney-client privilege. Furthermore, the commenter objected to the requirement in Form LM–20 to identify any ''subject employees'' about whom the attorney ''counseled'' the employer, arguing that such information is privileged. Another law firm identified the following checklist categories in Item 11.a as being too specific, in violation of the attorney-client privilege:

- Drafting, revising, or providing written materials [or speech] for presentation, dissemination, or distribution to employees
- Training supervisors or employer representatives to conduct individual or group employee meetings
- Developing personnel policies or practices.

The Department disagrees that these checklist items or, generally, the level of detail required to be reported on Form LM–20 would result in the disclosure of privileged information. As explained above, the Department recognizes that, in certain limited circumstances, otherwise non-privileged information, such as the nature and scope of the attorney-client relationship, might be deemed privileged if it reveals the client's motivations or the specific nature of the services provided. The Department stresses, however, that in such cases the information that would be revealed relates to a client's motivations in seeking *legal* representation or the specific nature of the *legal* services provided. The reporting requirements in Form LM–20, including the details of the agreement or arrangement in Item 10 and the checklist categories in Item 11.a, are designed to identify the specific *persuader* activities undertaken, not the legal advice provided. In other words, if an employer retains a law firm with the purpose to persuade, directly or indirectly, its employees not to unionize, that retention is not privileged because it is not done with a purpose of obtaining a legal opinion, legal services, or assistance in a legal proceeding. The check-box items in Form LM–20 refer *only* to the persuader activities performed (*e.g.,* the drafting or revising of speeches, the training of supervisors, and the development of personnel policies), regardless of whether an employer's motivation in retaining a law firm is for the firm to undertake *both* persuader activities and legal representation or other legal services. As the Sixth and Fourth Circuits concluded, Congress recognized that the ordinary practice of labor law does not encompass persuader activities. *Humphreys,* 755 F.2d at 1216 (citing to *Douglas* v. *Wirtz,* 353 F.2d 30, 33 (4th Cir. 1965)). Through the filing of a Form LM–20, the client's motivations in seeking legal representation remain privileged and undisclosed (*e.g.,* compliance with NLRB regulations); only its persuader activities are disclosed. Likewise, while the Form LM–20 requires the filer in Item 10 to identify the scope of the agreement or arrangement, the items in Form LM–20 do not reveal the specific nature of or any detail concerning the legal services provided. Instead, these items, notably the checklist in Item 11.a, are specific as to persuader activities only.

Some observers may nevertheless argue that the items in Form LM–20 reveal, by implication, the client's motivations in seeking legal representation or the specific nature of the legal advice provided. The Department is not persuaded by such an argument. The same argument can be made for many other disclosure laws. For example, in the tax context, one can argue that the filing of an IRS Form 8300 reveals, by implication, a client's motivation to ensure that it complies with tax laws or that the client had sought legal counsel because it received a single payment of cash in excess of $10,000. Similarly, in the context of lobbying disclosure, one can argue that disclosure reveals the motivation of the company or individual for whom the lobbying was provided. As discussed in the legal authorities cited above, a lawyer must be able to demonstrate more than the mere possibility that client motivations or the specific nature of the legal services provided might be revealed through inferences. See also comment to Annotated Model Rules of Professional Conduct, Seventh Edition Annotated Model Rules of Professional Conduct (7th ed. 2011), Rule 1.6(b)(6), Confidentiality of Information, available in Westlaw at ABA–AMRPC S 1.6 (Disclosure required by IRS Form 8300 ''has consistently been upheld against attacks based upon confidentiality and privilege'').

The Department received numerous comments that apparently misconstrue the type of information that must be reported under both the prior interpretation and the proposed rule. For example, several commenters objected to the presumed requirement that they provide copies of any documents prepared by or reviewed by them in providing services to their client, including, for example, memoranda or other documents outlining campaign strategy, a speech to be delivered by the employer, or literature prepared for distribution to employees. According to the commenters, these consultant-prepared materials are privileged from disclosure even if the client ultimately presents the final versions to its employees. One commenter suggested that the training and directing of supervisors, and associated materials, necessarily involves privileged communications. As stated above, the Department has not required a consultant-attorney to disclose any particular documents or to otherwise reveal the details of any

services provided to clients (other than as may be shown by the persuader agreement, which itself, may be redacted where needed to protect truly privileged communications). It bears repeating that a consultant, by engaging in direct or indirect persuader activity, merely triggers the obligation to provide the limited information required by the LM–10 (by employers) and the LM–20 (by consultants). As explained above, the information required under these reports (*e.g.,* the terms and conditions of agreements and the checklist activities) is not privileged.

In a similar vein, a company submitted comments stating that the attorney-client privilege applies whenever legal advice is provided in confidence by an attorney to a client. The commenter emphasized that the privilege covers not only the legal advice in a privileged communication, but also any unprivileged statements that accompany it. Another commenter, a trade association, argued that the proposed rule's interpretation of ''advice'' conflicts with the common law definition of legal advice as applied to the attorney-client privilege. The association cited to a number of federal cases for the proposition that legal advice ''intertwined'' with persuader activity is still protected from disclosure under the attorney-client privilege. These commenters, too, have misconstrued what is required to be disclosed under the final rule. The revised Form LM–20 does not require the disclosure of any communication other than any written persuader agreement between the parties.

Other commenters maintained that, once the rule becomes effective, any ensuing investigations conducted by the Department would lead to violations of the attorney-client privilege. One commenter theorized that the Department would be required to thoroughly investigate not only the attorney-client relationship, but also the attorney's communications with the client. The client or the attorney, according to the commenter, would likely be compelled to disclose otherwise privileged communications to prove the nature and object of the communications or in possible defense of criminal charges. Another commenter claimed that, at least in California, even *in camera* disclosures of attorney-client communications during investigatory enforcements of the final rule would result in violations of the attorney-client privilege.

In this rulemaking, the Department declines to comment on the applicability of the attorney-client privilege to hypothetical questions concerning investigations of potential reporting violations. Issues pertaining to the interplay between the attorney-client privilege and any ensuing investigations under section 203 are more appropriately resolved upon enforcement of the final rule once it becomes effective. See, *e.g., In re Grand Jury Subpoenas (Anderson)* (drug charges); *Holifield* v. *United States,* 909 F.2d 201, 203–04 (7th Cir. 1990) (tax); and *In re: Motion for Protective Order for Subpoena Issued to the Stein Law Firm,* No. MC 05–0033 JB, 2006 WL 1305041 (D. N. Mex. Feb. 9, 2006) (SEC investigation). See also *Marshall* v. *Stevens People and Friends for Freedom,* 669 F.2d 171, 177 (4th Cir. 1981) (reviewing district court rulings concerning information sought by Department of Labor in investigating alleged LMRDA reporting violations). The Department, however, emphasizes that it will protect information relating to the attorney-client relationship to the full extent possible in its investigations.

2. Confidential Information and Attorneys' Ethical Obligations

A few commenters acknowledged that the proposed rule, if implemented, would not infringe on the attorney-client privilege. Regardless of that fact, however, they and other commenters argued that the rule would result in the disclosure of confidential, even if not privileged, communications between attorney and client. While most of these commenters claimed that the disclosure of confidential information conflicts with attorneys' ethical obligations to maintain client confidences, a few argued that section 204 should be read to encompass even non-privileged, confidential information, such as a client's identity.

In support of this contention, a trade organization commented that the word ''privilege'' does not appear in section 204, which, to the organization, suggests strongly that the provision provides a broad, over-arching protection from disclosure of both privileged and confidential information. In a similar vein, two commenters, a higher education association and a public-interest organization, stressed that section 204 is broadly worded such that it exempts ''any information'' that was lawfully communicated in the course of a legitimate attorney-client relationship.

In response to these assertions, the Department notes that the Sixth Circuit, in *Humphreys,* has already ruled on this very issue. 755 F.2d at 1216. The appellants in that case, like the commenters here, contended that the privilege embodied in section 204 is broader than the traditional attorney-client privilege. The court, after a thorough review of the legislative history behind section 204, rejected the appellants' claim, concluding that in drafting section 204 Congress intended to accord the same protection as that provided by the federal common-law attorney-client privilege. Id. at 1219. See also *Wirtz* v. *Fowler,* 372 F.2d 315, 332–33 (5th Cir. 1966) (after finding that section 204 ''roughly parallel[s] the common-law attorney-client privilege,'' the court rejected the argument that information about the persuader agreement was protected from disclosure under section 204); *Douglas* v. *Wirtz,* 353 F.2d 30, 33 (4th Cir. 1966) (treating section 204 as equivalent to the attorney-client privilege). One of the commenters disagreed with the Sixth Circuit's holding in *Humphreys,* reasoning that the court failed to give effect to the plain language of section 204. The Department, however, agrees with the reading of section 204, as analyzed in *Humphreys,* and rejects those commenters' contention that section 204 broadly protects from disclosure any information, confidential or otherwise, that is not covered by the traditional attorney-client privilege.

According to other commenters, however, the disclosure of confidential client information would be a violation of attorneys' ethical obligations under various state bar rules. One law firm averred that many state bar associations have deemed certain types of client information, such as the identity of the client, the fact of representation, and the fees paid as part of that representation, to be confidential information prohibited from disclosure. Many of the commenters referenced Rule 1.6 of the ABA's Model Rules of Professional Conduct. As one law firm pointed out, 49 states and the District of Columbia have adopted some variation of Rule 1.6. In relevant part, ABA Model Rule 1.6, Confidentiality of Information, states as follow:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> . . .
>
> (6) to comply with other law or a court order.

The Department notes first, as discussed below, that section 204 of the LMRDA, as a federal law, controls over any conflicting state ethics rules modeled after ABA Rule 1.6.

Humphreys, 755 F.2d at 1219, n. 12. This issue has frequently arisen in tax reporting cases. For instance, in *United States* v. *Goldberger & Dubin, P.C.,* 935 F.2d 501, 504–05 (2d Cir. 1991), a law firm returned incomplete 8300 Forms to the IRS. Instead of reporting the required information, it informed the IRS that disclosure of the required client information would violate the New York state law of attorney-client privileges. The Court of Appeals rejected the firm's position, stating that ''in actions such as the instant one, which involve violations of federal law, it is the federal common law of privilege that applies'' (citations omitted). In *United States* v. *Blackman,* 72 F.3d 1418, 1424 (9th Cir. 1995), the attorney who resisted providing the information to the IRS argued that the issue was not just one of privilege, but also of duty. The attorney contended that Oregon's law on client confidentiality not only codifies the attorney-client privilege, but also imposes an affirmative duty upon the attorney to avoid disclosure of client confidences and secrets. The Ninth Circuit, however, found the argument to be ''specious.'' The court reasoned that the Oregon law's explicit spelling out of this duty did not create an exception to the federal common-law attorney-client privilege because such a duty is already implicit in the privilege. The court then concluded that ''Congress cannot have intended to allow local rules of professional ethics to carve out fifty different privileged exemptions to the reporting requirements'' in IRS Form 8300. Id. (citing *United States* v. *Sindel,* 53 F.3d 874, 877 (8th Cir. 1995)). The Department finds these cases instructive. Contrary to some commenters' assertions, Rule 1.6 and the various state ethics rules do not necessarily go beyond the traditional attorney-client privilege as recognized in section 204. Even if some commenters believe ethical conflicts will arise as a result of this final rule, the Department posits that sections 203 and 204, as federal law, must prevail over any conflicting state rules governing legal ethics.

In addition, as a few commenters noted, Rule 1.6(b)(6) allows for the disclosure of client information to comply with ''other law,'' which would include the LMRDA. Comment 12 to ABA Rule 1.6 states as follow: ''Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.'' Annotated Model Rules of Professional Conduct (7th ed. 2011), Rule 1.6 Confidentiality of Information, available in Westlaw at ABA–AMRPC S 1.6. In this respect, the model rule and the corresponding state rules do not conflict with sections 203 and 204. As discussed in the preceding paragraph, even in the case of a conflict with a state ethics requirement, the Department believes that section 203 and this rule supersede Rule 1.6 and any particular state equivalent. The Department notes further that the employer-client is also required by law to report identical information as the attorney-persuader. One commenter even acknowledged that the rules of conduct allow for disclosure required by other law or a court order. The commenter, however, contended that the ''strong language'' in section 204 indicates that the LMRDA was never intended to be interpreted in such a sweeping manner. The Department disagrees. As explained above, the court in *Humphreys,* 755 F.2d at 1216, concluded that Congress intended for section 204 to reflect the traditional federal attorney-client privilege, which controls over state rules on client confidentiality.

The ABA also acknowledged that a federal statute, such as the LMRDA, would constitute an exception to Rule 1.6, but it offered only a conclusory statement that ''nothing in the LMRDA expressly or implicitly requires lawyers to reveal client confidences to the government.'' Section 203(b), however, expressly requires that persuader consultants ''file a report with the Secretary . . . containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement.'' 29 U.S.C. 433(b). Section 208 authorizes the Department to ''issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this title.'' 29 U.S.C. 438. Further, to ensure that sections 203 and 204 are given full effect (with section 203 determining when and who must report, and section 204 limiting what must be reported), attorneys cannot be entirely excluded, as this would conflict with the statutory language, legislative intent, and history of section 203's application. Indeed, if attorneys engaging in direct persuasion must disclose information concerning the entire agreement or arrangement with the employer it logically follows that indirect persuaders, including attorneys, should disclose the same information.

Several commenters, however, maintained that, should conflicts arise, attorneys may be faced with the untenable position of choosing between their ethical duties to their clients and their reporting obligations under the LMRDA. One of these commenters illustrated this conundrum by explaining that an attorney who discloses confidential information without client consent would risk professional discipline under state ethics rules. On the other hand, the commenter stated, the attorney risks imprisonment and a fine for willful failure to file if he or she decides not to file the appropriate LM form.

As detailed above, however, the Department does not believe that the disclosure required by this rule poses a general or significant impediment for attorneys seeking to maintain client confidences, because the LMRDA constitutes ''other law,'' which under the ethical rules authorizes attorneys to disclose otherwise confidential client information. Thus, an ethical conflict would likely occur in only rare circumstances, such as where the disclosure of information would implicate the client in crimes or other illegal activities. Even there, however, it is by no means clear that the information should be withheld. As discussed above, courts have narrowly construed exceptions to disclosure of information required by federal law even in circumstances where there exists a reasonable argument that disclosure may entail some risk of criminal prosecution. The Department is not insensitive to such possibilities, but it does not believe those types of rare situations should dictate the decision to issue this final rule.[93] Instead, the Department can address those concerns on a case-by-case basis if and as they may arise.

Moreover, the Department recommends that labor relations attorneys and consultants who engage in direct or indirect persuader activity

[93] As discussed in the text, the Department disagrees with the suggestion that this rule will pose an ethical dilemma for attorneys. As with all aspects of legal practice, however, attorneys who have an ethical reservation about their obligations under the rule to report information about their clients always have the option to choose to decline to provide persuader services to clients who refuse to provide express consent to disclose the required information, and limit services to legal services, which do not trigger reporting in any event.

make proactive efforts to minimize the possibility for conflicts before this rule becomes effective. The Department notes that, under ABA Rule 1.6(a), attorneys are permitted to disclose confidential client information should the client give informed consent to do so after consultation. Accordingly, attorneys may want to inform their current and prospective clients about the disclosure provisions in section 203, which apply to both parties of the persuader agreement, the employer-client and attorney-persuader. As stated, when disclosure of information relating to the representation appears to be required by other law, as is the case with section 203, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. Attorneys who engage in persuasion of employees may also want to review their usual persuader agreements with clients, and consider modifying in the unusual circumstance that disclosure may inadvertently disclose privileged client information when they include these agreements as part of their LM–20 filings.

3. ''Chilling'' the Ability To Obtain Attorneys

In addition to the issues surrounding the attorney-client privilege and confidentiality, many of the commenters alleged that the proposed rule would chill employers' ability to obtain competent attorneys. The ABA, for instance, argued that by requiring lawyers to file detailed reports containing confidential client information, the proposed rule would chill and seriously undermine the confidential client-lawyer relationship. Characterizing these requirements as ''unfair reporting burdens,'' the ABA believed the rule could discourage employers ''from seeking the expert legal representation that they need, thereby effectively denying them their fundamental right to counsel.'' Several commenters suggested that if the proposed rule were implemented, many law firms would cease to provide advice to employers due to the new disclosure requirements. According to one of the commenters, this would make it much more difficult for employers to obtain counsel during organizing campaigns. Another commenter, a law firm, contended that employers' ignorance of the law would more likely result in violations of complex rules about permissible and impermissible conduct in the union organizing and collective bargaining contexts. Similarly, a law firm commented that the rule could well cause employers to act without the guidance of counsel, thereby adding to the likelihood of unfair labor practices, re-run elections, and further instability in labor relations. A comment from a small business public policy association posed a scenario where employers, due to the chill on the ability to obtain counsel, would be forced to either ''go it alone'' or find a lawyer willing to overlook the ethical obligations involved with filing as a persuader. Other commenters theorized that employers would simply remain silent during organizing campaigns, effectively ''muzzling'' or ''gagging'' themselves.

The Department finds that these arguments, in essence, present the same concerns raised by other commenters regarding the rule's potential chilling effect on employer free speech, which is addressed in Section V.G. As explained in that section, these concerns are unfounded because neither the proposed rule nor this rule requires the reporting of services provided by a consultant-attorney unless he or she engages in persuader activities. Even then, only limited information is required to be reported. Further, as explained in Section V.G, this rule establishes a clear test for attorneys and others to know what activities will trigger reporting and thereby avoid such activities if their goal is to avoid even the limited reporting required under this rule. Thus, under a proper understanding of the requirements and limits of this rule, the asserted chill on the ability of employers to retain counsel seems nothing more than unsubstantiated speculation. As such, this argument provides no basis for rejecting the rule.

In addition, as discussed above, the information required to be reported on the revised Form LM–20 is generally not protected by either the federal common law attorney-client privilege or prohibited from disclosure by state bar rules on client confidences. Because the final rule does not infringe on these protections, any corresponding chilling effect would come solely as a result of employers' or attorneys' choice to avoid reporting non-privileged, non-confidential information. In this respect, the Department is guided by the Ninth Circuit's observation in *Tornay* v. *United States,* 840 F.2d 1424, 1428–29 (9th Cir. 1988):

> We do not believe that clients, knowing that their attorneys may be compelled to testify about the amount, date, and form of fees paid, would be inhibited from disclosing fully information needed for an effective representation. Nor do we accept a generalization that clients feel less free to disclose once it becomes apparent that their attorney's testimony may cause adverse results. . . . Some prospective clients, arguably, may decide not to retain counsel for legal services if they could be implicated by expenditures for those services. This is not, however, a sufficient justification to invoke the [attorney-client] privilege.

In a similar vein, the Department does not believe the attorney-client privilege or state ethics rules should or can be used to shield employers and their attorneys from the LMRDA's reporting requirements once persuader activities are undertaken. The Department is not persuaded that employers, as a result of this rule, would be inhibited from seeking legal advice and sharing non-privileged, non-confidential information with their attorneys, nor will they be less able to retain attorneys, including persuader-attorneys, as a result of the rule.

4. Comments on Form LM–21 and Client Confidentiality

The Department also received several comments, including those from the ABA, concerning the impact of this rule on consultants' reporting requirements on the Form LM–21, Receipts and Disbursements Report.[94] These commenters expressed concern with the scope of information required to be reported because the Form LM–21 requires consultants to disclose receipts and disbursements from employers on account of any ''labor relations advice or services,'' not just those receipts and disbursements related to persuader activities.

The Form LM–21 implements the reporting requirements prescribed by section 203(b). That section, in relevant part, requires every person who engaged in persuader activities to file annually a report with the Secretary containing a statement of ''its receipts of any kind from employers *on account of labor relations advice or services,* designating the sources thereof,'' and a statement of its disbursements of any kind, in connection with those services and their purposes. (Emphasis added). See also 29 CFR 406.3 (LM–21 requirements). Section 203(b) requires that the reports

[94] The ABA made the following point: ''There is no reasonable nexus (no rational governmental purpose served by) between a lawyer's obligation to report persuader activities for a client and the resulting obligation under the rule that the lawyer report all receipts from and disbursements on behalf of any employer client for whom the lawyer provided labor relations advice or services.'' In making this point, the ABA relies on dicta in *Donovan* v. *Rose Law Firm,* 768 F.2d 964, 975 (8th Cir. 1985) (it is ''extraordinarily unlikely that Congress intended to require the *content* of reports by persuaders . . . to be so broad as to encompass dealings with employers who are not required to make any report whatsoever''). As discussed previously in the text, other courts have expressed a contrary view. See *Humphreys; Master Printers Association; Price* v. *Wirtz; Douglas* v. *Wirtz.*

are to be made ''with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement.'' Thus, unlike the Forms LM–10 and LM–20, the Form LM–21 requires consultants who have engaged in persuader activities to report all receipts from employers in connection with labor relations advice or services regardless of the purpose of the advice or services. For this requirement, the filer must also report in the aggregate the total amount of the disbursements made from such receipts, with a breakdown by office and administrative expenses, publicity, fees for professional service, loans, and other disbursement categories. For persuader and information-supplying activities only, the filer must additionally itemize each disbursement, the recipient of the disbursement, and the purpose of the disbursement.

The ABA, in particular, argued that the scope of this requirement compels the disclosure of a ''great deal'' of confidential client information that has ''no reasonable nexus'' to the persuader activities at issue in the NPRM and this rule. The ABA urged the Department to narrow the scope of the information that must be disclosed in Form LM–21 so that disclosure is required only for those receipts and disbursements pertaining to clients for whom persuader activities were undertaken.

While some commenters did acknowledge the scope of the NPRM, the ABA and multiple other commenters failed to note that this rulemaking focuses exclusively on the Form LM–20, not the Form LM–21. In this rulemaking, the Department proposed no changes to nor invited public comment on any aspect of the LM–21 form. Therefore, issues arising from the reporting requirements of the LM–21 are not appropriate for consideration under this rule. The Department has expressed its intent to address issues surrounding the Form LM–21 in a separate rulemaking in the future.[95]

VI. Regulatory Procedures

A. Executive Orders 13563 and 12866

Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has been designated a ''significant regulatory action'' although not economically significant, under section 3(f) of Executive Order 12866. Accordingly, the rule has been reviewed by the Office of Management and Budget (OMB).

In the Paperwork Reduction Act (PRA) analysis below, the Department estimates that the rule will result in a total annual recurring burden on employers, labor relations consultants, and other persons required to file Form LM–20 and Form LM–10 reports of approximately $1,263,499.50. Additionally, in the Regulatory Flexibility Analysis (RFA) below, the Department estimates that the total first-year burden on non-filing entities affected by this rule is approximately $7,270,822, with a recurring, annual burden of $3,634,578. See Section VI.H.4 below. Thus, the burden is less than $100 million annually and is therefore not economically significant within the meaning of Executive Order 12866.

The Department received comments that the proposed rule failed to assess all costs and benefits of available regulatory alternatives and that the rule would be significantly more burdensome than the current rule. An employer coalition argued that the proposed rule also violated the executive orders and should therefore be withdrawn, because it did not allow for adequate public participation, failed to promote predictability or reduce uncertainty, and was not written in plain language. Some commenters estimated that the total impact of the rule would easily exceed $100 million annually.

The Department disagrees with these comments. First, the Department has fully considered alternatives to the approach proposed and is adopting the proposed rule with some modification based on these alternatives. See discussion in Section V of the preamble to this rule. Second, the Department has provided estimated costs associated with the reporting requirements, adjusted in response to comments received on the proposed rule, in a manner that fully comports with requirements prescribed for regulations that are not economically significant. Third, the public was provided a full opportunity to express their views on the approach proposed, as evinced both by the public stakeholder meeting that preceded the proposal and the large number of comments submitted on the proposal. Fourth, the rule is written in a straightforward, easy to understand manner, with examples and checklists that simplify reporting. In response to comments received on the proposal, the Department has addressed various concerns about particular requirements and added additional clarity where appropriate. The Department has also responded to specific comments on its burden estimates below in the PRA and RFA sections, discussed the basis for such estimates, and refuted the assertions that the rule would result in an annual economic impact of greater than $100 million. As stated, the rule provides an objective, clear basis to determine reportability and certainty, and the Department will provide compliance assistance to filers and prospective filers to reduce any additional uncertainty or burden. The Department has also demonstrated in the preamble the sound basis for the rule in the language of the statute, legislative history, and public policy.

The following is a summary of the need for and objectives of the rule. A more complete discussion of various aspects of the rule is found elsewhere in the preamble to this rule and the NPRM.

The LMRDA was enacted to protect the rights and interests of employees, labor organizations and their members, and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and labor organization officers, employees, and representatives. Provisions of the LMRDA include financial reporting and disclosure requirements for labor organizations, employers, labor relations consultants, and others as set forth in Title II of the Act. See 29 U.S.C. 431–36, 441.

The revised rule amends the form, instructions, and reporting requirements for the Form LM–10, Employer Report, and the Form LM–20, Agreements and Activities Report, both of which are filed pursuant to section 203 of the LMRDA, 29 U.S.C. 433. Section 203 establishes reporting and disclosure requirements for employers and persons, including labor relations consultants, who enter into any agreement or arrangement whereby the consultant (or other person) undertakes activities to persuade employees as to their rights to organize and bargain collectively or to obtain certain information concerning the activities of employees or a labor organization in connection with a labor dispute involving the employer. Each party must also disclose payments made pursuant to such agreement or arrangement. An employer, additionally, must disclose certain other

[95] See note 88.

payments, including payments to its own employees, to persuade employees as to their bargaining rights and to obtain certain information in connection with a labor dispute. Employers report such information on the Form LM–10, which is an annual report due 90 days after the end of the employer's fiscal year. Consultants file the Form LM–20, which is due 30 days after entering into each agreement or arrangement with an employer to persuade.

In this final rule, the Department has revised its interpretation of the ''advice'' exemption of section 203(c) of the LMRDA, which provides, in part, that employers and consultants are not required to file a report by reason of the consultant's giving or agreeing to give ''advice'' to the employer. Under previous policy, as articulated in the LMRDA Interpretative Manual and in a **Federal Register** notice published on April 11, 2001 (66 FR 18864), this so-called ''advice'' exemption has been broadly interpreted to exclude from reporting any agreement under which a consultant engages in activities on behalf of the employer to persuade employees concerning their bargaining rights but has no direct contact with employees, even where the consultant is managing a campaign to defeat a union organizing effort.

The Department proposed to narrow the scope of the advice exemption to more closely reflect the employer and consultant reporting intended by Congress in enacting the LMRDA, which includes disclosure of agreements involving direct and indirect persuasion by employees. Strong evidence indicates that since the enactment of the LMRDA in 1959, the use of such consultants by employers to contest union organizing efforts has proliferated, with most employers hiring consultants to persuade employees through indirect methods. Nevertheless, since it began administering the statute in 1960 the Department has consistently received a small quantity of LM–20 reports relative to the greatly increased employer use of the labor relations consultant industry, which suggests substantial underreporting by employers and consultants. Moreover, evidence indicates that the Department's broad interpretation of the advice exemption has contributed to this underreporting.

As discussed in the preambles to both the proposed and final rule, the Department's prior interpretation failed to advance Congressional objectives concerning labor-management transparency to promote worker rights and harmonious labor relations. Considerable evidence suggests that regulatory action to revise the advice exemption interpretation is needed to provide labor-management transparency for the public, and to provide workers with information critical to their effective participation in the workplace.

Congress intended that employees would be timely informed of their employer's decision to engage the services of consultants in order to persuade them how to exercise their rights. Congress intended that this information, including ''a detailed statement of the terms and conditions'' of the agreement or arrangement would be publicly available no later than 30 days after the employer and consultant entered into such relationship. 29 U.S.C. 433(b)(2). With such information, employees are better able to assess the actions of the employer and the employer's message to them as they are considering whether or not to vote in favor of a union or exercise other aspects of their rights to engage in or refrain from engaging in collective bargaining.

Where persuader activities are not reported, employees may be less able to effectively exercise their rights under Section 7 of the NLRA and, in some instances, the lack of information will affect their individual and collective choices on whether or not to select a union as the exclusive bargaining representative or how to vote in contract ratification or strike authorization votes. The public disclosure benefit to the employees and to the public at large cannot reasonably be ascertained due to the uncertainty in knowing whether employees would have participated or not in a representation election or cast their ballots differently if they had timely known of the consultant's persuader activities. The real value of the LMRDA public disclosure of information is in its availability to workers and the public in accordance with Congressional intent. Such information gives employees the knowledge of the underlying source of the information directed at them, aids them in evaluating its merit and motivation, and assists them in developing independent and well-informed conclusions regarding union representation.

The Department also revises the Form LM–10, the Form LM–20, and the corresponding instructions. These changes include modifications of the layout of the forms and instructions to better outline the reporting requirements and improve the readability of the information. The revised forms also require greater detail about the activities conducted by consultants pursuant to agreements and arrangements with employers.

Finally, this rule requires that Form LM–10 and LM–20 filers must submit reports electronically, but also has provided a process for a continuing hardship exemption, whereby filers may apply to submit hardcopy forms on a temporary basis. Currently, labor organizations that file the Form LM–2 Labor Organization Annual Report have been required by regulation since 2004 to file electronically, and there has been good compliance with this submission requirement. Employers and consultants likely have the information technology resources and capacity to file electronically, as well. Moreover, electronic Web-based filing option is also planned for all LMRDA reports as part of an information technology enhancement, including for those forms that cannot now be electronically filed, such as the Form LM–10 and Form LM–20. This addition should greatly reduce the burden on filers to electronically sign and submit their forms. No commenters challenged this proposed addition of mandatory electronic filing, and several comments explicitly offered support.

Published at the end of this rule are the revised Forms LM–10 and LM–20 and instructions. The revised Forms LM–10 and LM–20 and instructions also will be made available via the Internet. The information collection requirements contained in this rule have been submitted to OMB for approval.

B. Unfunded Mandates Reform

This rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of $100 million or more annually, or in increased expenditures by the private sector of $100 million or more. As discussed throughout this part of the preamble, the compliance costs associated with this rule are far less than the above thresholds.

C. Small Business Regulatory Enforcement Fairness Act of 1996

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This rule will not result in an annual effect on the economy of $100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

The Department received comments suggesting that it did not properly

justify this conclusion in the NPRM. In this regard, commenters primarily argued that the Department only focused on the burdens on Form LM–10 and LM–20 filers estimated in the PRA analysis, and not the broader impact on labor relations and the economy. In this regard, a commenter emphasized its view that the proposed rule would deny employers legal advice and lead to violations of labor law and therefore impose additional costs on employers. The Department explained in the preamble the objective nature of the test to determine reportability of employer-consultant agreements, and the minimal impact, if any, on the rights of employers and consultants. The rule has no impact on whether an employer can enter into an agreement. The Department also stated that consultants, who provided only legal services, or any other advisory services or representation in the enumerated areas, would have no reporting obligation. Thus, the Department does not believe that the rule will operate to deny employers advice, and, as a result, it is not persuaded that there would be increase in violations of the law.

D. Executive Order 13132 (Federalism)

The Department has reviewed this rule in accordance with Executive Order 13132 regarding federalism and has determined that the rule does not have federalism implications. Because the economic effects under the rule will not be substantial for the reasons noted above and because the rule has no direct effect on states or their relationship to the federal government, the rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.''

E. Executive Order 13175 (Consultation and Coordination With Indian Tribal Governments)

One commenter questioned why the NPRM did not, pursuant to Section 5 of E.O. 13175, contain a tribal impact summary statement or indicate whether it had consulted with any tribes prior to issuing the NPRM. In response, the Department states that it provided the public, including Indian tribal governments, the opportunity to comment during the proposed rule's comment period. No Indian tribal government commented on the proposal. Further, the rule does not ''have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.'' See E.O. 13175, Section 1.a. Indeed, the commenter identified no specific actual impact on any Indian tribe and, in the Department's view, it is not clear that the rule will have *any* direct effect on *any* Indian tribe. Should an issue arise concerning such effect, the Department will carefully and appropriately consider the status of the tribe and its relationship with the Federal Government in resolving the issue.

F. General Overview of Paperwork Reduction Act and Regulatory Flexibility Act Sections

In order to meet the requirements of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* and the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.,* and the PRA's implementing regulations, 5 CFR part 1320, the Department has undertaken an analysis of the financial burdens to covered employers, labor relations consultants, and others associated with complying with the requirements contained in this rule. The focus of the RFA is to ensure that agencies ''review rules to assess and take appropriate account of the potential impact on small businesses, small governmental jurisdictions, and small organizations, as provided by the [RFA].'' Executive Order 13272, Sec. 1. The more specific focus of the PRA is to reduce, minimize and control burdens and maximize the practical utility and public benefit of the information created, collected, disclosed, maintained, used, shared and disseminated by or for the Federal government. 5 CFR 1320.1.

Compliance with the requirements of this rule involves information recordkeeping and information reporting tasks. Therefore, the overall impact to covered employers, labor relations consultants, and other persons, and in particular, to small employers and other organizations that are the focus of the RFA, is largely equivalent to the financial impact to such entities assessed for the purposes of the PRA. As a result, the Department's assessment of the compliance costs to covered entities for the purposes of the PRA is used as a basis for the analysis of the impact of those compliance costs to small entities addressed by the RFA. Additionally, in response to comments received, the Department has also addressed under the RFA the impact on those entities that must review the reporting requirements to determine that filing is not required. The Department's analysis of PRA costs, and the quantitative methods employed to reach conclusions regarding costs, are presented first. The conclusions regarding compliance costs in the PRA analysis regarding Form LM–10 and Form LM–20 files are then employed, along with estimated burden costs on non-filers, to assess the impact on small entities for the purposes of the RFA, which follows immediately after it.

With the information newly provided as a result of this rule, employees will be better able to understand the role that labor relations consultants play in their employer's efforts to persuade them concerning how they should exercise their rights as employees to union representation and collective bargaining matters. Better informed employees will promote more stable and harmonious labor-management relations.

This rule also requires that employers and consultants file Form LM–20 and Form LM–10 reports electronically. Electronic reporting contains error-checking and trapping functionality, as well as online, context-sensitive help, which improves the completeness of the reporting. Electronic filing is more efficient for reporting entities, results in more immediate availability of the reports on the agency's public disclosure Web site, and improves the efficiency of OLMS in processing the reports and in reviewing them for reporting compliance.

G. Paperwork Reduction Act

This statement is prepared in accordance with the PRA, 44 U.S.C. 3501. As discussed in the preamble, this rule would implement an information collection that meets the requirements of the PRA in that: (1) The information collection has practical utility to employees, employers, labor relations consultants, and other members of the public, and the Department; (2) the rule does not require the collection of information that is duplicative of other reasonably accessible information; (3) the provisions reduce to the extent practicable and appropriate the burden on employers, labor relations consultants, and other persons who must provide the information, including small entities; (4) the form, instructions, and explanatory information in the preamble are written in plain language that will be understandable by reporting entities; (5) the disclosure requirements are implemented in ways consistent and compatible, to the maximum extent practicable, with the existing reporting and recordkeeping practices of employers, labor relations consultants, and other persons who must comply with them; (6) this preamble informs reporting entities of the reasons that the information will be collected, the way

in which it will be used, the Department's estimate of the average burden of compliance, the fact that reporting is mandatory, the fact that all information collected will be made public, and the fact that they need not respond unless the form displays a currently valid OMB control number; (7) the Department has explained its plans for the efficient and effective management and use of the information to be collected, to enhance its utility to the Department and the public; (8) the Department has explained why the method of collecting information is ''appropriate to the purpose for which the information is to be collected''; and (9) the changes implemented by this rule make extensive, appropriate use of information technology ''to reduce burden and improve data quality, agency efficiency and responsiveness to the public.'' 5 CFR 1320.9; see also 44 U.S.C. 3506(c).

This rule establishes revised Form LM–10 and LM–20 reporting forms, which constitute a ''collection of information'' within the meaning of the Paperwork Reduction Act of 1995 (PRA) [44 U.S.C. 3501–3520]. Under the PRA, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number assigned by the Office of Management and Budget (OMB). The Department submitted an information collection request to OMB in association with this rule on February 25, 2016, after considering all public comments on the information collections in the proposed rule. That review is pending. The Department will publish an additional notice in the **Federal Register** to announce OMB's decision on the request.

The Department is in the process of extending the OMB authorization, as part of its effort to require mandatory electronic filing for labor organizations that file the Form LM–3 and LM–4 Labor Organization Annual Report. See the related Notice published in the **Federal Register** on May 20, 2015 (80 FR 29096).

In the analysis that follows, the Department estimates the recordkeeping and reporting costs of the rule on labor relations consultants and employers. To arrive at these estimates, the Department made the following assumptions:

- NLRB and NMB representation elections are a proxy for organizing campaigns. A mean consultant utilization rate of 78% by employers during organizing campaigns is used to arrive at the number of Form LM–20 reports and filers;
- An employer will hire only one consultant when faced with an organizing drive, as opposed to multiple consultants;
- The total number of Form LM–20 reports consists of reports for union avoidance seminars as well as targeted activities (non-seminar reports);
- The total of number of Form LM–20 filers are based on existing reporting data (only applied for non-seminar reports) and includes all consultants, including law firms;
- For the number of seminar reports, each ''business association'' entity (NAICS 813910, which includes trade associations and chambers of commerce) that operates year-round with 20 or more employees is estimated to sponsor a seminar annually and to contract with a consultant firm to conduct the seminar. The consultants hired to conduct these seminars will also independently hold an equal number of seminars. The consultants will file all seminar reports (half sponsored by business associations and half independently held by them).
- The total number of Form LM–10 reports is based off of the estimated number of non-seminar Form LM–20 reports, plus the existing reporting data on non-persuader Form LM–10 reports. The Department assumes that each Form LM–10 report submitted will involve either persuader or non-persuader activity, although in practice there may be some overlap. For the cost estimates, however, it is assumed that a filer will complete all parts of the Form LM–10, for both persuader and non-persuader transactions;
- Estimates for the recordkeeping and reporting hours derive largely from the Form LM–30 Labor Organization Officer and Employee Report final rule from October 2011 (see 76 FR 66441);
- Consultants and employers already keep business records necessary for reporting, such as agreements and seminar attendance sheets;
- Attorneys will file reports on behalf of consultants and employers. The estimated recordkeeping and reporting costs are based on BLS data of the average hourly wage of an attorney, including benefits;
- Non-filing entities are estimated to spend one hour total reading instructions (10 minutes) and determining that the rule does not apply to them or their clients (50 minutes). Non-filing entities are comprised of those labor and employment law firms, human resource consultant firms, and business associations that are not otherwise estimated to be filing. Not every employer, human resources firm, or law firm is impacted, only those that enter into labor relations agreements.
- No ''initial familiarization'' costs. Employers and consultants are unique filers each year, and costs associated with ''familiarization'' are therefore included within the estimated costs, as is the case with Form LM–30 filers;
- For the RFA analysis, all affected entities are assumed to be small business entities.

1. Overview and Response to Comments Received

In the notice of proposed rulemaking (NPRM), the Department estimated an annual total of 2,601 Form LM–20 filers and 3,414 Form LM–10 filers resulting from the proposed rule. 76 FR 36198–200. To estimate the number of Form LM–20 filers, the Department first identified the average number of representation elections. Representation elections permit employees to vote whether they wish to be represented by a particular labor union. Representation elections may be contested by employers who spend resources and hire management consulting firms to defeat unions at the ballot box. Id. at 36185. The Department calculated the representation cases filed with National Mediation Board during fiscal years 2005–2009 (which equaled 38.8 annually) and added that figure to the average number of National Labor Relations Board representation cases filed during the same period (which equaled 3,429.2), for an annual total of 3,468 representation elections. Next, the Department reviewed the research literature and determined that the median utilization rate of consultants by employers was approximately 75%. As a result, the Department concluded that there would be 2,601 ($3,468 \times .75 = 2,601$) elections in which employers would hire consultants to persuade employees with regard to their right to organize and bargain collectively, triggering thereby the requirements that employers file Form LM–10 and consultants file Form LM–20 reports.

To determine the increase in filing caused by the proposed rule, as compared to the existing rule, the number of estimated new Form LM–20 reports (2,601) was reduced by the average number of reports already being filed (191), resulting in an expected increase of 2,410 ($2,601 - 191 = 2,410$) Form LM–20 reports. Although the numbers could be increased by assuming that an employer might enter into multiple agreements during a single union organizing campaign or consultants may hire subcontractors, the Department made no such assumptions,

instead seeking comment on this issue. 76 FR 36199–200.

Having derived an estimate for Form LM–20 submissions, the Department then calculated the annual number of expected Form LM–10 filings. See 76 FR 36199. It estimated 3,414 Form LM–10 filers. This constituted an estimated increase of 2,484 over the existing average of 930 Form LM–10 reports. The analysis began with the 2,601 NLRB and NMB elections, discussed above, where 75% of involved employers were projected to hire consultants to persuade employees with regard to their right to organize and bargain collectively (3,468 × .75 = 2,601). The existing Form LM–10 reporting history was reviewed, revealing an annual average of 930 Form LM–10 reports filed, consisting of 117 reports of activities to persuade employees about their rights to organize and bargain collectively and about 813 reporting conduct unrelated to such activities. The 2,601 agreements to persuade were added to the average number (813) of Form LM–10 non-persuader reports. This resulted in a total of 3,414 annual Form LM–10 reports (2,601 persuader reports and 813 reports of financial activity unrelated to persuading) (2,601 + 813 = 3,414). Under the Form LM–10, and unlike the Form LM–20, multiple agreements and subcontracts are not relevant as they do not require additional reports.

In this rule, the Department estimates that it will receive approximately 4,194 Form LM–20 reports. Of this figure, 2,104 are associated with representation elections. The difference between the 2,601 reports arising from representation election projected in the NPRM and the 2,104 projected here is the use of current data (as explained below, the NRPM relied on NLRB and NMB data from FYs 2005–09, while the final rule uses data from FYs 2009–13 for NLRB data and data from FYs 2010–2014 for NMB data). Reports arising from union avoidance seminars account for an additional 2,090 Form LM–20 reports not projected in the NPRM. As further explained below, the Department assumes that 358 unique entities will file these reports. This is the number of estimated consultants, including law firms, which will be filing LM–20 reports.

This rule does not alter the method of calculating Form LM–10 reports. The Department estimates 2,777 Form LM–10 reports, which represents a decrease from the 3,414 estimate in the NPRM. The adjustment is the result of updated data made available by the NLRB and NMB, as well as accessible from the OLMS reporting records. The increase in Form LM–20's as a result of the union seminar rules will not increase the number of Form LM–10 reports because under the rule employers are not required to report their attendance at union avoidance seminars.

The Department received multiple comments in response to its PRA analysis and estimated burden numbers. These comments focused upon three areas: The number of filers and reports; the hours per filer; and the cost per filer.

Many of the comments focused on the number of potential reports. One business association criticized the Department's estimates, but noted that the NPRM's analysis ''does a better job than most'' in presenting its cost analysis. One employer association challenged the estimate of the number of submitted reports for the revised forms as too low, since the estimate focused only on organizing efforts thus ignoring the burdens associated with reporting activities related to ''positive workplace polices'' and matters such as voluntary recognition and corporate campaigns. Other commenters presented similar concerns, although none provided data or data sources to quantify such activities. Further, the Department's estimate, in the employer association's view, did not take into account the large number of seminars held for management or the broad scope of the term ''protected concerted activities,'' which would also trigger reporting if there was an object to persuade employees. Other commenters expressed similar concerns, with one consultant firm indicating that such seminars are offered by HR firms, chambers of commerce, trade associations, and law firms, with tens of thousands of attendees annually. This firm also estimated that employee opinion surveys would trigger hundreds of thousands of reports. One trade association asserted that the Department only provided an estimate for the number of employers required to file the forms (2,601) but not law firms or consultant firms.[96] A public policy organization argued that the Department's estimate incorrectly assumed that a Form LM–20 filer would submit a single report, while the Department's database suggests that Form LM–20 filers often submit multiple reports. A consultant firm also argued that consultants would enter into multiple reportable agreements annually.[97]

The Department believes that the basic approach to estimate the number of reports utilized in the Department's initial analysis is sound, and we replicate it here. As the commenters recognized, and as the Department noted both in the proposed and final rule, the Department has used NLRB and NMB election activities as a proxy for estimating the number of reports that will be filed under the rule. The Department again has calculated a five-year average of representation petitions from NLRB and NMB data, and then employed the mean rate (78%) of employer utilization of consultants to manage an anti-union campaign when faced with an organizing effort.[98] Please note that the Department previously used the median utilization rate, but is now using the mean for a more consistent statistical analysis. 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 and other union avoidance efforts outside of representation petitions, such as organizing efforts that do not result in the filing of a representation petition. Yet, as noted by the Department in the NPRM and in the comments received, there is no reliable basis for the Department to estimate reports received in many areas outside of representation petitions.[99] 76 FR 36199.

[96] This commenter was incorrect. The estimate of 2,601 was the number of Form LM–20 reports that the Department would receive as a result of the proposed rule, while the Department estimated 3,414 Form LM–10 filers.

[97] Some commenters argued that they would have been able to provide better estimates of the burden associated with the proposed rule if the comment period on the proposal had been extended. In the Department's view, the 90-day comment period provided adequate time for commenters to respond to the Department's estimates, as well as the rest of its proposal. This view is supported by the breadth of comments received on the Department's estimated burden and other aspects of the proposal. The Department also extended the initial 60-day comment period to 90 days, in response to comments received. See 76 FR 45480. The Department responded separately to these requests for an extension of the comment period.

[98] As also explained within the PRA analysis, the Department has updated this estimate based on more recent data from the NLRB and NMB: Data from FYs 2009–13 for NLRB data and data from FYs 2010–2014 for NMB data rather than FYs 2005–09 relied upon in the NPRM.

[99] An employer association noted that it is not aware of any ''reliable database'' to determine the number of such agreements concerning persuader activity that occurs outside of an NLRB or NMB representation petitions or otherwise outside of a labor dispute, including card check recognition or corporate campaigns, beyond the estimates provided. The Department concurs with this observation. While the Department's estimate is therefore necessarily imprecise, it is supported by the record and comments, and little substantiated or quantified data was proffered to contradict it. In applying to OMB for a continuation of the information request, the Department will update its

In one respect, the comments have persuaded the Department to refine its analysis in estimating the total number of LM–20 reports that will be filed under the rule. As discussed below, in addition to the number of persuader agreements connected with representation petitions, the Department has provided an estimate of the number of reports that will be filed in connection with union avoidance seminars. This activity was not specifically considered in the initial burden analysis. Its inclusion substantially increases the overall estimate of Form LM–20 reports. To summarize, the Department has estimated that it will receive 4,194 Form LM–20 reports pursuant to this rule, with 2,104 associated with representation elections and 2,090 with union avoidance seminars.

Additionally, the Department concurs with the commenter that asserted the Department should provide an estimate for the number of Form LM–20 *filers,* separately from the number of reports. In response to comments received, the Department provides an estimate of the number of Form LM–20 filers: 358.[100] This revision takes into account, as noted by some commenters, that Form LM–20 ''filers'' or ''respondents'' may submit multiple ''responses'' or reports under the rule.

The Department estimates from its existing data of submitted Form LM–20 reports that consultants, including law firms, file an annual average of approximately 5.875 reports a year. We assume this ratio will continue under this final rule for non-seminar reports. Accordingly, as we have estimated 2,104 reports will arise from representation elections, and that 5.875 of each will be submitted by a single filer, there will be approximately 358 unique filing entities (2,104/5.875 = 358). Because we conclude that the pool of consultants who engage in persuader activities during representation elections are the same group who engage in persuader activities in the context of union avoidance seminars, we do not estimate any further increase in filers when estimating the number of union avoidance seminar reports. Instead, the Department assumes that these 358 filers will conduct each of the union avoidance seminars covered by this rule.

Regarding the estimate for union avoidance seminars, in the absence of any data reflecting a precise number of seminars or conferences that would trigger reporting, to estimate the number of reportable seminars the Department begins with the number of business associations that appear most likely to organize such seminars (1,045). How the Department arrived at this number is discussed below.

To determine the number of Form LM–20 reports submitted by reason of consultants conducting union avoidance seminars, the Department utilized the reporting data for ''business associations'' from the U.S. Census Bureau's North American Industry Classification System Codes (NAICS), NAICS 813910, which includes trade associations and chambers of commerce.[101] Of the 15,808 total entities in this category, the Department assumes that each of the 1,045 business associations that operate year round and have 20 or more employees will sponsor, on average, one union avoidance seminar for employers.[102] The Department assumes that each association, on average, will offer one such seminar annually, most likely at the association's annual, general conference.

Additionally, the Department assumes, for purposes of estimating burden, that all of the 1,045 identified business associations will contract with a law or consultant firm to conduct that seminar, because these firms have expertise in the union avoidance area and will generally be willing to provide such service as a means to generate new clients. Further, the Department assumes that such seminars will be conducted by firms within the estimated group of 358 consultant firms, including law firms (that file the non-seminar Form LM–20 reports).

Furthermore, while the Department assumes that such firms will, as a matter of mutual benefit, generally utilize the existing seminar arrangements offered by the trade associations (given the potential savings of time and resources in recruitment, event planning and related expenses, which are typically absorbed by the trade association and given the potential exposure to members of that association which these firms might not otherwise have), the Department also considers it likely that many of the estimated 358 consultants, including law firms will also hold their own, independently facilitated union avoidance seminars. While the Department is not aware of any authoritative or comprehensive source that could provide accurate data concerning the number of such seminars that consultants would independently provide, and the comments are silent on this point, the Department assumes that such firms, in the aggregate, will offer at least as many annual seminars independently as would trade associations. Thus, for purposes of the instant analysis, the Department estimates that annually a total of 2,090 Form LM–20 reports will be filed in connection with union avoidance seminars. Half of these seminars (1,045) will be sponsored by a business association and half (1,045) will be unsponsored (1,045 + 1,045 = 2,090).

The Department assumes that, on average, each of the 358 estimated law/consultant firms will present and therefore report for each of these seminars. As a result, the Department estimates that such firms will present a total of approximately six seminars per year (2,090/358 is 5.838). This does not mean that each reporting consultant will file six Form LM–20 seminar reports per year; we expect there will be considerable variation in filing for union avoidance seminars around this average, as would be expected in a normal distribution. Some consultants may not have conducted a seminar, so they accordingly will not file a seminar-related Form LM–20 at all. Other consultants, for example, may only conduct one seminar annually while others may conduct one per month (or 12 annually). Thus, the Department believes that an average of approximately six is reasonable. These 2,090 seminar reports are in addition to the estimated 2,104 non-seminars reports, for a total of 4,194 Form LM–20 reports. Although, as discussed in note 102, there may be other entities required to submit reports, the

estimate based upon the reporting experience under the rule.

[100] The Department assumes that these 358 filers are consultants, including law firms, because the rulemaking record indicates that these entities manage counter-organizing efforts in connection with representation elections, as well as conduct union avoidance seminars. Additionally, in practice, other ''persons'' may enter into persuader agreements and business associations may engage in other reportable persuader activities, but no quantifiable data was provided on these persons or their activities. The Department also assumes that these 358 entities will file the estimated 2,104 non-seminar reports (as adjusted from the NPRM as a result of more recent OLMS, NLRB, and NMB data), as well as the additional 2,090 seminar reports estimated in this rule.

[101] See U.S. Census Bureau, Statistics of U.S. Businesses: 2012: Number of Firms, Number of Establishments, Employment, and Annual Payroll by Enterprise Employment Size for the United States, NAICS 813910—Business Associations, United States, released on 1/23/15, accessed at: *http://www.census.gov/econ/susb/.*

[102] The Department has used 20 employees as a threshold due to the logistics of planning a seminar. In particular, an organizer must plan the agenda, recruit and arrange persuaders to present, engage in public relations and event management, and arrange event space, meals, lodging, and audio/visual technology. The assumption that each entity with 20 or more employees organizes a persuader seminar is likely an overestimate, as not every entity capable of organizing a seminar will do so in practice.

comments suggest that number to be small relative to the estimated 358 entities.

The Department has not otherwise revised its estimates concerning the use by employers of consultants to persuade in circumstances in which employees are not currently seeking a union. First, the Department clarified, in Section IV.B of the preamble, that the consultant's development of personnel policies does not trigger reporting merely because they may subtly influence employee decisions. Rather, reporting is triggered only if they are undertaken with an object to persuade employees. Personnel policies are unlikely therefore to trigger a report, at least in circumstances other than what the Department has based its estimates (representation elections and union avoidance seminars). Second, the Department has removed the term ''protected concerted activities'' from the reporting obligation, which is now limited to persuader activities affecting the representation and collective bargaining rights of employees. Third, the final rule removes employee attitude surveys and vulnerability assessments from the list of persuader activities. Furthermore, the Department has revised its estimate, in response to comments received, to account for union avoidance seminars. Indeed, the rulemaking record does not suggest any further basis to estimate additional persuader reports.[103]

As the Department explained in the NPRM and in this preamble, the Department's past experience regarding the number of Form LM–10 (insofar as they may reflect persuader activities) and Form LM–20 filings provides limited utility in estimating the number of anticipated filings under the proposed or final rule. As discussed above, the Department's LMRDA reporting forms must be reviewed by the Department and approved by OMB at least every three years. Filing experience under the final rule will enable the Department to more accurately estimate the number of filers and burden associated with the rule and this experience will guide the Department in its future submissions to OMB justifying recertification of this information collection.

Several commenters criticized the Department's estimates concerning the hours required to complete the forms and the hourly wage rate used to calculate the total cost. No commenters provided any specific alternative methodologies, data sources, or estimates for reporting and recordkeeping burden, besides general statements criticizing the NPRM's estimates as too low and references to the purported ''vagueness'' of the proposed rule.[104]

In terms of burden hours required to read the Forms LM–10 and LM–20 instructions, an employer association contended that the 20-minute Form LM–10 estimate and 10-minute Form LM–20 estimate for reading each set of instructions, respectively, was ''arbitrary'' as it is not based upon any empirical study, and does not include time needed to read the preamble to the rule. A business association argued that the estimates to read the instructions were too low, and that employers would need to familiarize themselves with the LMRDA, its regulations, Department-issued guidance, as well as the forms, and then collect the information necessary to complete the form. Similarly, a law firm stated that underestimated numbers derive from the Department's lack of recognition of the broad scope of its new interpretation of persuader activities, particularly concerning personnel policies, which would require employers to analyze each of their employees' actions for evidence of a ''persuader act.'' A trade association argued that the estimates for the Form LM–10 were inaccurate, as they failed to take into account the complexities of various organizations, with ''unrealistic and seemingly arbitrary assumptions,'' and would ''clearly'' require more than two hours to complete. The employer association also stated that the NPRM did not take into account communication needed between the employer and consultant; the consultant's need to ''guess'' at the employer's intent; the need to institute new contracts, business practices, and records systems; and to monitor activities to ensure compliance. A consultant firm stated that the total burden must take into account the ''new, subjective definition of 'persuasion,' '' to determine if reporting is even required. Doing so would result in the employer spending many hours per year monitoring activities (such as conference or trade association meetings, training sessions or employee committee meetings, communications with outside attorneys, and development of employee opinion surveys) for persuader content, which would lead to over $100 million in total reporting.

Concerning other reporting and recordkeeping burden estimates, an employer association argued that the Department incorrectly relied on estimates used in the recently published Form LM–30 final rule, as that report is filed by individuals, not organizations that are more complex. See 76 FR 66485–89.[105] The employer association asserted that the filers do not regularly keep the required records, although it acknowledged that they ''may have appropriate records,'' but the NPRM did not take into account the need to review them. The commenter specifically mentioned records concerning seminars, as the employer may not keep track at all, nor would a lawyer who does not know the attendees.

[103] The Department has updated its estimate of Form LM–10 reports to account for more recent data made available by the NLRB and NMB, as well as that data accessible from the OLMS reporting records. The Department, however, has not otherwise modified its Form LM–10 estimates. Under the final rule, employers are not required to report their attendance at union avoidance seminars on the Form LM–10. See Section IV.B of the preamble. A consultant that conducts a union avoidance seminar identifies the employer attendees in a single report. Id.

[104] Commenters also mentioned the increased burden associated with the Form LM–21 Receipts and Disbursements Report. The Department has separately addressed the burden associated with this report in the Information Collection Request to OMB accompanying this rule.

[105] A public policy organization suggested that the Department in this rulemaking imposes a substantial burden on filers, whereas in 2011 the Department revised its LM–30 reporting requirements in order to reduce by five minutes the burden on union officials and to avoid overwhelming the public with unnecessary reports. In both rulemakings, the Department has been sensitive to concerns about imposing undue burden on filers, ensuring that burden brings with it meaningful benefits to employees, this Department, and the public. In the Form LM–30 rulemaking, the Department was concerned with the substantial time required by union officials to report union leave (payments from employers to union officials, who are current or former employees of the employer, for union work) under the previous rule (saving 120 minutes for those required to file the report and a substantial, although uncalculated, burden on non-filers, who needed to read the form and instructions and keep track of the number of union leave hours received). See 76 FR 66454.

In the Form LM–30 final rule, the Department determined that union leave reporting, as well as the reporting of certain bona fide loan payments to union officials, did not present actual or potential conflicts of interest, and therefore should be eliminated from reporting to prevent unnecessary burden on union officials and the receipt of superfluous reports that do not demonstrate conflicts of interest. See 76 FR 66451–54, 57. Similarly, the Department in this rule protects employers and consultants by focusing on employer retention of third parties to persuade employees, not in-house management officials. Further, for example, this rule exempts reporting for vulnerability assessments; personnel polices developed by the consultant without an object to persuade; and by exempting reporting for employer retention of attorneys for strictly legal services as well as other third parties for providing exclusively advice or certain representative services. The reporting of these services is not necessary for workers to evaluate the information presented to them by their employer, and reporting would burden employers and consultants and overwhelm the public with unnecessary information.

Further, a trade association disagreed with the estimated two minutes for ''signature and verification'' for the president and treasurer, which it considered too low due to the difficulty in ensuring each of these officers of a complex organization to sign any document. A law firm contended that the Department underestimated the time needed to identify the subject employees who are to be persuaded in Form LM–20 Item 12(a) and Form LM–10 Item 14(e), which, it argued, involved greater detail than the prior form, which only required the filer to provide the ''identity of the subject employees.''

The Department largely disagrees with these comments. The Department's estimates are not arbitrary, but rather derive from the similar Form LM–30 report. The Department views the use of Form LM–30 data is an appropriate benchmark, because each must be filed only upon a triggering event, and not merely by virtue of an entity's existence, as with the annual labor organization reports. The Form LM–30 also has many similar data requests to the Forms LM–10 and LM–20. The fact that Form LM–30 filers are individuals rather than organizations generally has no bearing on the type of information requested or the manner in which it is reported. Indeed, employers and consultant firms are more likely to employ attorneys to complete the reports, and likely have greater background in completing such reporting forms or in retaining the types of records required to be maintained, than labor organization officers and employees. In contrast, organizations such as employers and consultants regularly employ and retain hourly billing, financial, and other records and likely have systems in place to retrieve them.

Furthermore, as explained in the preamble, the Department asserts that the definition of ''persuasion'' has not changed and is an objective test. The preamble also clarifies that the reporting requirements are triggered by the consultant's object in undertaking the activities, including the development of personnel policies, as evidenced by the agreement and communications and personnel policies prepared and disseminated to employees. Thus, employers and consultants already have access to identical information, and neither party would be required to create any additional documents as a result of this rule. The parties also do not need to monitor activities undertaken, because reporting is triggered upon entering into the agreement. Thus, the parties would generally need to analyze the agreement itself, with a review of communications or policies only if the agreement did not make clear the intended consultant activities. In such cases, the employer and consultant would both likely have access to the consultant-created communications or personnel policies disseminated to employees, or employer-created material reviewed by the consultant who directed or coordinated the activities of the employer's representatives, and would therefore be able to review them. Concerning union avoidance seminars, the Department has exempted employers from reporting these agreements, and the Department is not convinced that the organizers of such events would fail to keep records of attendees. The organizers would likely maintain such business records both to ensure proper payment for attendance and to recruit participants for future conferences and/or consulting opportunities. The organizers, too, would have possession of the materials used at the seminar, if for no other reason than to use the same or very similar materials in future seminars or to provide additional copies of materials to participants or even non-participants that might request them. Any presenter at the event could obtain this information from the organizer, and it likely does so for purposes of identifying prospective clients. Additionally, as stated, the final rule removes, generally, employee attitude surveys and vulnerability assessments from reporting, unless there is evidence that the surveys are ''push-surveys'' or they otherwise evidence an object to persuade for the consultant.[106]

The Department concurs with the business association that the estimated 20 minutes to read and apply the Form LM–10 instructions and 10 minutes to read and apply the Form LM–20 instructions are too low. Since both parties will also need to apply the instructions to the agreement and related activities to determine reporting, and these estimates are significantly lower than the 30 minutes provided for the Form LM–30 instructions, the Department has increased both estimates to account for the total time needed to review and apply the instructions. Thus, the Department estimates that Form LM–10 filers will require 25 minutes to read and apply the instructions, and Form LM–20 filers 20 minutes to do so. This is a five and ten-minute increase over the revised rule for the two forms, respectively. While the Department estimates that Form LM–30 filers will require 30 minutes, see 76 FR 66487, the Forms LM–10 and LM–20 are completed by organizations, often with the assistance of attorneys, thus justifying the reduced time. The estimate for the Form LM–10 is greater than the Form LM–20, because the form and instructions have provisions that are not in the Form LM–20.

The Department does not agree that it must include the time needed to read other aspects of the LMRDA or its implementing regulations or any guidance issued by the Department concerning the Form LM–10 and LM–20 in the preamble to this rule or subsequent to its publication. Such further guidance will simply assist filers in applying the form and instructions, and thus the filer is not required to read such material. Further, no such time is given union officials in the case of the Form LM–30 or for that matter, for union officials who must complete the Form LM–2 or other annual financial reports. The time needed to gather records, upon reading the instructions, is a separately identified recordkeeping burden.

The Department also concurs that several other burden estimates should be increased. As a result of the determination to allow Form LM–20 filers to consolidate information concerning union avoidance seminar attendees on one form, the Department has increased the time required to complete Form LM–20 Item 6 from four minutes to ten minutes. This item requires the filer to identify the employer with which it entered into the agreement. The Department does not believe that, for example, Item 6 will require four minutes for each employer attendee, as the information for all attendees of the seminar will likely be located in one document and will be readily available. Additionally, the presenters of such seminars likely already receive this information from the seminar organizers, as explained. Furthermore, the Department will allow filers to import this data into the electronic form. However, the Department has increased the total estimate of time for these items because of the volume of employer attendees that certain seminar filers will need to record on the form.

[106] The Department notes that the consultant firm that estimated that the total burden of the proposed rule amounted to at least 1.4 million hours per year based its calculation on an incorrect assumption about the total of filers, which it stated would be in the hundreds of thousands. The commenter grounded this estimate of total filers in incorrect assumptions and estimates, as explained, made about seminars and opinion surveys. Thus, the Department dismisses the highly exaggerated estimate of total burden hours. The Department's revised estimates on total burden hours and costs, including more specific response to comments received, are detailed within this section.

The Department has also increased the estimated time required to identify the subject employees who are to be persuaded in Form LM–20 Item 12(a) and Form LM–10 Item 14(e), from one minute to five minutes. The Department agrees that the information required, although readily available, will require more than one minute to compile and record on the form. The information will either be readily available in the agreement itself or in the communications or policies prepared for employees. In certain cases, the consultant may have targeted its persuasion to all the employer's employees, or large groups of the employees, in which case the information will also be easily obtained.

Further, the Department has increased the estimated time for completing Form LM–20 Items 13 and 14, and Form LM–10 Items 18 and 19, the ''Signature and Verification'' items. The Department concurs that the president and treasurer of Forms LM–10 and LM–20 filers are not similar enough to Form LM–30 filers, in this respect, to justify the identical burden estimate for this aspect of the form. Rather, the president and secretary-treasurer of large labor organizations are more identical in this respect. In the 2003 Form LM–2 final rule, the Department estimated that it would take union officers two hours each to obtain an electronic signature and one hour to read and sign the report, upon its full implementation. See 68 FR 58438. However, the two-hour estimate to acquire the electronic signature no longer applies, as the Department has eliminated the costly and burdensome digital signature and has adopted a free and easy-to-obtain PIN and password approach, the same system that will be used by Form LM–10 and Form LM–20 filers. Further, the Forms LM–10 and LM–20 estimates do not exactly mirror the more detailed and time-consuming Form LM–2 report. Thus, the Department estimates that the signature and verification process will require a total of 20 minutes, 18 more than proposed. This estimate is identical to that of the recently rescinded Form T–1 Trust Annual Report. See 73 FR 57441.[107]

[107] The Department notes that the Form T–1 estimate was also based on the prior digital signature, not the easily-obtained EFS electronic signature. Thus, the 20-minute estimate may overstate the actual burden. Furthermore, the Department also notes that the rescission of the Form T–1 was not based upon errors in the PRA analysis. Indeed, the Department utilized some of the estimates and underlying assumptions in the PRA analysis establishing the Form T–1 in order to estimate the burden for subsidiary organization reporting on the Form LM–2. See 73 FR 74952.

In response to the Department's cost estimates, the employer association rejected the Department's use of the average hourly compensation for lawyers of $87.59, pursuant to data from the Bureau of Labor Statistics (BLS), and instead supported the use of average hourly compensation for chief executive officers (CEOs) of $108.34. A trade association also criticized the per-hour compensation figure, as it may be ''realistic'' for some ''in-house lawyers'' but not for lawyers in law firms. The Department rejects the employer association's suggestion, and retains the use of the total compensation figure for attorneys, as this conforms to the Department's historical practice, and the rulemaking record does not support the inference that the Form LM–10 or Form LM–20 is completed by CEOs rather than lawyers.[108] The Department also notes, as explained in more detail below, that it has updated its adjustment for total compensation from 41.2% (as used in the NPRM, see 76 FR 36203) to approximately 44.5% as a result of the availability new data from BLS, resulting in a revised average hourly compensation for lawyers of $92.53. The Department also rejects the lower 30% provided by the commenter. Further, the Department retains the BLS estimate for the hourly wage of lawyers (updated with more recent data), as the figure represents an average for all lawyers, and neither the trade association nor any other commenter provided an alternative estimate for the hourly wage for lawyers.

Additionally, a business association contended that affected employers would seek advice regarding LMRDA reporting compliance from outside counsel, and the Department did not take this into account. The Department emphasizes that the burden estimates to complete and submit the Form LM–10 are burdens impacting the employer, but this does not prevent the employer from seeking assistance from another party to complete the form. Indeed, in such a case the estimates are of time undertaken by the third party, although charged to the employer. In many cases, the consultant that entered into the agreement with the employer may assist the employer in completing the employer's report as well as its own. This third-party assistance is appropriate, as long as the employer's president and treasurer verifies and signs the report.

Finally, the Department in the preamble responded to comments that suggested that the revised forms established a ''subjective'' test, replacing a ''bright-line'' test, without adequate justification in the statute, legislative history, or public policy. The Department also responded to assertions that the proposed rule would chill employer speech, restrict access to attorneys and thereby increase labor law violations, and discourage positive personnel policies. In response, as explained elsewhere in the preamble, the Department clarified the objective nature of the test to determine reportability of employer-consultant agreements, the strong support for such test in the text of the statute and its legislative history, and the benefits concerning such transparency to employee rights to organize and bargain collectively, as well as to stable and peaceful labor-management relations. In particular, the Department explained that reporting is not triggered merely because the consultant developed a personnel policy that improves employee wages, benefits, or working conditions. Rather, the consultant must have an object to persuade employees.

Except as noted above or within, the analysis below is identical to that of the NPRM. Any differences are explained in this section.

2. Overview of the Revised Forms LM–20, LM–10, and Instructions

a. Revised Form LM–20 and Instructions

The Revised Form LM–20 and Instructions (see Appendix A) are described in Section IV.D, and this discussion is incorporated here by reference.

b. Revised Form LM–10 and Instructions

The Revised Form LM–10 and Instructions (see Appendix B) are described in Section IV.D, above, and this discussion is incorporated here by reference.

3. Methodology for the Burden Estimates

The Department first estimated the number of Form LM–10 and Form LM–20 filers that will submit the revised form, as well as the increase in submissions that result from the rule. Then, the estimated number of minutes that each filer will need to meet the

[108] The Department acknowledges that the employer officials signing and verifying the Form LM–10 reports may be CEOs rather than attorneys. However, the Department estimates that attorneys would still complete the overwhelming majority of the report, with the employer officials spending the estimated 20 minutes signing and verifying the forms, which is only a fraction of the total estimate of 147 minutes (approximately 13.6%) for the form. This difference, along with the relatively small difference in total compensation between the CEO and attorney categories, does not warrant a separate calculation, and the use of the average total attorney compensation provides a reasonable estimate for the Form LM–10.

reporting and recordkeeping burden of the revised forms was calculated, as was the total burden hours. The Department then estimated the cost to each filer for meeting those burden hours, as well as the total cost to all filers. Federal costs associated with the rule were also estimated. Additionally, the Department notes that the burden figures provided below are intended to be reasonable estimates, for the average filer, and not precise statements of the number of filers and hour and cost burden for every filer.

a. Number of Revised Form LM–20 and Form LM–10 Filers

The Department estimates 4,194 Form LM–20 reports and 2,777 Form LM–10 reports under this rule (the first number is increased from the 2,601 estimate in the NPRM; the second figure represents a decrease from the 3,414 estimate in the NPRM). The Form LM–20 total represents an increase of 3,807 Form LM–20 reports over the total of 191 reports estimated in the Department's most recent Information Collection Request (ICR) submission to the Office of Management and Budget (OMB). The Form LM–10 total represents a 1,820 increase over the average of 957 Form LM–10 reports received annually between FY 2010 and 2014.[109]

(i). Form LM–20 Total Filer Estimate

The Department estimates 4,187 revised Form LM–20 reports. To estimate the total number of revised Form LM–20 reports, the Department first estimated the number of individual persuader agreements between one employer and one consultant firm. Second, in response to comments received concerning seminar reporting, the Department estimated the number of Form LM–20 reports received for union avoidance seminars from consultant firms (including law firms).

First, the Department employed the mean rate (78%) of employer utilization of consultants to manage an anti-union campaign when faced with an organizing effort. See Section III.B.3. The Department views this rate as providing the best method at estimating non-seminar persuader reporting, as it is aware of no data set that will reflect all instances in which a labor relations consultant will engage in reportable persuader activity. Further, there is no ready proxy for estimating the use of consultants in contexts other than in election cases (with the exception of union avoidance seminars, as explained below), such as employer efforts to persuade employees during collective bargaining, a strike, or other labor dispute. The Department believes, however, that the number of representation and decertification elections supervised by the National Labor Relations Board (NLRB) and the National Mediation Board (NMB), the agencies that enforce private sector labor-management relations statutes, provides a reasonable benchmark for estimating the number of reports that will be filed under the rule.

The Department applied the 78% employer utilization rate of consultants to data from the NLRB and NMB. As shown above in Section III.B.3, and as updated from the NPRM to account for the most recent fiscal years available, the NLRB received an annual average of 2,658 representation cases during the fiscal years 2009–2013.[110] The NMB handled an annual average of 40 representation cases during the fiscal years 2010–2014.[111] Applying the 78% figure to 2,698 (the approximate, combined NLRB and NMB average representation case total per year) results in approximately 2,104 Form LM–20 reports.

Second, in response to comments received concerning persuader seminars and other persuader activities conducted outside the context of NLRB and NMB election process, and as explained above, the Department also assumes that reports will be filed in the context of union avoidance seminars (calculated independently from the NLRB and NMB election-based estimates). The Department estimated the number of Form LM–20 reports filed by consultants for such seminars by distinguishing between those seminars organized by a trade or businesses association but presented by a consultant who subcontracts with the association, and those seminars organized and presented by a consultant itself (or a trade or business association itself). The Department utilized data concerning the 15,808 ''business associations'' from the NAICS.[112] This category includes trade associations and chambers of commerce. The Department does not consider it likely that business associations with less than 20 employees will organize seminars for employers. Rather, the Department assumes that each of the 1,045 business associations that operate year round and have 20 or more employees will, on average, organize annually one persuader seminar. The Department does not believe it is likely that these associations would conduct such seminars themselves, but, rather, will contract to a consultant or law firm, as described. Additionally, to provide a more comprehensive picture of seminar reporting, the Department estimates that the combined 358 individual *filers* (law firms or other consultants), in addition to presenting the 1,045 seminars for business associations, would also conduct or present an additional 1,045 seminars conducted annually. Thus, the Department estimates that it will receive 2,090 (1,045 + 1,045) revised Form LM–20 reports annually as a result of union avoidance seminars, which corresponds to an average of approximately six seminar reports per filer. While the rulemaking record on this point is limited, it suggests that such seminars are relatively common and certain firms will conduct directly or present for business associations multiple seminars annually. However, the record does not suggest that all or the majority of firms will do so; the Department assumes that some will conduct no seminars, some only annually, and others perhaps as often as once per month. The Department therefore considers it reasonable to estimate that consultants, including law firms, will, *on average,* conduct or present approximately six such seminars annually.

The Department therefore estimates that the revised Form LM–20 will generate 4,194 (2,090 + 2,104) *reports,* which is an increase of 3,807 over the previous estimate of 387 (in the Department's most recent ICR submission to the OMB).[113] Additionally, the Department estimated the number of *filers* for those 4,194 reports. The Department reviewed the 2,726 Form LM–20 reports it registered from FY 10–14, and determined that

[109] In the NPRM, the Department did not utilize the Form LM–10 reports estimate from its recent ICR submission to OMB, because this total did not break the reports out pursuant to subsection of section 203(a), as did the FY 2007 and FY 2008 study referenced in the NPRM, and the total of 930 reports used in the NPRM is almost identical to the 938 Form LM–10 reports estimated in the prior ICR submission.

[110] The number of NLRB petitions include those filed in certification and decertification (RC, RD, and RM) cases. See 2010 and 2012 NLRB Summary of Operations (which include FYs 09 and 11) at *http://www.nlrb.gov/reports-guidance/reports/summary-operations*, as well as Number of Petitions Filed in FY13: *http://www.nlrb.gov/news-outreach/graphs-data/petitions-and-elections/number-petitions-filed-fy13*. Does not include unit deauthorization, unit amendment and unit clarification (UD, AC and UC) cases.

[111] See 2014 NMB Annual Report, Table 1 (CASES RECEIVED AND CLOSED), at the ''new'' cases line, *http://storage.googleapis.com/dakota-dev-content/2014annual-report/index.html*.

[112] See 2012 Economic Census, U.S. Census Bureau: NAICS 813910—Business Associations, United States, accessed at: *http://www.census.gov/econ/susb/*.

[113] As stated, these figures represent an increase over the NPRM's estimate. The estimate of 4,194 reports received is 1,593 greater than the 2,601 estimated in the NPRM. See 76 FR 36198.

these reports came from a *total* of 464 consultants, which averages to approximately 5.875 reports per consultant. Applying this ratio to the estimated 2,104 revised Form LM–20 reports received for non-seminar agreements results in an *average* of approximately 358 (2,104/5.875) consultant firms (including law firms) filing reports.[114]

(ii). Form LM–10 Total Filer Estimate

The Department estimates 2,777 revised Form LM–10 filers, for a total increase of 1,820 over the average of 957 Form LM–10 reports estimated in the Department's most recent ICR renewal. The Form LM–10 analysis follows only the first portion of the above analysis, as employers are not required to file Form LM–10 reports for participation at union avoidance seminars, and an employer files one Form LM–10 report per fiscal year, regardless of the number of persuader agreements entered. This contrasts with consultants, who file one Form LM–20 per agreement.

Additionally, the Form LM–10 has other aspects that are not affected by this rule. Specifically, an employer must report certain payments to unions and union officials pursuant to section 203(a)(1), as well as persuader and information gathering related payments pursuant to section 203(a)(2) and 202(a)(3). For these portions of the Form LM–10, the Department utilized data obtained from a review of the OLMS e.LORS system, which revealed an average of non-persuader Form LM–10 reports registered annually from FY 2010–2014.

The Department assumes for this calculation that each Form LM–10 report submitted will involve just one of the above statutory provisions, although in practice there may be some overlap. Thus, the Department combines the estimated 2,104 non-seminar persuader agreements between employers and law firms or other consultant firms, calculated for the Form LM–20, with 672.6 (the annual average number of Form LM–10 reports registered from FY 10–14, indicating that the forms were submitted pursuant to sections 203(a)(1)–(3), the non-consultant agreement or arrangement provisions). This yields a total estimate of approximately 2,777 revised Form LM–10 reports (2,104 + 672.6 = 2,776.6), which represents an increase of 1,820 reports over the average of 957 Form LM–10 reports registered annually from FY 10–14.

b. Hours To Complete and File the Revised Form LM–20 and Form LM–10

The Department has estimated the number of minutes that each Form LM–20 and Form LM–10 filer will need for completing and filing the revised forms (reporting burden), as well as the minutes needed to track and maintain records necessary to complete the forms (recordkeeping burden). The estimates for the Form LM–20 are included in Tables 1 and 2, and the estimates for the Form LM–10 are included in Tables 3 and 4. The tables describe the information sought by the revised forms and instructions, where on each form the particular information is to be reported, if applicable, and the amount of time estimated for completion of each item of information. The estimates for the reporting burden associated with completing certain items of the forms and reading the instructions, as well as the related recordkeeping requirements, are based on similar estimates utilized in the recent Form LM–30 Labor Organization Officer and Employee Report rulemaking, pursuant to section 202 of the LMRDA. While the information required to be reported in that form differs from the Forms LM–10 and LM–20, and union officers differ from attorneys who complete the employer and consultant forms, the Forms LM–10 and LM–20 contain primarily informational items such as contact names, many of which are very similar to that requested on the Form LM–30. Thus, the similarities in the forms and length of the instructions provide a reasonable basis for these estimates.

Further, the estimates include the time associated with gathering documentation and any work needed to complete the forms. For example, the estimates include reading the instructions, gathering relevant documentation and information, and checking the appropriate persuader or information-supplying activities boxes. The Department also notes that there are no calculations required for the Form LM–20, as it does not require the reporting of financial transactions (although Item 10, Terms and Conditions, requires reporting of aspects related to rate of consultant pay). The aspect of the Form LM–10 affected by this rulemaking, concerning the details of persuader agreements, requires the reporting disbursements made to the consultant, without any calculations.

Additionally, the estimates below are for all filers, including first-time filers and subsequent filers. While the Department considered separately estimating burdens for first-time and subsequent filers, the nature of Form LM–20 and Form LM–10 reporting militates against such a decision. Employers, labor relations consultants, and others may not be required to file reports for multiple fiscal years. In those cases in which the Department has reduced burden estimates for subsequent-year filings, it generally did so with regard to annual reports, specifically labor organization annual reports, Forms LM–2, LM–3, and LM–4. In contrast, the Form LM–20 and Form LM–10, like the Form LM–30, is only required for employers, labor relations consultants, and other filers in years that they engage in reportable transactions. As such, the burden estimates assume that the filer has never before filed a Form LM–20 or Form LM–10. See Form LM–30 Final Rule at 76 FR 66487.

(i). Recordkeeping Burden Hours To Complete the Form LM–20

The recordkeeping estimate of 15 minutes per filer represents a 13-minute increase from the 2-minute estimate for the prior Form LM–20, as prepared for the Department's most recent information collection request for OMB # 1245–0003. See also the prior Form LM–20 and instructions. This estimate reflects the Department's reevaluation of the effort needed to document the nature of the agreement or arrangement with an employer, as well as the types of activities engaged in pursuant to such agreement or arrangement. Additionally, the Department assumes that consultants retain most of the records needed to complete the form in the normal course of their business. Finally, the 15 minutes accounts for the 5-year retention period required by statute. See section 206, 29 U.S.C. 436.

(ii). Reporting Burden Hours for the Form LM–20

The reporting burden of 83 minutes per filer represents a 63-minute increase from the 20-minute estimate for the prior Form LM–20, as prepared for the Department's most recent information collection request for OMB # 1215–0188. See also the prior Form LM–20

[114] The Department notes that, pursuant to the terms of the statute and the instructions to the form, other persons who enter into agreements to aid the consultant in its efforts to persuade the employer's employees, are also required to submit Form LM–20 reports. Furthermore, it is possible that an employer could enter into reportable agreements with multiple consultants during an anti-union organizing effort. However, the Department did not receive any further information on these points in response to the NPRM. The Department therefore assumes in its estimates that most employers will hire one consultant for each persuader agreement. Moreover, as discussed, we assume that insofar as union avoidance seminars are concerned, in most instances, a law or consultant firm, as the presenter, will undertake the reporting.

Additionally, the Department notes that the estimated 358 filers will file approximately 12 reports each (4,194/358=11.71).

and instructions. (As explained below, this is also a 38-minute increase over the proposed Form LM–20 reporting burden estimate in the NPRM.) This estimate reflects the Department's reevaluation of the effort needed to record the nature of the agreement or arrangement with an employer, as well as the types of activities engaged in pursuant to such agreement or arrangement. It also includes the time required to read the Form LM–20 instructions to discover whether or not a report is owed and determine the correct manner to report the necessary information. The Department estimates that the average filer will need 20 minutes to read the instructions, which includes the time needed to apply the Department's revised interpretation of the advice exemption.[115] (This is a ten-minute increase over the NPRM's estimate.)

The Department views the simple data entries required by Items 1.a through 1.c, 4, 5, 7, and 11b–c as only requiring 30 seconds each. These items only require simple data entry regarding dates or file numbers, checking boxes, or, in the case of 11.c, a simple answer regarding the extent or performance for the activities undertaken pursuant to the agreement or arrangement. Additionally, Item 9 includes two boxes to check identifying generally the nature of the activities performed, so the Department estimates that this item will require one minute to complete. The Department estimates that a filer will be able to enter its own contact information in only two minutes, including its Employer Identification Number (EIN), if applicable, in Item 2, as well as two minutes for any additional contact information in Item 3. Further, the filer will require two minutes to record in Item 8(a) or Item 8(b) the names of the employer's representatives or officials of the prime consultant with whom the filer entered into the agreement or arrangement, as well as two minutes to identify in Item 11.d the individuals who carried out the activities for the employer. The filer will need ten minutes; however, to enter the information for the employer in Item 6, including the EIN, for non-seminar reports, as this information may not be as readily available as the filer's own. (This is a six-minute increase over the NPRM.)

The Department estimates that it will take filers five minutes to describe in Item 10 in narrative form the nature of the agreement or arrangement, as well as attach the written agreement (if applicable), and five minutes to complete the checklist in Item 11.a, which illustrates the nature of the activities undertaken pursuant to the agreement or arrangement. It will also take five minutes for Item 12.a (which represents a four-minute increase over the NPRM) and one minute for Item 12.b, in order to identify the subject group of employee(s) and organization(s).

Finally, the Department estimates that a Form LM–20 filer will utilize five minutes to check responses and review the completed report, and will require ten minutes per official to sign and verify the report in Items 13 and 14 (for 20 minutes total for these two items, which is an 18-minute increase over the NPRM). The Department introduced in calendar year 2010 a cost-free and simple electronic filing and signing protocol, the electronic form system or EFS, which will reduce burden on filers.

As a result, the Department estimates that a filer of the revised Form LM–20 will incur 98 minutes in reporting and recordkeeping burden to file a complete form (this is a 38-minute increase over the 60 minutes estimated in the NPRM). This 98-minute total compares with the 22 minutes per Form LM–20 filer in the currently approved information collection request. See Table 1 below.

TABLE 1—FORM LM–20 FILER RECORDKEEPING AND REPORTING BURDEN

[In minutes]

Burden description	Section of revised form	Recurring burden hours
Maintaining and gathering records	Recordkeeping Burden	15 minutes.
Reading the instructions to determine applicability of the form and how to complete it.	Reporting Burden	20 minutes.
Reporting LM–20 file number	Item 1.a	30 seconds.
Identifying if report filed under a Hardship Exemption	Item 1.b	30 seconds.[116]
Identifying if report is amended	Item 1.c	30 seconds.[117]
Reporting filer's contact information	Item 2	2 minutes.
Identifying Other Address Where Records Are Kept	Item 3	2 minutes.
Date Fiscal Year Ends	Item 4	30 seconds.
Type of Person	Item 5	30 seconds.
Full Name and Address of Employer	Item 6	10 minutes.
Date of Agreement or Arrangement	Item 7	30 seconds.
Person(s) Through Whom Agreement or Arrangement Made	Items 8(a) and (b)	2 minutes.
Object of Activities	Item 9	1 minute.
Terms and Conditions	Item 10	5 minutes.
Nature of Activities	Item 11.a	5 minutes.
Period During Which Activity Performed	Item 11.b	30 seconds.
Extent of Performance	Item 11.c	30 seconds.
Name and Address of Person Through Whom Performed	Item 11.d	2 minutes.
Identify the Subject Group of Employee(s)	Item 12.a	5 minutes.
Identify the Subject Labor Organization(s)	Item 12.b	1 minute.
Checking Responses	N/A	5 minutes.

[115] Additionally, the Department estimates that those persons who are not required to file the Form LM–20 will spend ten minutes reading the instructions. As explained further in the RFA section, these entities will spend an estimated 50 minutes applying the instructions to all of their clients to determine that reporting is not required, for a total burden of 60 minutes (or one hour) for these non-filers. This burden is not included in the total reporting burden, since these persons do not file and are thus not respondents.

[116] The Department includes this item and an estimated time of completion in an effort to provide a thorough burden analysis. However, the Department does not consider it likely that this item will need to be completed, so it has not been included in the total below.

[117] The Department includes this item and an estimated time of completion in an effort to provide a thorough burden analysis. However, the Department does not consider it likely that the average filer will need to complete this item, so it has not been included in the total below.

TABLE 1—FORM LM–20 FILER RECORDKEEPING AND REPORTING BURDEN—Continued

[In minutes]

Burden description	Section of revised form	Recurring burden hours
Signature and verification	Items 13–14	20 minutes.
Total Recordkeeping Burden Hour Estimate Per Form LM–20 Filer		15 minutes.
Total Reporting Burden Hour Estimate Per Form LM–20 Filer		83 minutes.
Total Burden Estimate Per Form LM–20 Filer		98 minutes.

(iii). Total Form LM–20 Reporting and Recordkeeping Burden

As stated, the Department estimates that the burden of maintaining and gathering records is 15 minutes and that it will receive 4,194 revised Form LM–20 reports. Thus, the estimated recordkeeping burden for all *reports* is 62,916.6 minutes (15 × 4,194.44 = 62,916.60 minutes) or approximately 1,048.61 hours (62,916.6/60 = 1,048.61). The remaining times (83 minutes) represents the burden involved with reviewing the instructions and reporting the data. The total estimated reporting burden for all LM–20 *reports* is 348,138.52 minutes (83 × 4,194.44 = 348,138.52 minutes) or approximately 5,802 hours (348,138.52/60 = 5,802.3 hours). The total estimated burden for all LM–20 *reports* is, therefore, 411,055 minutes or approximately 6,851 hours (1,048.61 + 5,802.3 = 6,850.9).[118] See Table 2 below.[119]

The total recordkeeping burden of approximately 1,049 hours represents an approximately 952-hour increase over the 96.8 hours Form LM–20 recordkeeping estimate presented in the Department's most recent ICR submission to OMB, and the total reporting burden of approximately 5,802 hours represents an approximately 5,268-hour increase over the 534 hours Form LM–20 reporting burden estimate presented in the ICR submission. The total burden of approximately 6,851 hours is an approximately 6,220-hour increase over the estimated 631 hours Form LM–20 burden total in the most recent ICR submission.

TABLE 2—TOTAL REPORTING AND RECORDKEEPING BURDEN FOR THE ESTIMATED 4,194 FORM LM–20 REPORTS

[In hours][120]

Total Recordkeeping Burden	1,049
Total Reporting Burden	5,802
Total Burden	6,851

(iv). Recordkeeping Burden Hours To Complete the Form LM–10

The recordkeeping estimate of 25 minutes per filer represents a 20-minute increase from the 5-minute estimate for the prior Form LM–10, as prepared for the Department's most recent information collection request for OMB # 1245–0003. See also the prior Form LM–10 and instructions. This estimate reflects the Department's reevaluation of the effort needed to document the nature of the agreement or arrangement with an employer, as well as the types of activities engaged in pursuant to such agreement or arrangement. The Department assumes that employers retain most of the records needed to complete the form in the ordinary course of their business. Furthermore, the 15 minutes accounts for the 5-year retention period required by statute. See section 206, 29 U.S.C. 436. Finally, the Department notes that the estimate for the Form LM–10 recordkeeping burden is ten minutes longer than that for the Form LM–20, which reflects the greater amount of information reported on the Form LM–10.

(v). Reporting Burden Hours To Complete the Form LM–10

In proposing these estimates, the Department is aware that not all employers required to file the Form LM–10 will need to complete each Part of the form. However, for purposes of assessing an average burden per filer, the Department assumes that the Form LM–10 filer engages in reportable transactions, agreements, or arrangements in all four of the revised parts.

The reporting burden of 147 minutes per filer represents an 112-minute increase from the 35-minute estimate for the prior Form LM–10, as prepared for the Department's most recent information collection request for OMB # 1245–0003. (This estimate is 27 minutes greater than estimated in the NPRM.) See also the prior Form LM–10 and instructions. This estimate reflects the Department's reevaluation of the effort needed to record the nature of the agreement or arrangement with a consultant and the types of activities engaged in pursuant to such agreement or arrangement, as well as record and enter each reportable payment or expenditure. It also includes the time required to read the Form LM–10 instructions to discover whether or not a report is owed and determine the correct manner to report the necessary information. The Department estimates that the average filer will need 25 minutes to read the instructions (a five-minute increase over the NPRM), which includes the time needed to apply the Department's revised interpretation of the ''advice'' exemption.[121] This estimate is five minutes greater than for the Form LM–20 instructions, as the Form LM–10 is a more complex report.

[118] As discussed earlier in the text, the Department has estimated that a total of 4,194 LM–20 reports will be filed annually. Based on the estimated number of unique filers (358), the Department estimates that on average each of these filers will file 11.71 reports annually (4,194.44/358.2). (The Department has elsewhere rounded the average number of reports to 12). The estimated total recordkeeping burden per *filer* for the estimated 358 labor relations consultant firms is approximately 176 minutes (15 minutes × 11.71) or approximately 2.93 hours, and the estimated total reporting burden per such *filer* is 972 minutes (83 × 11.71) or approximately 16.2 hours. Thus, the estimated total burden per such *filer* is approximately 1,148 minutes (176 + 972) or approximately 19 hours.

[119] As explained, while the recordkeeping burden of 15 minutes is identical to the NPRM, these other totals represent increases over the estimates in the NPRM. The total recordkeeping burden of 62,916.6 minutes or 1,048.61 hours is a 23,901.6-minute increase (or 398.36 hours) over the NPRM estimate of 39,015 minutes (or 650.25 hours). The reporting burden of 83 minutes is a 38-minute increase over the NPRM's estimate of 45 minutes, with a total of 348,138.52 minutes or 5,802.3 hours, for a total increase of 231,093.52 minutes (or approximately 3,852 hours) over the NPRM's estimate of 117,045 minutes (or 1,950.75 hours). The total Form LM–20 burden in this final rule is a 254,995-minute (or approximately 4,250 hour) increase over the 156,060 minutes (or 2,601 hours). See 76 FR 36201.

[120] The estimates in this table have all been rounded to the nearest whole number.

[121] Additionally, the Department estimates that those persons who are not required to file the Form LM–10 will spend ten minutes reading the instructions. This burden is not included in the total reporting burden, since these persons do not file and are thus not respondents.

The Department estimates, as with the Form LM–20, that it will take 30 seconds to complete each item that calls for entering dates, checking appropriate boxes, as well as entering the amount of a payment or expenditure and its type (see Items 1.a, 1.b, 1.c, 2, 6, 7, 9.a, 9.b, 9.c, 11.a, 11.b, 11.c, 13.a, 14.b, 15.a, 15.b, 15.c, 17.a, 17.b, and 17.c). Additionally, Parts C and D call for checking multiple boxes, which the Department also estimates will take 30 seconds each, or one minute for Part C and Part D, respectively.

The Department also estimated that it would take one minute to identify the labor organization target of persuader activities, as well as indicating the extent to which the activities have been performed (see Items 14.c and 14.f, respectively), while it will take 5 minutes to identify the employees being persuaded in Item 14.e (which is a four-minute increase over the NPRM).

Further, the Department estimates, as with the Form LM–20, that it will take two minutes for the employer to complete items calling for its own identifying information (see Items 3–5 and 14.d), including its EIN, if applicable and four minutes for items calling for another's identifying information, including EIN, if applicable (see Items 8, 10, 12, 14.d, and 16). The Department also estimates that it will take five minutes to detail the circumstances of each payment or expenditure, terms and conditions of any agreement or arrangement, and any activities pursuant to such agreement or arrangement (see Items 9.d, 11.d, 13.b, 14.a, 15.d, and 17.d).

Finally, the Department estimates that a Form LM–10 filer will utilize five minutes to check responses and review the completed report, and will require ten minutes per official to sign and verify the report in Items 18 and 19 (for 20 minutes total for these two items, which is an 18-minute increase over the NPRM). The Department introduced in calendar year 2010 a cost-free and simple electronic filing and signing protocol, which will reduce burden on filers.

As a result, the Department estimates that a filer of the revised Form LM–10 will incur 147 minutes in reporting and recordkeeping burden to file a complete form. This compares with the 35 minutes per filer in the currently approved information collection request. See Table 3 below.

TABLE 3—FORM LM–10 FILER RECORDKEEPING AND REPORTING BURDEN

[In minutes]

Burden description	Section of revised form	Recurring burden hours
Maintaining and gathering records	Recordkeeping Burden	25 minutes.
Reading the instructions to determine applicability of the form and how to complete it.	Reporting Burden	25 minutes.
Reporting LM–10 file number	Item 1.a	30 seconds.
Identifying if report filed under a Hardship Exemption	Item 1.b	30 seconds.[122]
Identifying if report is amended	Item 1.c	30 seconds.[123]
Fiscal Year Covered	Item 2	30 seconds.
Reporting employer's contact information	Item 3	2 minutes.
Reporting president's contact information if different than 3	Item 4	2 minutes.
Identifying Other Address Where Records Are Kept	Item 5	2 minutes.
Identifying where records are kept	Item 6	30 seconds.
Type of Organization	Item 7	30 seconds.
Reporting union or union official's contact information (Part A)	Item 8	4 minutes.
Date of Part A payments	Item 9.a	30 seconds.
Amount of Part A payments	Item 9.b	30 seconds.
Kind of Part A payments	Item 9.c	30 seconds.
Explaining Part A payments	Item 9.d	5 minutes.
Identifying recipient's name and contact information	Item 10	4 minutes.
Date of Part B payments	Item 11.a	30 seconds.
Amount of Part B payments	Item 11.b	30 seconds.
Kind of Part B payments	Item 11.c	30 seconds.
Explaining Part B payments	Item 11.d	5 minutes.
Part C: Identifying object(s) of the agreement or arrangement	Part C	1 minute.
Identifying name and contact information for individual with whom agreement or arrangement was made.	Item 12	4 minutes.
Indicating the date of the agreement or arrangement	Item 13.a	30 seconds.
Detailing the terms and conditions of agreement or arrangement	Item 13.b	5 minutes.
Identifying specific activities to be performed	Item 14.a	5 minutes.
Identifying period during which performed	Item 14.b	30 seconds.
Identifying the extent performed	Item 14.c	1 minute.
Identifying name of person(s) through whom activities were performed	Item 14.d	2 minutes.
Identify the Subject Group of Employee(s)	Item 14.e	5 minutes.
Identify the Subject Labor Organization(s)	Item 14.f	1 minute.
Indicating the date of each payment pursuant to agreement or arrangement	Item 15.a	30 seconds.
Indicating the amount of each payment	Item 15.b	30 seconds.
Indicating the kind of payment	Item 15.c	30 seconds.
Explanation for the circumstances surrounding the payment(s)	Item 15.d	5 minutes.
Part D: Identifying purpose of expenditure(s)	Part D	1 minute.
Part D: Identifying recipient's name and contact information	Item 16	4 minutes.
Date of Part D payments	Item 17.a	30 seconds.
Amount of Part D payments	Item 17.b	30 seconds.
Kind of Part D payments	Item 17.c	30 seconds.
Explaining Part D payments	Item 17.d	5 minutes.
Checking Responses	N/A	5 minutes.
Signature and verification	Items 18–19	20 minutes.

TABLE 3—FORM LM–10 FILER RECORDKEEPING AND REPORTING BURDEN—Continued

[In minutes]

Burden description	Section of revised form	Recurring burden hours
Total Recordkeeping Burden Hour Estimate Per Form LM–10 Filer	.....	25 minutes.
Total Reporting Burden Hour Estimate Per Form LM–10 Filer	.....	122 minutes.
Total Burden Estimate Per Form LM–10 Filer	.....	147 minutes.

(vi). Total Form LM–10 Reporting and Recordkeeping Burden

As stated, the Department estimates that it will receive 2,777 revised Form LM–10 reports. Thus, the estimated recordkeeping burden for all Form LM–10 filers is 69,426 minutes (25 × 2,777.04 = 69,426 minutes) or approximately 1,157.1 hours (69,426/60 = 1,157.1). The total estimated reporting burden for all Form LM–10 filers is 338,798.88 minutes (122 × 2,777.04 = 338,798.88 minutes) or approximately 5,647 hours (338,798.88/60 = 5,646.648. hours).

The total estimated burden for all Form LM–10 filers is, therefore, approximately 408,225 minutes (69,426 + 338,798.88 = 408,224.88) or approximately 6,804 hours (1,157.1 + 5,646.648 = 6,803.748). See Table 4 below.[124] The total recordkeeping burden of 1,157.1 hours represents a 755.2-hour increase over the 401.9-hour Form LM–10 recordkeeping estimate presented in the Department's most recent ICR submission to OMB, and the total reporting burden of 5,646.648 hours represents a 3,703.948-hour increase over the 1,942.7 hour Form LM–10 reporting burden estimate presented in the ICR request. The total burden of approximately 6,804 hours is an approximately 4,459-hour increase over the 2,344.6-hour Form LM–10 burden hour total in the most recent ICR submission.

TABLE 4—TOTAL REPORTING AND RECORDKEEPING BURDEN FOR THE ESTIMATED 2,777 FORM LM–10 REPORTS

[In Hours] [125]

	Hours
Total Recordkeeping Burden	1,157
Total Reporting Burden	5,647
Total Burden	6,804

c. Cost of Submitting the Form LM–20 and Form LM–10

The total cost imposed by the rule on Form LM–20 and Form LM–10 filers is $1,263,499.50. See Table 5 below. This is a $993,746.50 increase over the $269,753 estimated for the two forms in the most recent ICR submission. (This is also an increase of $437,613.39 over the estimated total cost of $825,886.11 in the NPRM. See 76 FR 36203).

(i). Form LM–20

To determine the cost per filer to submit the Form LM–20, the Department assumed that each filer would utilize the services of an attorney to complete the form. This is consistent with past calculations of costs per filer for the Form LM–20, and the assumption also corresponds to the analysis above in which the Department notes that the consultant industry consists in large part of practicing attorneys. The Department also considers non-attorney consultant firms as likely utilizing the services of attorneys to complete the form.

To determine the hourly compensation for attorneys for the purposes of this analysis, the Department first identified the average hourly salary for lawyers, $64.17, as derived from the Occupational Employment and Wages Survey for May 2014 (released on 3/25/15), Table 1 on page 12, from the Bureau of Labor Statistics (BLS) at *www.bls.gov/news.release/pdf/ocwage.pdf*. Next, the Department increased these figures by approximately 44.2% to account for total compensation.[126] For the purposes of this analysis, this yields an average hourly compensation for attorneys of approximately $92.53. ($64.17 plus $28.36).

Applying this hourly total compensation to the estimated 98-minute reporting and recordkeeping burden yields an estimated cost of approximately $151.14 ($92.5324 x (98/60)) per Form LM–20 *report*.[127] This is $3.36 greater than the $147.7752 estimate in the most recent ICR submission. The total cost for the estimated 4,194.44 Form LM–20 reports is therefore approximately $633,932.16 (4,194.44 × ($92.53(rounded) × 98/60) ≈ $633,932), which is $576,743.16 greater than the $57,189 total burden estimate for the Form LM–20 in the most recent ICR submission.[128]

(ii). Form LM–10

As with the Form LM–20 calculation above, the Department assumed that each filer would utilize the services of an attorney to complete the form. This is consistent with past calculations of costs per filer for the Form LM–10. The Department also considers that consultant firms are likely utilizing the

[122] The Department includes this item and an estimated time of completion in an effort to provide a thorough burden analysis. However, the Department does not consider it likely that this item will need to be completed, so it has not been included in the total below.

[123] The Department includes this item and an estimated time of completion in an effort to provide a thorough burden analysis. However, the Department does not consider it likely that the average filer will need to complete this item, so it has not been included in the total below.

[124] The total *recordkeeping* burden of 69,426 minutes is 15,924 less than the 85,350 minutes estimated in the NPRM (and the 1,157 hours is 266 hours less than the 1,423 hours estimated in the NPRM). The total *reporting* burden, however, is approximately 14,469 minutes over the estimated 324,330 minutes in the NPRM, or approximately 241 hours over the estimated 5,406 hours in the NPRM. The Form LM–10 *total burden* estimate is a decrease of 1,455 minutes (or 24.25 hours) over the 409,680 minutes (or 6,828 hours) in the NPRM. See 76 FR 36203.

[125] The estimates in this table have all been rounded to the nearest whole number.

[126] *See* Employer Costs for Employee Compensation Summary, from the BLS, December 2014 (released on 3/11/15) at *www.bls.gov/news.release/ecec.nr0.htm*. The Department increased the average hourly wage rate for employees ($21.72 in 2014) by the percentage total of the average hourly compensation figure ($9.60 in 2014) over the average hourly wage ($9.60/$21.72). Note: The Department has updated its estimates here from the NPRM, which was based upon 2009 BLS data.

[127] The Department also estimated the total costs per Form LM–20 *filer*. The estimated total cost per *filer* for the estimated 358 labor relations consultant firms, including law firms, is approximately $1,769.76, which the Department derived by multiplying the exact cost per form ($92.5324 × 98/60) by the exact number of forms per filer 11.7097. The Department derived the number of forms per filer by dividing the total estimate for Form LM–20 reports (4,194.44) by 358.2026 filers, and then rounding up to 12.

[128] The cost per Form LM–20 report is an increase of $63.55 over the $87.59 estimate in the NPRM. The total Form LM–20 estimated cost is $406,110.57 greater than the estimated $227,821.59 in the NPRM. See 76 FR 36203.

services of attorneys to complete the form.

Applying this hourly total compensation to the estimated 147-minute reporting and recordkeeping burden yields an estimated cost of approximately $226.70 ($92.53 × (147/60) = $226.6985) per report/filer. This is $4.59 greater than the estimated $222.11 Form LM–10 burden presented in the most recent ICR submission. The total cost for the estimated 2,777 Form LM–10 reports/filers is therefore approximately $629,567.34 (2,777.04 × $226.70(rounded) ≈ $629,567), which is $417,003.34 greater than the $212,564 estimated for the most recent ICR submission.[129]

(iii). Federal Costs

In its recent submission for revision of OMB #1245–0003, which contains all LMRDA forms, the Department estimates that its costs associated with the LMRDA forms are $1,825,935 for the OLMS national office and $3,279,173 for the OLMS field offices, for a total Federal cost of $5,105,108. Federal estimated costs include costs for contractors and operational expenses such as equipment, overhead, and printing as well as salaries and benefits for the OLMS staff in the National Office and field offices who are involved with reporting and disclosure activities. These estimates include time devoted to: (a) Receipt and processing of reports; (b) disclosing reports to the public; (c) obtaining delinquent reports; (d) reviewing reports; (e) obtaining amended reports if reports are determined to be deficient; and (f) providing compliance assistance training on recordkeeping and reporting requirements.

TABLE 5—REPORTING AND RECORDKEEPING BURDEN HOURS AND COSTS FOR FORM LM–20 AND FORM LM–10 [130]

Number of reports	Reporting hours per report	Total reporting hours	Recordkeeping hours per report	Total recordkeeping hours	Total burden hours per report	Total burden hours	Average cost per report	Total cost [131]
Form LM–20: 4,194	[132] 1.38	5,802	0.25	1,049	1.63	6,851	$151.14	$633,932.16
Form LM–10: 2,777	[133] 2.03	5,647	[134] 0.42	1,157	2.45	6,804	226.70	629,567.34
Total								1,263,499.50

The total burden for the Labor Organization and Auxiliary Reports information collection, including those not changed by this rulemaking action, is summarized as follows:

Agency: DOL–OLMS.

Title of Collection: Labor Organization and Auxiliary Reports.

OMB Control Number: 1245–0003.

Affected Public: Private Sector—businesses or other for-profits, farms, not-for-profit institutions, and individuals or households.

Total Estimated Number of Responses: 37,414.

Total Estimated Annual Burden Hours: 4,593,235.

Total Estimated Annual Other Costs Burden: $0.

H. Regulatory Flexibility Analysis and Executive Order 13272

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* requires agencies to consider the impact of their regulatory proposals on small entities, analyze effective alternatives that minimize small entity impacts, and make initial analyses available for public comment. 5 U.S.C. 603, 604. If an agency determines that its rule will not have a significant economic impact on a substantial number of small entities, it must certify that conclusion to the Small Business Administration (SBA). 5 U.S.C. 605(b). The Department provided that certification in the NPRM. 76 FR 36206. Executive Order 13272 concerns implementation of the RFA, and generally reinforces the RFA provisions. The Department has considered the impact of this rule on small businesses and small organizations as prescribed by this Executive Order. Although the Executive Order, at section 3(c), allows the Chief Counsel for Advocacy of the Small Business Administration to submit comments on a proposed rule, none have been submitted in this rulemaking.

The Department has modified its RFA analysis for this final rule in response to comments. In the analysis that follows, the Department considers the economic impact of the rule not only on small entity consultants and employers required to file reports, as discussed in the NPRM, but also on those small consultants and employers that may need to review the reporting requirements even if they ultimately are not required to file reports. The analysis shows that the estimated cost of the rule per affected small entity is not significant when compared to gross revenue. The Department therefore certifies that this rule does not have a significant economic impact on a substantial number of small entities. A full RFA analysis is thus not required.

1. Statement of the Need for, and Objectives of, the Rule

The discussion concerning Executive Orders 13563 and 12866 is hereby incorporated by reference.

2. Legal Basis for Rule

The legal authority for this rule is provided in sections 203 and 208 of the LMRDA. 29 U.S.C. 433, 438. Section 208 provides that the Secretary of Labor shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under Title II of the Act, and such other reasonable rules and regulations as she may find necessary to prevent the circumvention or evasion of the reporting requirements. 29 U.S.C. 438.

3. Number of Small Entities Covered Under the Final Rule

As explained below, the Department estimates that there are approximately 358 small consultants affected by the Form LM–20 portion of the rule as filing entities and 2,777 employers affected by the Form LM–10 portion as filing entities, for a total of 3,135 small entities affected by the rule as filing entities. Additionally, in response to comments received, the Department, as also explained below, has estimated the number of entities that will need to review the rule in order to determine

[129] The cost per Form LM–10 report is an increase of $51.52 over the $175.18 estimate in the NPRM. The total Form LM–10 estimated cost is $31,502.82 greater than the estimated $598,064.52 in the NPRM. See 76 FR 36203.

[130] The estimates in this table have all been rounded to the nearest whole number.

[131] The cost estimates provided in the table may not multiply exactly due to rounding. The PRA section of the final rule explains more precisely how the Department derived these figures.

[132] This is an approximate per hour figure derived from the estimated reporting burden of 83 minutes divided by 60 minutes in an hour.

[133] This is an approximate per hour figure derived from the estimated reporting burden of 122 minutes divided by 60 minutes in an hour.

[134] This is an approximate per hour figure derived from the estimated recordkeeping burden of 25 minutes divided by 60 minutes in an hour.

that they have not incurred a filing obligation: 39,298 non-filing consultants and 185,060 non-filing employers (for a total of 224,358 non-filing entities) affected by the rule.

Filing Consultants and Employers

As explained in the PRA analysis above, the Department estimates that there are 358 unique consultant firms that will file the expected 2,104 non-seminar Form LM–20 reports. Next, the Department analyzed data from the U.S. Census Bureau's North American Industry Classification System Codes (NAICS) for ''Human Resources Consulting Services,'' which includes ''Labor Relations Consulting Services.'' [135] Additionally, the Department utilized the Small Business Administration's (''SBA'') ''small business'' standard of $15 million in average annual receipts for ''Human Resources Consulting Services,'' NAICS code 541612.[136]

A review of the above data reveals that there are 6,461 firms within the ''Human Resources Consulting Services'' NAICS category, with nearly all of them (6,337, approximately 98% of the total) with less than $15 million in average annual receipts. See Statistics of U.S. Businesses: 2012: NAICS 541612. As a result, based on the best available data, the Department assumes for the purposes of the RFA certification that all 358 Form LM–20 filing entities are small entities affected by the Form LM–20 portion of the rule.

To determine the number of filing employers that can be classified as small entities, pursuant to the Form LM–10 portion of the rule, the Department notes that the SBA considers 99.7 percent of all employer firms to qualify as small entities.[137] Further, the rule affects all private sector employers. As a result, for the purposes of the RFA certification, the Department concludes that all 2,777 employers that the Department estimates will file under this rule (the derivation of the 2,777 estimate is explained in the PRA analysis) constitute small entities.

Therefore, the total number of small entities required to file reports under this rule is estimated to be 3,135 entities (358 consultants and 2,777 employers).

Non-Filing Consultants and Employers

Additionally, the Department has estimated the number of entities that, although not required to file reports by this rule, are affected by the rule because they must review the reporting requirements to determine that reporting is not required. The NPRM did not include such estimate. To estimate the number of affected non-filing consultant firms, the Department reviewed all law firms within the ''Offices of Lawyers'' category of NAICS Code 541110, human resources consultant firms within NAICS code 541612, and all business associations within NAICS Code 813910. First, concerning law firms, while there are 165,435 entities within NAICS Code 541110,[138] not all such firms will need to review the reporting requirements; rather, only those involved in the practice of labor and employment law will need to conduct that review. Indeed, only 17,387 firms in the United States fall into such category.[139] Second, as stated, there are 6,461 consultant firms within NAICS Code 541612. See Statistics of U.S. Businesses: 2012: NAICS 541612. Third, there are 15,808 business associations in the United States. See Statistics of U.S. Businesses: 2012: NAICS 813910. As a result, and subtracting out the 358 filing law and consultant firms, there are 39,298 non-filing, consultant small entities affected by this rule. The Department assumes that each of these entities is a small entity.

The Department found no empirical data upon which to estimate the universe of small employers that, although not required to file, may otherwise be affected by the rule. Not every private sector employer, large or small, will be impacted and required to review the new reporting requirements. However, many small businesses and small business representatives commented that *some small businesses*—out of the more than 2 million small business employers with over five employees—should be counted as affected small entities. These small businesses, they contend, could potentially be contacted about an organizing drive or other labor relations matter and will therefore hire labor relations consultants, even though the consultants ultimately do not undertake any reportable persuader activities on their behalf.

The Department agrees that these non-filing small businesses will potentially be affected by this rule because of their need to review the revised Form LM–10 instructions before determining that they are not required to file. However, the Department has found no reliable data or information that identifies the number of employers, large or small, that hire labor relations consultants. The NLRB compiles statistics on the number of representation petitions and elections, which the Department used to estimate the number of filing entities, but this data does not capture the total number of employers that have hired consultants, especially outside of the election context. In the absence of empirical data on this subset of employers, the Department assumes that the universe of non-filing employers utilize consultants at the same rate as the universe of filing employers. In other words, the Department assumes for this purpose that the rate of employer-consultant agreements resulting in reportable persuader activities is the same as the rate of employer-consultant agreements that do not lead to persuader activities. As explained previously, the Department estimates that there will be 2,777 filing employers and 358 filing consultants. Thus, the ratio of filing employers to filing consultants is about 7.76 (2,777 ÷ 358).

Using these assumptions, the Department estimates the universe of affected non-filing employers by applying the 7.76 rate to the number of non-filing consultants reasonably expected to be hired for organizing or collective bargaining purposes. Like with employers (discussed above), there is a lack of empirical data on the aggregate number of consultants that are hired but do not engage in persuader activities. Therefore, to make a conservative estimate, the Department assumes that every labor relations consultant (except for trade or business associations) will have employer clients that hire the consultant for a purpose requiring the employer-client to review the rule. As discussed above, the Department estimates that there are 17,387 labor and employment law firms and 6,461 human resources consultant firms that might be affected by the rule.

[135] *See* U.S. Census Bureau, Statistics of U.S. Businesses: 2012: Number of Firms, Number of Establishments, Employment and Annual Payroll by Enterprise Employment Size for the United States, NAICS 541612—Human resources & executive search consulting services, United States, accessed at: *www.census.gov/econ/susb/*.

[136] See U.S. Small Business Administration's Table of Small Business Size Standards Matched to the North American Industry Classification System Codes, at 42, accessed at: *www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf*. Note: The $15 million standard replaces the prior standard for NAICS 541612 used in the NPRM, as the SBA updated its data subsequent to the publication of the NPRM.

[137] See *https://www.sba.gov/sites/default/files/FAQ_March_2014_0.pdf*.

[138] See U.S. Census Bureau, Statistics of U.S. Businesses: 2012: Number of Firms, Number of Establishments, Employment and Annual Payroll by Enterprise Employment Size for the United States, NAICS 541110—Offices of Lawyers, United States, accessed at: *www.census.gov/econ/susb/*.

[139] See Martindale law firm search engine at *http://www.martindale.com/Find-Lawyers-and-Law-Firms.aspx*. Search conducted on 5/18/15 for all United States law firms that focus on labor and employment law.

This data adds up to 23,848 non-filing consultant firms that small businesses will likely hire.[140] Applying the 7.76 ratio to the 23,848 non-filing consultant firms results in approximately 185,060 (7.76 × 23,848) small employers that will be affected by the rule but not required to file. This number likely overestimates the universe of affected non-filing small businesses because the Department believes it unlikely every consultant will be hired in any given year for services related to organizing or collective bargaining.

Nonetheless, The Department estimates that the total number of non-filing small entities that will be affected by the rule is comprised of 39,298 consultants and 185,060 employers. The total number of affected small entities is outlined in Table 6.

TABLE 6—NUMBER OF AFFECTED SMALL ENTITIES

Category	Number
Filing consultants	358
Filing employers	2,777
Non-filing consultants	39,298
Non-filing employers	185,060
Total consultants	39,656
Total employers	187,837
Total of all entities	227,493

4. Costs of Reporting, Recording, and Other Compliance Requirements of the Rule on Small Entities

The rule is not expected to have a significant economic impact on a substantial number of small entities. The LMRDA is primarily a reporting and disclosure statute. The LMRDA establishes various reporting requirements for employers, labor relations consultants, and others, pursuant to Title II of the Act. Accordingly, the primary economic impact of the rule will be the cost to reporting entities of compiling, recording, and reporting required information or determining that such reporting is not required.

The Regulatory Flexibility Act does not define either ''significant economic impact'' or ''substantial'' as it relates to the number of regulated entities. 5 U.S.C. 601. In the absence of specific definitions, ''what is 'significant' or 'substantial' will vary depending on the problem that needs to be addressed, the rule's requirements, and the preliminary assessment of the rule's impact.'' See SBA's Office of Advocacy, A Guide for Government Agencies: How to Comply with the Regulatory Flexibility Act at 17.[141] As to economic impact, one important indicator is the cost of compliance in relation to revenue of the entity. Id.

This rule has an impact on a certain number of small entities that belong to two discrete categories of small entities: the consultant industry and all other small employers. For the consultant category, the Department estimates that the average annual revenue of a small entity consultant in the consultant industry is $734,058. To arrive at this figure, the Department took the total estimated receipts of small entities (those entities with less than $15 million in receipts) belonging to NAICS codes 541110 (attorneys), 541612 (human resources consultants), and 813810 (business associations) and divided the total receipts by the total number of firms within those codes. The Department found that there are an estimated 185,612 small consultant firms generating $136,250,030,000 in total receipts, resulting in an average of $734,058 in gross revenue per consultant firm. The Department assumed for this calculation that labor and employment law firms generate, on average, the same receipts as other law firms.

For all other small employers, the Department estimates that the average annual revenue for a small entity is $965,774. This figure is derived from taking the total estimated annual receipts of all entities in the United States with less than $15 million in receipts, excluding the receipts from the consultant industry, and then dividing the total receipts by the total number of firms with less than $15 million in receipts, excluding consultant firms. The Department found that there are an estimated 5,403,528 small firms, excluding consultants, generating $5,218,588,269,000 in total receipts, resulting in an average of $965,774 in gross revenue per firm.[142]

Costs on Filing Small Entities

As explained above, the Department estimates that there are 358 labor relations consultants and other small entities required to file the revised Form LM–20. Further, the Department estimates that there are 2,777 employer small entities required to file the revised Form LM–10, for a total of 3,135 small entities affected by the rule as filers. In the PRA analysis, above, the Department estimates that a Form LM–20 filer will spend $151.14 completing the form. The Department also noted that each of the 358 consultants will, on average, file about 11.71 Form LM–20 reports, resulting in 4,194 reports every year. The total cost for the estimated 4,194 Form LM–20 reports is therefore approximately $633,932.16 annually.

The Department estimates in the PRA analysis that it will cost an employer approximately $226.70 to complete the Form LM–10. The total cost for the estimated 2,777 Form LM–10 reports is therefore approximately $629,567.34 annually.

The combined cost for both Form LM–20 and Form LM–10 filers is $1,263,499.50 ($633,932.16 + $629,567.34).

Costs on Non-Filing Small Entities

As discussed above, the Department estimates that there are 39,298 non-filing consultants and 185,060 non-filing employers that will be affected by the rule, for a total of 224,358 non-filing entities.

The Department estimates that each of the 39,298 non-filing consultants will spend one hour reviewing the Form LM–20 instructions to determine that they do not have any reporting obligations. For the purposes of this analysis, the Department uses the average hourly compensation for attorneys of $92.53 because, as stated previously, the consultant industry consists in large part of practicing attorneys. Accordingly, the total cost of the rule on non-filing consultants is approximately $3,636,244 (39,298 consultants × 1 hour × $92.53/hr). This amount is a one-time cost to non-filing consultants.

The Department estimates that each of the 185,060 non-filing employers affected by the rule will spend 30 minutes reviewing the Form LM–10 instructions and applying them to the agreement with the consultant in order to determine that no report is owed. This cost is calculated as 30 minutes at the hourly wage of a Human Resources Specialist. The median hourly wage of a Human Resources Specialist is $27.23 plus 44.2 percent in fringe benefits. See note 126. This results in a total hourly rate of $39.27 (($27.23 × 0.442) + $27.23).[143] The cost to an employer for its own review will therefore be $19.64 ($39.27 × 0.5 hour). The total cost for all

[140] This number does not include trade or business associations (NAICS 813910) because such associations are unlikely to be hired to perform organizing or collective bargaining services.

[141] The Guide may be accessed at *https://www.sba.gov/sites/default/files/rfaguide_0512_0.pdf.*

[142] See U.S. Small Business Administration, Statistics of U.S. Businesses, Table 2—Number of firms, establishments, receipts, employment, and payroll by firm size (in receipts) and industry, available at *https://www.sba.gov/advocacy/firm-size-data* (last accessed March 1, 2016).

[143] See BLS Occupational Employment Statistics, Occupational Employment and Wages, May 2013, *http://www.bls.gov/oes/current/oes131071.htm.*

non-filing employers is approximately $3,634,578 ($19.64 x 185,060).

The combined cost for both non-filing consultants and non-filing employers is $7,270,822 ($3,636,244 + $3,634,578).

Economic Impact on Small Entities

The Department estimates that this rule will have a one-time cost on all small entity consultants of approximately $4,270,176. This amount represents the cost on filing consultants of $633,932 plus the cost on non-filing consultants of $3,636,244. Therefore, the total one-time cost per small entity consultant is $107.68 ($4,270,176 ÷ (358 filing consultants + 39,298 non-filing consultants)). This cost per consultant is not significant in comparison to the average annual gross revenue of a small entity consultant, which the Department calculated above to be $734,058. The $107.68 one-time cost per consultant represents only a 0.015% share of a consultant's average revenue ($107.68 ÷ $734,058).

Additionally, the rule will impose a recurring annual cost of $1,771 per filing consultant ($633,932 ÷ 358 filing consultants). This annual cost per consultant is not significant because it represents only a 0.24% share of a consultant's average annual gross revenue ($1,771 ÷ $734,058).

For employers, the Department estimates that the rule will have an annual cost on all small entity employers, excluding consultants, of $4,264,145. This amount represents the cost on filing employers of $629,567 plus the cost on non-filing employers of $3,634,578. Therefore, the annual cost per small entity employer, excluding consultants, is $22.70 ($4,264,145 ÷ (2,777 filing employers + 185,060 non-filing employers)). This cost per employer is not significant in comparison to the average annual gross revenue of a small entity employer, which the Department calculated above to be $965,774. The $22.70 annual cost per employer represents only a 0.002% share of a small employer's average gross revenue ($22.70 ÷ $965,774).

The above estimates show that the cost of the rule on small entities is not a significant cost. These costs are summarized in Table 7 and Table 8. Therefore, under 5 U.S.C. 605, the Department certifies to the Chief Counsel for Advocacy that the rule will not have a significant economic impact on a substantial number of small entities.

TABLE 7—COST AND IMPACT ON CONSULTANTS

Category	Number	Total cost	Cost per consultant	Average gross revenue	Cost per compared to gross revenue (percent)
Filing consultants	358	$633,932	$1,771	$734,058	0.024
Non-filing consultants	39,298	3,636,244	92.53	734,058	0.013
Total	39,656	4,270,176	107.68	734,058	0.015

TABLE 8—ANNUAL COST AND IMPACT ON OTHER EMPLOYERS

Category	Number	Total cost	Cost per other employer	Average gross revenue	Cost per compared to gross revenue (percent)
Filing employers	2,777	$629,567	$226.70	$965,774	0.023
Non-filing employers	185,060	3,634,578	19.63	965,774	0.002
Total	187,837	4,264,145	22.70	965,774	0.002

5. Relevant Federal Requirements Duplicating, Overlapping, or Conflicting With the Rule

The Department is not aware of any other Federal requirements requiring reporting of the activities, agreements, and arrangements covered by this rule.

6. Differing Compliance or Reporting Requirements for Small Entities

Under the rule, the Form LM–20 reporting and recordkeeping requirements apply equally to all persons required to file a Form LM–20, and the Form LM–10 reporting and recordkeeping requirements apply equally to all employers covered under the LMRDA. However, to reduce burden, the Department has exempted employers from filing Form LM–10 reports concerning agreements with consultants to participate in union avoidance seminars. For example, pursuant to the NPRM, if a reportable seminar was attended by 50 different employers, each of the 50 would have to file a separate Form LM–10 report. Under this rule, none are required to file in this instance. Further, only the entity that presented the seminar is required to file a Form LM–20 report, not the organizer of the event.

7. Clarification, Consolidation, and Simplification of Compliance and Reporting Requirements for Small Entities

The revised format of the Form LM–10, which organizes the material in a more user-friendly manner, will simplify filing by small entity employers. Furthermore, the addition of instructions regarding the ''advice'' exemption into the Form LM–20 and Form LM–10 instructions will improve the ease of filing.

OLMS will provide compliance assistance for any questions or difficulties that may arise from using the OLMS Electronic Forms System (EFS). A toll-free help desk is staffed during normal business hours and can be reached by telephone at (866) 401–1109. Additionally, the public can contact the OLMS Division of Interpretations and Standards directly at (202) 693–0123.

8. Steps Taken To Reduce Burden

The Department proposed that Form LM–10 and LM–20 filers submit reports electronically. Currently, labor organizations that file the Form LM–2 Labor Organization Annual Report are required by regulation to file electronically, and there has been good compliance with these requirements. The Department reasonably expects that

employers and consultants will have the information technology resources and capacity to file electronically as well.

The use of electronic forms helps reduce burden by making it possible to download information from previously filed reports directly into the form; enables most schedule information to be imported into the form; makes it easier to enter information; and automatically performs calculations and checks for typographical and mathematical errors and other discrepancies, which assists reporting compliance and reduces the likelihood that the filer will have to file an amended report. The error summaries provided by the electronic system, combined with the speed and ease of electronic filing, also make it easier for both the reporting organization and OLMS to identify errors in both current and previously filed reports and to file amended reports to correct them.

Moreover, a simplified electronic filing option is also planned for all LMRDA reports as part of an information technology enhancement, including for those forms that cannot currently be filed electronically, such as the Form LM–10 and Form LM–20. This addition should greatly reduce the burden on filers to electronically sign and submit their forms. Further, for those filers unable to submit electronically, without undue burden or expense, they will be permitted to apply for a continuing hardship exemption that permits filers to submit hardcopy forms.

9. Electronic Filing of Forms and Availability of Collected Data

Appropriate information technology is used to reduce burden and improve efficiency and responsiveness. The Form LM–20 and Form LM–10 reports now in use can be accessed and completed at the OLMS Web site. OLMS has implemented a system enabling such filers to submit forms electronically with electronic signatures.

The OLMS Online Disclosure Web site at *www.unionreports.gov* is available for public use. The Web site contains a copy of each Form LM–20 and Form LM–10 report for reporting years 2000 and thereafter, as well as an indexed computer database of the information in each report that is searchable through the Internet.

Information about this system can be obtained on the OLMS Web site at *www.olms.dol.gov*.

10. Response to Comments Received

The Department received several comments that addressed aspects of the RFA certification in the NPRM. These commenters argued that the Department should have included an analysis of the impact of the proposed rule on small entities, analyzed effective alternatives that minimized burden, and made them available for public input. An employer association contended that the certification was incorrect, as it only analyzed the burden on small entities required to file reports under the proposed rule, as described in the PRA analysis, and not those entities that must review the form and instructions to determine filing is not required. The employer association asserted that each employer in the United States with greater than five employees would be impacted by the proposed rule, along with every law firm and human relations consultant firm. The association also provided estimates for ''initial familiarization cost'' and ''annual compliance review cost.'' The association assumed that all of the nearly 6 million employers in the United States would need to review the Form LM–10 instructions, although its analysis limited this number to the 2.5 million employers with five or more employees. With these 2.5 million employees, multiplying by the $175.18 average cost for employer as noted in the NPRM, the commenter estimated a total cost on employers by the proposed rule of $444 million. Further, the commenter stated that initial familiarization for consultants would cost between four and 16 hours, corresponding to between $74.6 and $298.3 million, and two to four hours for employers, corresponding to between $549.6 million to $1.11 billion. The ''annual review'' costs were estimated, for consultants, at $385.5 million per year and for employers $408 million. The total costs in the first year were between $910.1 million and $2.2 billion and in subsequent years between $285.9 million and $793.1 million.

The association further argued that the Department did not factor into its estimates the increased burden created, in its view, by the ''new, subjective'' test; the need to communicate between employers and consultants concerning potential reporting; the need for parties to protect themselves against possible investigations and enforcement actions; and the potential negative impact on industry. Other commenters stated that the Department should also have considered the burden resulting from the ''continuous review'' that would be necessary, in its opinion, to ensure compliance, particularly because of the ''new'' and ''subjective'' nature of the test, and the reporting triggered by the development of personnel policies, conducting of seminars, and administrating employee attitude surveys. One employer coalition stressed the potential negative impact of the proposed rule on labor relations, as employers would be unable to obtain advice from lawyers and other third parties and would therefore be more likely to violate labor laws. The commenter urged the Department to take these factors into account as well, not just the PRA burden separately calculated for Form LM–10 and LM–20 filers.

As an initial matter, as stated at length in the preamble, the Department disagrees with the suggestion that the rule provides a subjective test that adds complexity and concomitant costs on filers or will have a negative and costly impact on labor relations. The Department also disagrees with the contention by the employer association that every employer and law firm in the United States must review the instructions, and therefore rejects the commenter's burden estimates as highly inflated. Rather, only those employers that retain third parties to provide labor relations services, and only those law firms involved in labor and employment law, must review the reporting requirements. Further, such a review is not of every activity engaged in by the employer's representatives, but only of each agreement entered into and the activities engaged upon by consultants pursuant to such an agreement. While the Department cannot reasonably provide an estimate for the number of employers retaining third parties for such services, the PRA analysis demonstrates that an insubstantial number of small business employers will be Form LM–10 respondents (2,777 Form LM–10 filers out of 2,182,169 employer firms in the United States with five or more employees).[144] Moreover, although the Department acknowledges that a larger number of small business employers must review the Form LM–10 instructions than merely those who must file, only an insubstantial number of total employer firms with five or more employees (2,777/2,182,169 = 0.1273%) must file the Form LM–10 (less than 0.13%), and the burden on filers and non-filers alike is not significant. Moreover, as explained in the RFA analysis above, the number of law firms engaged in labor and employment law is a fraction of the total figure, and the burden on

[144] See U.S. Census Bureau, Statistics of U.S. Businesses, 2012: United States & states, totals. See *http://www.census.gov/econ/susb/index.html.*

such labor and employment law firms is not significant.

Furthermore, the Department rejects the suggestion that it must provide an estimate for ''initial familiarization'' for each filing entity. Form LM–10 and LM–20 filers, similar to union officials who file the Form LM–30 conflict-of-interest report, are ''special reports'' not required to be filed each year, in contrast to labor organizations who must file the Forms LM–2, LM–3, or LM–4 Labor Organization Annual Report, disclosing financial information. Thus, the Department assumes that employers and consultants are unique filers each year, and costs associated with ''familiarization'' are therefore included within the estimated costs. This is particularly appropriate for employers, who are unlikely to enter into reportable persuader agreements with different firms in different years. This is also consistent with the Department's position regarding union officials, as stated in the recently published Form LM–30 final rule, which is also a special report that is only required upon the receipt of certain payments. See 76 FR 66487. Indeed, this is a conservative assumption, because, for law and consultant firms that do file multiple Form LM–20 reports over many years, the compliance costs estimated in this rule will decrease with familiarity. Moreover, Form LM–10 and LM–20 filers are not required to change any practices or create any new documents or procedures in order to comply with this rule.[145]

Finally, in the preamble the Department responded to comments that suggested that the revised forms established a subjective test that could establish burdens negatively impacting employer free speech and the attorney-client relationship, thus preventing employers from getting needed advice. In response, the Department explained the objective nature of the test to determine reportability of employer-consultant agreements, and the minimal impact, if any, on the rights of employers and consultants. Thus, the Department is not persuaded that employers could not obtain advice, and, as a result, there would be increase in violations of the law.

The Department, however, agrees with the suggestion that it should consider the impact of the rule on certain entities that may be affected by the rule, even though they may not be required to file Form LM–10 or LM–20 reports, such as employers, law firms, consultant firms, and business associations. Some of these entities will need to read and apply the Form LM–10 and LM–20 instructions to ensure LMRDA compliance.[146] Thus, the Department, utilizing the PRA estimate for non-filers of 10 minutes to read the Form LM–20 Instructions (as explained in the NPRM), also estimates in this rule that these entities will spend an additional estimated 50 minutes applying the instructions to all of their clients to determine that reporting is not required. Therefore, the Department has increased this estimate to a total of 60 minutes (or one hour) for consultants to read and apply the same instructions to each of their non-reportable agreements. The Department has estimated in the PRA analysis that it would take ten minutes to read the instructions, with an additional ten minutes to apply to a persuader agreement, with the entire reporting and submission process taking 98 and 147 minutes, respectively, for the Forms LM–20 and LM–10. The Department considers it reasonable to estimate that the process for non-filers to read the instructions and apply to each of their non-reportable agreements (and determine non-reportability) to take on average one hour less than the time to complete and submit the forms.[147] As explained in more detail in the RFA analysis above, the cost on all small entities, employer and consultant, is still not significant within the meaning of the RFA. Further, this would be the case even using the lower-end, four-hour annual compliance cost estimate provided by the commenter. See note 146, instead of the one-hour estimate.

Further, in terms of hourly wage data that is multiplied by total hours used to determine total costs, the Department rejects the employer association's suggestion to use the chief executive officer category, and instead has employed the attorney category that it used in the NPRM and in the PRA analysis for this rule. The Department has utilized this category in the past for Form LM–10 and LM–20 burden analyses, and it is reasonable to assume that employer firms will utilize the services of the law or consultant firm, connected with the agreement in question, to determine the large majority of the reportability decisions.

List of Subjects

29 CFR Part 405

Labor management relations, Reporting and recordkeeping requirements.

29 CFR Part 406

Labor management relations, Reporting and recordkeeping requirements.

Text of Rule

Accordingly, for the reasons provided above, the Department amends parts 405 and 406 of title 29, chapter IV of the Code of Federal Regulations as set forth below:

PART 405—EMPLOYER REPORTS

■ 1. The authority citation for part 405 continues to read as follows:

Authority: Secs. 203, 207, 208, 73 Stat. 526, 529 (29 U.S.C. 433, 437, 438); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

§ 405.5 [Amended]

■ 2. Amend § 405.5 by removing the phrase ''the second paragraph under the instructions for Question 8A of Form LM–10'' and adding in its place ''the instructions for Part A of the Form LM–10''.

§ 405.7 [Amended]

■ 3. Amend § 405.7 by removing the phrase ''Question 8C of Form LM–10'' and adding in its place ''Part D of the Form LM–10.''

PART 406—REPORTING BY LABOR RELATIONS CONSULTANTS AND OTHER PERSONS, CERTAIN AGREEMENTS WITH EMPLOYERS

■ 4. The authority citation for part 406 continues to read as follows:

[145] To the extent that attorneys, to ensure compliance with their ethical obligations, communicate with their clients concerning the reporting requirements, attorneys will likely engage in such communication for each agreement, even in subsequent years. Further, any such communication between the law firm and client is included in the time required to review and apply the reporting instructions for reportable agreements, and is part of the one hour estimated annual compliance review for non-reportable agreements.

[146] The Department, however, rejects the varying estimates provided by an employer association for ''annual compliance review'' of 1.5 to 28 hours for these employer firms to engage in annual compliance review, and four to 20 hours for law firms and 16–40 hours for HR consultant firms. The Department also rejects another commenter's estimate of 12 hours per year for employers to conduct a continual compliance review. These estimates appear highly overstated.

[147] The Department rejects the commenters' estimates for ''annual compliance review'' for employers, in addition to consultants, as this approach double-counts the annual burden for non-filers, as an employer and a consultant will have identical review time in situations where no report is required from either party. The consultant or law firm can review the agreement and advise the employer that no reporting is required. Thus, the review time would be simultaneously undertaken by the consultant on behalf of both parties. (Further, employers are exempt from reporting union avoidance seminars.)

Authority: Secs. 203, 207, 208, 73 Stat. 526, 529 (29 U.S.C. 433, 437, 438); Secretary's Order No. 03–2012, 77 FR 69376, November 16, 2012.

■ 5. Amend § 406.2(a) by revising the last two sentences of the paragraph to read as follows:

§ 406.2 Agreement and activities report.

(a) * * * The report shall be filed within 30 days after entering into an agreement or arrangement of the type described in this section, except that an agreement or arrangement to present a union avoidance seminar shall be filed within 30 days after the date of the seminar. If there is any change in the information reported (other than that required by Item 11.c, of the Form), it must be filed in a report clearly marked ''Amended Report'' within 30 days of the change.

* * * * *

Signed in Washington, DC, this 16th day of March, 2016.

Michael Hayes,

Director, Office of Labor-Management Standards.

Note: The following appendices will not appear in the Code of Federal Regulations.

Appendices: Revised Forms and Instructions

Paperwork Reduction Act Statement. Public reporting burden for this collection of information is estimated to average 147 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. Reporting of this information is mandatory and is required by the Labor-Management Reporting and Disclosure Act of 1959, as amended, for the purpose of public disclosure. As this is public information, there are no assurances of confidentiality. If you have any comments regarding this estimate or any other aspect of this information collection, including suggestions for reducing this burden, please send them to the U.S. Department of Labor, Office of Labor-Management Standards, Division of Interpretations and Standards, Room N-5609, 200 Constitution Avenue, NW, Washington, DC 20210.

DO NOT SEND YOUR COMPLETED FORM LM-10 TO THE ABOVE ADDRESS.

Instructions for Form LM-10 Employer Report

GENERAL INSTRUCTIONS

I. Why File

The Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), requires public disclosure of specific financial transactions, agreements, or arrangements made between an employer **and** one or more of the following: a labor organization, union official, employee, or labor relations consultant. Additionally, an employer must disclose expenditures for certain objects relating to activities of employees or a union. Pursuant to Section 203 of the LMRDA, every employer who has engaged in any such transaction, agreement, arrangement, or expenditures during the fiscal year must file a detailed report with the Secretary of Labor. The Secretary, under the authority of the LMRDA, has prescribed the filing of the Employer Report, Form LM-10, for employers to satisfy this reporting requirement.

These reporting requirements of the LMRDA and of the regulations and forms issued under the Act only relate to the disclosure of specified financial transactions, agreements, or arrangements. The reporting requirements do not address whether specific payments, expenditures, transactions, agreements, or arrangements are lawful or unlawful. The fact that a particular payment, expenditure, transaction, agreement, or arrangement is or is not required to be reported does not indicate whether or not it is subject to any legal prohibition.

II. Who Must File

Any employer, as defined by the LMRDA, who has engaged in certain financial transactions, agreements, or arrangements, of the type described in Section 203(a) of the Act, with any labor organization, union official, employee or labor relations consultant, **or** who has made expenditures for certain objects relating to activities of employees or a union, must file a Form LM-10. An employer required to file must complete only one Form LM-10 report each fiscal year that covers all instances of reportable activity even if activity occurs at multiple locations.

Note: Selected definitions from the LMRDA follow these instructions.

III. What Must Be Reported

The types of financial transactions, agreements, arrangements, or expenditures that must be reported are set forth in Form LM-10. The LMRDA states that every employer involved in any such transaction, agreement, or arrangement during the fiscal year must file a detailed report with the Secretary of Labor indicating the following: (1) the date and amount of each transaction, agreement, or arrangement; (2) the name, address, and position of the person with whom the agreement, arrangement, or transaction was made; and (3) a full explanation of the circumstances of all payments made, including the terms of any agreement or understanding pursuant to which they were made.

Form LM-10 is divided into four parts: Part A, Part B, Part C, and Part D.

Part A, pursuant to LMRDA section 203(a)(1), details direct or indirect payments, including loans, to unions or union officials.

Part B, pursuant to LMRDA section 203(a)(2), details direct or indirect payments (including reimbursed expenses) to any of the employer's employees, or to any group or committee of the employer's employees, for the purpose of causing them to persuade other employees to exercise or not exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing without previously or at the same time disclosing such payment to all such other employees.

Part C, pursuant to LMRDA sections 203(a)(4) and (5), details agreements and arrangements, and any payments made pursuant to such agreements or arrangements, between employers, labor relations consultants or other independent contractors or organizations under which the consultant or other person engages in actions, conduct, or communications with an object, directly or indirectly, to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own

choosing. Also reportable in Part C are agreements and arrangements under which the consultant or independent contractor or organization supplies information regarding employees or a labor organization in connection with a labor dispute involving the employer.

Part D, pursuant to LMRDA section 203(a)(3), details expenditures where an object thereof, directly or indirectly, was to interfere with, restrain, or coerce employees in the right to organize and bargain collectively through representatives of their own choosing; and any expenditure where an object thereof, directly or indirectly, was to obtain information concerning the activities of employees or of a labor organization in connection with a labor dispute involving the employer.

Special Reports. In addition to this report, the Secretary may require employers subject to the LMRDA to submit special reports on relevant information, including but not necessarily confined to reports involving specifically identified personnel on particular matters referred to in the instructions for Part A.

While Section 203 of the LMRDA does not amend or modify the rights protected by Section 8(c) of the National Labor Relations Act, as amended (NLRA), the LMRDA contains no provision exempting the activities protected by that section from the reporting requirements. Therefore, employers must report activities of the type set forth in Item 8, since the LMRDA requires such reports, regardless of whether the activities are protected by Section 8(c) of the NLRA. Note, however, that the information employers are required to report in response to question 8.c does not include expenditures relating exclusively to matters protected by Section 8(c) of the NLRA, because the definition in Section 203(g) of the LMRDA of the term "interfere with, restrain, or coerce," which is used in question 8.c, does not cover such matters.

Note: The text of NLRA Section 8(c) is set forth following these instructions.

IV. Who Must Sign the Report

Both the president and the treasurer, or corresponding officers, of the reporting employer must sign the completed Form LM-10. A report from a sole proprietor need only bear one signature.

V. When to File

Each employer, as defined by the LMRDA, who has engaged in any of the transactions or arrangements set forth in the form must submit a Form LM-10 report *within 90 days* after the end of the employer's fiscal year.

VI. How to File

Form LM-10 must be completed online, electronically signed, and submitted along with any required attachments to the Department using the OLMS Electronic Forms System (EFS). The electronic Form LM-10 can be accessed and completed at the OLMS website at www.olms.dol.gov.

If you have difficulty navigating EFS, or have questions about its functions or features, call the OLMS Help Desk at (866) 401-1109. You may also email questions to OLMS-Public@dol.gov.

You will be able to file a report in paper format only if you assert a temporary hardship exemption or apply for and are granted a continuing hardship exemption.

TEMPORARY HARDSHIP EXEMPTION:

If you experience unanticipated technical difficulties that prevent the timely preparation and submission of an electronic filing, you may file Form LM-10 in paper format by the required due date at this address:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-5616
Washington, DC 20210

An electronic format copy of the filed paper format document shall be submitted to the Department within ten business days after the required due date. Indicate in Item 1.b (Hardship Exempted Report) that you are filing under the hardship exemption procedures. Unanticipated technical difficulties that may result in additional delays should be brought to the attention of the OLMS Division of Interpretations and Standards, which can be reached at the address below, by email at OLMS-Public@dol.gov, by phone at (202) 693-0123, or by fax at (202) 693-1340.

Note: If either the paper filing or the electronic filing is not received in the timeframe specified above, the report will be considered delinquent.

CONTINUING HARDSHIP EXEMPTION:

(a) You may apply in writing for a continuing hardship exemption if Form LM-10 cannot be filed electronically without undue burden or expense. Such written application shall be received at least 30 days prior to the required due date of the report(s). The written application shall contain the information set forth in paragraph (b). The application must be mailed to the following address:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-5609

Washington, DC 20210

Questions regarding the application should be directed to the OLMS Division of Interpretations and Standards, which can be reached at the above address, by email at OLMS-Public@dol.gov, by phone at (202) 693-0123, or by fax at (202) 693-1340.

(b) The request for the continuing hardship exemption shall include, but not be limited to, the following: (1) the requested time period of, and justification for, the exemption (you must specify a time period not to exceed one year); (2) the burden and expense that you would incur if required to make an electronic submission; and (3) the reasons for not submitting the report(s) electronically.

(c) The continuing hardship exemption shall not be deemed granted until the Department notifies the applicant in writing. If the Department denies the application for an exemption, the filer shall file the report(s) in electronic format by the required due date. If the Department determines that the grant of the exemption is appropriate and consistent with the public interest and so notifies the applicant, the filer shall follow the procedures set forth in paragraph (d).

(d) If the request is granted, you shall submit the report(s) in paper format by the required due date. You may be required to submit Form LM-10 in electronic format upon the expiration of the period for which the exemption is granted. Indicate in Item 1.b. (Hardship Exemption) that you are filing under the hardship exemption procedures.

Note: If either the paper filing or the electronic filing is not received in the timeframe specified above, the report will be considered delinquent.

VII. Public Disclosure

Pursuant to the LMRDA, the U.S. Department of Labor is required to make all submitted reports available for public inspection. In the Online Public Disclosure Room at www.unionreports.gov, you may view and print copies of Form LM-10 reports, beginning with the year 2000.

You may also examine the Form LM-10 reports at, and purchase copies from, the OLMS Public Disclosure Room at:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-1519
Washington, DC 20210
Telephone: (202) 693-0125

VIII. Officer Responsibilities and Penalties

The president and treasurer, or corresponding principal officers of the reporting employer required to sign the Form LM-10, are personally responsible for its filing and accuracy. Under the LMRDA, these individuals are subject to criminal penalties for willful failure to file a required report and/or for false reporting. False reporting includes making any false statement or misrepresentation of a material fact while knowing it to be false, or knowingly failing to disclose a material fact in a required report or in the information required to be contained in it or in any information required to be submitted with it.

The reporting employer and the officers required to sign Form LM-10 are also subject to civil prosecution for violations of the filing requirements. Section 210 of the LMRDA provides that "whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate."

IX. Recordkeeping

The individuals required to file Form LM-10 are responsible for maintaining records which must provide in sufficient detail the information and data necessary to verify the accuracy and completeness of the report. You must retain the records for at least 5 years after the date you filed the report. You must retain any record necessary to verify, explain, or clarify the report, including, but not limited to, vouchers, worksheets, receipts, and applicable resolutions.

X. Completing Form LM-10

Read the instructions carefully before completing Form LM-10.

Information Entry. Complete Form LM-10 by entering information directly into the fields on the form. If additional space is needed for items that require an explanation or further information, EFS automatically adds space for additional entries.

Validation. You should click on the "Validate" button on each page to check for errors. This action will generate a "Validation Summary Page" listing any errors that will need to be corrected before you will be able to sign the form. Clicking on the signature lines will also perform the validation function.

Entering Dollars. In all items dealing with monetary values, report amounts in dollars only; do not enter cents. Round cents to the nearest dollar. Enter a single "0" in the boxes for reporting dollars if you have nothing to report.

Additional Parts. If you entered into multiple reportable transactions, agreements, or arrangements, then click the "Add Another" button to generate an additional part.

Information Items (Items 1–7)

1. FILE NUMBER, HARDSHIP EXEMPTION, AND AMENDED REPORT:

1.a. *File Number.* EFS will pre-fill this item with the reporting employer's file number. If you are a new filer, EFS will assign your organization a number upon registration.

1.b. *Hardship Exemption.* Indicate here if you are filing a hardcopy Form LM-10 pursuant to a hardship exemption.

1.c. *Amended Report.* Indicate here if you are filing an amended Form LM-10.

2. FISCAL YEAR—Enter the beginning and ending dates of the fiscal year covered in this report in mm/dd/yyyy format. The report must not cover more than a 12-month period. For example, if the reporting employer's 12-month fiscal year begins on January 1 and ends on December 31, do not enter a date beyond the 12-month period, such as January 1 to January 1; this is an invalid date entry.

3. NAME AND MAILING ADDRESS—Enter the full legal name of the reporting employer, a trade or commercial name, if applicable (such as a d/b/a or "doing business as" name), the name and title of the person to whom mail should be directed, and the complete address where mail should be sent, including any building and room number. Enter a valid email address for the employer. Also enter the Employer Identification Number (EIN) of the employer. If the employer does not have an EIN, enter "none."

4. NAME AND ADDRESS OF PRINCIPAL OFFICER—Enter the name and business address of the president or corresponding principal officer if the address is different from Item 3. Enter a valid email address for the principal officer.

5. ANY OTHER ADDRESS WHERE RECORDS ARE KEPT—If you maintain any of the records necessary to verify this report at an address different from the addresses listed in Items 3 or 4, enter the appropriate name and address in Item 5.

6. WHERE RECORDS ARE AVAILABLE—Select the appropriate box(es) to indicate where the records necessary to verify this report are available for examination.

7. TYPE OF ORGANIZATION—Select the appropriate box that describes the reporting employer: Corporation, Partnership, or Individual. If none of these choices apply, select "Other" and specify the type of reporting employer filing this report in the space provided.

Part A – PAYMENTS TO UNIONS OR UNION OFFICIALS

Complete Part A if you made or promised or agreed to make, directly or indirectly, any payment or loan of money or other thing of value (including reimbursed expenses) to any labor organization or to any officer,

agent, shop steward, or other representative or employee of any labor organization.

In answering Part A, ***exclude*** the following: (1) Payments of the kind referred to in Section 302(c) of the Labor Management Relations Act, 1947, as amended (LMRA); **and** (2) Payments or loans made in the regular course of business as a national or state bank, credit union, insurance company, savings and loan association, or other credit institution. (The text of Section 302(c) of the LMRA is set forth below.)

None of the following situations are required to be reported:

(a) payments made in the regular course of business to a class of persons determined without regard to whether they are, or are identified with, labor organizations and whose relationship to labor organizations is not ordinarily known to or readily ascertainable by the payer, for example, interest on bonds and dividends on stock issued by the reporting employer;

(b) loans made to employees under circumstances and terms unrelated to the employees' status in a labor organization;

(c) payments made to any regular employee as wages or other compensation for service as a regular employee of the employer, or by reason of his service as an employee of such employer, for periods during regular working hours in which such employee engages in activities other than productive work, if the payments for such periods of time are:

(1) required by law or a bona fide collective bargaining agreement, or

(2) made pursuant to a custom or practice under such a collective agreement, or

(3) made pursuant to a policy, custom, or practice with respect to employment in the establishment which the employer has adopted without regard to any holding by such employee of a position with a labor organization;

(d) initiation fees and assessments paid to labor organizations and deducted from the wages of employees pursuant to individual assignments meeting the terms specified in paragraph (4) of Section 302(c) of the LMRA;

(e) sporadic or occasional gifts, gratuities, or favors of insubstantial value, given under circumstances and terms unrelated to the recipients' status in a labor organization; for example, traditional Christmas gifts.

8. Enter the name and title of the recipient/contact, enter the name of the labor organization, and specify whether the recipient was an individual or a labor organization by selecting the appropriate box. Enter the address, telephone number, and email address of the recipient or contact person in the space provided. If the address of the labor organization differs from that of the individual recipient of the payment or the contact person for the labor organization, click the "Add Another" button to generate an additional page and enter the address of the organization or person on this page.

9. Enter information for each payment.

9.a. Enter the date the payment was made (or promise or agreement was entered into) in mm/dd/yyyy format.

9.b. Enter the amount of the payment.

9.c. Specify if this was a payment or a loan, and if it was made by cash or property. If the form of payment was cash, enter the U.S. dollar amount of each payment made during the fiscal year. If the form of payment was property, provide the market value (in U.S. dollars) of the property at the time of transfer. If the form of payment was another thing of value, describe the payment.

9.d. Explain fully the circumstances of the payment, including the terms of any oral agreement or understanding under which it was made. Provide a full explanation identifying the purpose and circumstances of the payments made or agreed or promised to be made. The explanation must fully outline the conditions and terms of any agreement or promise. In addition to the above, you must indicate whether the payments or promises reported specifically benefited the person or persons or labor organizations named in Item 8. If you made or promised or agreed to make payments through a person or persons not shown above, you must provide the full name and address of such person or persons. Your explanation must clearly indicate why you must report the payment. Any incomplete responses or unclear explanations will render this report deficient.

Part B – PERSUADER PAYMENTS TO EMPLOYEES OR EMPLOYEE COMMITTEES

Complete Part B if you made, directly or indirectly, any payment (including reimbursed expenses) to any of your employees, or to any group or committee of your employees, for the purpose of causing them to persuade other employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees.

> In answering Part B, **exclude** payments made to any regular officer, supervisor, or employee as compensation for services as a regular officer, supervisor, or employee.

10. Enter the name of the recipient and specify whether the recipient was an employee or employee group or committee by selecting the appropriate box. If you selected "Employee Group/Committee," provide a contact name and title. Enter the address, telephone number, and email address of the recipient in the space provided. If the address of the group or committee differs from that of the individual recipient of the payment or the contact person for the group or committee, click the "Add Another" button to generate an additional page and enter the additional address on this page.

11. Enter information for each payment.

11.a. Enter the date of each payment in mm/dd/yyyy format.

11.b. Enter the amount of each payment.

11.c. Specify if this was a payment or a loan, and if it was made by cash or property. If this form of payment was cash, enter the U.S. dollar amount of each payment made during the fiscal year. If the form of payment was property, provide the market value (in U.S. dollars) of the property at the time of transfer.

11.d. Explain fully the circumstances of the payment, including the terms of any oral agreement or understanding under which it was made. Provide a full explanation identifying the purpose and circumstances of the payment made or agreed or promised to be made. The explanation must fully outline the conditions and terms of any agreement or promise. In addition to the above, you must indicate whether the payments or promises reported specifically benefited the person or persons named in Item 10. If you made payments through a person or persons not shown above, you must provide the full name and address of such person or persons. Your explanation must clearly indicate why you must report the payment. Any incomplete responses or unclear explanations will render this report deficient.

Part C – PERSUADER AGREEMENTS OR ARRANGEMENTS WITH LABOR RELATIONS CONSULTANTS

Check the appropriate box(es) and complete Part C if you made any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person or

organization undertook activities where an object thereof, directly or indirectly, was to:

- Persuade employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.
- Furnish you with information concerning activities of employees or of a labor organization in connection with a labor dispute in which you were involved.

The term "agreement or arrangement" should be construed broadly and does not need to be in writing. A person "undertakes" activities not only when he/she performs the activity but also when he/she agrees to perform the activity or to have it performed.

When completing Part C, **exclude** agreements or arrangements covering services related exclusively to the following:

(1) giving or agreeing to give you advice; **or**

(2) agreeing to represent you before any court, administrative agency, or tribunal of arbitration; **or**

(3) engaging in collective bargaining on your behalf with respect to wages, hours, or other terms or conditions of employment, or negotiating a collective bargaining agreement or any question arising thereunder.

Note: If **any** reportable activities are undertaken, or are agreed to be undertaken, pursuant to the agreement or arrangement, the exemptions do not apply and information must be reported for the entire agreement or arrangement.

Reportable Persuader Agreements or Arrangements

An agreement or arrangement is reportable if a consultant undertakes activities with an object, directly or indirectly, to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing (hereinafter "persuade employees"). Such "persuader activities" are any actions, conduct, or communications that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights. Under a typical reportable agreement or arrangement, a consultant manages a campaign or program to avoid or counter a union organizing or collective bargaining effort, either jointly with the employer or separately, or conducts a union avoidance seminar.

Reporting of an agreement or arrangement is triggered when:

(1) A consultant engages in direct contact or communication with any employee with an object to persuade such employee; or

(2) A consultant who has no direct contact with employees undertakes the following activities with an object to persuade employees:

(a) plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;

(b) provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;

(c) develops or implements personnel policies, practices, or actions for the employer.

Specific examples of activities that either alone or in combination would trigger the reporting requirements include but are not limited to:

- planning or conducting individual employee meetings;
- planning or conducting group employee meetings;
- training supervisors or employer representatives to conduct such meetings;
- coordinating or directing the activities of supervisors or employer representatives;
- establishing or facilitating employee committees;
- drafting, revising, or providing speeches, written material, website, audiovisual or multimedia content for presentation, dissemination, or distribution to employees, directly or indirectly (including the sale of "off-the-shelf[1]" materials where the consultant assists the employer in the selection of such materials, except as noted below where such selection is made by trade associations for member-employers);
- developing employer personnel policies designed to persuade, such as when a consultant, in response to employee complaints about the need for a union to protect against arbitrary firings, develops a policy under which employees may arbitrate grievances;
- identifying employees for disciplinary action, reward, or other targeting based on their

[1] "Off-the-shelf materials" refer to pre-existing *material* not created for the particular employer who is party to the agreement.

involvement with a union representation campaign or perceived support for the union;
- coordinating the timing and sequencing of union avoidance tactics and strategies.

To be reportable, as noted above, such activities must be undertaken with an object to persuade employees, as evidenced by the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking.

Reportable Information-Supplying Agreements or Arrangements

Reportable information-supplying agreements or arrangements include those in which a consultant engages in activities with an object to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute[2] involving such employer. Such activities include information obtained from: supervisors or employer representatives; employees, employee representatives, or union meetings; research or investigation concerning employees or labor organizations; and surveillance of employees or union representatives (electronically or in person). A reportable agreement or arrangement includes an employer's purchase or other acquisition of such information, for example, from a consultant's website. Such purchase or acquisition would be reportable by both the consultant and the employer.

Exempt Agreements or Arrangements

No report is required covering the services of a labor relations consultant by reason of the consultant's giving or agreeing to give advice to an employer. "Advice" means an oral or written recommendation regarding a decision or a course of conduct. For example, a consultant who exclusively counsels employer representatives on what they may lawfully say to employees, reviews personnel policies or actions for legality or to ensure a productive and efficient workplace for the client, or provides guidance on National Labor Relations Board (NLRB) or National Mediation Board (NMB) practice or precedent is providing "advice."

As a general principle, no reporting is required for an agreement or arrangement to exclusively provide legal services. For example, no report is required if a lawyer or other consultant revises persuasive materials, communications, or policies created by the employer in order to ensure their legality rather than enhancing their persuasive effect. In such cases, the consultant has no object to persuade employees. Additionally, reports are not required for an agreement that involves a consultant merely representing the employer before any court, administrative agency, or tribunal of arbitration, or engaging in collective bargaining on the employer's behalf with respect to wages, hours, or other terms or conditions of employment or the negotiation of any agreement or any questions arising under the agreement.

The consultant's development or implementation of personnel policies or actions that improve employee pay, benefits, or working conditions do not trigger reporting merely because the policies or actions improve the pay, benefits, or working conditions of employees, even where they could subtly affect or influence the attitudes or views of the employees. Rather, to be reportable, the consultant must undertake the activities with an object to persuade employees, as evidenced by the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking.

No report from an employer is required for an agreement or arrangement to conduct a union avoidance seminar. A Form LM-20 report listing employer-attendees will be filed by the consultant.

Where a trade association sponsors a union avoidance seminar, it is required to file a report only if its staff makes a presentation at the seminar. In instances where solely an outside consultant makes the presentation, only the consultant is required to file a report. Employer-attendees are not required to report their attendance at union avoidance seminars.

A report is not required concerning an agreement or arrangement whereby the consultant conducts a survey of employees (other than a push survey designed to influence participants and thus with an object to persuade) or a vulnerability assessment for an employer concerning the proneness of union organizing. No reporting is required where a consultant merely makes a sales pitch to an employer to undertake persuader activities for the employer.

Moreover, no reporting is required for an agreement or arrangement under which an employer exclusively purchases or otherwise acquires off-the-shelf union avoidance materials from a consultant without any input by the consultant concerning the selection or dissemination of the materials.

Additionally, concerning potential reporting of information-supplying agreements or arrangements, no reporting is required for an agreement or arrangement

[2] The LMRDA defines a "labor dispute" as including "any controversy concerning the terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." See LMRDA section 3(g). Thus, a "labor dispute" includes any controversy over matters relating to the representation and collective bargaining rights of employees.

that covers services relating exclusively to supplying the employer with information for use only in conjunction with an administrative, arbitral, or judicial proceeding.

No reporting is required concerning an agreement between a franchisor and franchisee.

Agreements Involving Trade Associations

Trade associations are not required to file a report by reason of: their membership agreements, selecting off-the-shelf materials for member-employers, or distributing newsletters for member-employers. Such associations, however, are required to file reports for agreements covering the following activities:

Union avoidance seminars in which the trade association's employees serve as presenters; and

The trade association engages in reportable persuader activities for a particular employer or employers other than at a union avoidance seminar merely sponsored by the association.

NLRA Does Not Affect Reporting Obligations

While Section 203 of the LMRDA does not amend or modify the rights protected by Section 8(c) of the National Labor Relations Act, as amended (NLRA), the LMRDA contains no provision exempting the activities protected by that section from the reporting requirements. Therefore, activities of the type set forth in Section 203(a) of the LMRDA must be reported regardless of whether they are protected by Section 8(c) of the NLRA.

Note: The text of NLRA Section 8(c) is set forth following these instructions.

12. Enter the name of the person with whom (or through) a separate agreement or arrangement was made. Enter the name of the organization, and that person's position in the organization. Enter the address, telephone number, and email address of the person in the space provided. Also enter the Employer Identification Number (EIN) of the person, if applicable. If the address of the consultant or other organization differs from that of the individual with whom the separate agreement or arrangement was made, click the "Add Another" button to generate an additional page and enter the additional address on this page.

13. Enter details about the agreement or arrangement:

13.a. Enter the date of the agreement or arrangement in mm/dd/yyyy format.

13.b. Explain fully the terms and conditions of the agreement or arrangement. Any incomplete responses or unclear explanations will render this report deficient. The explanation must include the fee arrangement, as well as a description of the nature of the services agreed to be performed. For example, you must explain if you hired the labor relations consultant to manage a counter-organizing or union-avoidance campaign or to provide assistance to you in such a campaign through the persuader activities identified in Item 14. If you hired an attorney who provided legal advice and representation in addition to persuader services, you are only required to describe such portion of the agreement as the provision of "legal services," without any further description.

If any agreement or arrangement is in whole or in part contained in a written contract, memorandum, letter, or other written instrument, or has been wholly or partially reduced to writing, you must refer to that document and attach a copy of it to this report by clicking on the "Add Attachments" link at the top of the form.

14. Enter details about the specific activities performed or to be performed:

14.a. Nature of Activities. Select from the list in 14.a. each entry that describes the nature of a particular activity or activities performed or to be performed. The list is divided into two parts: persuader activities and information supplying activities, as identified in the initial boxes to Part C. For persuader activity, select each activity performed or to be performed, if the object thereof was, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively through representatives of their own choosing, or their right to engage in any protected concerted activity in the workplace. Select all that apply for each part that you identified in the initial boxes. If none of the items listed accurately describes the nature of a particular activity or activities, select "Other" and describe the nature of the activity or activities in the "Additional Information" space of Item 14.a. You may also provide further explanation for any activity selected in the "Additional Information" space of Item 14.a.

14.b. Describe the period during which the activity has been or will be performed. For example, if the performance will begin in June 2013 and will terminate in August 2013, so indicate by stating "06/01/2013 through 08/31/2013."

14.c. Indicate the extent to which the activity has been performed. For example, you should indicate whether the activity is pending, ongoing, near completion, or completed.

14.d. Enter the name of the person who performed the activities and indicate if the person is employed by the consultant or serves as an independent contractor or as part of a separate organization. Independent contractors or separate organizations in such cases are sub-consultants, who are required to file a separate Form LM-20 report. Enter the name of the

organization, and that person's position in the organization. Enter the address, telephone number, and email address of the person in the space provided. For independent contractors and a separate organization, add the employer identification number (EIN), if available. If the address of the organization differs from the business address of the person who performed the activities, or if more than one person performed the activities, click the "Add Another" button to generate an additional page and enter the address of the organization or the additional persons on this page.

14.e. Identify the subject groups of employees who are to be persuaded or concerning whose activities information is to be supplied to the employer, including a description of the department, job classification(s), work location, and/or shift(s) of the employees targeted, as well as the location of their work.

14.f. Identify the subject labor organizations that employees are seeking to join, or about whose activities information is to be supplied to the employer.

15. Enter information about each payment.

15.a. Enter the date of the payment in mm/dd/yyyy format.

15.b. Enter the amount of the payment. If the form of payment was cash, enter the U.S. dollar amount of each payment made during the fiscal year. If the form of payment was property, provide the market value in U.S. dollars of the property at the time of transfer.

15.c. Specify if this was a payment or a loan and if it was made by cash or property.

15.d. Explain fully the circumstances of the payment, including the terms of any oral agreement or understanding under which it was made. Provide a full explanation identifying the purpose and circumstances of the payments made. The explanation must fully outline the conditions and terms of any agreement or promise. In addition to the above, you must indicate whether the payments reported specifically benefited the person or persons named in Item 12. If you made payments through a person or persons not shown above, you must provide the full name and address of such person or persons. Your explanation must clearly indicate why you must report the payment. Any incomplete responses or unclear explanations will render this report deficient.

Part D – EXPENDITURES MADE TO INTERFERE WITH, RESTRAIN, OR COERCE EMPLOYEES OR TO OBTAIN INFORMATION CONCERNING EMPLOYEES OR A LABOR ORGANIZATION

Check the appropriate box in Part D and complete this Part if you made:

- Any expenditure where an object thereof, directly or indirectly, was to interfere with, restrain, or coerce employees in the right to organize and bargain collectively through representatives of their own choosing.

In answering this provision of Part D, **exclude** expenditures relating exclusively to matters protected by Section 8(c) of the National Labor Relations Act, as amended (NLRA).

Note: The definition set forth in Section 203(g) of the LMRDA for the term "interfere with, restrain, or coerce" excludes matters protected by Section 8(c) of the NLRA. Therefore, expenditures related exclusively to such matters protected by Section 8(c) are not required to be reported in this question. (The text of Section 8(c) of the NLRA is set forth below.)

- Any expenditure where an object thereof, directly or indirectly, was to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute in which you were involved.

In answering this provision of Part D, **exclude** the following:

(1) Information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; and
(2) Expenditures made to any regular officer, supervisor, or employee as compensation for service as a regular officer, supervisor, or employee.

16. Enter the name of the recipient of the expenditure and specify whether the recipient was an employee, an independent contractor or other individual, or a business or organization by selecting the appropriate box. If you selected "Business/Organization," provide a contact name and title. Enter the address, telephone number, and email address of the recipient in the space provided. If the address of the business or other organization differs from that of the individual who received the expenditure or that of the contact for the business or organization, click the "Add Another" button to generate an additional page and enter the additional address on this page.

17. Enter information for each expenditure.

17.a. Enter the date of the expenditure in mm/dd/yyyy format.

17.b. Enter the amount of the expenditure.

17.c. Specify if this was a payment or a loan and if it was made by cash or property.

17.d. Explain fully the circumstances of the expenditure, including the terms of any oral agreement or understanding under which it was made. Provide a full explanation identifying the purpose and circumstances of the expenditures made or agreed or promised to be made. The explanation must fully outline the conditions and terms of any agreement or promise. In addition to the above, you must indicate whether the payments or promises reported specifically benefited the person or persons named in Item 16. If you made expenditures through a person or persons not shown above, you must provide the full name and address of such person or persons. Your explanation must clearly indicate why you must report the expenditure. Any incomplete responses or unclear explanations will render this report deficient.

18–19. Signatures—The completed Form LM-10 that is filed with OLMS must be signed by both the president and treasurer, or corresponding principal officers, of the reporting employer. A report from a sole proprietor need only bear **one** signature which should be entered in Item 18. Otherwise, this report must bear **two** signatures. If the report is signed by an officer other than the president and/or treasurer, enter the correct title in the title field next to the signature.

Before signing the form, click the Validate button at the top of page 1 to ensure that the report passes validation and thus can be signed and submitted.

To sign the report, an officer will be required to attest to the data on the report and use his or her EFS username and password as the verification mechanism.

To electronically sign the form, click the signature spaces provided. Enter the date the report was signed and the telephone number at which the signatories conduct official business; you do not have to report a private, unlisted telephone number.

Once signed, the completed report can be electronically submitted to OLMS.

SELECTED DEFINITIONS FROM THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, AS AMENDED (LMRDA)

SEC. 3. For the purposes of titles I, II, III, IV, V except section 505), and VI of this Act-

(a) "Commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(b) "State" includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

(c) "Industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended.

(d) "Persons" includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, or receivers.

(e) "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce

(1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or

(2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

(f) "Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this Act.

(g) "Labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(h) Not applicable.

(i) "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers

concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

(j) A labor organization shall be deemed to be engaged in an industry affecting commerce if it:

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees or an employer or employers engaged in an industry affecting commerce;

(3) or has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2) ;

(4) or has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.

(k) Not applicable.

(l) Not applicable.

(m) "Labor relations consultant" means any person who, for compensation, advises or represents an employer, employer organization, or labor organization concerning employee organizing, concerted activities, or collective bargaining activities.

(n) "Officer" means any constitutional officer, any person authorized to perform the functions of president, vice president, secretary, treasurer, or other executive functions of a labor organization, and any member of its executive board or similar governing body.

(o) Not applicable.

(p) Not applicable.

(q) "Officer, agent, shop steward, or other representative," when used with respect to a labor organization, includes elected officials and key administrative personnel, whether elected or appointed (such as business agents, heads of departments or major units, and organizers who exercise substantial independent authority), but does not include salaried non-supervisory professional staff, stenographic, and service personnel.

NATIONAL LABOR RELATIONS ACT, AS AMENDED

Section 8. "(c) The expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

RELATED PROVISIONS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, AS AMENDED (LMRDA)

Report of Employers

Sec. 203.

(a) Every employer who in any fiscal year made-

(1) any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement therefore, to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of any labor organization, except
   (a) payments or loans made by any national or State bank, credit union, insurance company, savings and loan association or other credit institution and
   (b) payments of the kind referred to in section 302 (c) of the Labor Management Relations Act, 1947, as amended;

(2) any payment (including reimbursed expenses) to any of his employees, or any group or committee of such employees, for the purpose of causing such employee or group or committee of employees to persuade other employees to exercise or not to exercise, or as the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to such other employees;

(3) any expenditure, during the fiscal year, where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing, or is to obtain information concerning the activities of employees, or a labor organization in connection with a labor dispute involving such employer, except for use solely in conjunction with an administrative or

arbitral proceeding or a criminal or civil judicial proceeding;

(4) any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person 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, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; or

(5) any payment (including reimbursed expenses) pursuant to an agreement or arrangement described in subdivision(4); shall file with the Secretary a report, in a form prescribed by him, signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

(b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly-

(1) 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; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

(c) Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer 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 with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

Nothing contained in this section shall be construed to require an employer to file a report under subsection (a) unless he has made an expenditure, payment, loan, agreement, or arrangement of the kind described therein. Nothing contained in this section shall be construed to require any other person to file a report under subsection (b) unless he was a party to an agreement or arrangement of the kind described therein.

(d) Nothing contained in this section shall be construed to require any regular officer, supervisor, or employee of an employer to file a report in connection with services rendered to such employer nor shall any employer be required to file a report covering expenditures made to any regular officer, supervisor, or employee of an employer as compensation for service as a regular officer, supervisor, or employee of such employer.

(e) Nothing contained in this section shall be construed as an amendment to, or modification of the rights protected by, section 8 (c) of the National Labor Relations Act, as amended.

(f) The term "interfere with, restrain, or coerce" as used in this section means interference, restraint, and coercion which, if done with respect to the exercise of rights guaranteed in section 7 of the National Labor Relations Act, as amended, would, under section 8(a) of such Act, constitute an unfair labor practice.

SECTION 302(c) OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, AS AMENDED

"(c) The provisions of this section shall not be applicable (1) in respect to any money or other thing of value payable by an employer to any of his employees whose established duties include acting openly for such employer in matters of labor relations or personnel administration or to any representative of his employees, or to any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer; (2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: Provided, That the employer has received from each employee, on whose account such deductions re made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, which-ever occurs sooner; (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents) Provided, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event of the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities; or (6) with respect to money or other thing of value paid by any employer to a trust fund established by such a representative for the purpose of pooled vacation, holiday, severance or similar benefits, or defraying costs of apprenticeship or other training programs: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (7) with respect to money or other thing of value paid by any employer to a pooled or individual trust fund established by such representative for the purpose of (A) scholarships for the benefit of employees, their families, and dependents for study at educational institutions, or (B) child care centers for preschool and school age dependents of employees: Provided, That no labor organization or employer shall be required to bargain on the establishment of any such trust fund, and refusal to do so shall not constitute an unfair labor practice: Provided further, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds; (8) with respect to money or any other thing of value paid by any employer to a trust fund established by such representative for the purpose of defraying the costs of legal services for employees, their families, and dependents for counsel or plan of their choice: Provided, That the requirements of clause (B) of the proviso to clause (5) of this subsection shall apply to such trust funds: Provided further, That no such legal services shall be furnished: (A) to initiate any proceeding directed (i) against any such employer or its officers or agents except in workman's compensation cases, or (ii) against such labor organization, or its parent or subordinate bodies, or their officers or agents, or (iii) against any other employer or labor organization, or their officers or agents, in any matter arising under the National Labor Relations Act, as amended, or this Act; and (B) in any proceeding where a labor organization would be prohibited from defraying the costs of legal services by the provisions of the Labor-Management Reporting and Disclosure Act of 1959; or (9) with respect to money or other things of value paid by an employer to a plant, area or industry-wide labor management committee established for one or more of the purposes set forth in section 5(b) of the Labor Management Cooperation Act of 1978."

If You Need Assistance

The Office of Labor-Management Standards has field offices in the following cities to assist you if you have any questions concerning LMRDA and CSRA reporting requirements.

Atlanta, GA
Birmingham, AL
Boston, MA
Buffalo, NY
Chicago, IL
Cincinnati, OH
Cleveland, OH
Dallas, TX
Denver, CO
Detroit, MI
Honolulu, HI
Kansas City, MO
Fort Lauderdale, FL
Los Angeles, CA
Milwaukee, WI
Minneapolis, MN
Nashville, TN
New Orleans, LA
New York, NY
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
St. Louis, MO
San Francisco, CA
Seattle, WA
Tampa, FL
Washington, DC

Consult local telephone directory listings under United States Government, Labor Department, Office of Labor-Management Standards, for the address and phone number of your nearest field office. Contact information for OLMS field offices is also available on the OLMS website at www.olms.dol.gov.

Information about OLMS, including key personnel and telephone numbers, compliance assistance materials, the text of the LMRDA, and related Federal Register and Code of Federal Regulations (CFR) documents, is available on the OLMS website at www.olms.dol.gov.

Copies of labor organization annual financial reports, employer reports, labor relations consultant reports, and union officer and employee reports filed for the year 2000 and after can be viewed and printed at www.unionreports.gov. Copies of reports for the year 1999 and earlier can be ordered through the website. For questions on Form LM-10 or the instructions, call your nearest OLMS field office or the OLMS Division of Interpretations and Standards at (202) 693-0123. You can also email questions to olms-public@dol.gov.

If you would like to receive periodic email updates from the Office of Labor-Management Standards, including information about the LM forms, enforcement information, and compliance assistance programs, you may subscribe to the OLMS Mailing List from the OLMS website: www.olms.dol.gov.

Revised 03/2016

FORM LM-10
EMPLOYER REPORT

OMB No. 1245-0003. Expires XX-XX-XXXX.

IMPORTANT: This report is mandatory under P.L. 86-257, as amended. Failure to comply may result in criminal prosecution, fines, or civil penalties as provided by 29 U.S.C. 439 or 440.

Office of Labor-Management Standards
U.S. Department of Labor

OLMS

For Official Use Only

E

▶ *Read the instructions carefully before completing this report.* ◀

1.a. File Number E-	1.b. ☐ Hardship Exemption	1.c. ☐ Amended Report	2. Fiscal Year Covered: _____ (mm/dd/yyyy) through _____ (mm/dd/yyyy)

3. Name and address of Reporting Employer (including trade name, if any).

Employer _____

Attention To (including title) _____

Street _____

City _____

State _____ ZIP Code _____

Email Address _____

Employer Identification Number (EIN) _____

4. Name of President or corresponding principal officer and address if different from address in Item 3.

Name _____

Title _____

Street _____

City _____

State _____ ZIP Code _____

Email Address _____

5. Any other address where records necessary to verify this report will be available for examination.

Organization _____

Street _____

City _____

State _____ ZIP Code _____

Email Address _____

Contact Name _____

Title _____

6. Indicate by checking the appropriate box or boxes where records necessary to verify this report will be available for examination.

☐ Address in Item 3

☐ Address in Item 4

☐ Address in Item 5

7. Type of organization.

☐ Corporation ☐ Partnership ☐ Individual ☐ Other

(specify) _____

Signatures

Each of the undersigned, duly authorized officers of the above employer declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including the information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned's knowledge and belief, true, correct, and complete. *(See Section VIII on penalties in the instructions.)*

18. Signed _____
President (if other title, see instructions.)

On _____ _____
Date (mm/dd/yyyy) Telephone Number

19. Signed _____
Treasurer (if other title, see instructions.)

On _____ _____
Date (mm/dd/yyyy) Telephone Number

PART A – Payments to Unions and Union Officials. You must complete Part A if you made or promised or agreed to make, directly or indirectly, any payment or loan of money or other thing of value (including reimbursed expenses) to any labor organization or to any officer, agent, shop steward, or other representative or employee of any labor organization.

8. Name and Title of Recipient/Contact _____ Labor Organization _____

☐ Individual recipient ☐ Labor organization recipient

Street _____ City _____ State _____ ZIP Code _____

Telephone _____ Email Address _____

9.a. Date of each payment. (mm/dd/yyyy)	9.b. Amount of each payment.	9.c. Kind of payment. (Specify if payment or loan, and if in cash or property.)	9.d. Explain fully the circumstances of the payment, including the terms of any oral agreement or understanding pursuant to which it was made.
(1)			
(2)			
(3)			

PART B – Persuader Payments to Employees and Employee Committees. Complete Part B if you made, directly or indirectly, any payment (including reimbursed expenses) to any of your employees, or to any group or committee of your employees, for the purpose of causing them to persuade other employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing unless such payments were contemporaneously or previously disclosed to other employees.

10. Name of Recipient _____

Type of Recipient: ☐ Employee ☐ Employee Group/Committee
If you checked "Employee Group/Committee" provide contact name and title: _____

Street _____ City _____ State _____ ZIP Code _____

Telephone _____ Email Address _____

If the address of the group or organization differs from that of the individual recipient of the payment or the contact person for the group or organization, click here:

11.a. Date of each payment. (mm/dd/yyyy)	11.b. Amount of each payment.	11.c. Kind of payment. (Specify if payment or loan, and if in cash or property.)	11.d. Explain fully the circumstances of the payment, including the terms of any oral agreement or understanding pursuant to which it was made.
(1)			
(2)			
(3)			

PART C – Persuader Agreements/Arrangements with Labor Relations Consultants. Check the box(es) below and complete Part C if you made any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person or organization undertook activities where an object thereof, directly or indirectly, was to:

☐ Persuade employees to exercise or not to exercise, or as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.

☐ Furnish you with information concerning activities of employees or of a labor organization in connection with a labor dispute in which you were involved.

12. Name of person with whom (or through) a separate agreement was made _____

Organization _____ Position in Organization _____

Street _____ City _____ State _____ ZIP Code _____

Telephone _____ Email Address _____

Employer Identification Number (EIN) _____

If the address of the consultant or other organization differs from that of the individual with whom the separate agreement was made, click here:

13.a. Date of the agreement or arrangement. (mm/dd/yyyy)	13.b. Terms and conditions. (Explain in detail; see instructions. Written agreements must be attached by clicking the "Add Attachments" link at the top of the form.)

14. Information regarding activities performed or to be performed by the labor relations consultant pursuant to agreement or arrangement.

14.a. Nature of activities performed or to be performed by the labor relations consultant pursuant to agreement or arrangement:

PERSUADER ACTIVITIES: Select from the following reportable activities those which, per agreement with the consultant(s) named in item 12, have been or will be performed:

☐ Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees

☐ Drafting, revising, or providing a speech for presentation to employees

☐ Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees

☐ Drafting, revising, or providing website content for employees

☐ Planning or conducting individual employee meetings

☐ Planning or conducting group employee meetings

☐ Training supervisors or employer representatives to conduct individual or group employee meetings

☐ Coordinating or directing the activities of supervisors or employer representatives

☐ Establishing or facilitating employee committees

☐ Developing personnel policies or practices

☐ Identifying employees for disciplinary action, reward, or other targeting

☐ Speaking with or otherwise communicating directly with employees

☐ Other

INFORMATION SUPPLYING ACTIVITIES: Select each activity whereby the labor relations consultant supplies you with information concerning the activities of employees or a labor organization in connection with a labor dispute in which you are involved:

☐ Supplying information obtained from:

- ☐ Research or investigation concerning employees or labor organizations
- ☐ Supervisors or employer representatives
- ☐ Employees, employee representatives, or union meetings
- ☐ Surveillance of employees or union representatives (electronically or in person)

☐ Other

ADDITIONAL INFORMATION:

14.b. Period during which performed.	14.c. Extent performed.

14.d. Name of person(s) who performed activities _____

Type of Person: ☐ Employee of Consultant ☐ Independent Contractor ☐ Separate Organization

Organization _____ Position in Organization _____

Street _____ City _____ State _____ ZIP Code _____

Telephone _____ Email Address _____ Employer Identification Number (EIN) _____

If the address of the organization differs from the business address of the person who performed the activities, or if more than one person performed the activities, click here:

PART C – Persuader Agreements/Arrangements with Labor Relations Consultants. Continued

14.e. Identify subject groups of employees. [Continuation button]	14.f. Identify subject labor organizations.

15.a. Date of each payment. (mm/dd/yyyy)	15.b. Amount of each payment.	15.c. Kind of payment. (Specify if payment or loan, and if in cash or property.)	15.d. Explain fully the circumstances of the payment(s), including the terms of any oral agreement or understanding pursuant to which it was made.
(1)			
(2)			
(3)			

PART D – Expenditures Made to Interfere With, Restrain, or Coerce Employees; Obtain Information Concerning Employees or a Labor Organization.

Check the box(es) below and complete Part D if you made:

☐ Any expenditure where an object thereof, directly or indirectly, was to interfere with, restrain, or coerce employees in the right to organize and bargain collectively through representatives of their own choosing; or

☐ Any expenditure where an object thereof, directly or indirectly, was to obtain information concerning the activities of employees or of a labor organization in connection with a labor dispute in which you were involved.

16. Name of Recipient _____

Type of Recipient: ☐ Employee ☐ Independent Contractor ☐ Business/Organization

If you checked "Business/Organization," provide contact name and title: _____

Street _____ City _____ State _____ ZIP Code _____

Telephone _____ Email Address _____

If the address of the consultant or other organization differs from that of the individual with whom the separate agreement was made, click here:

17.a. Date of each expenditure. (mm/dd/yyyy)	17.b. Amount of each expenditure.	17.c. Kind of expenditure (Specify if payment or loan, and if in cash or property.)	17.d. Explain fully the circumstances of the expenditure(s), including the terms of any oral agreement or understanding pursuant to which they were made.
(1)			
(2)			
(3)			

Paperwork Reduction Act Statement. Public reporting burden for this collection of information is estimated to average 98 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Persons are not required to respond to the collection of information unless it displays a currently valid OMB control number. Reporting of this information is mandatory and is required by the Labor-Management Reporting and Disclosure Act of 1959, as amended, for the purpose of public disclosure. As this is public information, there are no assurances of confidentiality. If you have any comments regarding this estimate or any other aspect of this information collection, including suggestions for reducing this burden, please send them to the U.S. Department of Labor, Office of Labor-Management Standards, Division of Interpretations and Standards, Room N-5609, 200 Constitution Avenue, NW, Washington, DC 20210.

DO NOT SEND YOUR COMPLETED FORM LM-20 TO THE ABOVE ADDRESS.

Instructions for Form LM-20 Agreement and Activities Report

GENERAL INSTRUCTIONS

I. Why File

The Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), requires public disclosure of agreements or arrangements made between any person, including labor relations consultants and other individuals and organizations, and an employer to undertake certain actions, conduct, or communications concerning employees or labor organizations (hereinafter "activities"). Pursuant to Section 203(b) of the LMRDA, every person who undertakes any such activity under an agreement or arrangement with an employer is required to file detailed reports with the Secretary of Labor. The Secretary, under the authority of the LMRDA, has prescribed the filing of the Agreement and Activities Report, Form LM-20, to satisfy this reporting requirement.

These reporting requirements of the LMRDA and of the regulations and forms issued under the Act only relate to the disclosure of specific agreements, arrangements, and/or activities. The reporting requirements do not address whether such agreements or arrangements or activities are lawful or unlawful. The fact that a particular agreement, arrangement, or activity is or is not required to be reported does not indicate whether or not it is subject to any legal prohibition.

II. Who Must File

Any person who, as a direct or indirect party to any agreement or arrangement with an employer undertakes, pursuant to the agreement or arrangement, any activity of the type described in Section 203(b) of the LMRDA, must file a Form LM-20. The term "agreement or arrangement" should be construed broadly and does not need to be in writing.

A "person" is defined by LMRDA Section 3(d) to include, among others, labor relations consultants and other individuals and organizations. A person "undertakes" activities not only when he/she performs the activity but also when he/she agrees to perform the activity or to have it performed.

A "direct or indirect party" to an agreement or arrangement includes (1) persons who have secured the services of another or of others in connection with an agreement or arrangement of the type referred to in Section 203(b) of the LMRDA, and (2) persons who have undertaken activities at the behest of another or of others with knowledge or reason to believe that they are undertaken as a result of an agreement or arrangement between an employer and any other person. However, bona fide regular officers, supervisors, or employees of an employer are exempt from this reporting requirement to the extent that the services they undertook to perform were undertaken as such bona fide regular officers, supervisors, or employees of their employer.

Note: Selected definitions from the LMRDA follow these instructions.

III. What Must Be Reported

The information required to be reported on Form LM-20, as set forth in the form and the instructions below, includes (1) the party or parties to the agreement or arrangement, (2) the object and terms and conditions of the agreement or arrangement, and (3) the activities performed or to be performed pursuant to the agreement or arrangement.

Any person required to file Form LM-20 must also file Form LM-21, Receipts and Disbursements Report. You must file Form LM-21 for each fiscal year during which you made or received payments as a result of any agreement or arrangement described in Form LM-20.

You must file Form LM-21 within 90 days after the end of your fiscal year.

Note: With the exception of reportable union avoidance seminars, as described in Part X below, a separate Form

LM-20 must be filed for each agreement or arrangement the filer makes with an employer to undertake any activity of the type set forth in LMRDA Section 203(b).

IV. Who Must Sign the Report

Both the president and the treasurer, or the corresponding principal officers, of the reporting organization must sign the completed Form LM-20. A report from a sole proprietor or an individual on his/her own behalf need only bear one signature.

V. When to File

Each person who has entered into any agreement or arrangement to undertake reportable activities must file the report *within 30 days* after entering into such agreement or arrangement. For a reportable union avoidance seminar, as described in Part X below, you must file the report within 30 days after the conclusion of the seminar. You must file any changes to the information reported in Form LM-20 (excluding matters related to Item 11.c. (Extent of Performance)) within 30 days of the change in a report with Item 1.c. (Amended Report) clearly checked.

VI. How to File

Form LM-20 must be completed online, electronically signed, and submitted along with any required attachments using the OLMS Electronic Forms System (EFS). The electronic Form LM-20 can be accessed and completed at the OLMS website at www.olms.dol.gov.

If you have difficulty navigating EFS, or have questions about its functions or features, call the OLMS Help Desk at (866) 401-1109. You may also email questions to OLMS-Public@dol.gov.

You will be able to file a report in paper format only if you assert a temporary hardship exemption or apply for and are granted a continuing hardship exemption.

TEMPORARY HARDSHIP EXEMPTION:

If you experience unanticipated technical difficulties that prevent the timely preparation and submission of an electronic filing, you may file Form LM-20 in paper format by the required due date at this address:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-5616
Washington, DC 20210

An electronic format copy of the filed paper format document shall be submitted to the Department within ten business days after the required due date. Indicate in Item 1.b. (Hardship Exemption) that you are filing under the hardship exemption procedures.

Unanticipated technical difficulties that may result in additional delays should be brought to the attention of the Office of Labor-Management Standards (OLMS) Division of Interpretations and Standards, which can be reached at the address below, by email at OLMS-Public@dol.gov, by phone at (202) 693-0123, or by fax at (202) 693-1340.

Note: If either the paper filing or the electronic filing is not received in the timeframe specified above, the report will be considered delinquent.

CONTINUING HARDSHIP EXEMPTION:

(a) You may apply in writing for a continuing hardship exemption if filing Form LM-20 electronically would cause undue burden or expense. Such written application shall be received at least 30 days prior to the required due date of the report(s). The written application shall contain the information set forth in paragraph (b). The application must be mailed to the following address:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210

Questions regarding the application should be directed to the OLMS Division of Interpretations and Standards, which can be reached at the above address, by email at OLMS-Public@dol.gov, by phone at (202) 693-0123, or by fax at (202) 693-1340.

(b) The request for the continuing hardship exemption shall include, but not be limited to, the following: (1) the requested time period of, and justification for, the exemption (you must specify a time period not to exceed one year); (2) the burden and expense that you would incur if required to make an electronic submission; and (3) the reasons for not submitting the report(s) electronically.

(c) The continuing hardship exemption shall not be deemed granted until the Department notifies the applicant in writing. If the Department denies the application for an exemption, the filer shall file the report(s) in electronic format by the required due date. If the Department determines that the grant of the exemption is appropriate and consistent with the public interest and so notifies the applicant, the filer shall follow the procedures set forth in paragraph (d).

(d) If the request is granted, you shall submit the report(s) in paper format by the required due date. You will also be required to submit Form LM-20 in electronic format upon the expiration of the period for which the exemption is granted. Indicate in Item 1.b. (Hardship

Exemption) that you are filing under the hardship exemption procedures.

Note: If either the paper filing or the electronic filing is not received in the timeframe specified above, the report will be considered delinquent.

VII. Public Disclosure

Pursuant to the LMRDA, the U.S. Department of Labor is required to make all submitted reports available for public inspection. In the Online Public Disclosure Room at www.unionreports.gov, you may view and print copies of Form LM-20 reports, beginning with the year 2000.

You may also examine the Form LM-20 reports at, and purchase copies from, the OLMS Public Disclosure Room at:

U.S. Department of Labor
Office of Labor-Management Standards
200 Constitution Avenue, NW
Room N-1519
Washington, DC 20210-0001
Telephone: (202) 693-0125

VIII. Responsibilities and Penalties

The individuals required to sign Form LM-20 are personally responsible for its filing and accuracy. Under the LMRDA, these individuals are subject to criminal penalties for willful failure to file a required report and/or for false reporting. False reporting includes making any false statement or misrepresentation of a material fact while knowing it to be false, or knowingly failing to disclose a material fact in a required report or in the information required to be contained in it or in any information required to be submitted with it.

The reporting individuals and the reporting organizations, if any, are also subject to civil prosecution for violations of the filing requirements. According to Section 210 of the LMRDA, "whenever it shall appear that any person has violated or is about to violate any of the provisions of this title, the Secretary may bring a civil action for such relief (including injunctions) as may be appropriate."

IX. Recordkeeping

The individuals required to file Form LM-20 are responsible for maintaining records which will provide in sufficient detail the information and data necessary to verify the accuracy and completeness of the report. You must retain the records for at least 5 years after the date you filed the report. You must retain any record necessary to verify, explain, or clarify the report, including, but not limited to vouchers, worksheets, receipts, and applicable resolutions. Also to be included are the agreement or arrangement, and any related documents.

X. Completing Form LM-20

Read the instructions carefully before completing Form LM-20.

Information about EFS can be found on the OLMS website at www.olms.dol.gov.

Information Entry. Complete Form LM-20 by entering information directly into the fields on the form. If additional space is needed for items that require an explanation or further information, EFS automatically adds space for additional entries.

Validation. You should click on the "Validate" button on each page to check for errors. This action will generate a "Validation Summary Page" listing any errors that will need to be corrected before you will be able to sign the form. Clicking on the signature lines will also perform the validation function.

General Instructions for Agreements, Arrangements, and Activities

You must file a separate report for each agreement or arrangement made with an employer where an object is, directly or indirectly:

(1) To persuade employees to exercise or not to exercise, or to persuade them as to the manner of exercising, the right to organize and bargain collectively through representatives of their choice. (**Excluded** are agreements or arrangements that cover services relating exclusively to: (a) giving or agreeing to give advice to the employer; (b) representing the employer before any court, administrative agency, or tribunal of arbitration, and (c) engaging in collective bargaining on the employer's behalf with respect to wages, hours, or other terms or conditions of employment or the negotiation of any collective bargaining agreement or any question arising under the agreement.)

or

(2) To supply the employer with information concerning activities of employees or a labor organization in connection with a labor dispute involving such employer. (**Excluded** are agreements or arrangements that cover services relating exclusively to supplying the employer with information for use only in conjunction with an administrative, arbitral, or judicial proceeding.)

Note: If **any** reportable activities are undertaken, or agreed to be undertaken, pursuant to the agreement or arrangement, the exemptions do not apply and information must be reported for the entire agreement or arrangement.

Reportable Persuader Agreements or Arrangements

An agreement or arrangement is reportable if a consultant undertakes activities with an object, directly or

indirectly, to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing (hereinafter "persuade employees"). Such "persuader activities" are any actions, conduct, or communications that are undertaken with an object, explicitly or implicitly, directly or indirectly, to affect an employee's decisions regarding his or her representation or collective bargaining rights. Under a typical reportable agreement or arrangement, a consultant manages a campaign or program to avoid or counter a union organizing or collective bargaining effort, either jointly with the employer or separately, or conducts a union avoidance seminar.

Reporting of an agreement or arrangement is triggered when:

(1) A consultant engages in direct contact or communication with any employee with an object to persuade such employee; or

(2) A consultant who has no direct contact with employees undertakes the following activities with an object to persuade employees:

(a) plans, directs, or coordinates activities undertaken by supervisors or other employer representatives, including meetings and interactions with employees;

(b) provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees;

(c) conducts a seminar for supervisors or other employer representatives; or

(d) develops or implements personnel policies, practices, or actions for the employer.

Specific examples of activities that either alone or in combination would trigger the reporting requirements include but are not limited to:

- planning or conducting individual employee meetings;
- planning or conducting group employee meetings;
- training supervisors or employer representatives to conduct such meetings;
- coordinating or directing the activities of supervisors or employer representatives;
- establishing or facilitating employee committees;
- conducting a union avoidance seminar for supervisors or employer representatives in which the consultant develops or assists the attending employers in developing anti-union tactics or strategies for use by the employers' supervisors or other representatives ("reportable union avoidance seminar");[1]
- drafting, revising, or providing speeches, written material, website, audiovisual or multimedia content for presentation, dissemination, or distribution to employees, directly or indirectly (including the sale of "off-the-shelf[2]" materials where the consultant assists the employer in the selection of such materials, except as noted below where such selection is made by trade associations for member-employers);
- developing employer personnel policies designed to persuade, such as when a consultant, in response to employee complaints about the need for a union to protect against arbitrary firings, develops a policy under which employees may arbitrate grievances;
- identifying employees for disciplinary action, reward, or other targeting based on their involvement with a union representation campaign or perceived support for the union;
- coordinating the timing and sequencing of union avoidance tactics and strategies.

To be reportable, as noted above, such activities must be undertaken with an object to persuade employees, as evidenced by the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking.

Reportable Information-Supplying Agreements or Arrangements

Reportable information-supplying agreements or arrangements include those in which a consultant engages in activities with an object to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute[3] involving such employer. Such activities

[1] Note: Where a trade association sponsors a union avoidance seminar at which an independent contractor makes the presentation, only the independent contractor is required to file the report. The trade association and the employer-attendees do not need to report the seminars.

[2] "Off-the-shelf materials" refer to pre-existing material not created for the particular employer who is party to the agreement.

[3] The LMRDA defines a "labor dispute" as including "any controversy concerning the terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee." See LMRDA section 3(g). Thus, a "labor dispute" includes any controversy over matters

include information obtained from: supervisors or employer representatives; employees, employee representatives, or union meetings; research or investigation concerning employees or labor organizations; and surveillance of employees or union representatives (electronically or in person). A reportable agreement or arrangement includes an employer's purchase or other acquisition of such information, for example, from a consultant's website. Such purchase or acquisition would be reportable by both the consultant and the employer.

Exempt Agreements or Arrangements

No report is required covering the services of a labor relations consultant by reason of the consultant's giving or agreeing to give advice to an employer. "Advice" means an oral or written recommendation regarding a decision or a course of conduct. For example, a consultant who, exclusively, counsels employer representatives on what they may lawfully say to employees, ensures a client's compliance with the law, offers guidance on employer personnel policies and best practices, or provides guidance on National Labor Relations Board (NLRB) or National Mediation Board (NMB) practice or precedent is providing "advice."

As a general principle, no reporting is required for an agreement or arrangement to exclusively provide legal services. For example, no report is required if a lawyer or other consultant revises persuasive materials, communications, or policies created by the employer in order to ensure their legality rather than enhancing their persuasive effect. In such cases, the consultant has no object to persuade employees. Additionally, reports are not required for an agreement that involves a consultant merely representing the employer before any court, administrative agency, or tribunal of arbitration, or engaging in collective bargaining on the employer's behalf with respect to wages, hours, or other terms or conditions of employment or the negotiation of any agreement or any questions arising under the agreement.

The consultant's development or implementation of personnel policies or actions that improve employee pay, benefits, or working conditions do not trigger reporting merely because the policies or actions improve the pay, benefits, or working conditions of employees, even where they could subtly affect or influence the attitudes or views of the employees. Rather, to be reportable, the consultant must undertake the activities with an object to persuade employees, as evidenced by the agreement, any accompanying communications, the timing, or other circumstances relevant to the undertaking.

No report is required for an agreement or arrangement to conduct a seminar for employers in which the consultant does not develop or assist the attending employers in developing anti-union tactics or strategies.

Where a trade association sponsors a union avoidance seminar, it is required to file a report only if its staff makes a presentation at the seminar. In instances where solely an outside consultant makes the presentation, only the consultant is required to file a report. Employer-attendees are not required to report their attendance at union avoidance seminars.

A report is not required concerning an agreement or arrangement whereby the consultant conducts a survey of employees (other than a push survey designed to influence participants and thus with an object to persuade) or a vulnerability assessment for an employer concerning the proneness of union organizing. No reporting is required where a consultant merely makes a sales pitch to an employer to undertake persuader activities for the employer.

Moreover, no reporting is required for an agreement or arrangement under which an employer exclusively purchases or otherwise acquires off-the-shelf union avoidance materials from a consultant without any input by the consultant concerning the selection or dissemination of the materials.

Additionally, concerning potential reporting of information-supplying agreements or arrangements, no reporting is required for an agreement or arrangement that covers services relating exclusively to supplying the employer with information for use only in conjunction with an administrative, arbitral, or judicial proceeding.

No reporting is required concerning an agreement between a franchisor and franchisee.

Agreements Involving Trade Associations

Trade associations are not required to file a report by reason of: their membership agreements, selecting off-the-shelf materials for member-employers, or distributing newsletters for member-employers. Such associations, however, are required to file reports for agreements covering the following activities:

Union avoidance seminars in which the trade association's employees serve as presenters; and

The trade association engages in reportable persuader activities for a particular employer or employers other than at a union avoidance seminar merely sponsored by the association.

NLRA Does Not Affect Reporting Obligations

relating to the representation and collective bargaining rights of employees.

While Section 203 of the LMRDA does not amend or modify the rights protected by Section 8(c) of the National Labor Relations Act, as amended (NLRA), the LMRDA contains no provision exempting the activities protected by that section from the reporting requirements. Therefore, activities of the type set forth in Section 203(b) of the LMRDA must be reported regardless of whether they are protected by Section 8(c) of the NLRA.

Note: The text of NLRA Section 8(c) is set forth following these instructions.

Items 1–14

1. FILE NUMBER, HARDSHIP EXEMPTION, AND AMENDED REPORT:

1.a. *File Number.* EFS will pre-fill this item with your organization's file number. If you are a new filer, EFS will assign your organization a number upon registration.

1.b. *Hardship Exemption.* Indicate here if you are filing a hardcopy Form LM-20 pursuant to a hardship exemption.

1.c. *Amended Report.* Indicate here if you are filing an amended Form LM-20.

2. CONTACT INFORMATION FOR PERSON FILING—Enter the full legal name of the reporting individual or organization, a trade or commercial name, if applicable (such as a d/b/a or "doing business as" name), the name and title of the person to whom mail should be directed, and the complete address where mail should be sent, including any building and room number, and the person's email address. Also enter the Employer Identification Number (EIN) of the filer. If you do not have an EIN, enter "none."

3. OTHER ADDRESS WHERE RECORDS ARE KEPT—If you maintain any of the records necessary to verify this report at an address different from the address listed in Item 2, enter the appropriate name and address in Item 3.

4. FISCAL YEAR — Enter the beginning and ending dates of the fiscal year covered in this report in mm/dd/yyyy format. The report must not cover more than a 12-month period. For example, if the person's 12-month fiscal year begins on January 1 and ends on December 31, do not enter a date beyond the 12-month period, such as January 1 to January 1; this is an invalid date entry.

5. TYPE OF PERSON—If the person reporting is an individual, partnership, or corporation, so indicate by checking the appropriate box. If none of the choices apply, check "Other" and describe in the space provided the type of person.

6. FULL NAME AND ADDRESS OF EMPLOYER(S)—Enter the full legal name of the employer with whom the agreement or arrangement was made, a trade or commercial name, if applicable (such as a d/b/a or "doing business as" name), the name and title of the person to whom mail should be directed, the complete address where mail should be sent, including any building and room number, and the employer's email address. Also enter the Employer Identification Number (EIN) of the employer unless the employer is only attending a union avoidance seminar.

If you are reporting an agreement or arrangement concerning a union avoidance seminar, you must check the "seminar reporting" box and fully complete a separate Item 6 for each attendee, including member-employers of a trade association that organized the seminar. However, for such seminar reporting, you are not required to provide the EIN for each attending employer.

7. DATE OF AGREEMENT OR ARRANGEMENT—Enter the date on which you entered into the agreement or arrangement in mm/dd/yyyy format. Note: you are not required to complete this item if you are reporting an agreement or arrangement concerning a union avoidance seminar. However, you must complete a separate Item 6 for each attendee.

8. PERSON(S) THROUGH WHOM AGREEMENT OR ARRANGEMENT MADE—(a) ***Employer Representative***: Complete this portion of the item only if you are the prime consultant. Enter the name and title of each person, acting on behalf of the employer, making the agreement or arrangement. Leave Item 8(b) blank. **Note**: If you are a trade association completing this report for a reportable union avoidance seminar, then you are not required to complete Item 8.

(b) ***Prime Consultant***: Complete this portion of the item only if you are an indirect party (or sub-consultant) to a reportable employer-consultant agreement. Enter the name of the prime consultant with whom you entered into such agreement or arrangement, as well as its Employer Identification Number (EIN) and mailing address. If the prime consultant does not have an EIN, enter "none." Also enter the name and title of each person acting on behalf of the prime consultant making the agreement or arrangement. Leave Item 8(a) blank. **Note**: If you are a presenter at a reportable union avoidance seminar organized by a trade association, then you must enter the name of the trade association and the name and title of the association's official with whom you entered into such agreement or arrangement.

9. OBJECT OF ACTIVITIES—Check the appropriate box(es) indicating whether the object of your activities, pursuant to the agreement or arrangement is, directly or indirectly, to persuade employees to exercise their bargaining rights ***or*** to supply an employer with information related to a labor dispute. You must check either one or both of the boxes.

10. TERMS AND CONDITIONS—Provide a detailed explanation of the terms and conditions of the agreement or arrangement. This includes an explanation of the fee arrangement, as well as a description of the nature of the services agreed to be performed. For example, you must explain if you were hired to manage a counter-organizing or union-avoidance campaign, to conduct a union avoidance seminar, or to provide assistance to an employer in such a campaign through the persuader activities identified in Item 11. If you are an attorney who provides legal advice and representation in addition to persuader services, you are only required to describe such portion of the agreement as the provision of "legal services," without any further description.

If any agreement or arrangement is in whole or in part contained in a written contract, memorandum, letter, or other written instrument, or has been wholly or partially reduced to writing, you must refer to that document and attach a copy of it to this report by clicking on the "Add Attachments" link at the top of the form. For a reportable union avoidance seminar, this includes a single copy of the registration form and a description of the seminar provided to attendees.

11. DESCRIPTION OF ACTIVITIES—For each activity to be performed, give a detailed explanation of the following:

11.a. *Nature of Activity.* Select from the list in 11.a. each entry that describes the nature of a particular activity or activities performed or to be performed. The list is divided into two parts: persuader activities and information-supplying activities, as identified in Item 9. For persuader activity, select each activity performed or to be performed, if the object thereof was, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively through representatives of their own choosing. Select all activities that apply for each part that you identified in Item 9. If none of the items listed accurately describes the nature of a particular activity or activities, select "Other" and describe the nature of the activity or activities in the "Additional Information" space of Item 11.a. You may also provide further explanation for any activity selected in the "Additional Information" space of Item 11.a.

11.b. *Period during which activity performed.* Describe the period during which the activity has been or will be performed. For example, if the performance will begin in June 2013 and will terminate in August 2013, so indicate by stating "06/01/2013 through 08/31/2013." For a reportable union avoidance seminar, enter the date(s) in which the event was held.

11.c. *Extent of Performance.* Indicate the extent to which the activity has been performed. For example, you should indicate whether the activity is pending, ongoing, near completion, or completed.

11.d. *Name and Address of person through whom activity performed.* Enter the full legal name, title, organization, and contact information, including email address, of the person(s) through whom the activities are to be performed or have been performed and indicate if those person(s) are employed by the consultant or serve as an independent contractor. Independent contractors in such cases are sub-consultants, who are required to file a separate Form LM-20 report. For independent contractors, add the employer identification number (EIN). If the contractor does not have an EIN, enter "none." If the address of the organization differs from the business address of the person who performed the activities, or if more than one person performed the activities, click the "Add Another" button to generate an additional page and enter the address of the organization or the additional persons on this page.

12. SUBJECT GROUPS OF EMPLOYEES AND/OR LABOR ORGANIZATIONS—Identify the subject groups of employees who are to be persuaded and/or those labor organizations about whose activities information is to be supplied to the employer.

12.a. Identify the subject groups of employees who are to be persuaded or concerning whose activities information is to be supplied to the employer, including a description of the department, job classification(s), work location, and/or shift(s) of the employees targeted, as well as the location of their work.

If you are completing this item for an agreement or arrangement involving a reportable union avoidance seminar, then you must identify generally the category(ies) of employees employed in the industry or industries addressed or to be addressed by the seminar.

12.b. Identify the subject labor organization(s).

If you are completing this item for an agreement or arrangement involving a reportable union avoidance seminar, then you must identify the labor organization(s) upon which the event focuses or which represents or seeks to represent employees in the industry or industries with which the event focuses.

13-14. SIGNATURES—The completed Form LM-20 that is filed with OLMS must be signed by both the president and treasurer, or corresponding principal

officers, of the reporting organization. A report from an individual or a sole proprietor, on his/her own behalf, need only bear **one** signature which should be entered in Item 13. Otherwise, this report must bear **two** signatures. If the report is from an organization and is signed by an officer other than the president and/or treasurer, enter the correct title in the title field next to the signature.

Before signing the form, click the Validate button at the top of page 1 to ensure that the report passes validation and thus can be signed and submitted.

To sign the report, an officer will be required to attest to the data on the report and use his or her EFS username and password as the verification mechanism.

To electronically sign the form, click the signature spaces provided. Enter the date the report was signed and the telephone number at which the signatories conduct official business; you do not have to report a private, unlisted telephone number.

Once signed, the completed report can be electronically submitted to OLMS.

SELECTED DEFINITIONS AND RELATED PROVISIONS OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959, AS AMENDED (LMRDA)

Section 3.

(a) 'Commerce' means trade, traffic, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.

(b) 'State' includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf' Lands defined in the Outer Continental Shelf Lands Act (43 U.S.C. 1331-1343).

(c) 'Industry affecting commerce' means any activity, business or industry in commerce or in which a labor dispute could hinder or obstruct commerce or the free flow of commerce and includes any activity or Industry 'affecting commerce' within the meaning of the Labor-Management Relations Act, 1947, as amended, or the Railway Labor Act, as amended.

(d) 'Person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, or receivers.

(e) 'Employer' means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.

(f) 'Employee' means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in any manner or for any reason inconsistent with the requirements of this Act.

(g) 'Labor dispute' includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(i) 'Labor organization' means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exits for the purpose, in whole or in part, or dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body.

(j) A labor organization shall be deemed to be engaged in a industry affecting commerce if it—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2)

as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council, subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection, other than a State or local central body.

Section 203.

(b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly-

(1) 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; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding; shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

Section 204.

Nothing contained In this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include In any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

National Labor Relations Act

Section 8(c).

The expressing of any views, argument, or opinion, or the discussion thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

If You Need Assistance

The Office of Labor-Management Standards has field offices in the following cities to assist you if you have any questions concerning LMRDA and CSRA reporting requirements.

Atlanta, GA
Birmingham, AL
Boston, MA
Buffalo, NY
Chicago, IL
Cincinnati, OH
Cleveland, OH
Dallas, TX
Denver, CO
Detroit, MI
Honolulu, HI
Kansas City, MO
Fort Lauderdale, FL
Los Angeles, CA
Milwaukee, WI
Minneapolis, MN
Nashville, TN
New Orleans, LA
New York, NY
Philadelphia, PA
Phoenix, AZ
Pittsburgh, PA
St. Louis, MO
San Francisco, CA
Seattle, WA
Tampa, FL
Washington, DC

Consult local telephone directory listings under United States Government, Labor Department, Office of Labor-Management Standards, for the address and phone number of your nearest field office. Contact information for OLMS field offices is also available on the OLMS website at www.olms.dol.gov.

Information about OLMS, including key personnel and telephone numbers, compliance assistance materials, the text of the LMRDA, and related Federal Register and Code of Federal Regulations (CFR) documents, is available on the OLMS website at www.olms.dol.gov.

Copies of labor organization annual financial reports, employer reports, labor relations consultant reports, and union officer and employee reports filed for the year 2000 and after can be viewed and printed at www.unionreports.gov. Copies of reports for the year 1999 and earlier can be ordered through the website. For questions on Form LM-20 or the instructions, call your nearest OLMS field office or the OLMS Division of Interpretations and Standards at (202) 693-0123. You can also email questions to olms-public@dol.gov.

If you would like to receive periodic email updates from the Office of Labor-Management Standards, including information about the LM forms, enforcement information, and compliance assistance programs, you

may subscribe to the OLMS Mailing List from the OLMS website: www.olms.dol.gov.

Revised 03/2016

FORM LM-20 – AGREEMENT & ACTIVITIES REPORT

OMB No. 1245-0003. Expires XX-XX-XXXX.

IMPORTANT: This report is mandatory under P.L. 86-257, as amended. Failure to comply may result in criminal prosecution, fines, or civil penalties as provided by 29 U.S.C. 439 or 440. Required of persons, including Labor Relations Consultants and Other Individuals and Organizations, under Section 203(b) of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA).

Office of Labor-Management Standards
U.S. Department of Labor

OLMS

For Official Use Only

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► *Read the instructions carefully before completing this report.* ◄

1.a. File Number: C-	1.b. ☐ Hardship Exemption	1.c. ☐ Amended Report

2. Contact information for person filing:

Organization _____

Street _____

City _____ State ____

ZIP Code _____ Email Address _____

Employer Identification Number (EIN) _____

Contact Name _____

Title _____

3. Other address where records necessary to verify this report are kept:

Name _____

Title _____

Organization _____

Street _____

City _____

State _____ ZIP Code _____

Email Address _____

4. Fiscal Year Covered: from _____ through _____
(mm/dd/yyyy) (mm/dd/yyyy)

5. Type of person

a. ☐ Individual b. ☐ Partnership c. ☐ Corporation d. ☐ Other

6. Full name and address of employer with whom agreement or arrangement was made:

☐ Check this box if you are filing a report for a union avoidance seminar.

Organization (including trade name, if any) _____

Street _____

City _____ State ____

ZIP Code _____ Email Address _____

Employer Identification Number (EIN) _____

Contact Name _____

Title _____

7. Date agreement or arrangement entered into: _____
mm/dd/yyyy

8. Person(s) through whom agreement or arrangement made:

(a) Employer Representative:

Name and Title _____

OR

(b) Prime Consultant: _____

Name and Title _____

Employer Identification Number (EIN) _____

Address _____

Signatures

Each of the undersigned declares, under penalty of perjury and other applicable penalties of law, that all of the information submitted in this report (including the information contained in any accompanying documents) has been examined by the signatory and is, to the best of the undersigned's knowledge and belief, true, correct, and complete. *(See Section VII on penalties in the instructions.)*

13. Signed _____
President (If other title, see instructions.)

On _____ _____
Date (mm/dd/yyyy) Telephone Number

14. Signed _____
Treasurer (If other title, see instructions.)

On _____ _____
Date (mm/dd/yyyy) Telephone Number

Name of person filing:	File Number: C-

9. Check the appropriate box(es) to indicate whether an object of the activities undertaken is directly or indirectly:

a. ☐ 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.

b. ☐ To supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding.

10. Terms and conditions. (Explain in detail; see instructions. Written agreements must be attached by clicking the "Add Attachments" link at the top of the form. If reporting a union avoidance seminar, a single copy of the registration form and a description of the seminar provided to attendees also must be attached by clicking the "Add Attachments" link at the top of the form.)

11. Information regarding activities performed or to be performed by the labor relations consultant pursuant to agreement or arrangement. (See instructions.)

a. Nature of activities performed or to be performed by the labor relations consultant pursuant to the agreement or arrangement:

PERSUADER ACTIVITIES: Select from the following reportable activities those which, per agreement with the employer(s) named in item 6, have been or will be performed:

- ☐ Drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees
- ☐ Drafting, revising, or providing a speech for presentation to employees
- ☐ Drafting, revising, or providing audiovisual or multi-media presentations for presentation, dissemination, or distribution to employees
- ☐ Drafting, revising, or providing website content for employees
- ☐ Planning or conducting individual employee meetings
- ☐ Planning or conducting group employee meetings
- ☐ Training supervisors or employer representatives to conduct individual or group employee meetings
- ☐ Coordinating or directing the activities of supervisors or employer representatives
- ☐ Establishing or facilitating employee committees
- ☐ Developing employer personnel policies or practices
- ☐ Identifying employees for disciplinary action, reward, or other targeting
- ☐ Conducting a seminar for supervisors or employer representatives
- ☐ Speaking with or otherwise communicating directly with employees.
- ☐ Other

INFORMATION-SUPPLYING ACTIVITIES: Select each activity whereby you supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer:

- ☐ Supplying information obtained from:
  - ☐ Research or investigation concerning employees or labor organizations
  - ☐ Supervisors or employer representatives
  - ☐ Employees, employee representatives, or union meetings
  - ☐ Surveillance of employees or union representatives (electronically or in person)
- ☐ Other

ADDITIONAL INFORMATION:

11.b. Period during which activities performed: _____ mm/dd/yyyy – mm/dd/yyyy

11.c. Extent of performance:

11.d. Name and address of person(s) through whom activities were performed or will be performed:

Name and Title _____

Type of Person: ☐ Employee of Consultant ☐ Independent Contractor

Organization _____

Street _____

City _____ State _____ ZIP Code _____

Email Address _____

Employer Identification Number (EIN) _____

12.a. Identify subject groups of employees:

12.b. Identify subject labor organizations:

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