KEN PAXTON
ATTORNEY GENERAL OF TEXAS

August 11, 2017

The Honorable R. Alexander Acosta
Secretary of Labor
Attn: Andrew R. Davis
Chief, Division of Interpretation and Standards
200 Constitution Ave., N.W.
Washington, DC 20210

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

Dear Secretary Acosta:

As Governors and State Attorneys General, we write to express our support for rescission of the permanently-enjoined regulations in the final rule entitled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," commonly called the Persuader Rule. In our view, and that of the court that issued the injunction, the Rule is incompatible with the Act and irreconcilable with the principles of federalism.

The Act expressly safeguards attorney advice and respects the long-standing role of the States in regulating the practice of law to shield confidential communications from public disclosure. By contrast, the Persuader Rule imperils the attorney-client relationship by compelling attorneys to disclose the identities of their clients, as well as the terms, conditions, and scope of their representations. The Rule leaves employers two equally unacceptable options: have their lawyers act as "vending machines," offering purely technical responses to client inquiries, or have them provide useful legal advice that requires them to breach their duty of confidentiality. The Act Congress wrote does not force such a Hobson's choice; only the Rule does. We respectfully request that you finalize your proposal to rescind the Persuader Rule.

Irreconcilable with the Statute. The Act exempts from disclosure "giving or agreeing to give advice" to an employer, 29 U.S.C. § 433(c), as well as information "lawfully communicated to [an] attorney by any of his clients in the course of a legitimate attorney-client relationship," *id.* § 434. At the time Congress passed the Act—as now—"advice" was understood to refer to views or opinions made to a third-party who was free to take or leave any and all of the "advice" given. For example, Webster's defined "advice" to mean "counsel; an opinion offered as worthy to be

followed in a particular situation." WEBSTER'S NEW TWENTIETH CENTURY DICTIONARY 29 (2d ed. 1960). Successive editions of Black's Law Dictionary similarly defined advice to mean the following: "view; opinion; the counsel given by lawyers to their clients; an opinion expressed as to the wisdom of future conduct." BLACK'S LAW DICTIONARY 74 (4th ed. 1951); BLACK'S LAW DICTIONARY 74 (Rev. 4th ed. 1968). And Ballentine's Law Dictionary defined "advice" as a "[v]iew or opinion communicated to another, for example, a lawyer's advice to his client." BALLENTINE'S LAW DICTIONARY 41 (3d ed. 1969).

Significantly, there was a well-recognized distinction at the time of the Act's passage between "advice," on the one hand, and "persuade," on the other. The New Mexico Supreme Court noted that "to give advice; to counsel . . . is different in meaning from *instruct* . . . or *persuade*." *Hughes v. Van Bruggen*, 105 P.2d 494, 497 (N.M. 1940) (quoting 1 BOUVIER'S LAW DICTIONARY 155) (emphasis in original). "Advice" was synonymous with "legal counsel." *Id.* at 496. Unlike "instruct" and "persuade," "advice" was "optional." *Id.* "To instruct," the court explained, "carries an implication that it is to be obeyed, while advice means it is optional with the person addressed whether he will act on such advice or not.'" *Id.* at 496–97 (internal quotations omitted). As the Idaho Supreme Court commented:

> The Legislature, in using the word "advise" in said section, evidently intended to give it a different meaning from that which is generally given to the word "instruct." The generally accepted meaning of the word "instruct," when applied to courts, means a direction that is to be obeyed; while, under the meaning given to the word "advise," it is left optional with the person advised as to whether he will act on such advice or not.

State v. Downing, 130 P. 461, 462 (Idaho 1913). The Pennsylvania Supreme Court construed "advice" along the same lines. "Advice," it provided, "is optional with him to whom it is directed; that is, he can accept or decline it." *Commonwealth ex rel. Howley v. Mercer*, 42 A. 525, 526 (Pa. 1899) (emphasis added).

The Department of Labor's longstanding application of the advice exemption is consistent with the original meaning of the operative statutory terms. In 1962, Solicitor of Labor Charles Donahue produced a memorandum explaining that the exemption excuses reporting when two conditions are satisfied: (1) the consultant delivers the advice to an employer, and (2) the employer is free to accept or reject the

advice.[1] And, in 1989, Assistant Secretary for Labor-Management Standards Mario A. Lauro, Jr., described the Advice Exemption as follows:

> [The] usual indication that an employer-consultant agreement is exempt [from reporting] 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.

Memorandum of Acting Deputy Assistant Secretary for Labor-Management Standards Mario A. Lauro, Jr. (Mar. 24, 1989).

Reviewing the regulatory history from the Donahue Memo to the present, a federal district court correctly concluded that

> [f]or over five decades, . . . [the Department] interpreted the Advice Exemption . . . to exclude [attorney-client activities] from . . . reporting . . . so long as the consultant (including an attorney) had no direct contact with employees and the employer was free to accept or reject the consultant's (including an attorney's) recommendations.

Nat'l Fed'n of Indep. Bus. v. Perez, No. 5:16-CV-00066-C, 2016 WL 3766121, at *18 (N.D. Tex. June 27, 2016).

The Persuader Rule is irreconcilable with the Act. The Rule purports to limit "exempt 'advice' activities . . . to those activities that meet the plain meaning of the term: An oral or written recommendation regarding a decision or course of conduct." 81 Fed. Reg. 15,926 (Mar. 24, 2016). But the Rule does not end there. It goes on to

[1] The memo states:

> We have concluded that such 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.*

Interpretative Manual Entry § 265.005 (Jan. 19, 1962) (emphasis added).

redefine "advice" based on the form and "object" of the advice, effectively eviscerating the advice exemption. Under the Rule, a consultant is *not* providing advice when: (1) at a seminar, he or she "assists the attending employers in developing anti-union tactics and strategies for use by the employer"; (2) identifies for an employer "specific employees for disciplinary action, or reward, or other targeting based on their involvement with a union representation campaign"; or (3) "provid[es] or select[s] persuasive communications for use by [an] employer." *Id*. at 15,928, 15,971. And under the Rule, a consultant *is* providing advice when he or she (1) "conducts a vulnerability assessment for an employer"; (2) "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)"; or (3) "handl[es] litigation or grievances." *Id*. at 15,928, 15,973.

Simply put, the Persuader Rule creates a new distinction—without any basis in either the text of the Act or in dictionary definitions of "advice"—between whether advice relates to a "proposed course of conduct" or is one of several specified activities "undertaken with an object to persuade." *Id*. at 15,926. The Rule's reference to subjective intent is foreign to the definition of "advice," which looks to whether the addressee has the option of taking or leaving it.

In Conflict with the Principles of Federalism. Absent a "clear statement" from Congress that the Act has the effect of displacing the States' longstanding regulations of the practice of law, the statute cannot be so construed. Given that the Persuader Rule has the effect of regulating a traditionally state-regulated domain, and that Congress has made no such indication, the Department should rescind the Rule.

In *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), the Supreme Court ruled that the Tenth Amendment did not limit Congress's Commerce Clause power to apply the Fair Labor Standards Act's minimum wage and overtime protections to the States. Because this ruling threatened the vitality of the Tenth Amendment, the Court later required that courts "must be absolutely certain that Congress intended such an exercise" of power before they will uphold it as applied to the States. *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991). A "clear statement from Congress" is the threshold for demonstrating absolute certainty. *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001); *see Bond v. United States*, 134 S. Ct. 2077, 2088–90 (2014); *Gregory*, 501 U.S. at 460, 463. "If Congress intends to alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so unmistakably clear in the language of the statute." *Gregory*, 501 U.S. at 460 (citation and quotation marks omitted).

With respect to the Act, Congress made no "unmistakably clear" statement that it authorized the Department to rewrite state rules addressing the duties that attorneys owe their clients. The plain language of the Act protects the duty of confidentiality by exempting any "employer or other person" from filing "a report covering the services of such person by reason of his giving or agreeing to give advice to such employer." 29 U.S.C. § 433(c). And it further protects the universe of state laws by clarifying that "an attorney who is a *member in good standing of the bar of any State*" shall not be compelled to disclose "any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship." *Id.* § 434 (emphasis added).

States retain the authority to disbar or suspend attorneys precisely because they are responsible for enforcing state rules that govern the duties that attorneys owe their clients. *See*, *e.g.*, Tex. Rule Disciplinary P. 2.17(P), *reprinted* in Tex. Gov't Code Ann., tit. 2, subtit. G, app. A-1 (West 2013) (authorizing sanctions for professional misconduct). Thus, through the "good standing" requirement, the Act expressly defers to the legitimate authority that States exercise in shaping the legal and ethical obligations that control the attorney-client relationship.

The Act includes a "clear statement" protecting confidential attorney-client communications and deferring to the legitimate authority that States exercise over the attorney-client relationship. "The states have regulated the practice of law throughout the history of the country; the federal government has not." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 472 (D.C. Cir. 2005). The Persuader Rule imposes a federal disclosure requirement on attorney advice notwithstanding Congress's "clear statements" to the contrary.

Given that the Persuader Rule is harmful to attorney-client confidentiality, irreconcilable with the statute, and in conflict with the principles of federalism, we urge its rescission.

Sincerely,

Ken Paxton
Attorney General of Texas

Steven T. Marshall
Attorney General of Alabama

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Mark Brnovich
Attorney General of Arizona

Leslie Rutledge
Attorney General of Arkansas

Derek Schmidt
Attorney General of Kansas

Curtis T. Hill, Jr.
Attorney General of Indiana

Matt Bevin
Governor of Kentucky

Jeff Landry
Attorney General of Louisiana

Bill Schuette
Attorney General of Michigan

Phil Bryant
Governor of Mississippi

Joshua D. Hawley
Attorney General of Missouri

Adam Paul Laxalt
Attorney General of Nevada

Mike Hunter
Attorney General of Oklahoma

Alan Wilson
Attorney General of South Carolina

Sean Reyes
Attorney General of Utah

Patrick Morrisey
Attorney General of West Virginia

KEN PAXTON
ATTORNEY GENERAL OF TEXAS

Brad Schimel
Attorney General of Wisconsin