litigation and meets the criteria of section 3(b)(2) requiring that all regulations be written in clear language and contain clear legal standards.

H. Consultation With Indian Tribes (E.O. 13175)

The Department strives to strengthen its government-to-government relationship with Indian Tribes through a commitment to consultation with Indian Tribes and recognition of their right to self-governance and Tribal sovereignty. We have evaluated this rule under the Department's consultation policy and under the criteria in Executive Order 13175 and have determined there are no potential effects on federally recognized Indian Tribes and Indian trust assets.

I. Paperwork Reduction Act

This rule does not contain any information collections requiring approval under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*

J. National Environmental Policy Act

This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it is of an administrative, technical, and procedural nature. *See,* 43 CFR 46.210(i). No extraordinary circumstances exist that would require greater review under the National Environmental Policy Act.

K. Effects on the Energy Supply (E.O. 13211)

This rule is not a significant energy action under the definition in Executive Order 13211. A Statement of Energy Effects is not required.

L. Determination To Issue Final Rule Without the Opportunity for Public Comment and With Immediate Effective Date

BIA is taking this action under its authority, at 5 U.S.C. 552, to publish regulations in the **Federal Register**. Under the Administrative Procedure Act, statutory procedures for agency rulemaking do not apply ''when the agency for good cause finds . . . that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.'' 5 U.S.C. 553(b)(3)(B). BIA finds that the notice and comment procedure are impracticable, unnecessary, or contrary to the public interest, because: (1) These amendments are non-substantive; and (2) the public benefits for timely notification of a change in the official agency address, and further delay is unnecessary and contrary to the public interest. Similarly because this final rule makes no substantive changes and merely reflects a change of address and updates to titles in the existing regulations, this final rule is not subject to the effective date limitation of 5 U.S.C. 553(d).

List of Subjects in 25 CFR Part 83

Administrative practice and procedures, Indians-tribal government.

For the reasons stated in the preamble, the Department of the Interior, Bureau of Indian Affairs, amends part 83 in Title 25 of the Code of Federal Regulations as follows:

PART 83—PROCEDURES FOR FEDERAL ACKNOWLEDGMENT OF INDIAN TRIBES

■ 1. The authority citation for part 83 continues to read as follows:

Authority: 5 U.S.C. 301; 25 U.S.C. 2, 9, 479a–1; Pub. L. 103–454 Sec. 103 (Nov. 2, 1994); and 43 U.S.C. 1457.

■ 2. Revise § 83.20 to read as follows:

§ 83.20 How does an entity request Federal acknowledgment?

Any entity that believes it can satisfy the criteria in this part may submit a documented petition under this part to: Department of the Interior, Office of the Assistant Secretary—Indian Affairs, Attention: Office of Federal Acknowledgment, Mail Stop 4071 MIB, 1849 C Street NW, Washington, DC 20240.

Dated: June 14, 2018.

John Tahsuda,

Principal Deputy Assistant Secretary—Indian Affairs, Exercising the Authority of Assistant Secretary—Indian Affairs.

[FR Doc. 2018–15334 Filed 7–17–18; 8:45 am]

BILLING CODE 4337–15–P

DEPARTMENT OF LABOR

Office of Labor-Management Standards

29 CFR Parts 405 and 406

RIN 1245–AA07

Rescission of Rule Interpreting ''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: This final rule rescinds the regulations established in the final rule titled ''Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act,'' effective April 25, 2016.

DATES: This final rule is effective on August 17, 2018.

FOR FURTHER INFORMATION CONTACT: Andrew Davis, Chief of the Division of Interpretations and Standards, Office of Labor-Management Standards, U.S. Department of Labor, 200 Constitution Avenue NW, Room N–5609, Washington, DC 20210, (202) 693–0123 (this is not a toll-free number), (800) 877–8339 (TTY/TDD).

SUPPLEMENTARY INFORMATION:

I. Statutory Authority

Sections 203 and 208 of the LMRDA, 29 U.S.C. 432, 438, set forth the Department's authority. Section 208 gives the Secretary of Labor authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required under Title II of the Act and such other reasonable rules and regulations as necessary to prevent circumvention or evasion of the reporting requirements. 29 U.S.C. 438. Section 203, discussed in more detail below, sets out the substantive reporting obligations.

The Secretary has delegated his authority under the LMRDA to the Director of the Office of Labor-Management Standards and permitted redelegation of such authority. *See* Secretary's Order 03–2012 (Oct. 19, 2012), published at 77 FR 69375 (Nov. 16, 2012).

II. Background

A. Introduction

In this final rule, the Office of Labor-Management Standards of the Department of Labor revises the Form LM–20 Agreement and Activities Report and the Form LM–10 Employer Report upon reviewing the comments the Department received in response to a June 12, 2017 Notice of Proposed Rulemaking. 82 FR 26877. The NPRM proposed to rescind the regulations established in the final rule titled ''Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act,'' effective April 25, 2016. 81 FR 15924 (Mar. 24, 2016) (''Persuader Rule'').

This Persuader Rule revised the Department's interpretation of the ''advice'' exemption to the reporting requirements of Labor-Management Reporting and Disclosure Act Section 203. Sections 203(a) and (b) require employers and consultants to file reports when they reach an agreement

that the consultant will perform activities to persuade employees about how or whether to exercise their collective bargaining rights. But Section 203(c) excepts agreements by consultants who ''give advice'' to the employer. The Persuader Rule sought to require employers and their consultants to file a report not only when they make agreements or arrangements pursuant to which a consultant directly contacts employees, but also when a consultant engages in activities ''behind the scenes'' if an object of those activities is to persuade employees concerning their rights to organize and bargain collectively. *Id.* at 15925. Such ''behind the scenes'' activity included, for instance, recommending drafts of or revisions to an employer's speeches and communications if those drafts or revisions were designed to influence employees' exercise of their organizational rights.

In the NPRM, the Department proposed to rescind the Persuader Rule to further its consideration of the legal and policy objections raised by the federal courts that have reviewed the Rule and by other stakeholders. A number of comments objected to rescinding the Persuader Rule with a view toward engaging in further consideration. [LMSO–2017–0001–0543, AFL–CIO pages 9–10; LMSO–2017–0001–0797, NABTU, page 4, LMSO–2017–0001–1126, UFCW, page 4].

In accordance with these comments, the Department has now conducted its ultimate review of the objections to the Persuader Rule and has concluded that the Rule must be rescinded. The Rule relied on an inappropriate reading of Section 203(c) that required reporting based on recommendations that constitute ''advice'' under any reasonable understanding of the term. That fact alone requires rescission. Even if the statute does not unambiguously forbid the Persuader Rule, strong policy reasons—in particular, the Persuader Rule's effect on the attorney-client relationship—militate in favor of rescission.

Pursuant to today's final rule, the reporting requirements in effect are the requirements as they existed before the Persuader Rule. Due to an intervening court order that enjoined the Persuader Rule nationwide, *National Federation of Independent Business* v. *Perez* (N.D. Tex. 5:16–cv–00066–c) (filed Mar. 31, 2016), 2016 WL 3766121, 206 L.R.R.M. 35982016 (granting preliminary injunction); 2016 WL 8193279 (filed Nov. 16, 2016) (granting permanent injunction) (NFIB), no reports were ever filed or due under the Persuader Rule.

This final rule is considered an E.O. 13771 deregulatory action. For a perpetual time horizon, the annualized cost savings are the same at $92.89 million with a discount rate of 7 percent. Details of the estimated cost savings of this final rule can be found in the Rule's economic analysis.

B. The LMRDA's Reporting Requirements

In enacting the LMRDA in 1959, a bipartisan Congress sought to protect the rights and interests of employees, labor organizations, employers, and the public generally as they relate to collective bargaining.

Section 203(a) of the LMRDA, 29 U.S.C. 433(a), requires employers to report to the Department ''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.'' An employer must submit this information on the prescribed Form LM–10 within 90 days of the close of the employer's fiscal year. 29 U.S.C. 433(a); 29 CFR part 405.[2]

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). Covered individuals must submit this information on the prescribed Form LM–20 (''Agreement and Activities Report'') within 30 days of entering into the reportable agreement or arrangement. *See* 29 U.S.C. 433; 29 CFR part 406.

A third report is relevant here. Section 203(b) further requires that every labor relations consultant or other person who engages in reportable activity must file an additional report in each fiscal year during which payments were made as a result of reportable agreements or arrangements. The report must contain a statement (A) of the consultant's receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of the consultant's disbursements of any kind, in connection with such services and the purposes thereof. The consultant must submit the information on the prescribed Form LM–21 (''Receipts and Disbursements Report'') within 90 days of the close of the labor relations consultant's fiscal year. *See* 29 U.S.C. 433(b); 29 CFR part 406.

Since at least 1963, the reporting requirements have required reporting by the prescribed forms, Form LM–10, Form LM–20, and Form LM–21. 28 FR 14384, Dec. 27, 1963; *See* 29 CFR part 405, 406.

Section 203(c), referred to as the ''advice'' exemption, 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. 433(c). 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. Even if a report is triggered by persuader activity, and a report must therefore be filed, material that is advice is not to be reported on the form.

C. Administrative and Regulatory History

In 1960, one year after the LMRDA's passage, the Department issued its initial interpretation of Section 203(c)'s advice exemption. This interpretation appeared in a technical assistance publication for employers. U.S. Dep't of Labor, Bureau of Labor-Management

[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] The statute and the Form LM–10 also require disclosure of financial activities that do not constitute persuader activities, such as payments or loans from an employer to a labor union or a labor union's official. *Id.*

Reports,[3] *Technical Assistance Aid No. 4: Guide for Employer Reporting* (1960). Under this original interpretation, the Department required employers to report any ''[a]rrangement 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.'' *Id.* at 18. By contrast, employers were not required to report ''[a]rrangements with a 'labor relations consultant,' or other third parties related exclusively to advice, representation before a court, administrative agency, or arbitration tribunal, or engaging in collective bargaining on [the employer's] behalf.'' *Id.* Additionally, in opinion letters to members of the public, the Department stated that a lawyer's or consultant's revision of a document prepared by an employer constituted reportable activity. *See* 76 FR 36178, 36180 (June 21, 2011) (NPRM) (citing Benjamin Naumoff, Reporting Requirements under the Labor-Management Reporting and Disclosure Act, in Fourteenth Annual Proceedings of the New York University Conference on Labor 129, 140–141 (1961)).

Just two years later, the Department revisited its interpretation, adopting the view that it was to hold for the next several decades. The Department's revised interpretation construed the advice exemption of Section 203(c) so as to no longer trigger reporting upon the provision of materials by a third party to an employer that the employer could ''accept or reject.'' [4] But a consultant who did present materials for the employer to accept or reject could trigger disclosure obligations by interacting with employees, either directly or through an agent. *See* Interpretative Manual section 265.005 (Scope of the Advice Exemption).[5]

On June 21, 2011, the Department issued a notice of proposed rulemaking to revise its interpretation of Section 203(c). 76 FR 36178. The Department received approximately 9,000 comments. 81 FR at 15945. On March 24, 2016, the Department issued its final Rule, addressing the comments it received. *See* 81 FR at 15945–16,000 (Mar. 24, 2016).

The Persuader Rule—the subject of this final rule—altered the prior, decades-long interpretation. The preamble to the Persuader Rule and the instructions on the relevant forms defined ''advice,'' which does not give rise to a reporting obligation, as ''an oral or written recommendation regarding a decision or a course of conduct.'' *Id.* at 15,939, 16,028 (LM–10 instructions), 16,044 (LM–20 instructions). The Persuader Rule then defined four new categories of non-contact conduct that triggered reporting obligations when done with an object to persuade: Directing supervisor activity, providing material for employers to disseminate to employees, conducting tailored seminars on the issue of unionization, and developing or implementing personnel policies designed to influence unionization. 81 FR at 15938. (These categories were in addition to contact of employees by a consultant or a consultant's agent, which the Rule continued to cover.) Among the activities covered by the Persuader Rule's four new categories were providing messaging on unionization to employers, 81 FR at 15970; developing policies for employers to dissuade employees as to the need for a union (such as a longer lunch break or a more generous leave policy), 81 FR at 15973; drafting or revising written materials regarding unionization for employers to disseminate to employees, 81 FR at 15971; or planning ''captive audience'' meetings or scripting interactions between supervisors and employees, 81 FR at 15970.

The Department thus construed the ''advice'' exemption more narrowly than it had done previously. In particular, it abandoned the position that developing speeches, communications, policies, and other proposals that an employer may decide to accept or reject constituted ''advice'' that did not trigger the reporting requirement. Under the new rule, the fact that the employer itself delivered the message or carried out the policy developed by a consultant would no longer exempt a consulting arrangement from reporting. The stated purpose of this change was to ''more closely reflect the employer and consultant reporting intended by Congress in enacting the LMRDA.'' 81 FR at 16001. The Persuader Rule cited evidence that the use of outside consultants to contest union organizing efforts had proliferated, while the number of reports filed remained consistently small. 81 FR at 16001. The Department concluded that its previous ''broad interpretation of the advice exemption ha[d] contributed to this underreporting.'' *Id.*

D. Litigation Surrounding the Rule

Shortly after it was issued, the Persuader Rule was challenged in three district courts and eventually enjoined on a nationwide basis. Plaintiffs in those suits contended that the Rule conflicts with the LMRDA, is arbitrary and capricious, violates the First Amendment, and is void for vagueness. *Associated Builders & Contractors of Arkansas* v. *Perez* (E.D. Ark. 4:16-cv-169); *Labnet, Inc.* v. *U.S. Dep't of Labor,* 197 F. Supp. 3d 1159 (D. Minn. 2016); *Nat'l Fed'n of Indep. Bus.* v. *Perez,* 2016 WL 3766121 (N.D. Tex.). On June 22, 2016, the federal district court in Minnesota found that the plaintiffs were likely to establish that the Persuader Rule violated the LMRDA, in at least some of its applications, but denied their request for preliminary relief on the ground that plaintiffs had not shown the threat of irreparable harm. *Labnet,* 197 F. Supp. 3d at 1175–76. On June 27, 2016, a federal district court in Texas granted the challengers' motion for injunctive relief—finding that the plaintiffs were likely to prevail on the merits of both their statutory and constitutional claims—and issued a nationwide preliminary injunction, which was later converted to a permanent injunction. *NFIB,* 2016 WL 3766121, at *46; s*ee also NFIB,* 2016 WL 8193279 (granting permanent injunction). The Department appealed to the Fifth Circuit, which has held the matter in abeyance pending this rulemaking. *See NFIB,* Dkt. No. 00514035358 (Dec. 27, 2017). The other two court cases have also been stayed.

III. Determination To Rescind

While the NPRM proposed rescission of the Persuader Rule to enable the Department to engage in further analysis, a further review of the record, including several comments urging that the Department complete its final analysis of the Persuader Rule now, have convinced the Department that the best course of action is to achieve

[3] The Bureau of Labor-Management Reports was the predecessor agency to the Office of Labor-Management Standards.

[4] *See* 81 FR at 15936 (quoting the agency's 1962 LMRDA Interpretive Manual as stating: ''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 omitted).

[5] In 2001, the Department temporarily altered its interpretation of Section 203(c), expanding the scope of reportable activities by focusing on whether an activity has persuasion of employees as an object, rather than categorically exempting activities in which a consultant has no direct contact with employees. *See* 66 FR 2782 (Jan. 11, 2001). However, later that year, that interpretation was rescinded, and the Department returned to its prior view. *See* 66 FR 18864 (Apr. 11, 2001).

finality at this time.[6] The Department's NPRM notified the public of the possible rescission of the Persuader Rule, and the concerns animating that proposed rescission, including the Department's concerns about ''alternative interpretations of the statute,'' ''the potential effects of the Rule on attorneys and employers seeking legal assistance,'' the potential increased ''burden of the Form LM–20,'' and ''the impact of shifting priorities and resource constraints.'' 82 FR 26879. The Department received 1,160 comments submitted via the *www.regulations.gov* website in response to its NPRM. Of this total, 1,111 constituted non-substantive comments, including seven form letters.[7] The remaining 49 comments were substantive in nature, submitted by labor organizations, trade associations, business and professional federations, law firms, public policy groups, and four Members of Congress. Many of the substantive comments, both supporting and opposing rescission, discussed the merits of the Persuader Rule's consistency with Section 203(c) and provided the commenters' views on the Department's prior interpretation of the advice exemption. A number of comments objected to the Department's proposal to rescind with a view to further consideration rather than making a final substantive determination at this time.[8] Also, this same issue was evaluated at length in the Persuader Rule NPRM and final rule. The Department thus believes that it has received comments fully airing the substantive issues raised by the Persuader Rule, has completed its analysis of those issues, and will not engage in further analysis regarding its interpretation of Section 203(c) at this time.

Based on the comments received, and in light of the Department's legal and policy analysis, the Department has decided to rescind the Persuader Rule. The Department will continue to apply the longstanding interpretation of the advice exemption that predated the Persuader Rule.

Four primary reasons lead the Department to its rescission decision. First, the Department has determined that Section 203(c)'s plain text clearly forbids the interpretation on which the Persuader Rule in part rested. Second, the Department has determined that the Persuader Rule unduly causes disclosure of client confidences that are at the heart of the attorney-client relationship. Third, the Department has concluded that the Form LM–21's requirements substantially increased the burden on filers of the Form LM–20—a cost that the Persuader Rule declined to factor into its analysis. Fourth, the Department has determined to allocate its scarce resources to other priorities rather than to addressing the substantial fiscal burdens that the Persuader Rule imposed on the Department.

A. The Persuader Rule Rested on a Misinterpretation of Section 203(c)

Section 203(c) provides that the LMRDA's reporting obligation is not triggered by a consultant's ''giving or agreeing to give advice'' to an employer. The plain meaning of the term ''advice,'' as the Persuader Rule found, is ''an oral or written recommendation regarding a decision or course of conduct.'' 81 FR at 15926. Decisions about speech and written communications are among the subjects on which such ''recommendations'' are frequently made. Sometimes such advice may take the form of a general discussion about what the employer should or should not say to its employees. But it may also consist of drafts of speeches or written communications. Such drafts, if given to an employer to accept or reject, are simply recommendations to the employer to communicate as laid out in the draft. The employer remains free to disregard these recommendations and communicate in any manner it sees fit. Because the employer in such a scenario is the one communicating with employees, and the consultant simply proffers recommendations about those communications, the consultant renders only ''advice'' as that term is used in Section 203(c).

The Persuader Rule required reporting based on such advice. For instance, the Persuader Rule explained that reporting is required when a consultant, who has no direct contact with employees, ''provides material or communications to the employer, in oral, written, or electronic form, for dissemination or distribution to employees.'' 81 FR at 16027 (Mar. 24, 2016). Likewise, the Rule required reporting for ''drafting, revising, or providing speeches'' and ''written material . . . for presentation, dissemination, or distribution to employees.'' *Id.*

The Persuader Rule maintained that the ''preparation of persuader materials [such as speeches and written communications] 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,'' 81 FR at 15951 (Mar. 24, 2016), but that analysis was mistaken. If the employer retains the ability to accept or reject the proffered communication, the consultant has not tendered ''more than a recommendation,'' even if his recommendation is made with the purpose to persuade employees. *Id.* That is because ''the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it.'' *Janus Capital Grp.* v. *First Derivative Traders* 564 U.S. 135, 142 (2011).

Janus is instructive. There, plaintiffs claimed that a mutual fund's allegedly misleading prospectuses were prepared by the fund's investment advisor, and sought to hold the investment advisor liable under SEC Rule 10b–5 for ''mak[ing] an[] untrue statement of a material fact in connection with the purchase or sale of securities.'' *Id.* at 137 (first alteration in original; internal quotation marks omitted). The Supreme Court rejected plaintiffs' claims, holding that, as the alleged misstatements had been issued solely on the authority and under the name of the mutual fund, the advisor could not be held liable even if it had prepared the prospectuses that the mutual fund ultimately adopted. *Id.* at 142–47. The Court explained that the mutual fund, rather than the investment advisor, exercised ''ultimate authority'' over whether to adopt any communication prepared by the advisor; the advisor, ''[w]ithout control, . . . can merely suggest what to say, not 'make' a statement in its own right.'' *Id.* at 142.

The same rationale applies here: A consultant's draft of, or revisions to, speeches or other communications, constitute recommendations about how the employer should communicate with its employees. As long as the ''ultimate authority'' to decide whether to make such communications rests with the employer, such recommendations by a consultant are merely ''advice'' within the meaning of Section 203(c).

The Persuader Rule rejected this interpretation based in significant part on the desire to give more effect to Section 203(c)'s reporting requirement for agreements to undertake activities ''where an object thereof, directly *or*

[6] Several commenters noted that no further statutory analysis is needed given the Department's years of extensive analysis and study that initially led to the promulgation of the Persuader Rule. *See* Communication Workers of America [pp. 1–2]; Economic Policy Institute [pp. 4–5]; Ranking Members Scott and Sablan [p. 3].

[7] Additionally, the Department received 1,433 comments submitted via mail or email, all of which were duplicative of form letters that the Department also received properly via *www.regulations.gov*.

[8] LMSO–2017–0001–0543, AFL–CIO pages 9–10; LMSO–2017–0001–0797, NABTU, page 4, LMSO–2017–0001–1126, UFCW, page 4.

indirectly, is to persuade employees'' with respect to their collective bargaining rights. 29 U.S.C. 433(a)(4) (emphasis added); *see also id.* § 433(b) (likewise covering ''indirect'' persuasion). The Persuader Rule reasoned that, unless the drafting of speeches and communications were deemed ''indirect'' persuasion (in assistance of the employer's ''direct'' dissemination of the statements to its employees), the term ''indirect'' would have little independent meaning. See 57 FR at 15926, 15933, 15936–37, 15949 fn 39. The Department is now convinced, after a review of the statute's text, the intervening court decisions, and the submitted comments, that this reading of Section 203(c) is improper.

First, the Department's prior longstanding interpretation comports with the general principle ''that Congress, when drafting a statute, gives each provision independent meaning,'' *Torres* v. *Lynch,* 136 S. Ct. 1619, 1628 (2016) That presumption tells against the Persuader Rule. The Persuader Rule interpreted section 203(c) as having no independent meaning, merely ''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.'' 81 FR at 15951; see also *id.* at 15952 (advice exemption is simply a ''rule of construction'' that ''underscore[s] that advice *qua* advice . . . does not trigger a reporting obligation simply because it arguably concerns a potential employer action that has an object to persuade''). In other words, the Persuader Rule read Section 203(c) merely to clarify what already lies outside the scope of Sections 203(a) and (b)—depriving Section 203(c) of independent meaning. Both federal courts to have reviewed the Persuader Rule rejected this interpretation, and the D.C. Circuit long ago accepted the Department's view that ''[t]he very purpose of section 203's exemption prescription . . . is to remove from the section's coverage certain activity that otherwise would have been reportable.'' *UAW* v. *Dole,* 869 F.2d 616, 618 (DC Cir. 1989) (R. Ginsburg, J.). The reading that the Department reinstates today, by contrast, gives robust and independent meaning to Section 203(c).[9]

Second, the Persuader Rule is not needed to save the words ''or indirectly'' from redundancy, and the Department's longstanding interpretation did not render the words ''or indirectly'' redundant. These words bear independent meaning, under the Department's previous interpretation, if construed to cover cases in which a consultant communicates with employees through a third party, such as an agent or independent contractor. Thus, for instance, reporting requirements would attach when a consultant hires a spokesman to spread its message to employees or to pass out to employees advocacy materials the consultant had prepared. In such cases, the consultant—rather than the employer—retains final authority over the message to be delivered to employees, thus depriving the consultant of the advice exemption. The words ''or indirectly'' ensure that reporting requirements attach to such conduct, which has long been the Department's position. At least as far back as 1989, the Department's Interpretative Manual asserted that a consultant who employs an agent to contact employees falls within Section 203's reporting requirement. Interpretative Manual section 265.005 (Scope of the Advice Exemption) (''Moreover, the fact that such material may be delivered or disseminated through an agent would not alter the result.'').[10] Even if the Department's longstanding interpretation rendered the words ''or indirectly'' redundant, the redundancy to which the Persuader Rule reduced Section 203(c) means that one of the Persuader Rule's principal rationales—the asserted need to avoid rendering the words ''or indirectly'' redundant—cannot stand. When *either* of two interpretations would create redundancy, the canon against redundancy cannot constitute a basis for choosing between the interpretations, because neither interpretation avoids redundancy. If anything, rendering the words ''or indirectly'' redundant is preferable to rendering the entirety of Section 203(c) redundant, as the Persuader Rule did.

All that has been said above with respect to communications prepared by a consultant for final acceptance or rejection by the employer also applies to conduct and policies that a consultant advises an employer to implement, an activity that triggered reporting requirements under the Persuader Rule. Planning meetings with employees and developing personnel policies, like drafting a speech, consist of making recommendations that the employer is free to accept or reject. Planning such conduct or policies fits within the traditional meaning of ''advice.'' *See Labnet,* 197 F. Supp. 3d at 1169.

While the Department's own reading of the plain statutory text plays the principal role in supporting the interpretation of Section 203(c) taken here, the Department also notes that the only federal courts to have pronounced on the Persuader Rule found that it violates the text of the LMRDA or likely does so. One federal district court permanently enjoined the Persuader Rule after finding that it impermissibly required reporting based on advice within the meaning of Section 203(c) and indeed read Section 203(c) out of the statute. *NFIB,* 2016 WL 3766121, at *28; *see also NFIB,* 2016 WL 8193279 (converting preliminary injunction to permanent injunction). The other district court to consider the Persuader Rule similarly held that it ''categorizes conduct that clearly constitutes advice as reportable persuader activity'' and concluded that the plaintiffs in that case ''have a strong likelihood of success on their claim that the [Persuader Rule] conflicts with the plain language of the

[9] The Eighth Circuit, which canvassed the legislative history of section 203 in a case involving a different question, reached a conclusion that supports the Department's longstanding reading of section 203(c). That case involved the question whether a consultant who engages in reportable persuasion on behalf of one client must include in its LM–21 report information about advice given to other clients for whom it performed no persuader activity. Although the Department does not here opine on this issue, the Department notes that the Eighth Circuit exhaustively examined Section 203's legislative history and rejected the view that Section 203(c) merely clarifies the meaning of Sections 203(a) and (b), concluding that the view of the advice exception as ''broader than a mere proviso'' more closely reflects congressional intent. *Donovan* v. *Rose Law Firm,* 768 F.2d 964, 974 (8th Cir. 1985). The Eighth Circuit also persuasively explained how previous courts of appeals that reached the opposite conclusion on this question misread the intent of Section 203(c). *See, e.g., Humphreys, Hutcheson and Mosely* v. *Donovan,* 755 F.2d 1211 (6th Cir. 1985); *Price* v. *Wirtz,* 412 F.2d 647 (5th Cir. 1969) (en banc). These cases have limited relevance with regard to the question presented by the Persuader Rule and this proceeding. As the D.C. Circuit explained in *UAW,* the question considered in these cases differed from ''the threshold question presented by this [rulemaking]: what is the appropriate characterization of activity that can be viewed as both advice and persuasion?'' *UAW,* 869 F.2d at 618 n.3. Nevertheless, the Eighth Circuit's well-reasoned conclusion that Section 203(c) does not serve merely to make explicit the implicit contours of Sections 203(a) and (b) is consistent with the Department's longstanding interpretation that it reinstates today and is at least somewhat inconsistent with the Persuader Rule.

[10] The Persuader Rule rejected the view that the term ''indirectly'' could be given meaning by attributing to it coverage of a consultant's retention of a third party to interact with employees, because, according to the Persuader Rule, such indirect persuasion by a consultant would be covered even absent the words ''or indirectly.'' 57 FR at 15949, fn. 39. Absent any definitive authority on how the statute would be interpreted in the absence of those words, the Department finds persuasive the suggestion that Congress included the words 'or indirectly' to make clear something that might well not be implicit in the statute otherwise: That a consultant's use of a third party to contact employees triggers reporting requirements.

statute.'' *Labnet,* 197 F. Supp. 3d at 1170.

A number of commenters agreed that the Persuader Rule incorrectly read Section 203(c). For instance, the Retail Industry Leaders Association [p. 5], Council on Labor Law Equality [pp. 20–21], and Coalition for a Democratic Workforce [pp. 7–8], as well as several others, contended that Congress intended to give the term ''advice'' broad scope and the Persuader Rule's interpretation of Section 203(c) effectively eviscerated that advice exemption. The American Bar Association [p. 4] stated that the proposed interpretation of ''advice'' in the Persuader Rule would thwart the will of Congress.

Other commenters opposed rescission, but failed to grapple with the fundamental statutory problem with the Persuader Rule. For example, one commenter [LMSO–2017–0001–0543; AFL–CIO page 9–10] urged the Department to retain the Persuader Rule because it ''has multiple valid applications,'' citing *Labnet, Inc.,* 197 F. Supp. 3d at 1168. But rejection of the Department's longstanding accept-or-reject test stands at the heart of the Persuader Rule's legal analysis, see 81 FR at 15941, and that rejection is based on a fundamentally flawed interpretation of section 203. The Department accordingly is not rescinding the Persuader Rule because it has some invalid applications. The Department is rescinding the Persuader Rule because the Rule as a whole rested on an improper reading of Section 203(c).

Two Members of Congress serving on the House of Representatives' Committee on Education and the Workforce opined that ''a single district court decision should not be enough to justify rescinding a rule. [LMSO–2017–0001–1097; Ranking Members Scott and Sablan Comment Letter page 3.] [11] But the Department is not rescinding the Persuader Rule simply because a district court enjoined it. It is rescinding the Persuader Rule because the Department has concluded, after considering the arguments made by those challenging the Rule in litigation, the opinions of the two district courts to have pronounced on the Persuader Rule's merits, the comments that have been submitted, and the plain meaning of the statutory text, that the Persuader Rule read Section 203(c) improperly.

[11] A think tank [LMSO–2017–0001–0800; Economic Policy Institute p.5) raised a similar issue, asserting that the related litigation does not compel rescission.

Several commenters opposed rescission on the ground that the Persuader Rule is needed to address underreporting. [AFL–CIO, page 10; Economic Policy Institute, page 4; Communications Workers of America, page 2; North America's Building Trades Union, page 5; National Nurses United, page 2; Screen Actors Guild, page 2; and United Food and Commercial Workers, page 2] They noted that the Department cited underreporting under its prior interpretation—that a consultant incurs a reporting obligation only when it directly communicates with employees with an object to persuade them—as part of the rationale for promulgating the Persuader Rule. 81 FR 15933 (Mar. 24, 2016) (''Indeed, the prior interpretation did not properly take into account the widespread use of indirect tactics . . . and thus did not result in the reporting of most persuader agreements.''). But activities such as drafting speeches, proposing policies, and other recommendations that a business can accept or reject fall within the plain meaning of the ''advice'' that Congress exempted from its reporting requirements. Failure to report these activities accordingly is not ''evasion'' of the LMRDA; rather, such activities fall within the unambiguous scope of the term ''advice'' that Congress expressly excepted from triggering Section 203's reporting requirements, and thus declining to report based on such activities constitutes compliance with the LMRDA.

Even if a court were to disagree with the Department's view that its interpretation of the statute, as laid out in this rulemaking, is mandated by the statute, the Department's reasonable reading of the statute should still be given deference under *Chevron. Chevron, USA, Inc.* v. *Nat. Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984). And, as discussed in more detail in the next sections, several policy considerations support rescission of the Persuader Rule and the Department's prior longstanding interpretation of the statute. Even if the interpretation adopted herein were only one permissible interpretation of Section 203(c), the Department would nevertheless adopt it based on these compelling policy considerations.

B. The Persuader Rule Impinged on the Attorney-Client Relationship

A second, independent, reason supports rescission: The Persuader Rule would have interfered with longstanding protections of the attorney-client relationship.

The duty to safeguard client confidences has long formed the bedrock of the attorney-client relationship. One hundred years ago, the American Bar Association's first set of model ethics rules accepted as already established ''[t]he obligation . . . not to divulge [a client's] secrets or confidences.'' Code of Professional Ethics No. 6 (1908). Today, the ABA's Model Rules instruct that, absent specific exceptions, a ''lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . . .'' Model Rule 1.6.

The duty not to disclose confidences plays a vital role in encouraging businesses and individuals alike to seek counsel. Potential clients who fear their decision to retain counsel, or facts about the representation, will become public may hesitate before consulting a lawyer. Such hesitation would run counter to society's interest in fostering legal compliance, as more citizens and businesses would be forced to act based on an uninformed interpretation of the law. Perhaps even more importantly, the disincentive built into the Persuader Rule in consulting an attorney is particularly troubling given that the Rule is vague regarding the activities that would be newly reportable. Pressuring Americans to act in ignorance of the law imperils a ''fundamental principle in our legal system[, which] is that laws . . . must give fair notice of conduct that is forbidden or required.'' *FCC* v. *Fox Television Stations, Inc.,* 567 U.S. 239 (2012). For better or worse, such fair notice as a practical matter often requires consulting legal counsel.

The Department finds generally persuasive the American Bar Association's comments submitted in response to this rulemaking. One of these comments, on which the court in Texas relied, states that the Persuader Rule called for disclosure of important client confidences and would undermine the attorney-client relationship:

[The Persuader Rule] . . . would require lawyers (and their employer clients) to disclose a substantial amount of confidential client information, including the existence of the client-lawyer relationship and the identity of the client, the general nature of the legal representation, and a description of the legal tasks performed.

By requiring lawyers to file [such reports], the Proposed Rule could chill and seriously undermine the confidential client-lawyer relationship. In addition, by imposing these unfair reporting burdens on both the lawyers

and the employer clients they represent, the Proposed Rule could very well discourage many employers from seeking the expert legal representation that they need, thereby effectively denying them their fundamental right to counsel.

NFIB, 2016 WL 3766121, at *7–9. LMSO–2017–0001–0111, American Bar Assn., page 7.] Even a comment from several law professors in support of retaining the Persuader Rule did not dispute that the Rule required disclosure of information that would, absent the Rule, be shielded by rules of confidentiality. [LMSO–2017–0001–088127; 27 Law Professors page 5–7].

These concerns are not hypothetical; as the court in Texas found based on witness testimony, ''law firms around the country have already started announcing their decisions to cease providing advice and representations that would trigger reporting under DOL's New Rule,'' which ''decrease[s] employers' access to advice from an attorney of one's choice.'' *Id.* at *10. The court further noted the Persuader Rule's likely negative effect on organizations' ability to offer unionization-related training and seminars to employers (including small businesses) because would-be trainers and attendees ''will not want their attendance reported and made publicly available.'' *Id.* at *11. After analyzing these and other considerations, the court ultimately held that the Persuader Rule was likely ''arbitrary, capricious, and an abuse of discretion'' in part because ''the rule unreasonably conflicts with state rules governing the practice of law.'' *Id.* at *29. Several commenters shared similar concerns that the Texas court noted. [Chairwoman Foxx and Walberg, p. 8; Associated General Contractors of America, p. 8; Retail Industry Leaders Association, p. 3; Independent Electrical Contractors, p. 6; Seyfarth Shaw, p. 4; National Association of Homebuilders, p. 5; Coalition for a Democratic Workforce, p. 13; Employment Law Alliance, p. 7].

The Persuader Rule acknowledged the potential impact on attorney-client confidences, but simply concluded that the interpretation of the LMRDA advanced in the Rule, ''as federal law, must prevail over any conflicting . . . rules governing legal ethics'' and that Model Rule 1.6 and state laws modeled on it permit disclosure when required by law. 81 FR at 15998 (Mar. 24, 2016). Those arguments are beside the point. The Department agrees that federal law preempts state law and does not dispute that many state ethics laws permit disclosures required by law. But the state laws at issue enshrine, and bear witness to the importance of, certain principles of confidentiality—principles that the Persuader Rule, by requiring disclosure of client confidences, endangers irrespective of whether attorneys could be administratively disciplined for making such disclosures.[12]

This is not the first time the Department has recognized the need for confidentiality to protect the attorney-client relationship in the organizing context. The largest labor unions (those with annual receipts of $250,000 or more) must under certain circumstances disclose and itemize disbursements to lawyers, but that rule does not apply when disclosure would expose the union's prospective organizing strategy or provide a tactical advantage to a party in contract negotiations. See the Instructions for the Form LM–2, p22. The Persuader Rule included no similar exemption for employers' consultation with attorneys. Rescinding the Persuader Rule continues to recognize the importance of confidentiality in the attorney-client relationship, consistent with the Instructions for the Form LM–2.

One comment [LMSO–2017–0001–088127; 27 Law Professors page 2] advocated against rescission and noted the difficulty in obtaining evidence on how particular activities would affect the behavior of lawyers. The comment asserted that rescinding the Persuader Rule would preclude obtaining data on its effects and that input from lawyers on how they would change their practices could be ''nothing more than speculative and self-serving.'' [13] Because the Department rescinds the Persuader Rule on the merits rather than with a view to further consideration, this comment's concerns about whether rescission would facilitate a future merits consideration is no longer apropos.[14]

Commenters offered conflicting policy and fact-based arguments about the effects of the Persuader Rule on reporting under the LMRDA. One think tank [Economic Policy Institute, pages 7–8], for example, asserted that the proposed rescission would ''let[] America's working people down'' because, in its view, the Persuader Rule constituted merely a ''modest step toward leveling the playing field for workers by making sure they receive the information they deserve before making a decision on forming a union.'' *Id.* Multiple labor unions made similar comments. A representative of the building trades characterized the accept-or-reject rule as a ''loophole'' that ''resulted in vast underreporting of persuader activities.'' [See LMSO–2017–0001–0797 North America's Building Trades Unions, p3]; [LMSO–2017–0001–0543 AFL–CIO, p. 3–4.] An international union stated, 'While the Department will undoubtedly be inundated with comments from those who assert that the 2016 Rule was a sop to organized labor, the real beneficiaries of this proposal are the employees—the class of individuals for which the protections in Section 203 were intended.'' LMSO–2017–0001–1104 International Brotherhood of Teamsters, p3.] [SAG–AFTRA, pg. 2; UFCW, pg. 2]

The Department is not persuaded. First, some Form LM–20 information would have been stale. As the commenters noted, the 30 day filing deadline for a Form LM–20 is not much shorter than the 38-day median timeframe between the filing of an NLRB petition and the ensuing election, and 90% of the elections are held within 56 days. See 79 FR 74307. Although the Persuader Rule estimated that employers engage consultants at the first signs of union organizing, indicating the persuader agreement

[12] For these reasons, the Department was not persuaded by a comment that advocated retaining the Persuader Rule on the grounds that the Rule's disclosure requirements by their own force exempted lawyers from confidentiality obligations that would otherwise apply. [LMSO–2017–0001–088127; 27 Law Professors page 5–6].

[14] This comment also contended that the Persuader Rule did not compel disclosure of client confidences. [LMSO–2017–0001–088127; 27 Law Professors page 4]. The comment asserts that there is ''no conflict between the regulatory regime administered by the DOL and the ethical responsibilities of lawyers.'' The comment notes that section 204 of the LMRDA expressly exempts ''information that was lawfully communicated to such attorney by any of his clients,'' citing 29 U.S.C. 434. Reporting is required only when the lawyer provides services other than legal services, the comment continues. The comment identifies several other reporting and disclosure requirements imposed on lawyers and concludes that there is ''little evidence'' that these regimes have chilled attorneys from serving their clients. The Department is not persuaded by these arguments. First, it is notable that the comment does not dispute that the Persuader Rule *did* require disclosure of information that, absent the Persuader Rule, would be entitled to the protections of confidentiality. The portions of the Persuader Rule that did not infringe on confidential communications, such as the exemption for communications from a client to an attorney under 29 U.S.C. 434, do not negate those that do, such as the requirement that guidance provided from an attorney to an employer with an intent to persuade employees triggers reporting. The assertion of ''little evidence'' of chilling in other statutory contexts is bare and unquantified and therefore not persuasive and, here, not only did several commenters raise this concern, but a U.S. Distric Court found evidence of actual chilling. NFIB, 2016 WL 3766121, at *10; [Chairwoman Foxx and Walberg, p. 8; Associated General Contractors of America, p. 8; Retail Industry Leaders Association, p.3; Independent Electrical Contractors, p. 6; Seyfarth Shaw, p. 4].

would precede the petition, such promptness is very unlikely to be present in all cases; in cases where it is not, the Form LM–20 may not be filed early enough to be useful.

Second, it is vital to distinguish between information that helps employees make an informed decision about their right to form a union, on the one hand, and information that is significantly less useful, on the other. Information as to whether a person with whom an employee comes into contact is actually working for the employee's employer can help an employee evaluate whether to trust the arguments that that person may advance on the question of unionization. The additional disclosures that the Persuader Rule would have required, by contrast, are likely to be much less helpful. That is because, for any message or conduct that the Persuader Rule newly deemed to be indirect persuasion, employees *already* know that the employer stands behind that message or conduct, because the employer conveys the message or undertakes the conduct at issue. Knowing which advisor, if any, recommended a particular message or conduct is less likely to help employees make an informed decision than knowing that a seemingly-independent third-party is actually in the pay of his or her employer. It is the Department's conclusion that the serious concerns regarding attorney-client confidentiality discussed in this section outweigh any assistance the former knowledge might render.

Third, the relative paucity of LM–20 reports under the Department's longstanding interpretation of the advice exemption does not necessarily indicate under-reporting. Some commenters [Council on Labor Law Equality, p. 9; Independent Electrical Contractors, p. 7; Retail Industry Leaders Association, p. 7] argued that there is no indication that employers or consultants have engaged in misconduct or otherwise circumvented or evaded the LMRDA's reporting requirements under the Department's longstanding prior interpretation. The Department agrees: When comparatively few reports are filed, this can be an indication of non-compliance with the reporting rule *or* it can be an indication of relatively little reportable activity. The latter indicates compliance, not evasion, and, absent further information indicating that the filing of comparatively few reports instead indicates evasion, it provided no basis for the Persuader Rule and its mandatory reporting of activities such as recommending communications or courses of conduct for an employer to accept or reject.

C. The Costs of Additional Use of Form LM–21 Further Support Rescission

A third reason for rescission involves the additional regulatory burdens involving Forms LM–20 and LM–21 imposed by the Rule. The obligation to file the Form LM–20 and the Form LM–21 result from the same event: Persuader activity. Under section 203(b), every person who enters into an agreement or arrangement to undertake persuader activities must file a report with the Secretary that includes a detailed statement of the terms and conditions of such arrangement within 30 days of entering into the agreement, currently accomplished by filing a Form LM–20. The person must then also file annually a report containing a statement of the person's ''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, currently accomplished by filing a Form LM–21. *See also* 29 CFR 406.3 (Form LM–21 requirements). 57 FR 15929. Thus, by statute, the filing of a Form LM–20 necessitates the filing of a Form LM–21, so long as any disbursement is made pursuant to the reportable persuader agreement or arrangement.

An increase in the range and number of activities that constitute ''persuader activity'' would increase the number of Form LM–20 and Form LM–21 filers. Each form imposes a unique recordkeeping and reporting burden on the filer. For example, a consultant/law firm that contracted with an employer and engaged in persuader activity under the Rule would have to file a Form LM–20 disclosing the arrangement with the employer. According to the instructions, the consultant would also have to file a Form LM–21 on which it reports the full name and address of employers from whom receipts were received directly or indirectly on account of labor relations advice or services, as well as the total amount of receipts. In addition, the consultant's disbursements to officers and employees would be disclosed when made in connection with such labor relations advice or services. And the consultant would report in the aggregate the total amount of the disbursements attributable to this labor relations services and advice, with a breakdown by office and administrative expenses, publicity, fees for professional service, loans, and other disbursement categories. Finally, the consultant would be required to itemize its persuader-related disbursements, the recipient of the disbursements, and the purpose of the disbursements.[15]

The Department recognized in the final rule that the Persuader Rule would make some labor relations consultants and employers who had previously not been required to file at all under the LMRDA responsible for filing both forms LM–20 *and* LM–21, but did not fully consider that burden. Instead, it considered only the burden arising from the Form LM–20 and deferred consideration of the burden arising from Form LM–21 to a separate rulemaking. It did so, in part, because it intended to engage in parallel rulemaking for reform of the scope and detail of the Form LM–21. 57 FR 15992, fn 88. In the meantime, the Department issued a separate special enforcement policy that addressed the potential that new filers might have unique difficulties in filing the Form LM–21. Under that special enforcement policy, the filers of Form LM–20 who were also required to file a Form LM–21 were not required to complete two parts of that form. See *https://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm.*

The Department has now considered the burdens that the Persuader Rule would have imposed on the expanded Form LM–21 filers and concluded that they would have been substantial. As described below, under the Persuader Rule, many more labor relations consultants would have had to complete the Form LM–21, and they would have needed to devote additional time and resources to do so.

As discussed in the Economic Analysis below, the Department estimates that total number of Form LM–20 filers would have been 2,149. Consequently, there would also have been 2,149 Form LM–21 reports filed. This is an increase from the previously estimated 358 Form LM–21 reports. Thus the Persuader Rule would have created more filers of the Form LM–21. See *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201604-1245-001.*

These filers would have spent additional time completing the form, far more than the 35 minutes previously estimated by the Department.[16] Each filer of Form LM–21 is assumed to have already read the Form LM–20 form and

[15] The Department does not opine here on whether the statute requires consultants who have entered into persuader agreements or arrangements to list on the Form LM–21 non-persuader clients, *i.e.,* employers with whom they did not into persuader agreements or arrangements. *See Donovan* v. *Rose Law Firm,* 768 F.2d 964, 974 (8th Cir. 1985).

[16] See *https://www.reginfo.gov/public/do/PRAViewDocument?ref_nbr=201604-1245-001.*

instructions and therefore knows whether it must file the Form LM–21. No additional reading time is therefore necessary to make this determination. Nevertheless, the completion of the Form LM–21 would have been complicated by the Persuader Rule because the statutory term ''advice'' was broadened and expanded by the Persuader Rule, with no explanation of how the revised definition applied to the Form LM–21. This lack of clarity increases the burden of the Form LM–21. Due to this increased complexity, completing the form would have thus consumed 154.5 minutes. This equals a $631,181 Form LM–21 burden arising from the Persuader Rule and this burden was not considered by the Department when issuing that rule.

These additional costs of more than $631,000—which the Persuader Rule did not properly quantify or consider—are substantial and constitute an additional and important policy factor prompting rescission of the Persuader Rule to avoid unnecessary burden on the private sector.

D. Rescinding the Persuader Rule Will Preserve Limited Departmental Resources for Competing Priorities

A fourth reason for rescission of the Persuader Rule is the allocation of scarce resources to different priorities. The Department has the ''right to shape [its] enforcement policy to the realities of limited resources and competing priorities.'' *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am.* v. *Dole,* 869 F.2d 616, 620 (D.C. Cir. 1989). Under the prior interpretation of the advice exemption, there were significantly fewer reports due and accordingly fewer investigative resources needed for enforcing the rules on filing timely and complete reports. Further, under the prior interpretation, case investigations generally involved obtaining and reviewing the written agreement and interviewing employees. In contrast, enforcement of the Persuader Rule would likely have involved a lengthier and more complicated investigation, examining in detail the actions of consultants, their interactions with the employers' supervisors and other representatives, and the content of attorney communications. The investigator would have been required to review both the direct reporting category and the four indirect persuader categories. This would have been a substantially more resource-intensive process that pulled limited resources away from other vital priorities. The Department does not believe that this allocation of resources is warranted.[17]

One comment [LMSO–2017–0001–1097; Ranking Members Scott and Sablan Comment Letter page 4] stated that the Department's concern for limited resources ''does not account for the discrepancy between unions' broad disclosure requirements and employers' meager obligations,'' but that comment did not assess the Persuader Rule's burden on the Department. The comment asserted that ''the Form LM–2 that unions must file often consumes hundreds of pages, whereas employers' LM–10, LM–20 and LM–21 are four, two and two pages, respectively.'' But the resources filers spend completing their reports are not the same as the resources the Department spends administering the program. In addition, the length of the report does not correlate with the investigatory burden on the Department. The greater number of reports and the increased complexity of the investigations under the Persuader Rule mean persuader reports would have been resource intensive for the Department. In contrast to labor unions, which must file an annual report, persuader reports are required only when an employer or labor relations consultant actually engages in the identified persuader activities in the fiscal year. At the end of the fiscal year, the Department cannot know whether a particular employer or consultant owes a report, which substantially increases the time and expense of monitoring for delinquent employer and consultant reports.[18]

Ultimately, the Department has determined that its scarce resources are better allocated elsewhere than on the enforcement of the Persuader Rule. The Department has wide ranging priorities and responsibilities, including helping Americans find the jobs they need, closing the skills gap, protecting employees from hazardous working conditions, enforcing child labor protections, and many other critical initiatives. Among its other priorities, the Department promotes union democracy and financial integrity in private sector labor unions through standards for union officer elections and union trusteeships and safeguards for union assets, and it promotes labor union and labor-management transparency through reporting and disclosure requirements for labor unions and their officials, employers, labor relations consultants, and surety companies. Reporting by employers and labor relations consultants who make arrangements to persuade employees with regard to their rights to organize and bargain collectively is an important piece of this effort and DOL's broader mission, but it is just one piece. Rescission of the expansion of the advice exemption will not change the Department's robust enforcement of these core reporting requirements, which have protected the LMRDA's vital objectives for decades.

IV. Effect of Rescission

The reporting requirements in effect under this rescission are the same as they existed before the rescission. The Forms and Instructions, available on the Department's website, are those pre-existing the Rule. These are the Forms and Instructions currently being used by filers, in light of the litigation and court order discussed in section 2(A), above. *See National Federal of Independent Business* v. *Perez* (N.D. Tex. 5:16-cv-00066-c), Slip Op. p.89–90; 2016 WL 3766121; 2016 WL 8193279.

V. Analysis Conducted in Accordance With Executive Order 12866, Regulatory Planning and Review, Executive Order 13563, Improved Regulation and Regulatory Review, and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

Under Executive Order 12866, the Office of Management and Budget's (OMB's) Office of Information and Regulatory Affairs determines whether a regulatory action is significant and, therefore, subject to the requirements of the Executive Order and review by OMB. 58 FR 51735. Section 3(f) of Executive Order 12866 defines a ''significant regulatory action'' as an action that is likely to result in a rule that: (1) Has an annual effect on the economy of $100 million or more, or adversely affects in a material way a

[17] While the Department could avoid some or all of this burden by declining to enforce, or enforcing on a limited basis, the Persuader Rule, rescinding the Persuader Rule will afford the regulated community greater certainty than simply adopting a non-enforcement policy.

[18] A labor union raised concern that the rescission of the rule would also rescind the requirement that Form LM–10 and Form LM–20 be filed electronically. (LMSO–2017–0001–0110; American Federation of Teachers pp 2–3). ''While, perhaps, reasonable minds may differ on the application of the advice exemption, one is hard pressed to think of a fair reason why persuaders should not have to file timely, intelligible forms via electronic means—just as unions have had to do for over a decade.'' The comment stated that paper filing is more costly for the Department and results in delays in public disclosure. The commenter states, ''full repeal of the original Rule does workers, the public, and researchers a real disservice,'' and concludes that the Department should retain mandatory electronic filing of LM–10, LM–20, and LM–21 reports. Although outside the scope of the regulatory action, the Department will consider this request, as it moves to making all forms available for electronic filing.

sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities (also referred to as economically significant); (2) creates serious inconsistency or otherwise interferes with an action taken or planned by another agency; (3) materially alters the budgetary impacts of entitlement grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or (4) raises novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order. *Id.* OMB has determined that this final rule is a significant regulatory action under section 3(f)(1) of Executive Order 12866.

Executive Order 13563 directs agencies to propose or adopt a regulation only upon a reasoned determination that its benefits justify its costs; it is tailored to impose the least burden on society consistent with achieving the regulatory objectives; and in choosing among alternative regulatory approaches, the agency has selected the approach that maximizes net benefits. Executive Order 13563 recognizes that some benefits are difficult to quantify and provides that, where appropriate and permitted by law, agencies may consider and discuss qualitatively values that are difficult or impossible to quantify, including equity, human dignity, fairness, and distributive impacts.

A. The Need for Rulemaking

As explained above in Part II, Section A, today's final rule to rescind the Persuader Rule is part of the Department's continuing effort to effectuate the reporting requirements of the LMRDA. The LMRDA generally reflects the obligation of unions and employers to conduct labor-management relations in a manner that protects employees' rights to choose whether to be represented by a union for purposes of collective bargaining. The LMRDA's reporting provisions promote these rights by requiring unions, employers, and labor relations consultants to publicly disclose information about certain financial transactions, agreements, and arrangements. The Department believes that a fair and transparent government regulatory regime must consider and balance the interests of labor relations consultants, employers, labor organizations, their members, and the public. It should reflect close consideration of possible statutory interpretations and both direct and indirect burdens flowing from the Rule, particularly in sensitive areas, such as the attorney-client relationship. Any change to a labor relations consultant or employer's recordkeeping, reporting and business practices should be based on a demonstrated and significant need for information, along with consideration of the burden associated with such reporting and any increased costs associated with the change.

In its Notice of Proposed Rulemaking, the Department assumed the position that the rescission of the Persuader Rule would result in a burden reduction equal to the difference between the rule as it stood prior to the Persuader Rule and the Persuader Rule. 82 FR 26881. In utilizing this methodology, the Department estimated that the rescission of the Persuader Rule would result in annual cost savings of $1,198,714.50.

In response to the Notice of Proposed Rulemaking, the Department received a number of comments disagreeing with the Department's cost analysis. Specifically, commenters insisted that the Department failed to arrive at a realistic calculation of the actual cost of compliance and the cost of familiarization. A number of commenters pointed to a lack of definitiveness in the Persuader Rule in identifying whether a report would be required, who would be responsible for submitting a report, and whether sensitive issues would have to be disclosed through the information requested in the report. The commenters argued that these matters were significant determinations that would inevitably result in higher costs.

Additionally, in an order granting the issuance of a preliminary injunction enjoining the Persuader Rule, the U.S. District Court for the Northern District of Texas addressed the burden of the Persuader Rule and the increased costs associated with its implementation. Though the district court did not conduct its own methodology, the court cited and relied upon a third-party report to conclude that the Persuader Rule ''could cost the U.S. economy between $7.5 billion and $10.6 billion during the first year of implementation, and between $4.3 billion and $6.5 billion per year thereafter; the total cost over a ten-year period could be approximately $60 billion—and this would not include the indirect economic effects of raising the cost of doing business in the United States.'' *Nat'l Fed. of Indep. Bus.* v. *Perez,* Case No. 5:16-cv-00066-C, 2016 WL 3766121, at *15 (N.D. Tex. June 27, 2016).[19]

While the Department does not conclude that the Persuader Rule would have resulted in the burden identified by the *NFIB* court, the Department is cognizant of the concerns raised by the commenters in response to the NPRM and has thoroughly analyzed and examined these comments. After a thorough evaluation, the Department agrees that the previous figure failed to account for a number of significant considerations.

Concerning burden, the overarching difficulty associated with the Persuader Rule was the broadening of persuader reporting to certain categories of indirect contact where the employer remained free to accept or reject the recommendations of the consultant. That increase in scope would have made it more difficult to determine whether a report was required and what information the report should contain. In particular, the Persuader Rule would have required close consideration of sensitive matters such as privilege and confidentiality that might have affected how information should be entered onto the forms. And filers would have required more time to review the instructions in detail because of the difficulty in accurately and comprehensively completing such complex forms.[20] To the extent that the expanded reporting requirement would have potentially disclosed sensitive information or chilled efforts to seek help, the impact would have been greater and even more time would have been allocated to completing the forms. For all these reasons, the Department no longer believes it would be accurate to measure the reduced burden simply by comparing the burden figures in the Persuader Rule to the figures that it has replaced.

B. Economic Analysis

For the reasons discussed below, and as relevant here, the Department rejects the following assumptions as made in the Persuader Rule:

- Non-filing employers, human resources firms, and law firms would have spent one hour in total reading instructions (10 minutes) and determining that the rule does not apply to them or their clients (50 minutes) (81 FR 16003);

[19] The rulemaking record contains five comments that cite a study that supports these figures. Diana Furchtgott-Roth, *The High Costs of Proposed New Labor-Law Regulations,* MANHATTAN INSTITUTE, Jan. 2016.

[20] The NPRM for the Persuader Rule proposed that non-filing entities would require an hour to read the instructions and to determine that the rule does not apply to them. It also determined that no ''initial familiarization'' costs would be estimated. 81 FR 16003.

• The number of employers that would have filed Form LM–10 reports would have been 2,777 (81 FR 16004);

• The number of Form LM–10 reports filed would have been 2,777 (81 FR 16004);

• The total burden hours per Form LM–10 filer would have been 147 minutes. (81 FR 16014);

• The number of consultants that would have filed Form LM–20 reports would have been 358 (81 FR 16004);

• The number of Form LM–20 reports filed would have been 4,194 (81 FR 16004);

• The total burden hours per Form LM–20 filer would have been 98 minutes (81 FR 16012);

• The number of consultants that would have filed Form LM–21 reports would have been 358 (81 FR 16004);

• The number of Form LM–21 reports filed would have been 358 (81 FR 16004);

• Issues arising from the reporting requirements of the Form LM–21 would not have been appropriate for consideration under the Persuader Rule (81 FR 1600);

As relevant here, the Department accepts the following assumptions made in the Persuader Rule:

• Employers, business associations, and consultants (human resources firms, law firms, and labor relations consultants) would not have borne ''initial familiarization'' costs (81 FR 16003);

• Non-filing entities would have comprised those employers, business associations, and consultants (human resources firms, law firms, and labor relations consultants) that are not otherwise estimated to be filing (81 FR 16003);

• The number of non-filing consultants would have been 39,298 (81 FR 16016–17);

• The number of non-filing employers would have been 185,060 (81 FR 16017);

• Attorneys would have filed reports on behalf of consultants and employers (81 FR 16003);

• The estimated recordkeeping and reporting costs should be based on Bureau of Labor Statistics (BLS) data of the average hourly wage of a lawyer, including benefits (81 FR 16003);

• A lawyer (SOC 23–1011) has a fully-loaded wage of $114 (median hourly base wage of $56.81 plus fringe benefits and overhead costs of 100% of the base wage) [21]

[21] Source: Bureau of Labor Statistics, Occupational Employment Statistics, May 2016 National Employment and Wages Estimates. (*https://www.bls.gov/oes/current/oes_nat.htm*).

Based on the comments received, the Department makes the following assumptions:

• Non-filing employers, human resources firms, and law firms would have spent 2.75 hours in total reading instructions (45 minutes) for the Form LM–10 or the Form LM–20 and determining that the rule does not apply to them or their clients (120 minutes);

• The number of employers that would have filed Form LM–10 reports would have been 13,297;

• The number of Form LM–10 reports filed would have been 13,297;

• The total burden hours per Form LM–10 would have been 930 minutes;

• The number of consultants that would have filed Form LM–20 reports would have been 2,149;

• The number of Form LM–20 reports filed would have been 14,714;

• The total burden hours per Form LM–20 would have been 900 minutes;

• The number of consultants that would have filed Form LM–21 reports would have been 2,149;

• The number of Form LM–21 reports filed would have been 2,149;

• The total burden hours per Form LM–21 would have been 154.5 minutes.

Based on the comments received, and upon review of the litigation, the Department concludes that the Persuader Rule underestimated the burden with regard to the amount of time necessary for non-filers to read the form and instructions, the number of filers of Form LM–10 and Form LM–20, and the number of hours necessary to complete these forms. It also erred in failing to estimate the increase in the number of Form LM–21 filers and the increased burden the Persuader Rule caused through the Form LM–21.

The Burden on Non-Filers to Read the Forms

In the Persuader Rule, non-filing entities (employers and law firms/consultants) were estimated to need one hour in total to read the instructions (10 minutes) and determine that the rule does not apply to them or their clients (50 minutes). 57 FR 16003, 16007. This was not accurate. ''A more realistic assessment of the costs of these new forms to business would estimate a higher number of hours per firm, since businesses will need to spend time each year determining whether they are obligated to file.'' [Diana Furtchgott Roth, *The High Costs of Proposed New Labor-Law Regulations,* Manhattan Institute, Jan. 2016, at 8 n.16]. The U.S. District Court accepted as fact that the Department failed to adequately consider potential filers, concluding that ''[t]he department should have examined what the cost would be if all potentially affected employers and advisers were to file,'' and therefore that the Department did not provide ''an honest assessment of the potential effect of the proposed rule.'' *Nat'l Fed. of Indep.,* 2016 WL 3766121, at *15.

The Department estimates that, under the Persuader Rule, non-filing entities would have spent 2.75 hours total reading the instructions of the Form LM–10 or the Form LM–20 (45 minutes) to determine that the rule does not apply to them or their clients (120 minutes).

The additional reading time would have been necessary because of the vagueness of the Persuader Rule. The Persuader Rule broadened persuader reporting to certain categories of indirect contact where the employer remained free to accept or reject the recommendations of the consultant. That increase in scope would have made it more difficult to determine whether a report was required. One commenter reported, for example, ''DOL's new Rule creates a regulatory scheme that is so confusing and convoluted, with so many illogical exceptions and mandates, that neither employers nor their advisors, including labor law experts, can understand how to comply with it.'' [Associated Builders and Contractors of Arkansas LMSO–2017–0001–1096, p.13]. Another commenter noted, ''most of the cost of compliance will come from learning about the new rule and preparing the information to be recorded on the form.'' [Furchgott-Roth, p7, see fn 16.] Because the rule was vague as to the activities that resulted in reporting obligations, it would have taken more than an hour for an employer or a consultant to read, understand, and apply it to determine whether filing was required.

Besides vagueness, the sensitivity of the information to be included on the form would also have increased the amount of time required of non-filers. The Persuader Rule would have required close consideration of sensitive matters such as privilege and confidentiality that might have affected how information should be entered onto the forms. And filers would have required more time to review the instructions in detail because of the difficulty in accurately determining whether a report was owed. To the extent that the expanded reporting requirement would have potentially disclosed sensitive information or chilled efforts to seek help, the impact would have been greater and even more time would have been allocated to the determination. The Department now

concludes that non-filers would have spent 2.75 hours in total reading instructions (45 minutes) and determining that the rule does not apply to them or their clients (120 minutes).

The Department has not altered the time spent by non-filing employers on reading the Form LM–21 to determine that filing is not required. The review time spent on reading the Form LM–20 will provide employers with information on the regulatory regime and non-filers of Form LM–10 will have no obligation to file the Form LM–21.

The Number of Filers

The Department erred in its estimate of the number of filers. The Department had largely derived its estimates of the number of filers of both the LM–20 and LM–10 forms from the total number of representation and decertification elections supervised by the NLRB and the NMB. The Department assumed that, in 75% of such cases, the employer would utilize a consultant who will engage in reportable activity.[22] [81 FR 15964–65, 16004]. The Department considered only representation elections, but acknowledged that other reports 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.'' Id at 160004. The burden analysis would have benefited from the Department estimating a number from this acknowledged additional source of reports. Today, the Department estimates that five times the number of reports as those coming from election petitions would have resulted from non-election cases. As noted by the Department in the Persuader Rule, there is no reliable basis for estimating reports in the many areas outside of representation petitions. A commenter provided, however, ''given the narrow view the Department intends to take with respect to the advice exemption and the broad view of reporting obligations, it is likely that the vast majority of reportable activity will not involve representation or decertification campaigns at all.'' [U.S. Chamber of Commerce LMSO–2017–0001–1147]. As 2,104 reports are associated with representation elections we assume that there would have been another 10,520 ($2{,}104 \times 5 = 10{,}520$) associated with non-election activity, thus making the non-election activity akin to a ''vast majority.'' *See id.;* 81 FR 16004. Adding this to the election related reports equals a total of 12,624 reports (2,104 + 10,520 = 12,624). Adding this to the projected number of seminars, which is 2,090, the total number of reports would have been 14,714.[23] *See* 81 FR 16005. Assuming that there are 5.875 reports per filer, a determination made by the Persuader Rule (81 FR 16005),[24] the total number of Form LM–20 filers would have been 2,149 (12,624 \ 5.875 = 2,148.7).[25] This is an increase from the 358 filers determined by the Persuader Rule and is the result of counting the number of reports arising from non-representation/decertification persuader activity.

To determine the number of Form LM–10 filers, the Department combines the estimated 12,624 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 submitted pursuant to sections 203(a)(1)–(3), the non-persuader agreement or arrangement provisions). Seminar persuader agreements are not included because employers who attend a seminar were not required, under the Persuader Rule, to file a Form LM–10. This yields a total estimate of approximately 13,297 revised Form LM–10 reports (12,624 + 672.6 = 13,296.6) and thus 13,297 form LM–10 filers.

Firms that file LM–20 forms are also required by law to file LM–21 forms. ''Many law firms have never filed an LM–21 form because of the previous Interpretation from the Department. Under the New Interpretation, such firms would be required to file LM–21 forms with the Department.'' [Worklaw Network, LMSO–2017–0001–0253, p10]. As each filer of Form LM–20 reporting persuader activity must also file a Form LM–21, so long as receipts and disbursements were attributable to the persuader agreement or arrangement, the Department estimates that 2,149 Form LM–21 reports will be filed.

Time Necessary To Complete the Forms

The Persuader Rule underestimated the time necessary for filers to complete the forms. The rule's complexities not only increased the amount of time necessary for non-filing entities to read the instructions to understand whether to file, it also increased the amount of time it would require of filing entities to complete the form. As one commenter stated ''the lawyer or consultant must guess as to whether the client's object, in whole or in part, directly or indirectly, was to persuade or influence employees.'' [Seyfarth Shaw, LMSO–2017–0001–1062, p4]. As the table below shows, for Form LM–10, maintaining and gathering records and reading the instructions to determine applicability of the form and how to complete it was estimated by the Persuader Rule to take a total of 50 minutes. Upon reflection and review of the comments, it is clear that the time would have been much higher: A total of 306 minutes. The increased time was necessary because of the difficulty in categorizing activity as advice or persuader activity. ''Instructions . . . meant to clarify the rule demonstrate the lack of a clear distinction between reportable 'persuader activity' and exempt 'advice' under the new rule.'' House Report 114–739 (REPORT together with MINORITY VIEWS [To accompany H.J. Res. 87) LMSO–2017–0001–1151]. This lack of clarity increased the amount of time it would have taken to complete the Form LM–10 and Form LM–20.

In addition, the difficulty in discerning state of mind would have exacerbated the difficulty in completing the forms. The reporting obligation of an employer and its consultant would have turned on the subjectively perceived determination of each as to whether the policies developed were for the purpose of persuading employees with regard to unionizing and collective bargaining. As a commenter noted, ''In reality, there is no way to make this determination with any degree of confidence—particularly where both the employer and the

[22] The Department separately estimated the number of reports attributable to seminars. 81 FR 16005.

[23] The Persuader Rule explained the basis of the determination that 2,090 Form LM–20 reports would report the holding of a seminar. 81 FR 16004. To estimate the number of reportable 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. Of the 15,808 total entities in this category, the Department assumed that each of the 1,045 business associations that operate year round and have 20 or more employees would sponsor, on average, one union avoidance seminar for employers. Additionally, the Department assumed that all of the 1,045 identified business associations would contract with a law or consultant firm to conduct that seminar. Each of these parties would file a report, resulting in 2,090 reports.

[24] The Persuader Rule explained the relationship between the number of filers and the number of reports. The Department used its existing data on Form LM–20 reports. It determined that consultants, including law firms, file an annual average of approximately 5.875 reports a year. 81 FR 16004. Having determined the number of reports, the Department derived the number of filers.

[25] The number of reports of seminars are not counted when calculating the number of filers because, as determined in the Persuader Rule, the same law firms and consultants that handle organizing campaigns will be the ones that present (and report) seminars. 81 FR 16005.

lawyer/consultant have to make their own independent determination as to whether the work performed is reportable.'' [Proskauer, LMSO–2017–0001–0851, p10]. Although ''intent to persuade'' is and has always been an element in Form LM–20 and Form LM–10 reporting, the structure of the Persuader Rule made this difficult determination more frequent. Under the accept-or-reject test, issues of intent need not be considered absent direct contact between consultant and employee. Without such a clear delineation, the determination of intent would have come up routinely. This analysis is complicated where here, by definition, there are multiple parties involved, each with its own views and its own purpose in making the arrangement or agreement. As a result, in the Form LM–20 and LM–10 tables below, the Department increased the time estimated for the categories of questions that require analysis of the terms, objects and activities of the arrangement or agreement.

The Form LM–21

The burden of the Form LM–21 would also have been increased by the Persuader Rule. The Department recognizes that many difficult questions with regard to identifying persuader activity and how to fill out the form would have been undertaken for the Form LM–20 and resolved by the time the Form LM–21 must be completed. Nevertheless, the completion of the Form LM–21 would have been complicated by the Persuader Rule. The instructions required consultants to make efforts to allocate between ''receipts in connection with labor relations advice or services'' (which are subject to a reporting obligation) and other receipts for employers other than persuader clients. The same is true for disbursements. See Form LM–21, sections B and C. [26] Nevertheless, the term ''advice'' was narrowed by the Persuader Rule, with no explanation of how the revised definition applied to the Form LM–21. Under the Form LM–21, receipts and disbursement in connection with ''labor relations advice and services,'' must be reported. Under the reporting structure, labor relations advice is distinct from persuader activity but under the Persuader Rule there was no category of activity that was persuasive but nevertheless exempt (as advice). Further complicating the matter, the Department gave no guidance as to whether the revised definition of ''advice'' applied, or did not apply, to the Form LM–21. This lack of clarity increases the burden of the Form LM–21. Completing the form would have consumed 154.5 minutes.

The analysis covers a 10-year period (2018 through 2027) to ensure it captures major cost savings that accrue over time. In this analysis, we have sought to present cost savings discounted at 7 and 3 percent, respectively, following OMB guidelines.[27]

The Department has undertaken an analysis of the cost savings to covered employers, labor relations consultants, and others associated with complying with the requirements which are being rescinded by this rule. These cost savings are associated with both reporting and recordkeeping for Forms LM–10, LM–20, and LM–21.

The Persuader Rule was enjoined before it became applicable, so if the impacts of this final rule are assessed relative to current practice, the result would be that there is no impact. If, on the other hand, the Rule's effects are assessed relative to a baseline in which regulated entities comply with the Rule, the rescission would result in annualized cost savings of $92.89 million (with a 3 and 7 percent discount rate).

Under the Rule, employers would have needed to devote additional time and resources to the task of determining their responsibilities for complying with the rule. The Department used: (1) The number of private sector firms with 5 or more employees in addition to the number of consulting and lawyer offices; (2) the median hourly wage of a chief executive and a lawyer; and (3) the number of hours necessary to comply with the Rule. According to data from the U.S. Census Bureau's Statistics of U.S. Businesses, in 2015, there were 5,900,731 private firms in the United States. Of these businesses, 2,256,994 had five or more employees.[28] There are 6,461 Human Resource Management Consultant service firms (NAICS code 511612) and 165,435 Offices of Lawyers firms (NAICS code 541110).[29]

The Department determined that 185,060 [30] of the 2,256,994 private sector firms with five or more employees would have to review the rule and determine whether or not they have any obligation to file a Form LM–10 report. For this analysis, we estimated that for each of the 185,060 firms, a labor relations specialist (SOC 13–1075) with a fully-loaded wage of $60 (median hourly base wage of $29.96 plus fringe benefits and overhead costs of 100% of the base wage) would have spent 2.75 hours determining the firm's obligations relating to Form–10. The annualized cost for assessing compliance requirements for these potential filers would have been $30.53 million with 3 and 7 percent discount rate ($185{,}060 \times \$60 \times 2.75$ hours).

Once these employers determined that they needed to file Form LM–10, they would have also incurred reporting and recordkeeping costs associated with filling out the form. The Department estimates lawyers (SOC 23–1011) at a fully-loaded wage of $114 (median hourly base wage of $56.81 plus fringe benefits and overhead costs of 100% of the base wage) [31] for 13,297 firms would have spent 15.5 hours to complete the form. Using the methodology discussed above, the annualized recordkeeping cost for those who actually file Form LM–10 would therefore have been $23.50 million with 3 and 7 percent discount rate ($13{,}297 \times \$114 \times 15.5$ hours).

The Department estimates that 39,298 of 171,896 consulting and law offices would have to review the rule to determine whether or not they have any obligation to file a Form LM–20 report. For this analysis, we assume that for the 39,298 consulting and law offices, a lawyer with a fully-loaded wage of $114 (median hourly base wage of $56.81 plus fringe benefits and overhead costs of 100% of the base wage) [32] would have spent 2.75 hours determining their obligations relating to Form-20. The annualized cost for assessing

[26] The Form LM–21's Part B (Statement of Receipts) requires the filing law firm/consultant to report all receipts from employers in connection with labor relations advice or services regardless of the purposes of the advice or services. Part C (Statement of Disbursements) requires the filer to report all disbursements made by the reporting organization in connection with labor relations advice or services rendered to the employers listed in Part B.

[27] OMB Circular No. A–4, ''Regulatory Analysis,'' M–03–21 (Sept. 2003).

[28] Source: U.S. Census Bureau, Statistics of U.S. Businesses, 2015. (*https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html*).

[29] Source: U.S. Census Bureau, Statistics of U.S. Businesses, 2015. (*https://www.census.gov/data/tables/2015/econ/susb/2015-susb-annual.html*).

[30] The Department's methodology for estimating 185,060 is explained in the 2016 Final Rule, 81 FR at 16016–16017. In summary, the estimate is based on multiplying the ratio of estimated filing employers to filing consultants (7.76) by the total number of non-filing law firms and consultants (23,848), which is composed of the number of labor and employment firms (17,387) and human resources consultants (6,461). Other methodologies not described in detail herein can be referenced in the 2016 final rule.

[31] Source: Bureau of Labor Statistics, Occupational Employment Statistics, May 2016 National Employment and Wages Estimates. (*https://www.bls.gov/oes/current/oes_nat.htm*).

[32] Source: Bureau of Labor Statistics, Occupational Employment Statistics, May 2016 National Employment and Wages Estimates. (*https://www.bls.gov/oes/current/oes_nat.htm*).

compliance requirements for potential Form LM–20 filers would have been $12.32 million with 3 and 7 percent discount rate (39,298 × $114 × 2.75 hours).

Once the consulting and law offices determined that they needed to fill out Form LM–20, they would have also incurred reporting and recordkeeping costs associated with completing the form. The Department assumes labor relations specialists completing 14,714 forms would take 15 hours to complete the form. Using the methodology discussed above, the annual recordkeeping cost for those who actually file form LM–20 would therefore have been $25.16 million with 3 and 7 percent discount rate (14,714 × $114 × 15 hours).

The Department estimates that 39,298 consulting and law offices would have to review the rule to determine whether or not they have any obligation to file a Form LM–21 report. For this analysis, we assume that, for the 39,298 consulting and law offices, a lawyer (SOC 23–1011) with a fully-loaded wage of $114 would have spent ten minutes determining the office's obligations relating to Form-21. The annualized cost for assessing compliance requirements for potential Form LM–21 filers would have been $0.75 million with 3 and 7 percent discount rate (39,298 × $114 × 0.167 hours).

Once the consulting and law offices determined that they needed to fill out Form LM–21, they would have also incurred reporting and recordkeeping costs associated with completing the form. The Department assumes labor relations specialists completing 2,149 forms would take 2.58 hours to complete the form. Using the methodology discussed above, the annual recordkeeping cost for those who actually file Form LM–21 would therefore have been $0.63 million with 3 and 7 percent discount rates (2,149 × $114 × 2.58 hours).

Summary

The total annualized cost savings associated with this rule can be calculated by adding together the savings to potential filers of both Form LM–10, Form LM–20, and Form LM–21. There are also savings to actual filers of Form LM–10, Form LM–20, and Form LM–21. As shown in Table A, the total annualized cost savings are $92.89 million with a discount rate of 3 and 7 percent. For a perpetual time horizon, the annualized cost savings are the same at $92.89 million with a discount rate of 7 percent.

TABLE A—TOTAL COST SAVINGS

Cost savings summary	10-Year annualization		Perpetual annualization
	7% Discount rate	3% Discount rate	7% Disount rate
Form LM–10 Potential Filers (determining whether to file Form–10)	$30,534,900	$30,534,900	$30,534,900
Reporting and Recordkeeping for Form LM–10 reports	23,495,799	23,495,799	23,495,799
Form LM–20 Potential Filers (determining whether to file Form–20)	12,319,923	12,319,923	12,319,923
Reporting and Recordkeeping for Form LM–20 reports	25,160,940	25,160,940	25,160,940
Form LM–21 Potential Filers (determining whether to file Form–21)	748,155	748,155	748,155
Reporting and Recordkeeping for Form LM–21 reports	632,064	631,181	631,181
Total Cost Savings	92,891,781	92,890,898	92,890,898

TABLE B—FORM LM–10 RECORDKEEPING AND REPORTING BURDEN

Burden description: Form LM–10	Section of form	Persuader rule recurring burden (in minutes)	Recurring burden hours (in minutes) revised
Maintaining and gathering records	Recordkeeping Burden	25	126
Reading the instructions to determine applicability of the form and how to complete it.	Reporting Burden	25	180
Reporting LM–10 file number	Item 1.a	0.5	0.5
Identifying if report filed under a Hardship Exemption	Item 1.b	0.5	0.5
Identifying if report is amended	Item 1.c	0.5	0.5
Fiscal Year Covered	Item 2	0.5	0.5
Reporting employer's contact information	Item 3	2	2
Reporting president's contact information if different than 3	Item 4	2	2
Identifying Other Address Where Records Are Kept	Item 5	2	2
Identifying where records are kept	Item 6	0.5	2
Type of Organization	Item 7	0.5	0.5
Reporting union or union official's contact information (Part A)	Item 8	4	4
Date of Part A payments	Item 9.a	0.5	0.5
Amount of Part A payments	Item 9.b	0.5	0.5
Kind of Part A payments	Item 9.c	0.5	0.5
Explaining Part A payments	Item 9.d	5	5
Identifying recipient's name and contact information	Item 10	4	4
Date of Part B payments	Item 11.a	0.5	0.5
Amount of Part B payments	Item 11.b	0.5	0.5
Kind of Part B payments	11.c	0.5	0.5
Explaining Part B payments	11.d	5	5
Part C: Identifying object(s) of the agreement or arrangement	Part C	1	360

TABLE B—FORM LM–10 RECORDKEEPING AND REPORTING BURDEN—Continued

Burden description: Form LM–10	Section of form	Persuader rule recurring burden (in minutes)	Recurring burden hours (in minutes) revised
Identifying name and contact information for individual with whom agreement or arrangement was made.	Item 12	4	4
Indicating the date of the agreement or arrangement	Item 13.a	0.5	0.5
Detailing the terms and conditions of agreement or arrangement	Item 13.b	5	90
Identifying specific activities to be performed	Item 14.a	5	60.5
Identifying period during which performed	Item 14.b	0.5	0.5
Identifying the extent performed	Item 14.c	1	1
Identifying name of person(s) through whom activities were performed	Item 14.d	2	2
Identify the Subject Group of Employee(s)	Item 14.e	5	5
Identify the Subject Labor Organization(s)	Item 14.f	1	1
Indicating the date of each payment pursuant to agreement or arrangement.	Item 15.a	0.5	0.5
Indicating the amount of each payment	Item 15.b	0.5	0.5
Indicating the kind of payment	Item 15.c	0.5	0.5
Explanation for the circumstances surrounding the payment(s)	Item 15.d	5	30
Part D: Identifying purpose of expenditure(s)	Part D	1	1
Part D: Identifying recipient's name and contact information	Item 16	4	4
Date of Part D payments	Item 17.a	0.5	0.5
Amount of Part D payments	Item 17.b	0.5	0.5
Kind of Part D payments	Item 17.c	0.5	0.5
Explaining Part D payments	Item 17.d	5	5
Checking Responses	N/A	5	5
Signature and verification	Items 18–19	20	20
Total Recordkeeping Burden Hour Estimate Per Form LM–10 Filer		25	126
Total Reporting Burden Hour Estimate Per Form LM–10 Filer		122	804
Total Burden Estimate Per Form LM–10 Filer		147	930

TABLE C—FORM LM–20 RECORDKEEPING AND REPORTING BURDEN

Burden description: Form LM–20	Section of revised form	Persuader rule recurring burden (in minutes)	Recurring burden hours (in minutes) revised
Maintaining and gathering records	Recordkeeping Burden	15	126
Reading the instructions to determine applicability of the form and how to complete it.	Reporting Burden	20	180
Reporting LM–20 file number	Item 1.a	0.5	0.5
Identifying if report filed under a Hardship Exemption	Item 1.b	0.5	0.5
Identifying if report is amended	Item 1.c	0.5	0.5
Reporting filer's contact information	Item 2	2	2
Identifying Other Address Where Records Are Kept	Item 3	2	2
Date Fiscal Year Ends	Item 4	0.5	0.5
Type of Person	Item 5	0.5	0.5
Full Name and Address of Employer	Item 6	10	10
Date of Agreement or Arrangement	Item 7	0.5	0.5
Person(s) Through Whom Agreement or Arrangement Made	Items 8(a) and (b)	2	2
Object of Activities	Item 9	1	360
Terms and Conditions	Item 10	5	120
Nature of Activities	Item 11.a	5	61
Period During Which Activity Performed	Item 11.b	0.5	0.5
Extent of Performance	Item 11.c	0.5	0.5
Name and Address of Person Through Whom Performed	Items 11.d	2	2
Identify the Subject Group of Employee(s)	Item 12.a	5	5
Identify the Subject Labor Organization(s)	Item 12.b	1	1
Checking Responses	N/A	5	5
Signature and verification	Items 13–14	20	20
Total Recordkeeping Burden Hour Estimate Per Form LM–20 Filer		15	126
Total Reporting Burden Hour Estimate Per Form LM–20 Filer		83	774
Total Burden Estimate Per Form LM–20 Filer		98	900

TABLE D—FORM LM–21 RECORDKEEPING AND REPORTING BURDEN

Burden Description Form LM–21	Section of form	Persuader rule recurring burden (in minutes)	Recurring burden hours (in minutes) revised
Maintaining and gathering records	Recordkeeping Burden	10	10
Reading the instructions to determine applicability of the form and how to complete it.	Reporting Burden	10	10
Reporting LM–21 file number	Item 1	0.5	0.5
Period covered by report	Item 2	0.5	0.5
Part A: Reporting filers information	Item 3	0.5	0.5
Identifying Other Address where Records Are Kept	Item 4	0.5	0.5
Part B: Identifying Employer Name and Address	Item 5a	0.5	120
Termination Date	Item 5b	0.5	0.5
Amount of Receipts	Item 5c	0.5	0.5
Total of Receipts from All Employers	Item 6	0.5	0.5
Part C: Disbursements to Officers and Employees	Item 7		
Name(s)	Item 7a	0.5	0.5
Salary	Item 7b	0.5	0.5
Expenses	Item 7c	0.5	0.5
Total for Each Officer and Employee	Item 7d	0.5	0.5
Total Disbursements to All Officers and Employees	Item 8	1	1
Office and Administrative Expense	Item 9	0.5	0.5
Publicity	Item 10	0.5	0.5
Fees for Professional Services	Item 11	0.5	0.5
Loans Made	Item 12	0.5	0.5
Other Disbursements	Item 13	0.5	0.5
Total Disbursements for Reporting Period	Item 14	1	1
Part D: Schedule of Disbursements for Reportable Activity			
Name of Employer	Item 15a	0.5	0.5
Trade Name (if applicable)	Item 15b	0.5	0.5
Identify to whom payment was made	Item 15c	0.5	0.5
Amount of Payment	Item 15d	0.5	0.5
Purpose of Payment	Item 15e	0.5	0.5
Total Disbursements for Reporting Period	Item 16	1	1
President Signature and Date	Item 17	0.5	0.5
Treasurer Signature and Date	Item 18	0.5	0.5
Total Burden Estimate Per Form LM–21 Filer		35	154.5

VI. Regulatory Flexibility Analysis (RFA)

The Regulatory Flexibility Act of 1980 (RFA), 5 U.S.C. 601 *et seq.,* as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Public Law 104–121 (March 29, 1996), requires federal agencies engaged in rulemaking to consider the impact of their proposals on small entities, to consider alternatives to minimize that impact, and to solicit public comment on their analyses. The RFA requires the assessment of the impact of a regulation on a wide range of small entities, including small businesses, not-for-profit organizations, and small governmental jurisdictions. Agencies must determine whether a proposed or final rule would have a significant economic impact on a substantial number of those small entities. 5 U.S.C. 603 and 604. As part of a regulatory proposal, the RFA requires a federal agency to prepare, and make available for public comment, an initial regulatory flexibility analysis that describes the impact of the proposed rule on small entities. 5 U.S.C. 603(a).

The Final Rule will result in cost savings to small consultants and employers because it contains no new collection of information and relieves the additional burden that would have been imposed upon employers and labor relations consultants by the regulations published on Mar. 24, 2016. From the regulatory impact analysis above, the annualized cost savings per employer who filed Form LM–10 are estimated at $1,932.[33] The annualized cost savings per labor relation consultant who filed Form LM–20 and Form LM–21 is $2,337.[34] The cost savings to small entities, however, are not significant and below one percent of their annual gross revenues. The average annual gross revenue for the smallest businesses with 5 to 9 employees ranges from $389,846 for Accommodation and Food Services (NAICS code: 11) to $4.91 million for Wholesale Trade (NAICS code: 53). Therefore, the Department certifies that this rule does not have a significant economic impact on a substantial number of small entities.

[33] The annualized cost savings (with a 7 percent discount rate) for an employer from relieving the reporting and recordkeeping requirements for Form LM–10 is $1,932 ($60 × 2.75 hours + $114 × 15.5 hours).

[34] The annualized cost savings (with a 7 percent discount rate) for a consulting and law office from relieving the reporting and recordkeeping requirements for Form LM–20 and Form LM–21 is $2,337 ($114 × 17.75 hours + $114 × 2.747 hours).

VII. Paperwork Reduction Act (PRA)

The Paperwork Reduction Act of 1995 (PRA), 44 U.S.C. 3501 *et seq.,* provides that no person is required to respond to a collection of information unless it displays a valid OMB control number. In order to obtain PRA approval, a Federal agency must engage in a number of steps, including estimating the burden the collection places on the public and seeking public input on the proposed information collection.

This rule contains no new information collection requirements for purposes of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). The Department notes that, consistent with the previously mentioned injunction, the agency has already amended the information collection approval for Forms LM–10 and LM–20 and their instructions to reapply the pre-2016 versions. When

issuing its approval, the OMB issued clearance terms providing the previously approved versions of these forms will remain in effect until further notice. See ICR Reference Number 201604–1245–001.

As the rule still requires an information collection, the Department is submitting, contemporaneous with the publication of this document, an information collection request (ICR) to revise the PRA clearance to address the clearance term. A copy of this ICR, with applicable supporting documentation, including among other things a description of the likely respondents, proposed frequency of response, and estimated total burden may be obtained free of charge from the RegInfo.gov website at *https://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201710-1245-001* (this link will only become active on the day following publication of this document) or from the Department by contacting Andrew Davis on 202–693–0123 (this is not a toll-free number) / email: *OLMS-Public@dol.gov.*

Type of Review: Revision of a currently approved collection.

Agency: Office of Labor-Management Standards.

Title: Labor Organization and Auxiliary Reports.

OMB Number: 1245–0003.

Affected Public: Private Sector—businesses or other for-profits and not-for-profit institutions.

Total Estimated Number of Respondents: 2,488,213.

Number of Annual Responses: 2,488,528.

Frequency of Response: Varies.

Estimated Total Annual Burden Hours: 6,362,032.

Estimated Total Annual Other Burden Cost: $0.

VIII. Regulatory Impact

A. Unfunded Mandates Reform

This rule does 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, or in increased expenditures by the private sector of $100 million or more.

B. 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.

List of Subjects in 29 CFR Parts 405 and 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 instructions for Part A of the Form LM–10'' and adding in its place ''the second paragraph under the instructions for Question 8A of Form LM–10''.

§ 405.7 [Amended]

■ 3. Amend § 405.7 by removing the phrase ''Part D of the Form LM–10'' and adding in its place ''Question 8C of 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:

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. If there is any change in the information reported (other than that required by Item C. 10, (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 9th day of July, 2018.

Arthur F. Rosenfeld,

Director, Office of Labor-Management Standards.

[FR Doc. 2018–14948 Filed 7–17–18; 8:45 am]

BILLING CODE P

DEPARTMENT OF HOMELAND SECURITY

Coast Guard

33 CFR Part 165

[Docket Number USCG–2017–0914]

RIN 1625–AA00

Safety Zone; Taylor Bayou Turning Basin, Port Arthur, TX

AGENCY: Coast Guard, DHS.

ACTION: Temporary final rule.

SUMMARY: The Coast Guard is establishing a temporary safety zone for the upper reaches of Taylor Bayou Turning Basin in Port Arthur, TX. This action is necessary to provide protection for the levee and temporary protection wall located at the north end of the turning basin until permanent repairs can be effected. This regulation prohibits persons and vessels from entering the safety zone unless authorized by the Captain of the Port Marine Safety Unit Port Arthur (COTP) or a designated representative.

DATES: This rule is effective without actual notice from July 18, 2018 through January 31, 2023. For the purposes of enforcement, actual notice will be used from July 11, 2018 through July 18, 2018.

ADDRESSES: To view documents mentioned in this preamble as being available in the docket, go to *http://www.regulations.gov,* type USCG–2017–0914 in the ''SEARCH'' box and click ''SEARCH.'' Click on Open Docket Folder on the line associated with this rule.

FOR FURTHER INFORMATION CONTACT: If you have questions on this rule, call or email Mr. Scott Whalen, Marine Safety Unit Port Arthur, U.S. Coast Guard; telephone 409–719–5086, email *scott.k.whalen@uscg.mil.*

SUPPLEMENTARY INFORMATION:

I. Table of Abbreviations

CFR Code of Federal Regulations
COTP Captain of the Port Marine Safety Unit Port Arthur
DHS Department of Homeland Security
FR Federal Register
NPRM Notice of proposed rulemaking