CENTER FOR LABOR & A JUST ECONOMY
AT HARVARD LAW SCHOOL

GOVERNING FOR IMPACT

LaborLab

PROPOSED ACTION MEMORANDUM

Spotlight on Union-Busters:

Recommendations to the Department of Labor and Federal Trade Commission

May 2024

I. Introduction

The last few years have seen increasing worker organizing activity and public support for unions. However, some employers have met the re-energized labor movement with hostility. To oppose organizing campaigns, employers across the country hire union-avoidance law and consulting firms, or "persuaders."[1] These firms are deploying increasingly aggressive tactics to dissuade employees from unionizing.

The rise of persuader-driven union-busting activity raises at least three problems. First, as noted above, persuaders encourage extreme behavior by employers. Because persuaders do not have an ongoing relationship with the employees subject to the campaigns they design, they lean towards recommending highly coercive campaigns. Second, the use of persuaders without adequate transparency keeps from workers essential information about the source of the views, materials, and policies to which they are subjected. Without this information, they are unable to fully assess their employer's posture regarding their unionization. For example, they are unable to see how much their employers are willing to spend to prevent unionization or to assess the sincerity of their employer's anti-union or union-neutral messages. Third, the dominance of the persuader sector by a small group of law firms and consulting firms raises questions about whether their activities create a locus for coordination among employers.

While the adequacy of labor law to deal with the first problem is outside the scope of this memo – the National Labor Relations Act defines the line between highly coercive campaigns and unlawfully coercive campaigns – we address the second and third problems below.

Given a rise in union-busting activity, the Office of Labor-Management Standards ("OLMS") within the Department of Labor ("DOL") should revise its employer and management-side firm reporting requirements under the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401 *et seq.*, to fulfill its statutory mandate of shining a light on unscrupulous anti-union behavior. Such revisions would be in keeping with a recent recommendation from the DOL Office of the Inspector General (OIG) to consider "rule changes … to increase employer and consultant compliance."[2] Additionally, the Federal Trade Commission ("FTC") could investigate whether anti-union consultants facilitate coordination among employers in ways that constitute unfair methods of competition under the Federal Trade Commission Act ("FTCA"), 15 U.S.C. § 45(a)(1). Specifically, this memorandum suggests the following actions at DOL and FTC:

1. DOL: Rescind the OLMS Form LM-21 special enforcement policy and clarify that the Form LM-21 requires the reporting of receipts and disbursements from labor relations *advice* as well as persuasion activity.
2. DOL: Require employers who must complete LM-10 forms to indicate if they receive federal financial support in the form of grants, loans, or loan guarantees.
3. DOL: Take new action to expand the scope of employer reporting on Form LM-10.
4. FTC: Investigate whether union-avoidance firms facilitate unlawful conspiracies between competing employers to hold down wages and prevent unionization.

Any of these reforms could be pursued in isolation, but they may be most effective if pursued in concert. The purpose of this report is to explain each policy proposal and the legal basis upon which the agency could act.

[1] Dave Jamieson, *Workers Wanted A Union. Then The Mysterious Men Showed Up.,* (Jul. 24, 2023), https://www.huffpost.com/entry/workers-wanted-a-union-then-the-mysterious-men-showed-up_n_64b7dd60e4b0dcb4cab68347?gmc.

[2] U.S. Department of Labor, Office of the Inspector General, Report 09-24-002-16-001, OLMS Can Do More to Protect Workers' Rights to Unionize Through Enforcing Persuader Activity Disclosure 13, (May 3, 2024), https://www.oig.dol.gov/public/reports/oa/2024/09-24-002-16-001.pdf (hereinafter "OIG Report").

II. Justification

The DOL and FTC should consider the below actions because anti-union persuader activity is a significant barrier to workers' ability to organize. Recent years have seen a historic increase in organizing efforts. The number of union election petitions filed between October 2021 and September 2022 increased by 53 percent, and the number of workers represented by a union rose by 200,000.[3] Near-record proportions of Americans have positive views of unions.[4] An emboldened labor movement has led to concrete gains for workers: a threatened Teamsters strike led to a historic deal for workers at UPS,[5] the Hollywood writers' strike secured protections against studio abuse,[6] and the United Auto Workers union continues to flex its muscle to secure reasonable terms for autoworkers.[7]

And yet, union density rates continue to drop. The mismatch between organizing activity, public support for unions, and the number of workers who can translate that desire for representation into the reality of representation suggests that the process by which workers make their choice is flawed. The challenges to union organizing under current law are multi-faceted. The magnitude and complexity of the problem require that all the regulatory tools available to solve the problem be brought to bear.

Employers have met increased worker power with aggressive union-busting campaigns. In addition to in-house efforts, employers hire union-avoidance consultants and law firms that devise campaigns and strategies designed to thwart workers' organizing efforts.[8] The Economic Policy Institute estimated that employers spend more than $400 million per year on union-avoidance consultants – Amazon paid out more than $14 million to such consultants in 2022 alone.[9] The individual investments that employers make are quite large: an in-depth Huffington Post investigation into the industry explained that employers pay upwards of $3,000 a day, plus expenses, for each union-busting consultant.[10] The union-avoidance industry can also be quite consolidated in some sectors, like healthcare, where many employers contract with the same consultant.[11]

Congress enacted the LMRDA to ensure that workers know when their employer is paying a third party to influence their exercise of their organizing rights. Employers' and consultants' rampant underreporting undermines Congress' intent. A recent DOL OIG report found that, during the period between 2021 and 2023, only 428 employers and 211 consultants reported persuader activities to OLMS.[12] While the total amount of persuader activity during that period is difficult to estimate, the OIG noted that in 2021 alone there were

[3] Shierholz, et. al, *Unionization increased by 200,000 in 2022,* Economic Policy Institute, (Jan. 19, 2023), https://www.epi.org/publication/unionization-2022/.
[4] Lydia Saad, *More in U.S. See Unions Strengthening and Want It That Way,* Gallup, (Aug. 30, 2023), https://news.gallup.com/poll/510281/unions-strengthening.aspx.
[5] Noam Scheiber, *UPS Employees Approve New Contract, Averting Strike,* New York Times, (Aug. 22, 2023), https://www.nytimes.com/2023/08/22/business/economy/ups-contract-vote-teamsters.html.
[6] Alissa Wilkinson & Emily Stewart, *The Hollywood writers' strike is over — and they won big,* Vox, (Sept. 28, 2023), https://www.vox.com/culture/2023/9/24/23888673/wga-strike-end-sag-aftra-contract.
[7] Jeanne Whelan, *UAW members ratify record contracts with Big 3 automakers,* Washington Post, (Nov. 20, 2023), https://www.washingtonpost.com/business/2023/11/20/uaw-contract-ford-general-motors-stellantis/.
[8] Celine McNicholas, et. al, *Employers spend more than $400 million per year on 'union-avoidance' consultants to bolster their union-busting efforts,* Economic Policy Institute, (Mar. 29, 2023), https://www.epi.org/publication/union-avoidance/.
[9] *Id.*
[10] Dave Jamieson, *Workers Wanted A Union. Then The Mysterious Men Showed Up.,* (Jul. 24, 2023), https://www.huffpost.com/entry/workers-wanted-a-union-then-the-mysterious-men-showed-up_n_64b7dd60e4b0dcb4cab68347?gmc.
[11] *See, e.g.,* Submitted Forms LM-21, 2020-2022, Report IDs 860184, 837652, 752810 (Accessed: Mar. 5, 2024), https://olmsapps.dol.gov/query/orgReport.do?rptId=860184&rptForm=LM21Form, https://olmsapps.dol.gov/query/orgReport.do?rptId=837652&rptForm=LM21Form, https://olmsapps.dol.gov/query/orgReport.do?rptId=752810&rptForm=LM21Form (geographically proximate healthcare employers sharing one anti-union consultant).
[12] OIG Report.

roughly 1,100 union organizing campaigns, in which approximately 75 percent of employers hired persuader consultants. These numbers, widespread delinquency in filing, and well-documented mismatches between reports that should contain identical information, led the OIG to conclude that "OLMS did not effectively ensure required persuader activity reports were filed and that employers and consultants that filed did so timely and accurately."[13] Of course, this underreporting is not a new problem: a Congressional subcommittee issued similar findings in 1985[14] and, in the course of the Obama-era effort to revise LMRDA reporting, the OLMS estimated that roughly three-quarters of anti-union persuader activity went unreported between 2009 and 2014.[15] Although much of the problem is due to employer and consultant non-compliance and agency under-funding, federal agencies could take regulatory action to help shine a brighter light on employers' persuader activity,[16] as the OIG suggested in its report.[17]

III. Background

Under LMRDA § 203(a), employers must report through Form LM-10 any agreements or arrangements with third-party consultants to persuade employees with respect to their collective bargaining rights.[18] Under LMRDA § 203(b), labor relations consultants and attorneys also have reporting requirements: a Form LM-20 disclosing any agreements or arrangements with employers to persuade employees as to their collective bargaining rights, to be filed within 30 days of the formation of the agreements or arrangements, and, an annual Form LM-21 Receipts and Disbursements Report, if any qualifying payments were made or received during the fiscal year.[19]

The Obama administration attempted to revise the LM-10 and LM-20 reporting forms to narrow the DOL's long-standing guidance on what kind of activity qualified for the statute's "advice" exemption at LMRDA § 203(c), which exempts consultants from new reporting requirements triggered "by reason of his giving or agreeing to give advice to [an] employer."[20] The rule, described in more detail in Section IV(D), was invalidated by two district courts.[21] The Trump administration declined to vigorously appeal those decisions and rescinded the rule.[22]

The Biden administration recently undertook a more modest revision to the LM-10 employer form. In a final rule published July 28, 2023, DOL added a checkbox to the form requiring employers to reveal whether they were federal contractors or subcontractors during their prior fiscal year.[23] This, the OLMS

[13] OIG Report.
[14] U.S. House of Representatives, Committee on Education and Labor, Subcommittee on Labor-Management Relations, Report: The Forgotten Law—Disclosure of Consultant and Employer Activity Under the LMRDA, (1985), https://play.google.com/books/reader?id=veiFdh-gtWAgC&pg=GBS.PP1&hl=en.
[15] Office of Labor-Management Standards, Department of Labor, Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15923, 15933, (Mar. 24, 2016).
[16] *Labnet Inc. v. United States Dep't of Lab.,* 197 F. Supp. 3d 1159, 1168 (D. Minn. 2016) (acknowledging that the existing definition of "advice" is underinclusive; *see also* Dave Jamieson, *Why We Know So Little About The U.S. 'Union-Busting' Industry,* (Jul. 28, 2023), https://www.huffpost.com/entry/why-we-know-so-little-about-the-us-union-busting-industry_n_64c28622e4b03ad2b897077f.
[17] OIG Report at 13.
[18] 29 U.S.C. § 433(a).
[19] 29 U.S.C. § 433(b).
[20] *See generally* Office of Labor-Management Standards, Department of Labor, Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15923, (Mar. 24, 2016).
[21] *Labnet Inc. v. United States Dep't of Lab.,* 197 F. Supp. 3d 1159 (D. Minn. 2016); *Nat'l Fed'n of Indep. Bus. v. Perez,* No. 5:16-CV-00066-C, 2016 WL 3766121 (N.D. Tex. June 27, 2016).
[22] Office of Labor-Management Standards, Department of Labor, Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 83 Fed. Reg. 33826, (Jul. 18, 2018).
[23] Office of Labor-Management Standards, Department of Labor, Revision of the Form LM-10 Employer Report, 88 Fed. Reg. 49230, (Jul.

explained, would help inform workers and the public about when their tax dollars were being used against workers' organizing efforts.[24]

Since the 2016 Obama-era rule's promulgation, the DOL has left a "Special Enforcement Policy" in place, which permits many consultants to leave incomplete the most important sections of the year-end LM-21 report: statutory requirements that consultants who engage in persuader activity for *any* employer disclose all anti-union spending, not just concerning "persuader activity" but also "advice," for *every* employer.[25] This report describes this policy in more detail below.

OLMS has recently taken steps to increase enforcement of employer reporting requirements, including establishing a free compliance assistance program, setting up a tip line, and increasing the office's coordination efforts with the National Labor Relations Board ("NLRB") to identify potential violators.[26] We applaud these efforts and urge the Department to consider acting on our proposals.

IV. Proposed Actions

A. DOL: Rescind the OLMS Form LM-21 special enforcement policy

In the course of its 2016 attempted rewrite of the "advice" exception for LM-10 and LM-20 reporting, the Department — likely anticipating forthcoming legal challenges and some degree of confusion during the transition to a new policy, as well as the Department's intention to make changes to the Form LM-21[27] — decided to temporarily suspend full-throated enforcement of a separate LMRDA reporting and recordkeeping requirement: the annual LM-21 disclosures for anti-union consultants and law firms. Today, several years after the Obama update was invalidated in court and after two modest revisions, the "temporary" suspension remains in place.

The policy remains on the DOL website[28] and labor advocates have been asking for the policy's complete rescission.[29] OLMS took a modest step forward in April 2024, once again imposing LM-21 reporting

28, 2023).

[24] *See id.* at 49237.

[25] Office of Labor-Management Standards, Revised Form LM-21 Special Enforcement Policy, (Effective Jul. 3, 2024), (Accessed: Apr. 8, 2024), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy/revised-form-lm-21-sep, prior version: Office of Labor-Management Standards, OLMS-News 2016: Special Enforcement Policy for certain Form LM-21 Requirements, (Apr. 13, 2016), https://www.dol.gov/agencies/olms/about/newsletter/2016/2; prior version: Form LM-21 Special Enforcement Policy, (Jul. 18, 2018), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy.

[26] Jeffrey Freund, *Putting 'Management' Back Into the Labor-Management Reporting and Disclosure Act,* (Jan 5, 2022), https://blog.dol.gov/2022/01/05/putting-management-back-into-the-LMRDA; for more examples of actions that the OLMS has taken since 2021, *see* OIG Report at 22-23.

[27] Office of Labor-Management Standards, Revised Form LM-21 Special Enforcement Policy, (Effective Jul. 3, 2024), (Accessed: Apr. 8, 2024), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy/revised-form-lm-21-sep, prior version: Office of Labor-Management Standards, OLMS-News 2016: Special Enforcement Policy for certain Form LM-21 Requirements, (Apr. 13, 2016), https://www.dol.gov/agencies/olms/about/newsletter/2016/2; prior version: Form LM-21 Special Enforcement Policy, (Jul. 18, 2018), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy.

[28] Office of Labor-Management Standards, Revised Form LM-21 Special Enforcement Policy, (Effective Jul. 3, 2024), (Accessed: Apr. 8, 2024), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy/revised-form-lm-21-sep, prior version: Office of Labor-Management Standards, OLMS-News 2016: Special Enforcement Policy for certain Form LM-21 Requirements, (Apr. 13, 2016), https://www.dol.gov/agencies/olms/about/newsletter/2016/2; prior version: Form LM-21 Special Enforcement Policy, (Jul. 18, 2018), https://www.dol.gov/agencies/olms/r eporting/forms/lm-21-special-enforcement-policy.

[29] Bob Funk, director of the labor advocacy nonprofit LaborLab, said he "remains baffled as to why regulators haven't changed the [non-enforcement] policy. 'It's very frustrating,' he said." Dave Jamieson, "Why We Know So Little About the U.S. 'Union-Busting' Industry,"

obligations on filers for information that they also reported on their LM-20 forms.[30] But the revision stopped short of fully repealing the special enforcement policy, which, as we explain below, both flouts the statute, as interpreted by a majority of the courts of appeals, and continues to allow anti-union consultants to obscure their full client list. The DOL should fully withdraw this special enforcement policy and once again clarify its longstanding interpretation that the LM-21 requires reporting both persuader and advice activities.

Absent the special enforcement policy, the year-end Form LM-21s would provide much more comprehensive information than the LM-10 or LM-20. The latter forms only pertain when an anti-union consultant or law firm, on behalf of a specific employer, engages in reportable "persuader" activity, which is easier to identify if it involves direct contact with employees. For example, if an employer hires an anti-union consultant to give a speech opposing unionization to its employees, that clearly counts as "persuasion" and so triggers LM-10 and LM-20 filing requirements. But if a consultant drafts the same speech for a company executive to deliver, that may qualify as "advice" and therefore be exempt from reporting. (Such glaring loopholes inspired the Obama effort to narrow the advice exemption). Moreover, the LM-20 forms are employer-specific. So a consultancy that provides "persuader" services on behalf of one employer but only "advice" services for another would only have to file an LM-20 for the former. Finally, the LM-20 does not require a report of the costs involved in the persuader agreement.

By contrast, the LM-21 form requires a consultant who has filed at least one LM-20 form during the previous fiscal year to report *all* activities (including the amount paid for those activities) — both "persuasion" and, crucially, "advice" — for *any* employer in an itemized, year-end filing.[31] This not only allows the public to view the full scope of a consultant's work on behalf of a client (both its persuasion and advice activity), but it also offers the potential to reveal connections between consultants and employers who are otherwise exempt from filing the LM-10 and LM-20 forms. Put differently, a fully-enforced LM-21 can help circumvent employers' exploitation of the infamous "advice" exemption. (However, note that there remains a subset of potentially non-reportable activity under a fully-enforced LM-21 regime: if a consultant only ever engages in "advice" activity, it will never have to file an LM-20 and therefore would not be required to complete the more comprehensive LM-21 either).

The LM-21's broader reach arises from the text of the LMRDA: in the LM-10 and LM-20 context, the statute notes that "nothing in this section shall be construed to require any … person to file a report … by reason of his giving or agreeing to give advice to such employer" (the origin of the so-called "advice" exemption); but for the LM-21, the LMRDA explicitly sidesteps the advice exemption, stating that the year-end report must contain "receipts of *any kind* from employers on account of labor relations *advice* or services."[32] Although there has been ample judicial disagreement about the scope of the "advice" exemption,[33] courts largely agree that Form LM-21 requires disclosure of this broader category of activity.[34]

Huff Post (July 28, 2023), https://www.huffpost.com/entry/why-we-know-so-little-about-the-us-union-busting-industry_n_64c28622e-4b03ad2b897077f; *see also* Celine McNicholas, et. al, E*mployers spend more than $400 million per year on 'union-avoidance' consultants to bolster their union-busting efforts*, Economic Policy Institute, (Mar. 29, 2023), https://www.epi.org/publication/union-avoidance/(recommending re-scission of the special enforcement policy).

[30] Office of Labor-Management Standards, Revised Form LM-21 Special Enforcement Policy, (Effective Jul. 3, 2024), (Accessed: Apr. 8, 2024), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy/revised-form-lm-21-sep.

[31] *See, e.g.,* Office of Labor-Management Standards, Interpretive Manual at 260.300, https://www.dol.gov/agencies/olms/compliance-assistance/interprative-manual/200-reporting-and-disclosure (giving an example).

[32] 29 U.S.C. § 433(b) (emphasis added).

[33] Moshe Marvit, Judge's Ruling Re-Opens a Major Loophole that Allows Union Busters To Remain in the Shadows, In These Times, (Jul. 5, 2016), https://inthesetimes.com/article/new-ruling-re-opens-a-major-loophole-that-allows-union-busters-to-remain-in.

[34] *Douglas v. Wirtz,* 353 F.2d 30 (4th Cir.1965); *Price v. Wirtz,* 412 F.2d 647 (5th Cir.1969)(*en banc*); *Humphreys, Hutcheson and Mosely v. Don-*

Yet due to the still-active LM-21 special enforcement policy, consultants today need only to report on the LM-21 the receipts and disbursements that were already subject to reporting on the LM-20 and continue to evade reporting on their advice activity.[35] This defangs the most revelatory portions of the year-end form, parts B and C, which, as noted above, should require reporting of receipts from employers and the consultants' disbursements in connection with labor relations advice or services rendered to those employers, including those that would otherwise be hidden from disclosure under the "advice" exemption to LM-20.[36]

This has inhibited workers and their advocates, like LaborLab, which uses LMRDA reporting data to produce easy-to-understand resources for workers and unions. Organizers use this information during union election campaigns to ensure that workers know who is responsible for anti-union messaging,[37] as well as to force employers and consultants to comply fully with transparency laws.[38] With fulsome LM-21 reporting effectively suspended, it is more difficult for workers to trace the complex web of actors paid to dissuade them from exercising their rights under labor law.

As advocates like LaborLab and the Economic Policy Institute have argued for years, whatever reasons initially prompted the special enforcement policy no longer apply.[39] And while rescinding the policy will not fully resolve the larger issue of LMDRA non-compliance, it will certainly provide more insight than the status quo. The DOL should take immediate action to end the policy.

1. LEGAL AUTHORITY

The LMRDA, at 29 U.S.C. § 433(b), requires that consultants who engage in persuader activity (or provide information on employees during a union drive) file both a report within 30 days detailing that persuader activity (the LM-20 form) as well as a much more comprehensive annual report (the LM-21 form), which must:

> "contain[] a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof."

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ovan, 755 F.2d 1211 (6th Cir.1985); *Master Printers Ass'n v. Donovan,* 699 F.2d 370 (7th Cir.1983), *cert. denied,* 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984); *but see Donovan v. Rose L. Firm,* 768 F.2d 964, 975 (8th Cir. 1985) ("we hold that the annual report required by § 203(b) need not cover the services of a consultant by reason of his giving advice to an employer, representing an employer before a court or administrative agency, or engaging in collective bargaining on behalf of an employer, unless the consultant has performed persuader activities for that employer.").

[35] Office of Labor-Management Standards, Revised Form LM-21 Special Enforcement Policy, (Effective Jul. 3, 2024), (Accessed: Apr. 8, 2024), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy/revised-form-lm-21-sep (announcing that OLMS would not take enforcement actions based on a consultant's failure to report receipts or disbursements other than those "subject to reporting on Form LM-20").

[36] *See* Office of Labor-Management Standards, Form LM-21, (Accessed: Feb 9, 2024), https://www.dol.gov/sites/dolgov/files/OLMS/regs/compliance/GPEA_Forms/forms/lm-21_form_facsimile_2022.pdf.

[37] Mike Elk, *Union Buster Tracker Aims to Help Union Organizing,* Payday Report, (Mar. 16, 2022), https://paydayreport.com/union-buster-tracker-aims-to-help-union-organizing/.

[38] Nicole Girten, N*urses at St. Peter's Health allege union-busting tactics; hospital defends,* (Sept. 29, 2023), https://dailymontanan.com/2023/09/29/nurses-at-st-peters-health-allege-union-busting-tactics-hospital-defends/.

[39] Celine McNicholas, et. al, *Employers spend more than $400 million per year on 'union-avoidance' consultants to bolster their union-busting efforts,* Economic Policy Institute, (Mar. 29, 2023), https://www.epi.org/publication/union-avoidance/; LaborLab, Tweet, (Nov. 15, 2022), https://twitter.com/LaborLabUS/status/1592390958309838850.

The Fourth, Fifth, Sixth, and Seventh Circuit Courts have all upheld the DOL's longstanding interpretation of the annual report provision: because the provision uses the phrase "receipts of *any* kind from employers" and specifically references "advice," consultants who engage in persuader activity for any client must divulge information about *any* anti-union spending for any employer, including about activities otherwise characterized as "advice" (that is, notwithstanding the "advice" exemption at 29 U.S.C. § 433(c)).[40] The only circuit court to take a more limited view of the disclosure requirements was the Eighth Circuit in 1985, which held that the statute's language about annual reports, once triggered, does require consultants to disclose spending on "advice" activities on behalf of an employer who has also contracted for persuader activity under the statute, but does *not* require the disclosure of such spending by employers who themselves have not hired the consultant to engage in persuader activity.[41] The Eighth Circuit's view is an outlier, and the OLMS is on firm footing to follow the interpretation of the other four circuit courts.

Rescinding the policy has the added benefit of being procedurally simple. The policy states that it is effective "until further notice, which will be provided no less than 90 days prior to any change."[42] The enforcement policy was not published in the *Federal Register*. And so the agency needs only to post an update to its website announcing the beginning of the 90-day notice period. To encourage compliance, the agency could notify employers via mail or the office's newsletter list about the upcoming change to enforcement practices. However, the agency is not required to do so, nor to solicit comment in the *Federal Register*, as agency statements of policy are exempt from notice-and-comment requirements under the Administrative Procedure Act ("APA").[43] The Supreme Court recently held that an agency does not need to go through notice-and-comment in order to change or rescind an interpretive rule.[44] Indeed, the OLMS already revised the special enforcement policy in 2018 and in 2024, and did so without additional procedure.[45]

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[40] *Douglas v. Wirtz,* 353 F.2d 30 (4th Cir.1965); *Price v. Wirtz*, 412 F.2d 647 (5th Cir.1969)(*en banc*); *Humphreys, Hutcheson and Mosely v. Donovan,* 755 F.2d 1211 (6th Cir.1985); *Master Printers Ass'n v. Donovan,* 699 F.2d 370 (7th Cir.1983), *cert. denied,* 464 U.S. 1040, 104 S.Ct. 703, 79 L.Ed.2d 168 (1984).

[41] *See Donovan v. Rose L. Firm,* 768 F.2d 964, 975 (8th Cir. 1985) ("we hold that the annual report required by § 203(b) need not cover the services of a consultant by reason of his giving advice to an employer, representing an employer before a court or administrative agency, or engaging in collective bargaining on behalf of an employer, unless the consultant has performed persuader activities for that employer."); The Minnesota district court that blocked the Obama-era LM-10 rule appears to have mistakenly believed that the D.C. Circuit reached a similar conclusion, *Labnet Inc. v. United States Dep't of Lab.,* 197 F. Supp. 3d 1159, 1164 (D. Minn. 2016), but that decision expressly disclaimed to be answering this question. *See Int'l Union, (UAW) v. Dole,* 869 F.2d 616, 618 n. 3 (D.C. Cir. 1989) ("The circuit decisions to which the [D.C.] district court referred addressed a different issue: whether a consultant who engages in reportable persuasion on behalf of one client must include in its report information about advice given to other clients for whom no persuasion was performed. The answer returned in four of five circuits is yes…These decisions do not resolve the threshold question presented by this case: what is the appropriate characterization of activity that can be viewed as both advice and persuasion?").

[42] Office of Labor-Management Standards, OLMS-News 2016: Special Enforcement Policy for certain Form LM-21 Requirements, (Apr. 13, 2016), https://www.dol.gov/agencies/olms/about/newsletter/2016/2, revised in 2018, Form LM-21 Special Enforcement Policy, (Jul. 18, 2018), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy and in 2024, Revised Form LM-21 Special Enforcement Policy, (Effective Jul. 3, 2024), (Accessed: Apr. 8, 2024), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy/revised-form-lm-21-sep.

[43] 5 U.S.C. § 553(b)(A).

[44] *Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 101 (2015) (overturning the *Paralyzed Veterans* doctrine, explaining that "Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures when it amends or repeals that interpretive rule").

[45] *Compare* Office of Labor-Management Standards, OLMS-News 2016: Special Enforcement Policy for certain Form LM-21 Requirements, (Apr. 13, 2016), https://www.dol.gov/agencies/olms/about/newsletter/2016/2 *with* Office of Labor-Management Standards, Form LM-21 Special Enforcement Policy, (Jul. 18, 2018), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy and Office of Labor-Management Standards, Revised Form LM-21 Special Enforcement Policy, (Effective Jul. 3, 2024), (Accessed: Apr. 8, 2024), https://www.dol.gov/agencies/olms/reporting/forms/lm-21-special-enforcement-policy/revised-form-lm-21-sep.

B. DOL: Modify Form LM-10 to require employer reporting of federal grants, loans, and loan guarantees

As a follow-on to the OLMS's recent final rule requiring employers filing a Form LM-10 to indicate whether they are a federal contractor or subcontractor, the OLMS could likewise revise the Form LM-10 to require employers to check a box disclosing whether they receive grants, loans, or loan guarantees from the federal government.

Like the justification for the OLMS contractor revision, including this kind of information on the LM-10 would encourage transparency for workers and the public about the extent to which federal dollars are being used to persuade workers against joining a union. This could aid workers in their advocacy campaigns and put pressure on employers to play fair during organizing campaigns.

1. LEGAL AUTHORITY

The legal argument for requiring self-certification of receipt of federal funds could mirror that in the 2023 final form revision for federal contractor self-certification.[46] The LMRDA, at 29 U.S.C. § 433(a)(5), requires employers who made a reportable payment to (emphasis added):

> file with the Secretary a report, **in a form prescribed by him,** signed by its president and treasurer or corresponding principal officers showing in detail the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a **full explanation of the circumstances** of all such payments, including the terms of any agreement or understanding pursuant to which they were made.

29 U.S.C. § 438 authorizes the Secretary to issue "rules and regulations prescribing the form and publication" of required reports.

Congress enacted the LMRDA and the LM-10 requirement specifically because it was dissatisfied with "'large sums of money [that] are spent in organized campaigns on behalf of some employers' on persuader activities that 'may or may not be technically permissible'" and its "determination that the appropriate response to such persuader campaigns is to disclose them in the public interest and for the preservation of 'the rights of employees.'"[47] Congress viewed anti-union persuasion as a "suspect activity" that could be remedied through disclosure.[48]

In line with its authority under 29 U.S.C. § 438 to prescribe the form of reports required under § 433(a)(5), the DOL could determine that one of the "circumstances" required to be explained by §433(a)(5) is whether the payments concern employees performing work for an employer that receives direct financial assistance from taxpayers.

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[46] Office of Labor-Management Standards, Department of Labor, Revision of the Form LM-10 Employer Report, 88 Fed. Reg. 49230, (Jul. 28, 2023).

[47] Office of Labor-Management Standards, Department of Labor, Revision of the Form LM-10 Employer Report, 88 Fed. Reg. 49230, 49233, (Jul. 28, 2023) quoting S. Rep. NO. 86-187 at 10-12, reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (hereinafter "LMRDA Leg. Hist.") at 406-07; *see also Donovan v. Master Printers Ass'n, a Div. of Printing Indus. of Illinois Ass'n,* 532 F. Supp. 1140, 1142-6 (N.D. Ill. 1981), *aff'd sub nom. Master Printers Ass'n, Div. of Printing Indus. of Illinois v. Donovan,* 699 F.2d 370 (7th Cir. 1983) (explaining that "Congress did not look favorably on the activity of outside consultants" and quoting legislative history that stated that "employers should be required to report their arrangements with these union-busting middlemen").

[48] *Humphreys, Hutcheson & Moseley v. Donovan,* 755 F.2d 1211, 1215 (6th Cir. 1985) citing *Price v. Wirtz,* 412 F.2d 647 (5th Cir.1969).

As it was in the case of the federal contractor NPRM, disclosing financial assistance is consistent with Congress's intent in enacting the LMRDA: "[I]t continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection."[49]

Increased transparency informs the public of how discretionary federal funds are spent and empowers voters and activists to prevent taxpayer dollars from funding disruptions to harmonious labor relations, even if these activities are lawful.[50] Given the potential for disruption, the public and employees have an interest in knowing whether the government is indirectly funding persuader activity by offering grants, loans, and loan guarantees to these employers. Such a disclosure is necessary to ensure the government's impartiality in labor disputes is not compromised by secretive, indirect, and inadvertent government funding of anti-union campaigns.[51]

Workers, too, have a particular interest in knowing whether their employers receive federal financial assistance because, as taxpayers themselves, those employees should know whether they are indirectly financing persuasion campaigns regarding their own rights to organize and bargain collectively.[52]

C. DOL: Take regulatory or subregulatory action to expand the scope of LM-10 reporting

As noted above, during the Obama administration, OLMS attempted to modify its regulations to require LM-10 reporting for more transactions by narrowing the "advice exemption." OLMS sought this change to ensure that a greater proportion of spending on anti-union activities would be documented in LM-10 forms.[53] The final regulation was invalidated by two district courts in June 2016; the incoming Trump administration declined to vigorously defend or appeal those decisions and instead rescinded the regulation.[54]

The current OLMS could take one of three paths: (a) decline to make regulatory changes, and instead enforce existing law and guidance to reach a broader set of persuader activity that does not involve direct contact between union-avoidance consultants and employees; (b) issue a new regulation that modifies the Obama-era rule in a way that heeds requirements and recommendations of at least the Minnesota district court, as explained below;[55] or (c) reissue the Obama-era rule narrowing the "advice" exemption and vigorously appeal any adverse court decisions.

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[49] Office of Labor-Management Standards, Department of Labor, Revision of the Form LM-10 Employer Report, 88 Fed. Reg. 49230, 49233, (Jul. 28, 2023).

[50] *See* S. Rep. 187 at 10-12, LMRDA Leg. Hist. at 406.

[51] *See* 29 U.S.C. 401(a) (Congress finding that "it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection."); The White House, Executive Order 13494: Economy in Government Contracting, 74 Fed. Reg. 6101, (Feb. 4, 2009) (explaining "the policy of the United States to remain impartial concerning any labor-management dispute involving Government contractors.").

[52] Adapted from Office of Labor-Management Standards, Department of Labor, Revision of the Form LM-10 Employer Report, 88 Fed. Reg. 49230, 49237, (Jul. 28, 2023).

[53] Office of Labor-Management Standards, Department of Labor, Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15923, 15933, (Mar. 24, 2016).

[54] Office of Labor-Management Standards, Department of Labor, Rescission of Rule Interpreting "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 83 Fed. Reg. 33826, (Jul. 18, 2018).

[55] Doing so may come at the expense of reaching a narrower band of anti-union activity than the Obama-era regulation. Interestingly, a less vigorous approach to the breadth of the advice exemption may be made up for by our proposed rescission of the LM-21 special enforcement policy, which has the potential to capture receipts and disbursements made for "labor relations advice" provided to employers for whom a consultant has also performed persuader activity—and possibly also for employers for whom a consultant has not done so.

1. LEGAL AUTHORITY

Under 29 U.S.C. § 433(a)(4), employers must report through Form LM-10 any agreements or arrangements with third-party consultants 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. At 29 U.S.C. § 433(c), the statute creates the so-called "advice" exemption, by stating 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. § 438 authorizes the Secretary of Labor to "issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed" under the LMRDA and prescribe "such other reasonable rules and regulations … as he may find necessary to prevent the circumvention or evasion of such reporting requirements."

a) Modifying subregulatory guidance and enforcement

Rather than pursue a resource-intensive rulemaking procedure that invites the risk of prolonged litigation, the OLMS has the option of revising its internal subregulatory guidance documents and enforcement procedures to ensure that persuader activities that do not involve direct contact between consultants and employees, but that are also not "advice" within the terms of the statute, are reported on LM-10 forms.

The current OLMS policy that de-emphasizes enforcement against underreporting of non-direct contact persuader activities stems from a 1989 internal guidance memo from then-Acting Deputy Assistant Secretary for Labor-Management Standards Mario A. Lauro, Jr. That memo was issued without notice-and-comment procedures and stated:

> [T]here is no purely mechanical test for determining whether an employer-consultant agreement is exempt from reporting under the section 203(c) advice exemption. However, a **usual indication that an employer-consultant agreement is exempt is the fact that the consultant has no direct contact with employees** and limits his activity to providing to the employer or his supervisors advice or materials for use in persuading employees which the employer has the right to accept or reject.[56]

The OLMS has the authority to rescind the 1989 memo and ensure enforcement of the LMRDA's employer reporting requirements for transactions with consultants that have the object, directly or indirectly, to persuade employees about their organizing rights, regardless of whether the consultants come into direct contact with employees. Agencies have the authority to issue and modify guidance documents, which include agency policies, opinions, and recommendations. Guidance documents, and changes to them, are exempt from the APA's notice and comment requirements under the APA's exception for "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice."[57]

b) Revising the "advice" definition regulation based on court decisions

In *Labnet Inc. v. United States Department of Labor*, a Minnesota district court took issue with the Obama-era rule's attempt to define "advice" and persuader activities as mutually exclusive.[58] Notably, while the

[56] Office of Labor-Management Standards, Department of Labor, Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15923, 15936, (Mar. 24, 2016) quoting March 24, 1989 memorandum from then Acting Deputy Assistant Secretary for Labor-Management Standards Mario A. Lauro, Jr. (emphasis added).
[57] 5 U.S.C. § 553(b)(A); *see also Perez v. Mortg. Bankers Ass'n,* 575 U.S. 92, 101 (2015) (Explaining that agencies cannot be required to use more burdensome procedure to rescind or modify an APA procedures-exempt interpretation than it used to issue it in the first place.
[58] See subsection below.

Minnesota court held that the Obama-era interpretation was likely invalid under the statute, it did not enjoin the rule and signaled its openness to numerous aspects of the Obama-era rule besides its statutory interpretation of the advice exemption.[59] Importantly, the court did not dispute that the DOL had *some* discretion to expand the definition of "advice" (and the application thereof) to encompass more types of activities, agreeing with the OLMS that "an act can constitute persuader activity—and not constitute advice—even though the act does not involve direct contact with employees."[60]

A new rulemaking that seeks to comport with the Minnesota court's requirements, then, would have to acknowledge that advice and persuasion are not mutually exclusive categories.[61] The new rule could maintain the plain language definition of "advice" as "an oral or written recommendation regarding a decision or a course of conduct," which the MN court deemed to be "perfectly reasonable."[62] The rule would likely then need to identify common activities of union-avoidance consultants – perhaps based on the list in the Obama-era regulation[63] – and explain why and when they would or would not be covered by a narrower "advice" exemption.[64]

c) Re-issuing the Obama-era rule

The Obama-era rule sought to narrow the "advice" exemption by outlining activities that have the "object to persuade" employees without direct contact between the third party and employees and are not "advice" under the statute.[65] In doing so, the DOL put forward a new interpretation of the statute: rather than conceiving of "advice" as a safe harbor carve out from the larger category of otherwise reportable persuader activity, the Department concluded that "advice" and "persuasion" constituted entirely distinct categories of activity; that is, as the Department wrote in its Final Rule, "'[a]dvice' does not include persuader activities, i.e., actions, conduct, or communications by a consultant on behalf of an employer that are undertaken with an object, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively." The rule required LM-10 reporting of transactions if the arrangement: 1)

[59] *Labnet Inc. v. United States Dep't of Lab.,* 197 F. Supp. 3d 1159, 1176 (D. Minn. 2016) ("the regulation's potentially valid applications may outnumber its potentially invalid ones").
[60] *Id.* at 1168.
[61] *Labnet Inc.,* 197 F. Supp. 3d at 1168.
[62] *Id.*
[63] (1) drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees; (2) drafting, revising, or providing a speech for presentation to employees; (3) drafting, revising, or providing audiovisual or multimedia presentations for presentation, dissemination, or distribution to employees; (4) drafting, revising, or providing website content for employees; (5) planning or conducting individual employee meetings; (6) planning or conducting group employee meetings; (7) training supervisors or employer representatives to conduct individual or group employee meetings; (8) coordinating or directing the activities of supervisors or employer representatives; (9) Establishing or facilitating employee committees; (10) developing employer personnel policies or practices; (11) identifying employees for disciplinary action, reward or other targeting; (12) conducting a seminar for supervisors or employer representatives; (13) speaking with or otherwise communicating directly with employees.
[64] For example, the DOL could define several activities as not "advice" because the consultants are interacting with a person who has little to no control over a "decision or a course of conduct." This would cover some activities outlined in the Obama-era rule, like (7), (8), and (12), wherein the union avoidance consultant is training or managing supervisors or employer representatives. They are not interacting with a person who has the authority to reject their advice or make a decision or set a particular course of conduct. Another category of persuader activities that are probably not "advice" is implementation work, wherein the persuader takes an active role in the business. From the Obama-era rule, "[e]stablishing or facilitating employee committees" falls into this category. Other activities, particularly those specifically identified by the MN court *would* likely count as advice, at least in some instances. For example, one activity cited by the court was "drafting, revising, or providing written materials for presentation, dissemination, or distribution to employees," *Labnet Inc.,* 197 F. Supp. 3d at 1169 (explaining that a scenario where a lawyer provides an employer with a paper policy to distribute to employees is certainly "advice (as any reasonable person would define that term)).") This may count as advice because the materials are presumably being delivered to a decision-maker who has the authority to either use the materials, not use the materials, or request revisions (i.e. to make a "decision" or set a "course of conduct").
[65] Office of Labor-Management Standards, Department of Labor, Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 15923, (Mar. 24, 2016).

involved the consultant engaging in direct *or indirect* contact activities identified in the instructions;[66] and 2) the consultant did so with an object to persuade employees.[67] Two district courts invalidated the rule, and the incoming Trump administration failed to vigorously appeal those decisions. The current OLMS could reissue this rule and fully litigate it.

D. FTC: Investigate union-avoidance firms for unfair methods of competition

The FTC could explore exercising its authority to prevent unfair methods of competition by scrutinizing employers' and union-avoidance consultants' anti-union activities. In sectors where a small number of anti-union consultancies serve clients that comprise a large share of a particular sector, the FTC could consider investigating acts or practices that "facilitate" coordination in a way that makes it easier for parties to coordinate wages or other behavior in an anticompetitive manner. The FTC could investigate union-avoidance consultants as "hub" entities and the employers they serve as "spokes" in "hub-and-spoke" conspiracies, wherein an entity that has vertical relationships with several competitors helps coordinate anticompetitive behavior between the competitors.

The FTC could use OLMS' LMRDA disclosure data — particularly data made available by a fully-enforced Form LM-21 — to identify targets for investigation. Form LM-21 requires anti-union consultants to report receipts from employers, which could provide a network map between competing employers that may coordinate through an anti-union consulting firm. Specifically, the FTC could investigate anti-union consulting firms that provide services to employers that make up a large proportion of particular sectors to ensure that their services are not being used to drive down wages or working conditions in a concerted manner.

Although this use of Section 5 would break new ground, the FTC already uses its authority to investigate and prevent labor market abuses in other circumstances. Especially recently, the FTC has taken enforcement steps under its Section 5 unfair methods of competition ("UMC") authority to protect competition in labor markets.[68] In 2022, the FTC and the NLRB announced a memorandum of understanding that coordinates enforcement against noncompetes and other restrictive employment arrangements.[69] There has been a well-documented shift at the FTC and DOJ toward enforcement of antitrust laws against wage fixing and suppression.[70] The FTC recently finalized a regulation that uses its unfair methods of competition authority to ban non-compete clauses in employment contracts.[71] And the FTC has issued policy statements explaining how certain practices in labor markets can implicate antitrust principles.[72]

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[66] Office of Labor-Management Standards, Department of Labor, Interpretation of the "Advice" Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act, 81 Fed. Reg. 16027, (Mar. 24, 2016).
[67] *Id.* at 15969
[68] *See, e.g.,* Danielle Kaye, *Kroger-Albertsons Suit Wields Antitrust to Protect Union Workers,* BloombergNews, (Feb. 29, 2024), https://news.bloomberglaw.com/business-and-practice/kroger-albertsons-suit-spotlights-unions-in-novel-labor-approach.
[69] Federal Trade Commission, Federal Trade Commission, National Labor Relations Board Forge New Partnership to Protect Workers from Anticompetitive, Unfair, and Deceptive Practices, (Jul. 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/07/federal-trade-commission-national-labor-relations-board-forge-new-partnership-protect-workers.
[70] Jeffrey Jacobovitz, *A New Trend in Antitrust Enforcement: Wage Fixing and "No-Poach" Agreements,* (Aug. 11, 2021), https://www.jdsupra.com/legalnews/a-new-trend-in-antitrust-enforcement-6808636/.
[71] Federal Trade Commission, Noncompete Rule, (Accessed: Apr. 30, 2024), https://www.ftc.gov/legal-library/browse/rules/noncompete-rule.
[72] *See, e.g.,* Federal Trade Commission, FTC Policy Statement on Enforcement Related to Gig Work, (Sept. 15, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Matter%20No.%20P227600%20Gig%20Policy%20Statement.pdf.

1. LEGAL AUTHORITY

Under the FTCA, the FTC has authority to "prosecute any inquiry necessary to its duties in any part of the United States"[73] and "gather and compile information concerning, and to investigate from time to time the organization, business, conduct, practices, and management of any person, partnership, or corporation engaged in or whose business affects commerce."[74] After investigation, the FTC can initiate administrative or judicial enforcement if it has "reason to believe,"[75] that Section 5 is being violated.

Section 5, 15 U.S.C. § 45(a)(1), prohibits "[u]nfair methods of competition in or affecting commerce." Section 5 can reach both actual and incipient violations of antitrust statutes like the Sherman and Clayton Acts, as well as standalone violations of the FTC Act itself.[76] The Supreme Court has noted that, in establishing the "unfair methods of competition" standard in 1914, Congress "explicitly considered, and rejected," critics' suggestions to tie "the concept of unfairness to a common-law or statutory standard or by enumerating the particular practices to which it was intended to apply."[77] Several cases since the FTCA's passage that sought to narrow the scope of unfairness only to violations of antitrust laws, or even only to competition concerns, failed in the appeals courts.[78]

Labor market monopsony, which is an employer's ability to unilaterally establish sub-competitive wages and conditions of workers without them leaving to find other jobs, is an important harm that should be remedied by FTC enforcement.[79] Wage fixing and wage suppression – in addition to other conduct that "softens competition" for labor – has long been recognized as a type of competitive harm against which the antitrust laws should protect workers.[80] For example, in 2013 a court certified a class of registered nurses that alleged that eight Michigan hospital systems violated the Sherman Act when they agreed to regularly exchange compensation-related information in a manner that could reduce competition for labor.[81] The parties ultimately settled just before trial.[82]

A facilitating practice is any act or practice that "makes it easier for parties to coordinate price or other behavior in an anti-competitive way"[83] and encompasses "conduct by a respondent that is undertaken with other acts and practices that cumulatively may tend to undermine competitive conditions in the

[73] 15 U.S.C. § 43.
[74] 15 U.S.C. § 46(a).
[75] 15 U.S.C. § 45(b).
[76] An analogous example would be that the FTC Act can reach what are known as "invitations to collude" (literally a company asking, implicitly or explicitly, to engage in some sort of collusion). This violation is not reachable under the Sherman Act (because there is no "agreement" which is a legal requirement under Section 1, and Section 2's restrictions on vertical restraints would not apply either) or the Clayton Act (because the conduct doesn't apply to Sections 2,3,7, or 8); *see generally* Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act, (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.
[77] *F.T.C. v. Sperry & Hutchinson Co.,* 405 U.S. 233, 239-40 (1972) citing Senate Report No. 597, 63d Cong., 2d Sess., 13 (1914).
[78] *Id.* at 240-44.
[79] *See* Luke Taylor, *Antitrust Remedies for Union Busting,* Berk. J. Lab. Emp. 44:1 at 11, (May 2023), https://lawcat.berkeley.edu/record/1263789.
[80] Department of Justice, *Health Care Company Pleads Guilty and is Sentenced for Conspiring to Suppress Wages of School Nurses,* (Oct. 27, 2022), https://www.justice.gov/opa/pr/health-care-company-pleads-guilty-and-sentenced-conspiring-suppress-wages-school-nurses; Cohen Milstein, *Jien, et al. v. Perdue Farms, Inc., et al.,* (Accessed: Feb. 9, 2024), https://www.cohenmilstein.com/case-study/jien-et-al-v-perdue-farms-inc-et-al.
[81] *Merenda v. VHS of Michigan, Inc.,* 296 F.R.D. 528 (E.D. Mich. 2013).
[82] Bloomberg Law News, *Hospital to Pay Nurses $42M in Wage Case,* (Sept. 15, 2015), https://news.bloomberglaw.com/antitrust/hospital-to-pay-nurses-42m-in-wage-case.
[83] Areeda & Hovenkamp, Antitrust Law, para. 1407b, at 29 (2d ed. 2003).

market."[84] Information exchange is the most common type of facilitating practice,[85] and refers to the sharing of company-specific information that could enable would-be competitors to collude or otherwise harm competition.

The FTC routinely brings enforcement actions against anticompetitive information exchanges. In a 2009 settlement, for example, the FTC concluded that the National Association of Music Merchants, a trade association, convened and encouraged its members to share business strategies, including pricing plans. Those acts and practices were enough to establish a violation of FTCA Section 5 because they "had the purpose, tendency, and capacity to facilitate collusion and unreasonably constrain trade."[86]

Union-avoidance consultants accumulate an immense amount of information about their clients and their clients' employees. Using the consultant-employer mapping made available by LMRDA reporting data, the FTC could investigate union-avoidance consultants – especially those that advise clients composing a significant share of a particular sector – and employers to ensure that employers are not exchanging information about, for example, anti-union tactics and strategy, wage and benefit offerings, shift scheduling, and layoff and lockout plans in a way that could "facilitate" collusion that results in artificially sub-competitive wages.[87] This kind of tacit coordination may violate Section 5 even if there is no explicit agreement among competitors to engage in this conduct.[88]

For example, the healthcare sector is relatively concentrated in terms of employers sharing union-avoidance consultants. Form LM-21s that are already on file reveal that several healthcare employers in a single state have spent heavily over multiple years to contract the services of a single anti-union consultant.[89] If that consultant could or actually does serve as a conduit for sensitive business information between competing firms in a way that would undermine competitive conditions, that may constitute a violation of Section 5.

The fact that union-avoidance consultants are not themselves competitors of the employers absolves neither the consultants nor the employers from liability in a scheme of anticompetitive coordination. Antitrust enforcers routinely investigate potential conspiracies among competitors that are enabled by a party at a different point of the supply chain. These are known as "hub-and-spoke" conspiracies, and refer to when competitors (the "spokes") engage in anticompetitive conduct vis-a-vis each other by coordinating, not "horizontally" with each other, but instead through another entity (the "hub") with whom they each have a separate "vertical" relationship.

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[84] Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 14, (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

[85] OECD, Facilitating Practices in Oligopolies 9, (2007), https://www.oecd.org/daf/competition/41472165.pdf.

[86] Complaint, *In the Matter of National Association of Music Merchants, Inc.,* Docket No. C-4255 at 2, (Apr. 2009), https://www.ftc.gov/sites/default/files/documents/cases/2009/04/090410nammcmpt.pdf.

[87] The FTC recently rescinded a policy that delineated a "safe harbor" for information exchanges, so the Commission's posture on information exchanges is more aggressive than it has been in the past. Candace Friel, et. al, *The Other Shoe Drops: What the FTC's Withdrawal of Long-Standing Antitrust Guidance in the Healthcare Industry and the Demise of its Information Sharing Safety Zone Really Means for Clients,* JDSupra, (Jul. 28, 2023), https://www.jdsupra.com/legalnews/the-other-shoe-drops-what-the-ftc-s-6588703/.

[88] Federal Trade Commission, Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act 13 n. 76, (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf, citing Analysis to Aid Public Comment, In re BMG Music et. al, 65 Fed. Reg. 31,319 (2000), Docket No. C-3973 (2000) (Decision & Order) (distributors of pre-recorded music, acting in parallel but without agreement, impose identical coercive limits on retailer advertising of discounts).

[89] *See, e.g.,* Submitted Forms LM-21, 2020-2022, Report IDs 860184, 837652, 752810 (Accessed: Mar. 5, 2024),
https://olmsapps.dol.gov/query/orgReport.do?rptId=860184&rptForm=LM21Form,
https://olmsapps.dol.gov/query/orgReport.do?rptId=837652&rptForm=LM21Form,
https://olmsapps.dol.gov/query/orgReport.do?rptId=752810&rptForm=LM21Form (geographically proximate healthcare employers sharing one anti-union consultant).

A leading case and helpful illustration is the Second Circuit Court of Appeals decision in *United States v. Apple*.[90] In that case, the court found that Apple facilitated a conspiracy between book publishers to increase the price of eBooks in the company's effort to resist the Amazon Kindle's effects on the book market.[91] In doing so, Apple leveraged its relationships with individual book publishers to assure them that they could maintain higher prices because competing book publishers had also made an agreement with Apple. In *Toys "R" US, Inc. v. Federal Trade Commission,*[92] the Seventh Circuit upheld an FTC order against the toy retailer that found that the company coordinated a horizontal conspiracy among toy manufacturers to offer bad terms to other retailers. In both cases, the illicit coordination was facilitated by a "hub" entity with which the horizontal competitors had a vertical relationship.

Similarly, union avoidance firms have vertical contracts with employers. If the same avoidance firm has enough vertical contracts within an industry, the shared tactics and efforts to thwart worker organizing may have the effect of facilitating an implicit agreement among competing employers to impede unionization and worsen wages and job conditions throughout the sector. This can limit workers' options for mobility and reduce employers' incentives to compete for workers by improving job conditions and wages. The Department of Justice's guidance on antitrust "red flags for employment practices" highlights agreements "with another company about employee benefits."[93] If vertical agreements between employers and a dominant union-avoidance consultant facilitate horizontal coordination on wages and benefits, they could be subject to antitrust scrutiny based on the existence of a hub-and-spoke conspiracy.

V. Conclusion

The rise in union-busting activities through persuaders presents significant challenges to the goals of worker organizing efforts. This report has outlined strategic actions that the DOL and the FTC can undertake to address the lack of transparency and potential anti-competitive behavior in the union-avoidance industry. By rescinding the OLMS Form LM-21 special enforcement policy and expanding reporting on Form LM-10, the DOL can enhance transparency and provide workers with crucial information about anti-union activities. As described above, the FTC could investigate firms to curb anti-competitive practices that harm workers' rights to organize. Implementing these reforms, whether individually or collectively, will strengthen regulatory oversight and support fair labor practices, reflecting the agencies' statutory mandates to protect workers and promote fair competition. This approach will help ensure that workers can make informed decisions about unionization without undue influence from covert persuader activities.

[90] 791 F.3d 290 (2d Cir. 2015).
[91] *Apple,* 791 F.3d at 314.
[92] 221 F.3d 928 (7th Cir. 2000).
[93] Department of Justice, Antitrust Red Flags for Employment Practices, (Accessed: Feb. 9, 2024), https://www.ftc.gov/system/files/documents/public_statements/992623/ftc-doj_hr_red_flags.pdf.


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