Opening Statement of Ranking Member Bobby Scott
Committee on Education and the Workforce
Markup up H.J Res 87, a Joint Resolution of Disapproval
of the U.S. Department of Labor's Persuader Rule
May 18, 2016

Mr. Chairman, the resolution we are taking up today would harm workers' free choice in deciding whether to be represented by a union for the purposes of collective bargaining.

Since its inception in 1959, the Labor-Management Reporting and Disclosure Act (LMRDA) has required employers and union avoidance consultants to disclose **both** direct and indirect persuader activity.

In 1962, DOL issued informal guidance which classified **indirect** persuader activities as non-reportable "advice," and it did so without ever going through notice and comment rulemaking. This interpretation created a massive loophole which left workers in the dark about indirect persuader activity, and rendered a key part of LMRDA's disclosure requirements inoperative.

To address this problem, DOL commenced formal notice and comment rulemaking in 2011, and on March 24, 2016, DOL issued its persuader rule which closed this loophole. The final rule requires consultants and the employers that hire them to file reports involving "indirect persuader activity." I applaud the DOL final rule as it brings reporting requirements back in line with the statute's mandate.

Some questioned the legal authority of this action, but LMRDA Section 208 clearly states:

> "The Secretary shall have authority to issue, amend, and rescind rules and regulations . . . as he may find necessary **to prevent the circumvention or evasion of [the Act's] reporting requirements."**

That Congressional directive is precisely what DOL followed by ending a 54-year circumvention of the Act's reporting requirements.

Some opponents to this rule also argue that workers have the right to hear both sides of the debate. I agree. But as they hear both sides,

workers deserve to know whether what they are hearing is the product of certain, well-known consultants brought in to influence their decisions, and how much their employers are paying to influence their views. The Persuader Rule is about transparency. Thanks to this rule, the curtain will be pulled back, and working men and women will be able to see their employers' arrangements with union avoidance consultants.

Moreover, the Persuader Rule levels the playing field. Unions already must disclose far more information about lawyers and consultants than is required of employers and their consultants under this Rule.

As we learned at the April 27th HELP Subcommittee hearing, union reports filed with the Department of Labor can be hundreds of pages long. The Employer's reporting form is a mere 4 pages and the Consultant's form is a mere 2 pages.

And despite the fact that attorneys and law firms have increasingly engaged in persuader activities, the American Bar Association questions whether attorneys should not have to comply with the DOL's final rule.

Any attorney who confines himself only to giving legal advice incurs no obligation to report under this rule. Rather, attorneys must disclose their arrangements when they cross over from giving standard legal advice to engaging in activities to persuade employees against organizing and exercising their own rights.

And none of the information required to be reported (such as the identity of the client or the fees paid) is covered by the attorney-client privilege. Moreover, attorney client privileged information is expressly excluded from the reporting requirements.

But the reporting requirements are consistent with ABA Model Rule of Professional Conduct 1.6 outlines the duty to keep information relating to the client confidential, but states: "A lawyer may reveal information

relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order." That principle is no different than requiring an attorney to disclose lobbying activity for a client under the Lobbying Disclosure Act.

A letter from legal ethics and labor law professors from across the country affirms this view. Mr. Chairman, I ask unanimous consent to include this letter from 32 **law professors** in the record.

Mr. Chairman. This markup is a lost opportunity. Today, we could be considering legislation that the overwhelming majority of Americans support. There are bills available for markup to raise the minimum wage, reduce wage theft, strengthen worker safety and promote a secure retirement.

Instead, since the Majority took control in 2011, this Committee has used its time to hold 24 hearings or mark-ups solely focused on ways to weaken the ability of workers to organize and bargain for a better life.

The Resolution before us today will undermine the principle of transparency embodied in the reporting and disclosure requirements. Transparency is not just a union value, it is a democratic value, and this rule furthers workers' ability to make an informed choice.

The only losers from the DOL's persuader rule are those who have been lurking in the shadows, shielded by a DOL policy that was at odds with the direction Congress provided over 50 years ago.

I urge a "no" vote on this Resolution of Disapproval.