

NFIB
The Voice of Small Business.
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Via <http://www.regulations.gov>
and U.S. First Class Mail

June 22, 2017

The Honorable R. Alexander Acosta
Secretary of Labor
Attn: Andrew Davis, Chief
Division of Interpretations and Standards
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue NW
Washington, DC 20210

Dear Mr. Secretary:

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

This letter presents comments of the National Federation of Independent Business (NFIB) on the Notice of Proposed Rulemaking (NPRM), "Rescission of Rule Interpreting 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," RIN 1245-AA07, 82 *Fed. Reg.* 26877 (June 12, 2017). NFIB is an incorporated nonprofit association with more than 300,000 members across America. NFIB protects and advances the ability of Americans to own, operate, and grow their businesses and, in particular, ensures that the governments of the United States and the fifty states hear the voice of small business as they formulate public policies. NFIB sets forth below three recommendations in response to the NPRM.

Section 203 of the LMRDA, the Advice Exception, and the Persuader Rule

Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) (29 U.S.C. 433) addresses the following:

- (1) activities of which an object is, directly or indirectly, to persuade employees to exercise, not exercise, or how to exercise, the right to organize and bargain collectively through representatives of their own choosing; and
- (2) the activity of supplying an employer information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer (other than information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding).

Subsection 203(a), paragraph (4), of the LMRDA imposes on employers a duty to file reports with the Secretary of Labor concerning any agreement or arrangement between the employer and a labor relations consultant, other independent contractor, or organization under which the latter engages in activities described above. Similarly, subsection 203(b) of the LMRDA imposes, on every person who engages in activities described above under an agreement or arrangement with an employer, a duty to file reports with the Secretary of Labor.

The duties imposed by subsections 203(a) and (b) are subject to an exception set forth in subsection 203(c) of the LMRDA, known as the "Advice Exception." Subsection 203(c) provides (emphasis added):

(c) Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

As is clear from the text of subsection 203(c), the subsection provides broad protection to the right of employers to obtain advice on labor matters free of government intrusion in the form of the reporting mandates in subsections 203(a) and (b). Despite that clear statutory policy, the Department of Labor issued in 2016 a final rule, known as the "Persuader Rule," that misconstrued subsection 203(c) to the point that the statutory protection for advice evaporated. "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," 81 *Fed. Reg.* 15924 (March 24, 2016). For example, the Persuader Rule required reporting in four situations that would not previously have been reportable: when a consultant who has no direct contact with employees undertakes the following activities with an object to persuade employees: (a) plans, directs, or coordinates activities undertaken by supervisors or other employer representatives; (b) provides material or communications to the employer for dissemination or distribution to employees; (c) conducts a seminar for supervisors or other employer representatives; or (d) develops or implements personnel policies, practices, or actions for the employer.

NFIB agrees with the U.S. District Court for the Northern District of Texas that, as the Court stated in its decision upon issuing a preliminary injunction, the Persuader Rule was "defective to its core because it entirely eliminates the LMRDA's Advice Exemption." *NFIB v. Perez*, 2016 WL 3766121, para. 175 (N.D. Tex. June 27, 2016). The Court rightly set aside the Persuader Rule under the Administrative Procedure Act (5 U.S.C. 706(2)) upon issuing a permanent injunction in the case. *NFIB v. Perez*, 2016 WL 8193279 (N.D. Tex. Nov. 16, 2016). NFIB hereby incorporates in these comments by reference the decisions, judgments, filings, and evidence in the record of *NFIB v. Perez*, No. 5:16-cv-00066 (N.D. Tex.), specifically including the documents issuing a preliminary injunction (Doc. 85, "Because the scope of the irreparable injury is national, and because the DOL's New Rule is facially invalid, the injunction should be nationwide

in scope”), a permanent injunction (Doc. 135, “the Court is of the opinion that” the Persuader Rule “should be held unlawful and set aside pursuant to 5 U.S.C. §706(2), and the Court’s preliminary injunction preventing the implementation of that Rule should be converted into a permanent injunction with nationwide effect,”) and the final judgment (Doc. 145, Persuader Rule “is held unlawful and is set aside”). NFIB notes that, as a legal matter, the Persuader Rule, having been set aside, is a nullity; nevertheless, upon the Department’s withdrawal of its appeal in the Fifth Circuit, NFIB would welcome the Department’s revocation of the Persuader Rule to clean up the regulation books.

NFIB Recommendations to the Department of Labor

NFIB makes three recommendations in response to the NPRM.

First, if the Government dismisses its appeal in *NFIB v. Acosta*, No. 17-10054 (5th Cir.) (appeal held in abeyance by order of June 15, 2017), NFIB would recommend adoption of the Department of Labor’s proposal in the NPRM “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 15, 2016.” With the Government’s dismissal of its appeal, the decisions of the U.S. District Court for the Northern District of Texas, 2016 WL 3766121 (N.D. Tex. June 27, 2016) (preliminary injunction and accompanying opinion) and 2016 WL 8193279 (N.D. Tex. Nov. 16, 2016) (permanent injunction and accompanying opinion) would become final -- the last and binding decisions of the judiciary. The District Court’s decisions make clear that the Department of Labor’s issuance of the Persuader Rule in 2016 exceeded the Department’s authority under section 203(c) of the LMRDA, improperly arrogated to the Department the power to regulate advisory relationships, and trampled on the First Amendment rights of free speech and association. As the last and binding decisions of the judiciary, the District Court’s decisions would help guide the Department in recognizing the proper limits of its power when issuing future regulations that implement section 203 of the LMRDA.

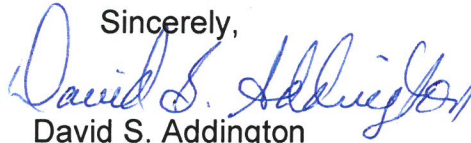
Secondly, NFIB recommends that the Department review all its remaining regulations and interpretive and other guidance implementing section 203 of the LMRDA and tailor them more closely to the text of the LMRDA. The Department should revise such regulations and guidance to ensure, in particular, that the regulations give the full, broad scope to the statutory exemption for advice in subsection 203(c) of the LMRDA.

Finally, and to assist the Department of Labor in complying with Administrative Procedure Act generally, the NFIB recommends that the U.S. Department of Labor desist from refusing to accept written comments through the U.S. mail from the American people on its notices of proposed rulemaking. In the NPRM (82 *Fed. Reg.* at 26877, col. 2), the Department of Labor stated that commenters could submit comments “only” by submission of electronic comments to the federal eRulemaking Portal at <http://www.regulations.gov>. The prohibition on non-electronic comments is inconsistent with the law and deprives many Americans of the opportunity to participate in the Department’s rulemaking process. Section 553(c) of title 5 of the U.S. Code provides that “the agency shall give interested persons an opportunity to participate in the rule

making through submission of written data, views, or arguments” and thus it is highly doubtful that the agency can lawfully prohibit an interested person from filing comments by sending written comments to the Department through the U.S. mail. Moreover, the prohibition on non-electronic comments excludes from participation in the Department’s rulemaking processes Americans who lack internet access. See, Thom File and Camille Ryan, “Computer and Internet Use in the United States: 2013,” U.S. Bureau of the Census (ACS-28) (November 2014).

The NFIB appreciates the opportunity to comment on the NPRM and looks forward to continuing to assist the U.S. Department of Labor in efforts to implement the laws of the United States in a manner that refrains from imposing unwarranted burdens on Americans who own, operate, and grow the small and independent businesses that generate so much economic growth and so many jobs for Americans.

Sincerely,



David S. Addington

Senior Vice President and General Counsel