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Office of Labor-Management Standards,
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210
Attn: Andrew Davis, Chief of the Division of Interpretations and Standards

RE: "Rescission of Rule Interpreting 'Advice" Exemption in Section 203 (c) of the Labor-Management Reporting and Disclosure Act"

The American Fuel & Petrochemical Manufacturers (AFPM)[1] appreciates the opportunity to comment on the rescission of the rule interpreting the "advice" exemption in section 203(c) of the Labor-Management Reporting and Disclosure Act ("LMRDA" or the "Act").[2] AFPM members are interested in this matter, as many of them are subject to the provisions of the Act.

I. Background

In 1959, the Act was developed at the request of Congress to protect the rights and interests of both unions and employers. Among other items, the LMRDA established reporting requirements for labor organizations, union officers, union employees, employers, labor-relations consultants, and surety companies.

The Act contains several exceptions to the reporting requirements. Specifically, section 203(c) exempts the disclosure of individuals who provide advice such as attorneys and consultants. Historically, this exception has operated to exclude the disclosure of those persons and companies who provide advice to employers in the areas of labor relations, union representation and collective bargaining. The purpose of this exception is to promote candid conversations between a company and its legal representatives and/or labor consultants.

[1] AFPM is a trade association whose members include nearly 400 companies that encompass virtually all U.S. refining and petrochemical manufacturing capacity.
[2] 82 *Federal Register* 26887 (June 12, 2017).

In June 2011, the Department of Labor ("DOL") issued a proposed rule reinterpreting the "advice" exemption of the Act.[3] On September 21, 2011, the National Petrochemical & Refiners Association[4] was one of over 9,000 entities to submit comments to DOL on the interpretation of the "advice" exemption. NPRA opposed the proposed rule because it would mandate the disclosure of confidential agreements between employers and law firms and/or consultants. NPRA's comments also stated that the proposed rule was beyond the scope of the Act and conflicted with section 8(c) of the National Labor Relations Act ("NLRA"), which states, "The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."[5] The 2011 NPRA comments concluded by emphasizing that the proposed rule violated employers' freedom of speech, expression and association rights.

The Rule was finalized on March 24, 2016; however, the effective date of the Rule was delayed due to pending legal challenges.[6]

II. Legal Challenges

On November 16, 2016, the U.S. District Court for the Northern District of Texas issued a nationwide injunction against the enforcement of the Rule in *National Federation of Independent Business* v. *Perez*. NFIB brought suit alleging the Rule infringed on their members' rights to obtain confidential legal advice from third parties and inhibited their ability to communicate with their employees about unions and workplace issues. NFIB also argued that the Rule violated the Administrative Procedure Act ("APA"), the Regulatory Flexibility Act ("RFA"), and the First and Fifth Amendments.

The Court struck down the Rule and issued a nationwide injunction against the enforcement of the Rule, holding that the Rule violated free speech and could not survive strict scrutiny because it failed to advance any compelling government interest. In response to the Court's ruling, DOL issued a Notice of Proposed Rulemaking to rescind the Rule.[7]

III. AFPM's Position

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[3] 76 *Federal Register* 36178 (June 11, 2011).
[4] NPRA changed its name to AFPM in January 2012.
[5] NLRA Sec. 8. [§ 158] (c).
[6] Associated Builders & Contractors of Arkansas v. Perez (E.D. Ark 4:16-cv-169); Labnet Inc. v. United States Department of Labor (D. Minn. 0:16-cv-00844); National Federation of Independent Business v. Perez (N.D. Tex. 5:16-cv-00066-c
[7] 82 *Federal Register* 26887 (June 12, 2017).

AFPM supports DOL's rescission of the Rule. AFPM members understand that the Act cannot be static. Labor relations and financial reporting methods have evolved, and AFPM members recognize that DOL must periodically review the regulations issued under the Act to ensure that it reflects modern day labor relations and financial reporting methods. However, prescriptive rules, such as the Rule being rescinded, run counter to successful and established protocols in the Act and would inhibit an employer's ability to obtain legal advice.

The rescission of the Rule will allow DOL to conduct further analysis to ensure that modernization of the Act does not have unintended consequences.

AFPM looks forward to an open, constructive dialogue with DOL on the continuing evolvement of regulations issued under the Act. If you have any questions or if AFPM can be of any assistance, please contact me at (202) 552-8475 or at dstrachan@afpm.org.

Sincerely,

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