

COALITION FOR A
DEMOCRATIC WORKPLACE

**COMMENTS ON DEPARTMENT OF LABOR'S PROPOSED RULEMAKING
RESCISSION OF RULE INTERPRETING "ADVICE" EXEMPTION IN SECTION 203(C) OF THE
LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT
(RIN 1245-AA07)**

Submitted by

THE COALITION FOR A DEMOCRATIC WORKPLACE

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Submitted to

OFFICE OF LABOR MANAGEMENT STANDARDS, U.S. DEPARTMENT OF LABOR

August 11, 2017

COALITION FOR A DEMOCRATIC WORKPLACE
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Re: Rescission of Rule Interpreting “Advice” Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act; RIN 1245-AA07

Dear Sirs:

Thank you for the opportunity to submit the following comments by the Coalition for a Democratic Workplace in response to the above referenced Notice of Proposed Rulemaking, published in the Federal Register on June 12, 2017 at 82 Fed. Reg. 26877.

The Coalition for a Democratic Workplace (“CDW”) represents millions of businesses of all sizes from every industry and every region of the country. Its membership includes hundreds of employer associations as well as individual employers and other organizations.¹ As a representative of employers that are subject to the Labor-Management Reporting and Disclosure Act (“LMRDA”) under the jurisdiction of the U.S. Department of Labor (“Department”), as well as the National Labor Relations Act (“NLRA”) under the jurisdiction of the National Labor Relations Board (“NLRB”), CDW has a profound interest in the Department’s administration of the “advice” exemption to the LMRDA Persuader Activity Regulations within the confines of its statutory authority and as related to the NLRA.

CDW filed comments in June 2011 opposing what became the rule that the Department now proposes to rescind (hereafter the “2016 Rule”). After the final rule was published, CDW joined the first of the three lawsuits filed that challenged the legality of the 2016 Rule.² As the Department is aware, the *NFIB* suit resulted in a preliminary injunction preventing the 2016 Rule from being implemented,³ followed by summary judgment vacating the 2016 Rule permanently

¹ See [http:// myprivateballot.com/about](http://myprivateballot.com/about), listing CDW’s member organizations. A list of CDW’s management committee members who have reviewed and signed onto these comments appears on the signature page at the end of this document. A number of these organizations have also filed comments on their own behalf.

² CDW is one of the co-plaintiffs in the suit captioned *Associated Builders and Contractors of Arkansas v. Perez*, Case No. 4:16-cv-169 (E.D. Ark.). The other two pending suits are *National Fed’n of Indep. Bus. v. Perez*, Case No. 5:16-cv-00066-C (N.D. Tex.) (hereafter “*NFIB*”) and *Labnet, Inc. v. United States Department of Labor*, Case No. 16-CV-0844 (D. Minn.).

³ *Nat’l Fed’n. of Indep. Bus. v. Perez*, 2016 U.S. Dist. LEXIS 89694 (N.D. Tex. June 27, 2016), *appeal dismissed as moot*, Docket No. 16-11315 (5th Cir. Dec. 19, 2016).

on a nationwide basis.⁴ The appeal from that decision, as well as the other pending suits, has been stayed pending the outcome of the present NPRM.

For the reasons stated in the *NFIB* decision, in other court rulings, in CDW's original comments and those of many other opponents of the 2016 Rule, and for the reasons stated in the Department's NPRM itself, the 2016 Rule should be immediately rescinded. Alternatively, the Department should withdraw and voluntarily dismiss its pending (in abeyance) appeal from the *NFIB* decision, which would result in permanent vacatur of the 2016 Rule. As further explained below, the 2016 Rule was and remains arbitrary, overbroad, unduly vague, contrary to the LMRDA, and unconstitutional. Newly available information regarding the impact of the 2016 Rule, combined with the previous Administration's failure to adequately address the many defects in the Rule demonstrated in the previous rulemaking record and subsequent litigation, amply justify rescission of the 2016 Rule.

I. PRELIMINARY STATEMENT

CDW strongly supports the Department's proposed rescission of the 2016 Rule. The 2016 Rule improperly narrowed the exemption of "advice" from the "persuader activity" reporting requirements under section 203 of the LMRDA. Primarily at issue is the Department's 2016 attempt to radically change the long accepted definition of advice, which for more than 50 years prior to 2016 had consistently been held to refer to a consultant's activity that "is submitted orally or in written form to the employer for his use, [where] the employer is free to accept or reject the oral or written material submitted to him."⁵ The 2016 Rule redefined the term "advice" to mean only such oral or written recommendations that does not have an object in whole or in part, directly or indirectly, to persuade employees concerning their rights to organize or bargain collectively, *regardless* of whether the employer is free to accept or reject the recommended materials.⁶ The 2016 Rule identified thirteen types of conduct as to which reporting would have been required, many of which previously were considered to be, in whole or in part, exempt advice.⁷

⁴ *Nat'l Fedn. of Indep. Bus v. Perez*, 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016), *appeal placed in abeyance pending the present rulemaking*, Docket No. 17-10054 (5th Cir. June 15, 2017).

⁵ *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America v. Dole* (hereafter *UAW v. Dole*), 869 F. 2d 616, 617 (D.C. Cir. 1989), *citing inter alia* Section 265.005 LMRDA Interpretive Manual (USDOL 1962). In *Dole*, the D.C. Circuit upheld the pre-2016 definition of advice as a proper exercise of the Department's discretion. *Id.* at 617.

⁶ 81 Fed. Reg. at 15937.

⁷ The thirteen categories of reportable activities listed on the revised LM-10 and LM-20 forms were as follows: "(1) drafting, revising, or providing written materials...; (2) drafting, revising, or providing a speech...; (3) drafting, revising, or providing audiovisual or multi-media presentations...; (4) drafting, revising, or providing website content...; (5) planning or conducting individual employee meetings; (6) planning or conducting group employee meetings; (7) training supervisors or employer representatives to conduct ... employee meetings; (8) coordinating or directing the activities of supervisors...; (9) establishing or facilitating employee committees; (10) developing employer personnel policies or practices; (11) identifying employees for disciplinary action...; (12) conducting a seminar for supervisors or employer representatives; and (13) speaking with or otherwise communicating directly with employees." Of these newly defined reporting categories, all but items 5, 6, 9, and 13 were previously treated

As the district court correctly held in the *NFIB* case, the 2016 Rule was “defective to its core” because it entirely eliminated the LMRDA’s “advice” exemption, and required the disclosure of a “great deal of advice that is actually protected from disclosure by the LMRDA.”⁸ The *NFIB* court also held that the Department abused its discretion because the 2016 Rule contained reporting requirements that “undermine the attorney-client relationship and the confidentiality of that relationship.”⁹ The court further held that the 2016 Rule imposed content-based burdens on speech that could not survive strict scrutiny under the First Amendment.¹⁰ The *NFIB* decision also found the 2016 Rule to be “vague and impossible to apply.”¹¹ The judge in *NFIB* found that DOL’s claims to any benefits from the 2016 Rule were “vague and speculative,” whereas the harm caused to employers, associations, and their attorney advisors was “irreparable.”¹² Finally, the court found that the Department’s failure to wait for its announced revision to the LM-21 form prior to issuing the 2016 Rule revising the LM-20 form, along with Department’s failure to consider the significant economic impact of the Rule on many small businesses, constituted a violation of the Regulatory Flexibility Act.¹³

Each of the foregoing grounds on which the *NFIB* court invalidated the 2016 Rule constitutes sufficient justification for the Department to rescind it. CDW therefore primarily supports the Department’s proposed rescission of the Rule, as stated in the NPRM, in order to allow the Department to “address the concerns that have been raised by reviewing courts with respect to the 2016 Rule.”¹⁴ CDW further will show below that evidence submitted in the three pending cases, not addressed by the Department prior to the promulgation of the 2016 Rule, provides additional support for rescission of the Rule.

CDW supports each of the additional grounds for rescission set forth in the NPRM as well. These include the need for the Department to give more consideration to several important effects of the 2016 Rule on regulated parties, especially employers who seek legal assistance from labor attorneys, and the attorneys who provide such services now but will be unable to do so without filing reports under the 2016 Rule.¹⁵ CDW also supports the Department’s stated intent to reconsider the proper interpretation of the statute before making future changes to the

by the Department as non-reportable advice, so long as the employer retained the prerogative whether to accept or reject the activity and so long as the advisor refrained from communicating with non-management employees.

⁸ *NFIB*, 2016 U.S. Dist. LEXIS 89694, at *124, *incorporated by reference in summary judgment order, NFIB*, 2016 U.S. Dist. LEXIS 183750 (N.D. Tex. Nov. 16, 2016).

⁹ *Id.* at **82-83.

¹⁰ *Id.* at **87-88.

¹¹ *Id.* at *99.

¹² *Id.* at **90-95.

¹³ *Id.* at **103-08.

¹⁴ NPRM, 82 Fed. Reg. at 26879.

¹⁵ *Id.*

interpretation of the advice exemption.¹⁶ CDW further agrees with the Department that rescission is justified by the need to consider the interaction and effects of the LM-21 and LM-20 forms together in light of possible changes to both; and so that the Department can consider its shifting priorities and resource constraints since the issuance of the 2016 Rule.

For all of these reasons, as further discussed below, the Department is fully justified, and is indeed compelled, to rescind the 2016 Rule.

II. DISCUSSION

A. The Department Is Statutorily Authorized To Rescind The 2016 Rule

It is well settled that the Administrative Procedure Act (“APA”)¹⁷ authorizes federal agencies to reverse previously promulgated rules, even if the preceding rule has not been enjoined as the 2016 Rule has been. Under the Supreme Court’s holding in *FCC v. Fox TV Stations, Inc.*,¹⁸ the Department simply must show that “the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”¹⁹ The agency “need not demonstrate . . . that the reasons for the new policy are better than the reasons for the old one.”²⁰

Here, the proposed rescission satisfies all of the *Fox TV* requirements. First, the Department’s proposed rescission constitutes a return to the long-accepted previous enforcement of the advice exemption, which is plainly permissible under the statute, having been expressly upheld by the D.C. Circuit in *UAW v. Dole*.²¹ Second, there are many good reasons for the proposed return to the pre-2016 standard, as decreed by the *NFIB* court and as set forth in the NPRM itself. Finally, the Department is fully justified in its stated belief that rescinding the 2016 Rule would be a better policy than the arbitrary regulatory scheme adopted in 2016, which the *NFIB* court described as “defective to its core” and the *Labnet* court characterized as “incoherent.”²²

The NPRM sets forth several sound bases for rescinding the 2016 Rule, as noted above, all of which are consistent with the APA. These include the Department’s need to ensure that the Department’s interpretation of the advice exemption is fully consistent with the LMRDA in light of the recent court criticism of the 2016 Rule; the need to give more consideration to the newly

¹⁶ *Id.*

¹⁷ 5 U.S.C. § 706.

¹⁸ 556 U.S. 502, 515 (2009). *See also Home Care Association of America v. Weil*, 799 F.3d 1084 1094-95(D.C. Cir. 2015), cited by the Department in issuing the 2016 Rule. 81 Fed. Reg. at 15947.

¹⁹ *Fox TV*, 566 U.S. at 525.

²⁰ *Id.*

²¹ 869 F.2d 616.

²² *NFIB*, 2016 U.S. Dist. LEXIS 89694, at *124; *Labnet*, 2016 U.S. Dist. LEXIS 81884, at *16.

identified adverse effects of the 2016 Rule on regulated employers and their attorney advisors; the need to consider the interaction of the LM-20 revisions with possible changes to the LM-21; and the shifting priorities and resource constraints arising since the issuance of the 2016 Rule. Each of these reasons for rescinding the 2016 Rule will next be addressed below.

1. The 2016 Rule Should Be Rescinded Because It Has Been Found By A Federal Court To Violate The LMRDA.

As discussed above, the nationwide injunction issued by the district court in *NFIB* arguably compels rescission of the 2016 Rule. At a minimum, the district court's order establishes that the 2016 Rule is contrary to the governing statute (the LMRDA), is arbitrary and unconstitutional on its face, and would cause significant harm. All of these findings provide obvious justification for the Department to rescind the 2016 Rule now, so that the Department can address the strongly identified concerns of the *NFIB* decision and other court rulings discussed below.

First with regard to the 2016 Rule's conflict with the LMRDA, the *NFIB* court properly held Congress intended to grant broad scope to the term "advice." The Congressional Conference Report clearly stated as much, as follows: "Subsection (c) of section 203 ... grants a broad exemption from the [reporting] requirements of the section with respect to the giving of advice."²³ By contrast, the Department's 2016 claim that the longstanding definition of advice under the LMRDA "seems inconsistent with the legislative history" of the Act²⁴ was completely unsupported by the Congressional record. Indeed, the very Congressional testimony cited by the Department as supposed justification for the 2016 Rule²⁵ in fact showed that Congress did *not* intend to impose reporting requirements on the type of legal and advisory conduct which the 2016 Rule targeted. To the contrary, the testimony made clear that Congress sought to expose only those labor consultants acting as "middlemen," *i.e.*, engaging in direct communications with employees on behalf of management, without revealing their true connection to the employer. Congress thus sought to expose persuaders who acted as "fronts for the employer's anti-union activity," or who otherwise engaged in "unethical" acts and/or served as "middlemen" employed to spy on organizing activity while "masquerading as legitimate labor consultants."²⁶ Congress did *not* highlight or target lawyers or consultants who merely advised employers on ways in which the *employers themselves* could lawfully campaign against union organizing. Certainly, in

²³ H.R. CONF. REP. No. 1147, 86th Cong., 1st Sess. 33 (1959), *reprinted in* 1 National Labor Relations Board, *Legislative History of the Labor-Management Reporting and Disclosure Act* 937, 1959 U.S. CODE CONG. & ADMIN. NEWS 2503, 2505, cited in *UAW v. Dole*, *supra*, 869 F. 2d at 618.

²⁴ 76 Fed. Reg. at 36184.

²⁵ 76 Fed. Reg. at 36178-9, 36184.

²⁶ S. Rep. No. 85-1417 at 255-300 (1958); S. Rep. 187 at 10-11, LMRDA Leg. Hist. at 406-S. Rep. 187 at 10-11, LMRDA Leg. Hist. at 406-407, LMRDA Leg. Hist. at 435-436. In promulgating the 2016 Rule, the Department referred to the much discussed 1950's labor consultant Nathan Sheffernan, without acknowledging that Sheffernan's referenced tactics of "organizing vote no committees," weeding out pro-union workers, and negotiating improper sweetheart contracts with union officials bore no resemblance to the types of advice offered by legitimate labor lawyers, consultants and trade associations, which the 2016 Rule targeted for the first time. 76 Fed. Reg. at 36184.

promulgating the 2016 Rule, the Department failed to cite any such language or legislative history that supported the Rule's unprecedented narrowing of the advice exemption.²⁷

In 1962, then Solicitor of Labor Charles Donahue interpreted the "advice" exemption in the context of the above legislative history and held that "reviewed in the context of Congressional intent" there was "no apparent attempt to curb labor relations in whatever setting it might be couched."²⁸ Solicitor Donahue appropriately recognized that expert advice was often needed by employers, and that "even when this advice is embedded in a speech or statement prepared by the advisor to persuade, it is nevertheless advice and must be treated as advice."²⁹ Contrary to statements in the Department's 2016 Rule, Solicitor Donahue's opinion remained the consistent position of the Department of Labor with regard to the meaning of "advice" under the LMRDA from 1962 until 2016.³⁰

In the absence of any support for the 2016 Rule in the LMRDA's legislative history, the Department wrongly asserted that the longstanding prior understanding as to the meaning of "advice" in the text of the LMRDA was "not grounded in the common or ordinary understanding of the term..."³¹ As support for this novel assertion, the Department cited to dictionary definitions of "advice" that actually contradicted the Department's redefinition of the term. Specifically, the Department acknowledged that "advice ordinarily is understood to mean a recommendation regarding a decision or a course of conduct," and cited various dictionaries to this effect.³² Yet the Department ignored the common understanding of the word "recommendation," which is that the recipient of a recommendation is free to reject it.³³ For this reason, the *Labnet* court properly found: "The problem is not with the manner in which DOL formally defines 'advice.' * * * The problem is that DOL does not apply its own definition of

²⁷ Equally unsupported is the Department's reversal of the longstanding treatment of conduct that is partly advice and partly persuader activity, which the 2016 Rule for the first time treated entirely as the latter, ignoring the exemption of the former under Section 203(c). 81 Fed. Reg. 15947.

²⁸ Charles Donahue, "Some Problems under Landrum Griffin" American Bar Association, Section of Labor Relations Law, in Proceedings 49 (1962).

²⁹ *Id.*

³⁰ See also Section 265.005 of the LMRDA Interpretative Manual ("IM") which stated for decades prior to 2016: "[I]t is equally plain that where an employer drafts a speech, letter or document which he intends to deliver or disseminate to his employees for the purpose of persuading them in the exercise of their rights, and asks a lawyer or other person for advice concerning its legality, the giving of such advice, whether in written or oral form, is not in itself sufficient to require a report." Even where an employer's advisor prepares an entire speech or document, the pre-2016 stated that such activity constituted advice rather than persuasion, as long as "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...."

³¹ 81 Fed. Reg. at 15937.

³² *Id.* at 15941.

³³ See definitions of "recommend" appearing at <http://dictionary.reference.com/browse/recommend> ("to advise, as an alternative; suggest a choice, course of action, etc."); and <http://dictionary.cambridge.org/dictionarybritish/recommend> ("to suggest that a particular action should be done).

advice.”³⁴ The *NFIB* court agreed, adding: “In whatever manner DOL defines “advice,” it must do so consistent with the statute and therefore must actually exempt advice, including advice that has an object to persuade. The New Rule not only fails to do that, it does the exact opposite: it nullifies the exemption for advice that relates to persuasion.”³⁵

The 2016 Rule also failed to address additional court rulings that continue to compel the conclusion that the Rule relied on a fundamental misapprehension of the plain language meaning of “advice,” both within and outside the framework of the LMRDA. Thus, contrary to the Department’s 2016 claim that the previous longstanding definition of advice was “overbroad,” the Court of Appeals for the D.C. Circuit held in *UAW v. Dole*³⁶ that the Department’s previous application of the term was reasonable. Also contradicting the 2016 Rule’s redefinition of advice is the case of *Martin v. Power, Inc.*, No. 92-385J, 1992 WL 252264, *2 (W.D. Pa. Sept. 28, 1992) (“The Secretary does not allege direct contact with employees by [the attorney] during this period. [The attorney’s] actions in advising [the employer] concerning purchases of anti-union propaganda or in the contents of letters sent by the company to its employees do not constitute persuader activity.”). See also *Wirtz v. Fowler*, 372 F. 2d 315, 330-331, n. 32 (5th Cir. 1966), *overruled in part on other grounds*, *Price v. Wirtz*, 412 F. 2d 647 (5th Cir. 1969) (observing that “a reasonable construction of advice would hold it applicable to all activities of the lawyer in which it is contemplated that the client will be the ultimate implementing actor and in which the client retains the power to accept or reject the activities of the lawyer.”).³⁷

The Department’s 2016 Rule was thus based on a false premise: that advice only occurs when a person “exclusively counsels employer representatives on what they may lawfully say to employees, ensures a client’s compliance with the law, or provides guidance on NLRB practice or precedent.”³⁸ In reality, advice takes many forms, both in the legal profession and in other forms of management training. Meaningful labor relations advice frequently cannot be provided to employers without intermingling legal and practical (including persuasive) concepts, and often includes initial drafting of documents in order to convey advice recommendations. Section 203(c) exempts all forms of advice, not merely legal advice, regardless of any persuasive effect such advice may have.

³⁴ *Labnet*, 2016 U.S. Dist. LEXIS 81884, at *15.

³⁵ *NFIB*, 2016 U.S. Dist. LEXIS 89694, at *124.

³⁶ 869 F. 2d at 619-620.

³⁷ To the same effect is more than a century of common law precedent as to the meaning of “advice,” nowhere addressed in the 2016 Rule. See *Hughes v. Van Bruggen*, 44 N.M. 534, 105 P. 2d 494, 496-97 (1940) (“Advice” means it is optional with the person addressed whether he will act on such advice or not. *** It is different in meaning from instruct or persuade.”); *State v. Downing*, 23 Idaho 540, 130 P. 461, 462 (1913) ([With reference to legislation] “the meaning given to the word “advise,” it is left optional with the person advised as to whether he will act on such advice or not.”); *Commonwealth ex rel. Howley v. Mercer*, 190 Pa. 134, 137, 42 A. 525, 526 (1899) (“Advice is optional with him to whom it is directed; that is, he can accept or decline it.”).

³⁸ 81 Fed. Reg. 16044.

For the same reasons, there is nothing improper in treating as advice the drafting of talking points, letters, flyers or similar documents discussing labor unions, in order to demonstrate to employers what is both legal and *effective* for the employers to communicate with their employees in light of complex and constantly shifting interpretations of the law of union organizing.³⁹ In the same manner, many trade associations properly exercise their lawful right to advise their employer members regarding union campaign tactics and communications tools in order to enable their members to respond lawfully to union organizing. Nothing in the LMRDA condemns or restricts such conduct, and nothing requires such advice to be reported and posted on the internet.⁴⁰

Thus, in light of the 2016 Rule's erroneous interpretation of the Act's language and history, as evidenced by controlling judicial authority, the Department's current proposal to rescind the unlawful 2016 Rule is clearly justified. Such rescission will allow the Department to reconsider the best manner in which to comply with the Act and restore the previous longstanding, clearly permissible interpretation of the statute while any such reconsideration takes place.

2. The 2016 Rule Should Also Be Rescinded Because It Has Been Found To Violate The Constitution.

The *NFIB* court properly held that the 2016 Rule violated the Constitution because the Rule imposes content based burdens on speech, citing *Reed v. Town of Gilbert*⁴¹ and numerous other cases.⁴² The court found the Rule to be unconstitutional under both the strict scrutiny exacting scrutiny standards. The 2016 Rule is not supported by a narrowly tailored, compelling government interest (as evidenced by five decades of enforcement without previously requiring any reporting of advice) and there is no substantial relation between the Rule's overbroad disclosure requirements and any important governmental interest.⁴³ The court then held that the

³⁹ As one of many possible examples, where an employer drafts a speech and an advisor pronounces it unlawfully coercive, the client will naturally and legitimately ask what needs to be changed in order to fix the problem. Under the Department's 2016 Rule, if an attorney or other advisor suggested new, non-coercive language, this could be deemed a revision of the speech and therefore trigger the reporting requirements. Under the 2016 Rule the employer would apparently be reduced to playing the game of "Twenty Questions" with the advisor, making stabs in the dark until the lawyer or consultant finally pronounced the speech lawful. No court has ever limited the meaning of advice in this manner.

⁴⁰ Nor is such advice limited to active union organizing campaigns. Employers have every right to communicate with their employees on the subject of labor relations without any notice that any petition is threatened or has been filed. At such times as well, employers have the right to seek and receive advice from experts in the field in oral or written form, without being subject to any reporting requirement so long as the employer retains the right to accept or reject the advisory materials.

⁴¹ 135 S. Ct. 2218, 2227 (2015).

⁴² *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014); *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 811 (2000); and *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 798-801 (1988)

⁴³ *NFIB*, 2016 U.S. Dist. LEXIS, at **88-89, 94-95.

Department failed to prove a compelling governmental interest, and that DOL relied on “vaguely described, speculative benefits” of “transparency,” unsupported by any study or causal relation.

The *NFIB* court found the result to be the same even under a lower level of “exacting scrutiny,” as CDW and other Plaintiffs in the lawsuits against the rule have likewise argued. This is so because there is no substantial relation between DOL’s new disclosure requirement and any important governmental interest, nor is the new Rule narrowly tailored to that relationship.⁴⁴ In addition, by forcing attorneys and other consultants to identify themselves as “persuaders,” a highly controversial label in the labor relations field, the 2016 Rule compelled such advisors and their employer clients to publicly stigmatize themselves, a form of compelled speech prohibited by the Constitution.⁴⁵

Significantly, in response to Constitutional challenges raised in the 2011 comments, the 2016 Rule relied heavily on cases decided under the older, less intrusive definition of advice, such as *Humphreys, Hutcheson & Moseley v. Donovan*.⁴⁶ Because those cases dealt only with the previous, much more narrowly tailored Department enforcement policy, which excluded advice from the persuader reporting requirements, they offer no support for the 2016 Rule now.

The *NFIB* court additionally found the 2016 Rule to be unconstitutional due to its inherent vagueness and the confusing, arbitrary exceptions, which are spread throughout the one hundred-plus pages of the Rule.⁴⁷ As was recently made clear by the Fifth Circuit, principles of fair notice and due process protect businesses against unduly vague government regulations, particularly where criminal sanctions may result from violations.⁴⁸ On this additional ground, the 2016 Rule must be rescinded.

3. The 2016 Rule Should Also Be Rescinded Because It Has Been Found To Be Filled With Arbitrary Inconsistencies And Illogical Outcomes.

The *NFIB* court properly held that “An unexplained inconsistency in agency policy is a reason for holding an interpretation to be an arbitrary and capricious change from agency

⁴⁴ 2016 U.S. Dist. LEXIS 89694, at **94-95.

⁴⁵ See *National Association of Manufacturers v. SEC*, 800 F.3d 518 (D.C. Cir. 2015), *rehearing en banc denied*, 2015 U.S. App. LEXIS 19539 (D.C. Cir. Nov. 9, 2015) (“Requiring a company to publicly condemn itself is undoubtedly a more ‘effective’ way for the government to stigmatize and shape behavior than for the government to have to convey its views itself, but that makes the requirement more constitutionally offensive not less so.”); see also *ABC of Southeast Texas v. Rung*, 2016 U.S. Dist. LEXIS 155232, at **28-30 (E.D. Tex. Oct. 24, 2016) (filing of public reports of unproven labor law violations held to violate First Amendment).

⁴⁶ 755 F.2d 1211, 1215 (6th Cir. 1985). The First Amendment analysis in *Humphreys* was squarely rejected in *Donovan v. The Rose Law Firm*, 768 F.2d 965-66.

⁴⁷ 2016 U.S. Dist. LEXIS 89694, at **98-103.

⁴⁸ *Employer Solutions Staffing Group II, LLC v. Office of the Chief Administrative Hearing Officer*, Case No. 15-60173, 2016 WL 4254370 (5th Cir. 2016); See also *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *Parker v. Levy*, 417 U.S. 733, 775 (1974); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972).

practice.”⁴⁹ The 2016 Rule was filled with such unexplained inconsistencies, including but not limited to the following:

- The 2016 Rule failed to explain the logic behind allowing consultants to provide “off the shelf” materials to employers without reporting, while mandating that consultants must file reports if they actually *advised* the employers by helping them select the *right* materials for their campaign. In other words, consultants lost the “advice” exemption under the 2016 Rule by actually giving advice.⁵⁰
- The 2016 Rule also did not explain why a trade association should be allowed to help employers select “off the shelf” material, but should lose the “advice” exemption if the association staff advised the employer how to tailor the material to the employer’s particular needs. Again, the act of giving advice somehow deprived the association of the “advice” exemption.⁵¹
- The 2016 Rule again failed to explain why consultants could present seminars on union organizing to groups of employers without reporting, unless of course the presenters *advised* the attending employers how to “develop anti-union tactics and strategies for use in a union campaign,” even where such advice was not particular to any individual employer. As noted above, the Rule said that “off the shelf” materials were not reportable because they were not particularized to any individual employer; yet the same logic apparently did not apply to seminars that are likewise not particularized to any individual employer.⁵²
- Likewise, the 2016 Rule did not explain why trade associations could sponsor union avoidance seminars under the new Rule without reporting, but if the associations’ own staff presented the same advice as the consultants, then reporting would be required. Meanwhile, employers could attend anti-union seminars and receive the consultants’ advice, without themselves filing reports, even though the consultant and/or the association staff member who presented the advisory program was required by the 2016 Rule to file reports.⁵³
- The 2016 Rule also failed to justify the requirement that consultants file reports if they develop or implement personnel policies or actions with the object to persuade employees. The Rule stated that no reporting is required if the policies only “subtly” affect or influence the attitudes or views of the employees. There is no logical difference

⁴⁹ 2016 U.S. Dist. LEXIS 89694, at *81, quoting from *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. at 2126 (2016).

⁵⁰ 81 Fed. Reg. at 15938

⁵¹ *Id.*

⁵² *Id.* at 15938-39.

⁵³ *Id.*

between these two situations.⁵⁴

- As was also pointed out in testimony before the House Education and Labor Committee after promulgation of the 2016 Rule, the Rule declared that representation of an employer in collective bargaining is not reportable, but if the bargaining representative advises the employer how to communicate its bargaining proposals to the workforce (often an essential aspect of collective bargaining) reporting would apparently be required.⁵⁵
- The 2016 Rule claimed that there is a recognizable distinction (though there is not) between consultants' creation of persuader materials (reportable) and lawyers' counseling employers as to what the NLRB says is lawful (unreportable). The Rule failed to justify its new requirement that lawyers must report advice as to how employers can *lawfully persuade*.
- The 2016 Rule also claimed without support that there is some sort of well recognized distinction between (reportable) "push" surveys and (non-reportable) "attitude" surveys. There is no such distinction; and the 2016 Rule arbitrarily declared that even attitude surveys will be reportable if they "concern employee activities during a labor dispute."

All of the foregoing inconsistencies rendered the 2016 Rule hopelessly confusing to employers and consultants alike, as found by both of the district judges who issued rulings in response to employer challenges to the Rule in 2016.⁵⁶

4. Rescission Of The 2016 Rule Is Further Justified By The Need To Give More Consideration To The Effects Of The 2016 Rule On Regulated Employers And Their Advisors, Particularly Their Labor Attorneys.

As an additional ground for rescission of the Rule, the Department's NPRM properly asserts the need to give additional consideration to the impact of the 2016 Rule on the regulated community, *i.e.*, employers, trade associations and consultants, particularly labor attorneys. CDW agrees fully with this justification for rescission. New information presented in the three lawsuits and elsewhere, not previously addressed prior to issuance of the Rule itself, demonstrates numerous arbitrary and unlawful effects of the 2016 Rule which strongly support this ground for rescission.

As noted above, following the issuance of the 2016 Rule, which included changes from the proposed rule, three lawsuits were filed and Congressional hearings were held regarding the

⁵⁴ *Id.* at 15939.

⁵⁵ See Testimony of Joseph Baumgarten, Hearing: The Persuader Rule," Subcommittee on Health, Employment, Labor, and Pensions, April 27, 2016, available at <http://docs.house.gov/Committee>.

⁵⁶ *NFIB*, 2016 U.S. Dist. LEXIS 89694, at **79-81; *Labnet*, 2016 U.S. Dist. LEXIS 81884, at *27-29 (describing the "untenable divide" that the 2016 Rule created between persuader activities and advice, including activities that are "materially indistinguishable.")

final Rule. The affidavits and sworn testimony submitted in the court proceedings occurring after promulgation of the 2016 Rule are public records that constitute new evidence justifying rescission and reconsideration of the 2016 Rule. The 2016 Rule should therefore be rescinded so that the Department can consider such additional evidence of the Rule's chilling effect and adverse impact that was not available prior to promulgation of the 2016 Rule.

Thus, in the Arkansas federal court case in which CDW was (and still is) a co-plaintiff, undisputed sworn testimony in the record established that employers, trade associations, and labor attorneys around the country would be irreparably harmed by the 2016 Rule if it were allowed to go into effect. Numerous law firm representatives testified under oath that they would be forced to cease providing labor relations advice if the 2016 Rule were allowed to take effect due to the burdensome impact of compliance with the Rule.⁵⁷

In addition to the foregoing substantial evidence, the *NFIB* court made detailed findings based upon trial testimony of numerous witnesses representing both employers, trade associations, and law firms. The lawyer witnesses again testified to the chilling effect of the 2016 Rule on their ability to give lawful labor relations advice to employer clients.⁵⁸ The court made additional findings of the Rule's negative impact on trade associations.⁵⁹ The court further made findings based on sworn testimony as to the Rule's negative impact on small employers.⁶⁰ Finally, the *NFIB* court made findings that the cost of complying with the 2016 Rule would have been between \$7.5-\$10 Billion during the first year of implementation, with additional recurring costs thereafter, and the cost to a single law firm would be \$296,000 in the first year, with additional recurring costs thereafter.⁶¹

Based upon such evidence, the *NFIB* court found that the 2016 Rule unlawfully interfered with the attorney-client privilege and the ethical duty of confidentiality owed by attorneys to their clients. The Department is therefore entirely justified in rescinding the Rule in order to reevaluate the adverse impact of the Rule on employers and their attorney advisors. Certainly the 2016 Rule required both employers and their advisors to "provide a detailed explanation of the terms and conditions of the agreement or arrangement" with the client.⁶² DOL's instructions also require employers and their lawyers to disclose previously confidential communications between attorneys and clients confirming the arrangements, as well as the substance of the confidential advisory communications on forms LM-10, LM-20, and LM-21.

⁵⁷ *ABC v. Perez*, Docket No. 16-cv-00169 (E.D. Ark.), exhibits A-H to Reply Memorandum, Doc. 41 (May 5, 2016); *Id.* at Doc. 3, Attachments 1-3 (Apr. 2, 2016).

⁵⁸ *NFIB* at *27-29, 32-33.

⁵⁹ *Id.* at *29-38.

⁶⁰ *Id.* at *38-41.

⁶¹ *Id.* at *42.

⁶² 81 Fed. Reg. 16046.

Under the 2016 Rule, attorneys who disclosed the information demanded by the Department would have inevitably disclosed confidential client information in violation of Rule 1.6(a) of the Model Rules of Professional Conduct, and its counterparts in almost every state legal ethics code. That provision states that a “lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”⁶³ Rule 1.6(c) provides that a “lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.”

The American Bar Association opposed the 2016 Rule on this ground prior to its original promulgation, and has repeatedly reaffirmed its opposition since that time, including comments recently filed in the present NPRM proceeding.⁶⁴ Numerous State Attorneys General, defending the practice of law in their jurisdictions, likewise have filed comments in support of rescission of the 2016 Rule and also filed amicus briefs and/or intervened in the several lawsuits challenging the 2016 Rule. Those briefs cited to numerous ethical opinions and case authorities not previously addressed in the 2016 Rule.⁶⁵ For this reason as well, the Department is justified in rescinding the 2016 Rule.

As further noted above, the 2016 Rule attempted to draw a distinction that does not exist between “pure” legal advice (protected from disclosure) and practical business advice by lawyers (whose disclosure DOL seeks to compel). Most state legal ethics rules disagree. As an example, Rule 2.1 of the Arkansas Rules of Professional Conduct states: “In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client’s situation.” Comment 2 to the Arkansas Rule further states: “Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as costs or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate.”

By ignoring the state law principles guiding the legal profession, the 2016 Rule in effect arrogated to the Department the power to regulate the practice of law, though nothing in the LMRDA gives the Department any such power. The D.C. Circuit held in the case of *ABA v. FTC*,⁶⁶ that if Congress intended to preempt state law regulating the practice of law, then Congress must provide a “clear statement” of its intent to do so. Here, the opposite is true. Not

⁶³ *Id.*

⁶⁴ See Comments filed by the American Bar Association, August, 2017; See also Testimony of Wm. T. (Bill) Robinson, III, House Subcommittee on Health, Employment, Labor, and Pensions (April 27, 2016), available at <http://edworkforce.house.gov> (reiterating that disclosure of the information sought in the LM report forms is “clearly inconsistent with lawyers’ existing duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule.”).

⁶⁵ See NFIB, 2016 U.S. Dist. LEXIS 89694, at **83-85; *Associated Builders and Contractors v. Perez*, Docket No. 4:16-cv-169 (E.D. Ark.) (State Attorneys General Amicus Brief), citing *inter alia*, *Gipson v. Southwestern Bell Tel. Co.*, 2009 U.S. Dist. LEXIS 25457, *43-44 (D. Kan. 2009) (privilege applies where “the specific nature of services provided” must be revealed); *Clarke v. American Commerce National Bank*, 974 F.2d 127, 129 (statements that reveal the nature of the client’s motive in seeking representation fall within the privilege).

⁶⁶ 430 F.3d 457, 471 (D.C. Cir. 2005).

only did Congress make no clear statement of an intent to regulate attorneys in their role as business advisors, but instead Congress expressly *disclaimed* any intent to require attorney-advisors to disclose their advice, both in Section 203(c) and 204 of the Act. These constitute additional grounds for rescission and reconsideration of the 2016 Rule.

5. The “Facts” Regarding Consultant Activities Relied On In 2016 To Support The Rule Present No Obstacle To Rescinding The 2016 Rule.

In the 2016 preamble to the final Rule, the previous Administration contended that post-LMRDA Congressional and Executive branch observations regarding labor consultant activity somehow justified the radical changes in the Rule. The Department specifically recited House Subcommittee Reports from 1980 and 1984 which purported to find inadequate enforcement of the LMRDA’s consultant reporting provisions.⁶⁷ Unstated was the fact that both the House and the Senate as a whole took no action in response to the Subcommittee Reports, leading inescapably to the conclusion that a majority of the Congress was satisfied with the Department’s enforcement of the LMRDA and *disagreed* with the Subcommittees’ findings. The 1990 Report of the Dunlop Commission, which is also cited in the Department’s Notice,⁶⁸ met with a similar lack of interest in Congress.

Congressional silence over a period of decades in response to a settled position by a government agency has been held to constitute ratification thereof and constitutes a further indication of Congressional intent.⁶⁹ Thus, far from justifying the Department’s change of position in 2016, Congress’ decision to ignore the House Subcommittee and Dunlop Reports, and to leave in place for 50 years the Department’s previous longstanding enforcement of the “advice” exemption, refute the previously claimed justification for the 2016 Rule.

The 2016 Rule’s preamble also claimed that “current industrial relations research evidences proliferation of consultant industry and substantial use by employers of labor relations consultants.”⁷⁰ This claim was overstated because the research cited was not “current” but was more than a decade old. But in any event, the LMRDA was not enacted to outlaw or reduce employer reliance on labor relations advisors. The sole purpose of the Act was to expose and require reporting of specific consulting activities, *i.e.*, those by which such consultants, as opposed to employers themselves, persuade employees. It is clear from the Department’s discussion of the supposed research into the consulting industry, however, that the previous Administration erroneously believed that its mission should be to somehow reduce the number of consultants, no matter how legitimately the consultants conducted themselves.

Contrary to the 2016 Rule, it should have been irrelevant to the Department’s analysis that a majority of employers have continued to hire consultants as advisors during union

⁶⁷ 81 Fed. Reg. at 15961-62.

⁶⁸ *Id.*

⁶⁹ See *FDA v. Brown & Williamson Tobacco Co.*, 529 U.S. 120 (2000).

⁷⁰ 81 Fed. Reg. at 15963.

organizing campaigns, as supposedly reported by some studies, inasmuch as Congress never intended to discourage such hiring.⁷¹ None of the studies relied on in 2016 identified the extent to which any consultants had *violated* either the NLRA or the LMRDA. Most importantly, none of the cited studies indicated that the failure to report consultant activity which is now considered to be exempt advice had in any way resulted in violations of either Act. Nor did the studies measure the extent to which consultant advisors – lawyers, associations, and other third party experts – had *reduced* the number of employer violations by educating clients and association members as to what the legal prohibitions are. Without such measurements and comparisons, the previous Department’s reliance on the cited studies as justification for the 2016 Rule was arbitrary, and serves as no justification for failing to rescind the Rule now.

Moreover, the studies relied on in the 2016 rulemaking were refuted by counter-studies, arbitrarily ignored in the 2016 Rule, and the pro-union studies were shown not to be credible with regard to the influence of labor relations consultants on union organizing campaigns.⁷²

Equally suspect was the 2016 Rule’s contention that there is an “underreporting problem” among consultants under the LMRDA.⁷³ This claim was based on the false connection, described above, between the number of consultants and the number of reports that such consultants should be filing. Again, the fact that consultants supposedly are hired in a majority of union organizing campaigns does not mean that such consultants are hired to engage in persuader activity. The Department cites no justification at all for the claim that the number of reports filed is “7.4% of those expected.”⁷⁴ It is just as likely that most of the consultants who have been hired have been careful to comply with the law by providing only exempt advice; and that the Department’s “expectations” are grossly inflated.

Also unsupported and disingenuous was the claim in the 2016 Rule that changing the advice interpretation would “enable employees to make a more informed choice regarding the exercise of their rights to organize and bargain collectively.”⁷⁵ This claim reflects a policy choice which could only be made, and has already been made, by Congress, and it is beyond the scope of the Department’s authority to disregard Congressional intent. Certainly, it was impermissible for the 2016 Rule to base its changed definition of advice on a misguided desire to add to the burdens of disclosures that small businesses already face during union organizing campaigns. In any event, there is no evidence that the disclosure of the advice received by employers would accomplish anything other than to chill employers from seeking to obtain such advice and/or chill lawyers and trade associations from providing it.

⁷¹ 81 Fed. Reg. at 15965.

⁷² See U.S. Chamber of Commerce, *Responding to Union Rhetoric: The Reality of the American Workplace – Union Studies on Employer Coercion Lack Credibility and Integrity* (U.S. Chamber of Commerce White Paper 2009).

⁷³ 81 Fed. Reg. at 15965.

⁷⁴ 81 Fed. Reg. 15964.

⁷⁵ *Id.* at 15986.

For much the same reasons, the claim in the 2016 Rule that changing the definition of advice was needed to redress the balance of “contemporary labor relations”⁷⁶ was arbitrary and contrary to Congressional intent. Particularly misguided was the unsupported claim that use by employers of labor relations consultants “interferes with employees’ exercise of their protected rights to organize and bargaining collectively and disrupts labor-management relations.”⁷⁷ Not only is there no support for that claim, but it was not the issue that the 2016 Rule supposedly addressed. The unwarranted 2016 attacks on labor relations advisors – lawyers, associations, and other third parties – demonstrate that the 2016 Rule’s true agenda was not to enforce the Act as written but to prevent employers from exercising their right of free speech under Section 8(c) of the National Labor Relations Act. As is next discussed, that apparent agenda constitutes another violation of law that justifies the rescission of the 2016 Rule.

6. The 2016 Rule Should Also Be Rescinded Because It Has Been Found To Be In Conflict with the National Labor Relations Act and LMRDA Section 203(f).

As noted above, by effectively denying employers the right to counsel, the 2016 Rule conflicted with section 8(c) of the NLRA and, by extension, section 203(f) of the LMRDA, which obligates the Department to uphold employers’ section 8(c) rights.⁷⁸ The Supreme Court has recently reaffirmed that Section 8(c) expresses a Congressional policy of “favoring uninhibited, robust, and wide-open debate” on matters relating to unionization, so long as that does not include unlawful speech or conduct.⁷⁹

The 2016 Rule denied employers their rights under section 8(c) by effectively preventing employers from receiving legal counsel related to communications with employees regarding an upcoming election. As discussed above, the LMRDA reporting requirements would apply not only to an outside advisor’s direct communications and interaction with employees, but to all indirect communications stemming from advice from a lawyer, consultant or association in drafting or reviewing speeches, letters, or other written materials. Consequently, the only “advice” that would not be reportable would be a declaration by the lawyer as to whether the materials an employer prepares are unlawful or not.

This would be of little help to an employer attempting to navigate the complexities of labor law and NLRB rulings so it can lawfully communicate with its employees within the limited time frame of a representation election (the median time for an election is less than 30 days under current NLRB procedures, and has been reduced to as few as 10 days).

The practical implications of the 2016 Rule are that employers would face the Hobson’s choice of either saying nothing, or going it alone without meaningful access to labor relations

⁷⁶ *Id.* at 15960.

⁷⁷ *Id.* at 15967.

⁷⁸ 29 U.S.C. §§158(c), 433(f).

⁷⁹ *Chamber of Commerce v. Brown*, 554 U.S. 60, 67-68 (2008).

advice in the hope that they could steer clear of unlawful interaction with their employees. In this manner, the 2016 Rule not only chills employer speech, as discussed above, but also would have led to a significant rise in unfair labor practice charges, but for the injunction and rescission of the Rule.

The true victims of the 2016 Rule would have been employees, who would be forced into union elections without the benefit of the full and open debate the Supreme Court has called for, or be exposed to inadvertent violations of their rights by well-intentioned employers deprived of expert advice. This, of course, runs counter to the primary goal of the NLRA and the LMRDA and benefits only union organizers.

The chilling effect of the 2016 Rule was magnified by the lack of detailed guidance as to what constitutes “indirect” persuasion. Once the longstanding meaning of advice was changed to remove the “firewall” of employer acceptance or rejection of advice, neither employers nor consultants would have had any way to know whether their communications would be deemed indirectly persuasive of employees by a pro-union Department investigator. The scenarios listed in the Department’s Rule are so broad as to cover every conceivable communication by a third party to an employer, or even to a *group* of employers, on the subject of employees and unions. It is also significant that the burdens of disclosure would be of no benefit to employees in a typical NLRB election, now that the “quickie” election rules of the NLRB have shortened the average time from petition to election to less than 30 days.⁸⁰

7. Rescission Of The 2016 Rule Is Further Justified By The Need to Consider Any Revisions of the LM-20 Together With the Possible Revisions to LM-21.

As the *NFIB* court properly found, the 2016 Rule should only have been issued, if at all, in conjunction with the announced revisions of the annual LM-21 report forms. The LM-21, as currently enforced by the Department, requires disclosure of all fees and other arrangements for all labor relations services (even non-persuader services) for all labor relations clients, if there is a single instance of reportable persuader activity involving a single client.⁸¹ An inadvertent action by a lawyer whose advice is found to have the “object” of indirect persuasion, could thus lead to the compelled filing of reports that may seriously injure a law firm’s attorney-client relationships with its *non*-persuader clients and would violate ethical rules. Lawyers would have little choice but to avoid such results by declining any representation that could conceivably trigger persuader reporting requirements.

⁸⁰ NFIB, 2016 U.S. Dist. LEXIS 89694, at **41-43.

⁸¹ See *Humphreys, Hutcheson and Moseley v. Donovan*, 755 F. 2d 1211, 1214 (6th Cir. 1985) (“The annual report requires the persuader to disclose all receipts from all employers on account of labor relations advice or services, and the persuader must designate the source of these receipts.”)

8. The 2016 Rule Should Also Be Rescinded Due to Shifts In The Department's Enforcement Budget And Priorities.

The 2016 Rule acknowledged that if allowed to go into effect, the number of LM-20 reports that would have to be filed would increase by almost 1000% annually.⁸² It would then fall to Department staff to examine the increased number of reports and the complicated new instructions for determining reportable activity. The 2016 Rule failed to adequately address realistic (increased) staff requirements imposed by the new reporting requirements, nor did the Rule anticipate the budget cuts that are now being proposed for the Department or the recent Executive Orders that require all federal agencies to review and reduce the burdens imposed by their regulations generally. Given that there has been no credible showing that the increased number of reports will accomplish any publicly beneficial purpose, while at the same time there is a strong likelihood of increasing the burdens imposed on employers and consultants, the Department is clearly justified in reconsidering its enforcement priorities with regard to the 2016 Rule. It makes no sense to attempt to enforce the burdensome 2016 Rule until after such reconsideration takes place, and for this reason as well, the Rule should be rescinded.

III. CONCLUSION.

For the foregoing reasons, CDW strongly supports the Department's proposed rescission of the 2016 Rule. The radical narrowing of the advice exemption in 2016 violated the plain language and history of the LMRDA and was patently intended to serve an unauthorized agenda of promoting union organizing by chilling the right of employers to obtain lawful and legitimate advice from experts in labor relations.

Further, the regulatory burden and impact on all business, but most particularly small businesses, would be far greater than the Department originally estimated if the 2016 Rule were ever allowed to take effect. The true costs in time and money simply to fill out forms were vastly understated in the 2016 Rule. The greater costs, though, as found by the *NFIB* court, must include the burdens imposed on job creators and the resulting negative effects on the economy; the effects of increased agency and judicial litigation that would follow implementation of the 2016 Rule changes; and the chilling effect on free speech and the denial of the right to counsel—with effects on employers and on employees through destruction of the robust debate called for in the union organizing process.

Respectfully submitted,

THE COALITION FOR A DEMOCRATIC WORKPLACE

⁸² 81 Fed. Reg. at 15929, anticipating an increase from 387 reports annually to 4,194.

Management Committee Signatories:

American Hotel & Lodging Association
Associated Builders and Contractors, Inc.
International Foodservice Distributors Association
International Franchise Association
National Association of Manufacturers
National Association of Wholesaler-Distributors
National Council of Chain Restaurants
National Federation of Independent Business
National Restaurant Association
National Retail Federation
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