FOOD MARKETING INSTITUTE

September 21, 2011

Submitted Electronically

Mr. Andrew R. Davis
Chief of the Division of Interpretations and Standards
Office of Labor-Management Relations
U. S. Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, D.C. 20210

RIN 1215-AB79

Dear Mr. Davis:

The Food Marketing Institute (FMI) respectfully submits the following comments in response to the Department of Labor's (DOL) Office of Labor-Management Standards proposed revisions to the Form LM-10 Employer Report and to Form LM-20 Agreements and Activities Report, which are required under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA or Act).[1]

By way of background, FMI is the national trade association conducting programs in public affairs, food safety, research, education and industry relations on behalf of its 1,500 member companies – food retailers and wholesalers – in the United States and around the world. FMI's members in the United States operate approximately 26,000 retail food stores and 14,000 pharmacies. Their combined annual sales volume of $680 billion represents three-quarters of all food store sales in America. FMI's retail membership is composed of large multi-store chains, regional companies and independent supermarkets. More than 3.4 million persons, both union and non-union, are employed in the supermarket industry throughout the United States. FMI appreciates the opportunity to comment on this proposal which would revise DOL's interpretation of the "advice" exemption under LMRDA, and thus expand circumstances or activities for which reporting would be required of employer-consultant persuader agreements.

[1] 36 Fed. Reg. 36178 (June 21, 2011).

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FMI has grave concerns about this rulemaking as we strongly believe the Department's proposal will make it very difficult for our supermarket members, especially smaller grocery store operators to obtain needed advice on the complexities of labor law, especially legal advice with respect union organizing campaigns. Furthermore, FMI firmly believes that the DOL rulemaking cannot be considered in a vacuum or as a stand alone proposal in view of another proposed regulations that has been put forth by the National Labor Relations Board (NLRB) which seeks to establish new procedures for conducting a secret ballot election to determine if employees wish to be represented by a union for purposes of collective bargaining. If the NLRB rulemaking is promulgated, it would compress the time frame in which a union representation election is held from approximately 31 days on average to between 10 and 21 days resulting in employees having less opportunity to receive and digest information necessary to make an informed decision about union representation. Thus, when one considers the NLRB proposal combined with DOL's so-called "persuader" rulemaking, supermarkets as employers will face double jeopardy placing them and their employees at a significant disadvantage with respect to any and all matters concerning union representation.

The DOL proposes to make drastic changes to the persuader regulations that FMI firmly believes were never envisioned or intended when Congress approved LMRDA in 1959. As we interpret the Department's proposal, it would require employers to report on a host of routine HR activities such as seminars, employee surveys, training sessions, employee manuals, and various company communications including websites, newsletters, e-mails, and webinars among other things on the supposition that these activities may possibly be "persuader" activity.

Previously for some 50 years the Department has used a standard that is easily understood, and that is "persuader" reporting would only be triggered when outside third parties communicate directly with employees or provides materials directly to employees concerning union organizing and collective bargaining. Under the Department's newly proposed regulations, practically all communications by a consultant or attorney would be reportable if it involves labor relations issues regardless of whether these third-parties have any contact with employees.

The Department's proposed rulemaking would further require employers and consultants to report a broad range of activities, such as drafting or revising written materials, drafting or revising speeches, drafting or revising audio-visual materials or websites, supervisory training, coordinating the activities of supervisors, developing personnel policies or practices, and conducting meetings and seminars for supervisors or employer representatives provided that the materials or training are designed to directly or indirectly reach employees and persuade or influence them as to a concerted activity concerning the right to organize or bargain collectively. If any of the above activities involve both reportable activity and exempt "advice" they would then become reportable.

For example, among our industry's many concerns with this proposed expansion of reporting is that an innocent question from an employee during a regularly held meeting asking an employer what

should he do if approached by a union organizer or asked to sign an authorization card would trigger a reporting obligation. Our concern here is that if the employer responding to the question urges the employee to exercise caution or asks the person not to sign the authorization card such responses could be construed as a persuader communication or activity. To the extent that such a meeting was never intended or scheduled for the purpose of discussing unionization issues, such responses from the employer should not be reportable as persuader activity.

Another major concern for FMI and our members is the reporting obligations under "information supplying activities". It appears that surveillance of employees or union representatives using video, audio, internet or in person by consultants and attorneys would be a reportable activity. FMI's concern here is that a significant number of supermarkets members utilize closed circuit television surveillance cameras for customer safety purposes and to detect and stop theft and other types of crimes in grocery stores, warehouses and outside premises. As such, these surveillance cameras will invariably include video footage of employees at work including associates who are union members. Thus, FMI hopes that such surveillance systems would not be deemed a reportable activity for supermarkets under the proposed rules. By the same token, employers who utilize technology such as computers, point-of-sale equipment and the internet to monitor productivity and job performance should also be excluded from having to report these types of activities under the DOL rulemaking.

The Department of Labor (DOL) states that it now believes that its current interpretation of the advice exemption may be overly broad to the extent that they do not cover agreements and arrangements between employers and labor consultants involving persuader activity which Congress intended to be reported under LMDRA. DOL goes further in justifying its desire to dramatically expand the persuader activity regulations by noting that despite a significant proliferation and use of labor consultants by employers "evidence suggests that much of this persuader activity goes unreported".

With respect to the Department's claim that its current interpretation of the advice exemption may be overly broad, FMI wishes to point out that the Department has employed various interpretations of the advice exemption over the past five decades. Each interpretation of the advice exemption worked well and was easily understood for compliance purposes FMI disagrees with the Department's assertion that the advice exemption may be overly broad which warrants a change in policy. Rather than putting forth through administrative rulemaking yet another and greatly expanded reinterpretation of the statutory text of LMRDA, FMI believes the more prudent course of action is for DOL to seek clarification of LMRDA from Congress through the legislative process so that there can be no misunderstanding as to what activities and arrangements are to be reported.

As to the Department's statement that evidence suggests that a certain percentage of persuader activity goes unreported, we believe that in all likelihood what should be reported is being reported

to DOL under LMRDA due to the statue's clarity on the advice exemption. If in fact, DOL believes that there needs to be improvement in this area, FMI wishes to suggest that DOL engage in outreach activities with the employer and labor consultant community to remind them of their obligations under LMRDA. Such an educational outreach effort by DOL would promote reporting while allowing Congress to revisit LMRDA and make clarifications legislatively where needed.

FMI is of the opinion that proposed expansion of reporting under LMRDA will be costly and that the Department has grossly underestimated the compliance price tag of the rulemaking on employers, labor law attorney and third-party consultants. DOL estimates that only some 2,601 companies would be required to file under the proposed rulemaking, but we sees no estimate on the number of outside law counsels, consultants and other third-party experts who would also have to file reports.

Aside from the cost burden of filling out Form LM-20 and LM-10, DOL failed to provide any cost estimate on the continuous review that will have to be conducted throughout the course of the year to determine if an activity needs to be reported. Such a review would include looking at meeting and conference agendas to make sure that none of the presentations cover "persuader" issues. Similarly, companies will need to review the content and agenda of every training session, seminar and meeting that is conducted by a third-party consultant or attorney to determine if "persuader" issues would be discussed. Each and every communication by an employer with an outside counsel or consultant will have to be evaluated in order to determine whether the communication would qualify as being a "persuader" activity. Therefore, FMI believes the compliance cost of this rulemaking is significantly greater than DOL's annual estimate of $825,886.11.

In our view, the Department's rulemaking conflicts with President Obama's Executive Order on Improving Regulation and Regulatory Review issued on January 18, 2011, as we believe the compliance costs associated with reporting proposal greatly outweigh any perceived benefit. Moreover, the rulemaking will significantly increase the burden on private sector companies over what is currently in place in terms of reporting obligations under LMRDA. While DOL did in fact provide public participation and an open exchange of ideas in the rulemaking process, the mere promulgation of proposed regulations in the current form will not promote predictability and reduce uncertainty. In fact, the opposite will occur as employers struggle to determine what should be reported as "persuader" activity.

The DOL proposed regulations are so intrusive and burdensome that they will dissuade many law firms and third-party consultants from offering labor relations advice and services to employers. This will mean that it will become increasingly difficult for companies, especially small businesses to obtain advice and legal counsel on labor matters. Moreover, the new reporting rules will require employers and consultants to disclose all payments and financial arrangements regarding union-related advice and services provided. As such FMI firmly believes the proposed rules will interfere

with privileged attorney-client relationships. Employers will also be required to report internal costs, including wages paid to managers and supervisors for time spent engaging in activities that are designed to persuade employees about the downside or negatives of unionization. Recognizing that employers who fail to file each and every reportable activity could face both civil and criminal penalties will likely result in employers deciding not to exercise their rights to free speech in terms of communicating with their associates about labor issues for fear of violating the law. What this means is employees will be denied balanced information and they will be less informed about unionization issues. FMI is of the opinion that such an outcome is undesirable and unfair to employers and employees alike.

In summary, FMI firmly believes that LMRDA was never intended by Congress to be overly burdensome, especially with respect to requiring employers to report basic, routine HR type activities as "persuader" activity. Moreover, the current LMRDA rules and the advice exemption are working well and are easily understood for compliance purposes that they should be maintained as is. Thus on behalf of our supermarket and warehouse members, we urge the Department to withdraw this proposed rulemaking in its entirety.

Sincerely,

Erik R. Lieberman
Regulatory Counsel