THE VOICE OF FOOD RETAIL

Feeding Families Enriching Lives

August 11, 2017

Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue NW, Room N-5609
Washington, DC 20210

Re: Interpretation of Advice Exemption in Labor-Management Reporting and Disclosure Act; Rescission; RIN 1245-AA07.

Dear Sir or Madam,

On June 12, 2017, the Office of Labor-Management Standards (OLMS) published in the Federal Register a Notice of Proposed Rulemaking (NPRM) that proposes to rescind the currently-enjoined regulations established in the final rule titled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act," published March 24, 2016, and effective April 25, 2016.[1] According to the NPRM, the proposal to rescind the Rule will provide the Department of Labor (DOL) with an opportunity to give more consideration to several important effects of the Rule and, in particular, the advice exemption on regulated parties. Specifically, the NPRM indicates that rescission of the rule would permit the DOL to engage in further statutory analysis, to consider the interaction between Form LM-20 and Form LM-21, and to review attorneys' activities in greater detail. The Food Marketing Institute (FMI) agrees that the DOL should reexamine its interpretation of the advice exemption, and appreciates the opportunity to comment on the NPRM.

By way of background, FMI proudly advocates on behalf of the food retail industry. FMI's U.S. members operate nearly 40,000 retail food stores and 25,000 pharmacies, representing a combined annual sales volume of almost $770 billion. Through programs in public affairs, food safety, research, education and industry relations, FMI offers resources and provides valuable benefits to more than 1,225 food retail and wholesale member companies in the United States and around the world. FMI membership covers the spectrum of diverse venues where food is sold, including single owner grocery stores, large multi-store supermarket chains and mixed retail stores. For more information, visit www.fmi.org and for information regarding the FMI foundation,

[1] See the NPRM at: https://www.regulations.gov/document?D=LMSO_FRDOC_0001-0037. 82 Fed. Reg. 26877 (June 12, 2017).

visit www.fmifoundation.org. The food wholesale and retail industry is an important economic sector that employs more than 4.8 million people and helps support almost 3 million additional jobs in supplier and upstream industries. The food retail sector employs both union and non-union workers.[2]

1. Statutory Analysis

We agree the DOL should conduct additional statutory analysis related to the persuader rule. As noted by the NPRM, the 2016 Rule revised the DOL's interpretation of the reporting requirements set out in Section 203 of the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. 433, concerning employers and labor relations consultants who make agreements or arrangements under which the consultant undertakes activities with an object, directly or indirectly, to persuade employees regarding the exercise of the right to organize and bargain collectively through representatives of their own choosing.[3] The statute states that no report is required covering the services of a consultant or other person by reason of his giving or agreeing to give "advice" to such employer; however, the 2016 Rule narrowed the interpretation of the "advice" exemption. It expanded the reporting requirements by requiring the reporting of employer-consultant agreements under which the consultant undertakes activities that do not involve direct contact between consultants and employees.[4]

It is generally recognized that Section 203(b) of the LMRDA is a broad provision requiring labor relations consultants who enter into agreements or arrangements with employers to disclose their persuader activities, while Section 203(a) includes disclosure requirements applicable to employers that enter into such agreements with consultants. It is FMI's position that the LMRDA expressly limits the scope of the Section 203(b) reporting and disclosure requirements established by the statute. More specifically, Section 203(c) of the LMRDA provides:

> (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.

This language is referred to as the "advice" exemption from the broad disclosure provision in Section 203(b). Based on this language, DOL's position had been that where a consultant, including attorneys, provides only advice or materials to the employer for use in persuading employees, no reporting requirement is triggered as

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[2] Data provided to FMI by John Dunham and Associates as part of research on "the Economic Impact of the Food Retail Industry in the United States."
[3] See the 2016 Rule at: https://www.gpo.gov/fdsys/pkg/FR-2016-03-24/pdf/2016-06296.pdf.
[4] See the 2016 Final Rule page for further information.

long as the attorney or consultant has no direct contact with the employees. Additionally, Section 204 ("Exemption of Attorney-Client Communications") provides:

> Nothing contained in this Act shall be construed to require an attorney who is a member in good standing of the bar of any State, to include in any report required to be filed pursuant to the provisions of this Act any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.

In its 2016 Rule, the DOL promulgated a narrower interpretation of the advice exemption, which had the effect of expanding the types of persuader activities that should be reported under Section 203(b). As illustrated in the litigation involving the 2016 Final Rule, it created a paradox between narrowly defined advice, which would be exempt from reporting, and persuader activity, which would be reportable under the 2016 Rule. In its NPRM, DOL recognized that this artificial distinction between non-reportable advice and reportable persuader activities gave rise, in part, to an opportunity for the Department to rescind the 2016 Rule while giving "more consideration to several important effects of the Rule on the regulated parties". 82 *Fed. Reg*. at 26879 (June 12, 2017).

In summary, DOL should rescind the interpretation of the advice exemption in the 2016 Rule because it exceeds DOL's authority and compromises attorney-client privilege by ignoring express provisions of the LMRDA. Rescission would restore its longstanding interpretation of the advice exemption and the pre-2016 rule reporting requirements. Should DOL feel compelled to consider "possible alternative interpretations of the statute", any consideration of alternatives should first address the concerns and issues raised in the cases challenging the 2016 Rule. *Id*. FMI does not believe it is necessary for DOL to propose future changes to the advice exemption since the pre-2016 Rule interpretation was both consistent with the statute and workable as a practical matter.

2. Attorneys' Activities in Food Retail

We also agree that the DOL should further review attorneys' activities as related to the persuader rule. In particular, FMI has grave concerns that the 2016 interpretation of the advice exemption and indirect persuader activities would make it very difficult for our supermarket members, especially smaller grocery store operators, to obtain needed legal advice on the complexities of labor law, including advice related to union organizing campaigns. Under the 2016 Rule, practically all communications by a consultant or attorney would be reportable as indirect persuading activities if they involve labor relations issues, regardless of whether these third-parties have any contact with employees and regardless of whether such communications included legal advice. As we understand it, DOL's interpretation of the 2016 Rule would also 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, webinars, etc. on the premise that these

activities could be "persuader" activity and with no regard to the existence of an attorney-client relationship.

FMI would be remiss if it did not add that the 2016 Rule unfairly disadvantages trade associations, like FMI, that occasionally provide training, seminars, and educational opportunities and materials for their members on union and certain employment law related topics. The 2016 Rule details an extensive list of persuader activities that FMI would be obligated to disclose should it provide any advice in these areas. Instead of promoting informed decision-making about the consequences of unionization, the 2016 Rule "chills" an employer's ability to obtain legal and accurate educational information to share with its employees to enable them to make an informed decision.

While the increased volume of reportable activity under the 2016 Rule is burdensome on many industries, it is particularly significant in the supermarket industry where retailers operate on extremely thin profit margins, generally between 1.0 and 2.0%.[5] At such low profit margins, grocery retailers have virtually no ability to absorb unnecessary regulatory costs and are ultimately forced to pass the cost on to consumers in the form of higher prices. FMI firmly believes that LMRDA was never intended by Congress to be overly burdensome, especially with respect to requiring employers to report attorneys' activities. This supports our position that DOL should restore its longstanding interpretation of the advice exemption and the far less burdensome pre-2016 rule reporting requirements.

3. **Interaction Between Form LM-20 and Form LM-21**

In the NPRM, DOL states that another reason for rescinding the 2016 Rule is to provide further opportunities to evaluate "the interaction between Form LM-20 and Form LM-21." 83 *Fed. Reg.* 26880 (June 12, 2017). Generally, under the 2016 Rule both of these forms must be filed as a result of the performance of persuader activities. Agreements or arrangements involving the performance of persuader activities under Section 203(b) of the LMRDA trigger the filing of Form LM-20 by a labor relations consultant; unless the activity constitutes advice that would qualify under the restrictive interpretation of the exemption in Section 203(c) of the LMRDA. Any individual required to file a Form LM-20 would also be required to submit a Form LM-21 for disbursements made pursuant to such arrangements or agreements. Because the 2016 Rule expands the types of services that constitute persuader activities, the NPRM correctly observed that not only will "both the number of Form LM-20 filers and Form LM-21 filers" increase, but also that the burdens to file Form LM-20 will increase. *Id.* However, the 2016 Rule deferred action on addressing Form LM-21 and, instead, DOL issued a "special enforcement policy for certain LM-21 requirements".[6]

FMI concurs with and endorses DOL's proposal to rescind the 2016 Rule because it would increase the burdens to file Form LM-20 and by extension, Form LM-21

[5] FMI Report, Food Retailing Industry Speaks (2016).
[6] See Form LM-21 Special Enforcement Policy at https://www.dol.gov/olms/regs/compliance/ecr/lm21_specialenforce.htm.

substantially. FMI also submits that DOL grossly underestimated the total costs of approximately $634,000 to file Form LM-20 in its 2016 rule. 81 *Fed. Reg*. 16015 (Mar.24, 2016) Perhaps more significantly, rescinding the 2016 Rule will enable DOL to consider the combined impact of filing these forms upon the regulated community. Also, rescission will afford DOL an opportunity to review and revise the overly broad reach of the disclosure requirements in a Form LM-21 and reconsider its special enforcement policy.

4. Conclusion

Once again, FMI appreciates the opportunity to submit comments to DOL regarding the NPRM that proposes to rescind the currently enjoined regulations established in the final rule titled "Interpretation of the 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act." We look forward to our continued collaboration with DOL on the persuader rule.

If you have questions about these comments or would like additional information, please feel free to contact me at (202) 220-0637 or dmullen@fmi.org.

Sincerely,

Dana Mullen
Regulatory Counsel