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February 3, 2003

Ms. Cheryl Atkinson
Administrator
Office of Workforce Security
Employment and Training Administration
U.S. Department of Labor
200 Constitution Avenue, N.W.
Room S-4231
Washington, D.C. 20210

**Re: Comments on Proposed Removal of Birth and Adoption Unemployment Compensation Rule**

Dear Ms. Atkinson:

The Food Marketing Institute (FMI) appreciates the opportunity to submit the following comments in response to the Employment and Training Administration (ETA) notice of proposed rulemaking, which would rescind the Birth and Adoption Unemployment Compensation (BAA-UC) regulation found in 20 CFR, Part 604. 67 Fed. Reg. 72122 (Dec. 4, 2002). FMI opposed the extension of unemployment compensation to those who choose to leave the workforce voluntarily and, therefore, strongly endorses the proposal. The ETA rule, finalized by the Clinton Administration in June 2000 (65 Fed. Reg. 37210 (June 13, 2002)), violates the spirit and the letter of the fundamental principle that unemployment insurance (UI) benefits should be reserved for those who are involuntarily separated from the workforce.

FMI is a non-profit association that conducts programs in research, education, industry relations and public affairs on behalf of its 1,500 members and their subsidiaries. Our membership includes food retailers and wholesalers, as well as their customers, in the United States and around the world. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of $220 billion, which accounts for more than half of all grocery store sales in the United States. FMI's retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets. Our international membership includes 200 members from 60 countries.

American supermarkets employ approximately 3.5 million people. As a leading provider of jobs, FMI members are sensitive to the needs of their employees, and are pleased to offer progressive parental leave programs on a voluntary basis. The supermarket industry's role as a significant employer also means that food retailers contribute substantial resources to state UI Trust Funds, and, therefore, have a keen

interest in the way in which UI funds are disbursed. We are especially concerned that the Clinton administration set forth a vaguely justified proposal that, if left in place by the Bush Administration, would undoubtedly increase UI expenditures and, therefore, increase the UI taxes imposed upon the food distribution industry, without accomplishing the ill-defined goal it purported to seek. Accordingly, we support the proposal to remove this regulation. For a detailed outline of FMI's objections to the rule when it was proposed, we encourage you to review our comments filed on February 2, 2000, which are incorporated by reference herein.

### A. Regulation Could Consume Substantial Resources from State UI Trust Funds, Many of Which Are Insufficiently Funded for Their Primary Purpose

In our original comments on the proposed rule, FMI outlined the inability of state funds to absorb the tremendous costs associated with providing this benefit, even in the strong economic times in which the rule was finalized in 2000. As ETA indicates in the current proposal, many states now have substantially lower unemployment balances than in 2000 due to the economic downturn. As you point out, 28 states had less than the Department's recommended level of reserves in their trust funds at the end of 2001. Furthermore, as you point out, the low level of balances in state funds has caused Congress to pass legislation infusing $8 billion to states to help them meet their unemployment compensation obligations. Without this assistance many state funds could have become insolvent. Had any states enacted BAA-UC legislation this situation would have been made much worse. The experience seen in these poor economic times highlight the fact that these funds must be used solely for their intended purpose of assisting those who cannot find work.

### B. "Able and Available" Requirement Cannot Be Met by Individuals Who Voluntarily Choose To Leave Work and Remain Unemployed

#### 1. Involuntary Unemployment and the Meaning of "Able and Available"

The UI program was created in 1935 to provide income assistance to unemployed workers who lost their jobs through no fault of their own. "Supplementary Social Insurance Information," OIG Repot No. 12-99-002-13-001 at 6.3. Benefits under the unemployment compensation laws are not payable to all persons who are out of employment, but only to those who are qualified in accordance with the prescribed requirements and conditions. 81 C.J.S. § 212. Statutes providing for unemployment benefits are not intended to serve as insurance for all who are without wages. See 81 C.J.S. § 261.

Rather, unemployment compensation is designed to provide a source of income in the case of involuntary unemployment, which is unemployment resulting from a failure of industry to provide stable employment, rather than from situations in which an individual becomes unemployed by reason of a change in personal conditions or

circumstances.[1] 81 C.J.S. § 225. This fundamental principle is reflected in the "able and available" standard, which has been used by the federal government since the inception of the program to direct State payment of UI trust fund moneys as unemployment compensation.

Specifically, the Department of Labor (DOL) and its predecessor agencies in administering the UI program have long interpreted four federal statutory provisions as requiring that claimants be able to and available for work; that is, UI recipients must be actively seeking and willing to accept new employment. Under the Federal Unemployment Tax Act (FUTA) and the Social Security Act (SSA), withdrawals from a State's unemployment fund may only be used to pay "compensation." 26 U.S.C. § 3304(a)(4); 42 U.S.C. § 503(a)(5). Compensation is defined as "cash benefits payable to individuals with respect to their unemployment." 26 U.S.C. § 3306(h). Thus, an individual must be unemployed and, therefore, no longer an employee, in order to receive unemployment compensation.[2]

Moreover, compensation must be paid "through public employment offices." 26 U.S.C. § 3304(1)(1); 42 U.S.C. § 503(a)(2). As DOL pointed out in the original notice proposing this regulation, linking unemployment compensation with the public employment system that is intended to locate jobs for people ties the payment of unemployment compensation to an individual's search for employment. 64 Fed. Reg. 67971, 67972 (December 3, 1999).

The "able and available" requirements determine whether a claimant is unemployed within the meaning of the statutes. 64 Fed. Reg. at 67972. The purpose of the "availability" requirement is to establish or test the claimant's attachment to the labor market and to determine if the claimant is unemployed because of the lack of suitable job opportunities or for some other reason. 81 C.J.S. § 258. In order to be "available" for work, a claimant must ordinarily do more than passively wait for work; a claimant must make a good faith or sincere effort to secure employment. See 81 C.J.S. § 254. See, also, Webster's II New College Dictionary at 77 (1995) (available: "1. accessible for use: at hand. 2. having the qualities and the willingness to take on a responsibility").

In direct contravention of the "able and available" requirements, the Clinton Administration regulation opened the UI trust funds to persons who voluntarily make themselves unavailable for employment for a non-work-related reason. The rule itself acknowledges that it seeks to provide UI benefits to those who desire to take approved leave, thereby underscoring the point that the claimant has chosen to be unavailable for

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[1] See 81 C.J.S. § 225 ("It would be inequitable and unjust to compel employers to contribute money to fund from which unemployment compensation is paid for express purpose of paying employees during periods of involuntary unemployment and then to divert employer's contribution from its lawful purpose by giving it to former employees during unemployment brought about by their voluntary and deliberate act.")

[2] But, c.f., proposed 29 C.F.R. § 604.3(a) ("approved leave" means a specific period of time, agreed to by both the employee and the employer, during which an employee is temporarily separated from employment and after which the employee will return to work for that employer).

work. Accordingly, the rule runs afoul of the fundamental principle of unemployment compensation that the claimant must be able to and available for work.

FMI endorses the view contained in the instant proposal to rescind the BAA-UC regulation that the rule is poor policy and a misapplication of federal unemployment compensation law relating to the able and available requirements.

**C. Extending UC to New Parents Will Set Poor Policy Precedent**

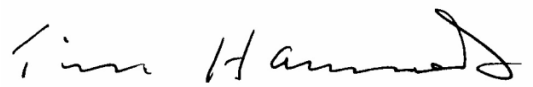
Enactment of the BAA-UC rule by the Clinton Administration established a poor precedent for the use of UI funds. The rule violates longstanding principles that go to the core of the unemployment compensation system. Eroding the "able and available" requirement to justify paying unemployment compensation to new parents will open the door for the use of UI funds for other projects unrelated to the core purpose of the UI system. For example, the instant proposal claims to be a vehicle to allow more new parents to take advantage of the leave provided by the Family and Medical Leave Act (FMLA); however, the proposal might just as well have included all of the various types of family and medical leave for which the FMLA provides, e.g., family leave to care for elderly parents, or medical leave for the worker or the worker's family members.

* * *

On behalf of the companies in the food industry that help to fund the unemployment system, we strongly believe that this money must be reserved only for those who find themselves without jobs despite the fact that they are able to and available for work. The economic downturn we have seen in the past two years highlights this point. The funds should not be used to further unrelated social goals; rather, the money must be reserved for the truly unemployed.

We appreciate the opportunity to provide our comments on the proposed removal of the Clinton Administration's birth-adoption compensation plan. We strongly urge the Department to finalize this rulemaking and rescind the regulation promptly.

Sincerely,



Tim Hammonds
President and CEO

Enclosures