

ONE HUNDRED ELEVENTH CONGRESS
Congress of the United States
House of Representatives

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June 22, 2009

Ms. Denise M. Boucher
Director of the Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, D.C. 20210

**RE: RIN 1215-AB62: Labor Organization Financial Reports;
Notice of Proposed Rulemaking**

Dear Ms. Boucher:

I write in strong opposition to the Obama Administration's systematic dismantling of the Office of Labor Management and Standards (OLMS), and rescission of the Form LM-2 (annual report filed by the largest labor organizations) and LM-3 (annual report filed by labor organizations with between \$10,000 and \$249,999 in annual receipts) final rule published in the Federal Register on January 21, 2009 (74 FR 3677). While the Administration continues to talk about improving transparency and accountability of government and financial firms, it has taken the opposite tact in seeking to aid and abet criminal wrongdoing by corrupt union bosses. By dismantling reporting requirements and other safeguards meant to stop embezzlement and other illegal activities, these changes would deprive more than 8 million private sector U.S. workers¹ of the means to effectively and independently monitor their labor organization. .

From 2001 to 2008, OLMS successfully prosecuted and convicted 904 union officers, employees, and representatives resulting in \$91,524,704 in restitution to defrauded unions and their members.² In 2003, the Form LM-2 was revised for the first

¹ Bureau of Labor Statistics, *Household Data Annual Averages*. Available at <http://www.bls.gov/cps/cpsaat42.pdf>.

² Todd, Don, *2008 Annual Report Office of Labor-Management Standards*, January 2009. Available at http://www.dol.gov/esa/olms/regs/compliance/highlights_08.pdf.

time since 1959. In 2006, OLMS reduced the time between union audits to once every 33 years compared to once every 133 years in 2000.³ In 2007, OLMS revised the Form LM-30 (union officer conflict of interest form) and began enforcing the reporting requirements resulting in 2,333 filed Form LM-30s compared to 60 filed Form LM-30s in 2001. In 2008, OLMS audited 791 local and intermediate unions, an increase of 232% from 2001, and 7 international unions, an increase of 600% from 2001.⁴ The audits identified 64 cases of reporting deficiencies, 31 cases of inadequate record-keeping, 34 cases of inadequate internal controls, and 7 cases of fiduciary responsibility, bonding, and office-holding prohibitions.⁵ In spite of this success or perhaps because of it, within weeks of taking office, the Obama Administration took what is effectively a non-enforcement position on the Form LM-30, made plans to revise or rescind the Forms LM-2, T-1 (union trust reporting form), and LM-30,⁶ and cut OLMS's budget by nearly 10 percent.⁷

A memorandum from President Obama to the heads of the executive departments and agencies stated that his "administration is committed to creating an unprecedented level of openness in Government... [T]ransparency promotes accountability and provides information for citizens about what their Government is doing."⁸ The Administration, however, seems to have taken the opposite view when it comes to organized labor.

Although the Obama administration has attempted to categorize the previous administration's revisions to the Form LM-2, which were published in the Federal Register on January 21, 2009, as an ad hoc last minute rulemaking, it was actually part of an initiative that began in 2001 to improve union transparency by updating and improving union reporting forms which had been largely ignored for 40 years. In 2003, the Department of Labor (DOL) published the first Form LM-2 final rule which made extensive changes to the reporting itemization thresholds, increasing them from \$1,000 to \$5,000, and changed a number of the itemization schedules to provide more meaningful information to union members.

Following the 2003 LM-2 final rule, the Department drew on the expertise of its investigators, and auditors, and interested parties to identify areas where the Form LM-2 could be improved to complete the 8 year improvement of the Form LM-2.⁹ After five years of further investigations and audits and three years of reporting on the 2003 Form

³ Sessions, Jeff, *Department of Labor Health and Human Services and Education Appropriations Act 2008 Text from the Congressional Record*. Available at <http://www.c-spanarchives.org/congress/?q=node/77531&id=8123884>.

⁴ Todd, Don, *2008 Annual Report Office of Labor-Management Standards*, January 2009. Available at http://www.dol.gov/esa/olms/regs/compliance/highlights_08.pdf.

⁵ Todd, Don, *2008 Annual Report Office of Labor-Management Standards*, January 2009. Available at http://www.dol.gov/esa/olms/regs/compliance/highlights_08.pdf.

⁶ Office of the Secretary, Labor, *Semiannual Agenda of Regulations*, May 11, 2009, page 32-3. Available at http://www.dol.gov/asp/regs/unifiedagenda/spring_2009_agenda.pdf.

⁷ Employment Standards Administration, *FY 2010 Congressional Budget Justification*, page 8. Available at <http://www.dol.gov/dol/budget/2010/PDF/CBJ-2010-V2-03.pdf>.

⁸ Id.

⁹ 29 CFR 3681.

LM-2, the Department identified a number of holes that were not addressed in 2003. The Department found that limiting itemization to disbursements, aggregating officer and employee benefits, limiting reporting of indirect disbursements, and lack of purchaser/seller information on the purchase/sale of union assets robbed union members of an accurate picture of their union's activities.¹⁰ The 2009 Form LM-2 final rule sought to fix these problems by making the following changes: 1) require union officer and employee benefits to be reported next to the officer or employee's name; 2) require officers and employees to report indirect disbursements; 3) create 9 new receipt itemization schedules; and 4) add identification information on individuals who bought or sold to the union.

The Administration offers two bases for withdrawal of the 2009 Form LM-2 final rule: 1) "the rule was issued without an adequate review of the Department's experience under the relatively recent revisions to Form LM-2 in 2003;"¹¹ and 2) "the comments indicate that the Department may have underestimated the increased burden that would be placed on reporting labor organization by the January 21st rule."¹² As outlined below, each of the 2009 Form LM-2 changes were based on experience and sound policy. Additionally, as discussed below, the burden analysis was a fair and accurate estimation of the Form LM-2 burden based on the best available data. The 2009 Form LM-2 final rule provides union members with an unprecedented level of transparency through which they can hold their union and its officers accountable while limiting the additional burden.

Union Officer and Employee Benefits

The 2003 Form LM-2 disclosed the gross salary, allowances, disbursements for official business, and other disbursements next to the name of every officer, and employee of the union earning \$10,000 or more.¹³ In contrast, the benefits provided to individual union officers and employees were only included in large aggregated amounts in line items on other parts of the form.¹⁴ For the first time, the 2009 Form LM-2 final rule required union officer and employee benefits to be reported next to the officer or employee's name.¹⁵

The 2009 Form LM-2 final rule recognized the growing importance of benefits and sought to create a level of parity between union and corporate reporting. The importance of benefit reporting is exemplified by the March 2009 "Employer Costs for Employee Compensation" survey, produced by the Bureau of Labor and Statistics, which indicated that, on average, over 30% of employee compensation came from benefits.¹⁶

¹⁰ Id.

¹¹ 29 CFR 18173.

¹² Id.

¹³ 29 CFR 3689.

¹⁴ Id.

¹⁵ Id.

¹⁶ Bureau of Labor Statistics, *Employer Costs for Employee Compensation – March 2009*, June 10, 2009. Available at <http://www.bls.gov/news.release/ecec.nr0.htm>.

Benefit reporting by officers and employees is essential to providing union members with accurate information on their compensation.

The Security and Exchange Commission (SEC) recognized this need in the corporate sector in 2006 when it adopted new benefit reporting rules for corporations. For example, a pension benefits table for each named executive officer (NEO) is now included on the company's proxy statement.¹⁷ This table includes the NEO's name, the name of each plan he participates in, the number of years of credited service under each plan, the actuarial present value of accumulated benefits, and any payments to him during the last fiscal year.¹⁸

Understanding officer and employee compensation, including benefits, is essential to keeping officers and employees accountable to the rank and file member.

Indirect Disbursements

For the last 40 years, the Form LM-2 had inconsistent rules for the reporting of direct and indirect disbursements to officers and employees for temporary lodging and transportation by public carrier. If a union officer or employee used a personal credit card for temporary lodging or transportation by public carrier, and he was directly reimbursed by the union, the reimbursement would be reported for that individual officer or employee. However, if the payment went directly to the vendor (indirect disbursement), the amount was not reported for the individual union officer or employee. The 2009 Form LM-2 final rule fixed this inconsistency, as required by the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA),¹⁹ by subjecting indirect disbursements to the same level of transparency as direct disbursements. However, to reduce the burden on unions, if the billing arrangement is set up in such a way that expenses are not detailed by officer or employee (i.e., when a labor organization purchases a block of hotel rooms for its officers and employees) then the labor organization will divide the total cost by the number of officers and employees for which the expense was incurred.²⁰

This loophole for indirect disbursements has been used by union officers and employees to hide expenses and has led to misleading reporting. The 1999 report by the House Subcommittee on Oversight and Investigation of the Committee on Education and

¹⁷ J.P. Morgan, *Post-Employment Benefits in the New World of Proxy Disclosure*, September 13, 2006. Available at

http://www.jpmorgan.com/cm/cs?pagename=JPM_redesign/JPM_Content_C/Generic_Detail_Page_Template&cid=1159308246246&c=JPM_Content_C

¹⁸ Id.

¹⁹ The LMRDA requires every labor organization to file an annual report with the Secretary of Labor disclosing the financial condition and operations for its preceding year including the "salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than \$10,000 in the aggregate from such labor organization." 29 U.S.C. 431(b). There is no exception for indirect disbursements for travel or lodging.

²⁰ 29 CFR 3687.

the Workforce on the “Financial, Operating and Political Affairs of the International Brotherhood of Teamsters,” one of the most in depth analyses of union finances, found that the Form LM-2 did not fully or accurately disclose the costs of travel by its officers and employees. From 1994 to 1997, the subcommittee found a difference of over \$5 million between itemized travel expenses by employee and actual employee travel expenses. In one case, an International Brotherhood of Teamsters (IBT) employee reported travel costs totaling about \$2,700, his travel costs actually totaled over \$43,000, about sixteen times the amount reported on the Form LM-2.

This loophole has been an obstacle to true union transparency for 40 years. The 2009 Form LM-2 final rule successfully improved transparency of officer and employee expenses by closing this 40 year loophole.

Receipt Itemization Schedules

Most of the “Cash Receipts” on the 2003 Form LM-2 were not itemized. The 2009 Form LM-2 final rule requires labor organizations to itemize certain receipts²¹ that are over \$5,000. However, to reduce the burden on unions, DOL created a special reporting requirement for Dues and Agency Fees and Per Capita Taxes. Unions are not required to itemize Dues and Agency Fees by individual members, the aggregate dues and agency fees received directly from a represented employer are reported as aggregates of all payments received during the reporting period. Like Dues and Agency Fees, Per Capita Taxes received directly from a labor organization must be aggregated for the year and reported by each individual labor organization.²²

Prior to the implementation of receipts itemization, union members only had half the necessary information to judge the activities of their labor organization. Additionally, as with itemization of disbursements, itemization of receipts promotes greater transparency which increases the detection of embezzlement and financial irregularities, and in doing so, deters such behavior.²³ Prior to this change, it was not uncommon for receipt line items on the Form LM-2 to exceed \$20 million. A union member could not discern useful information from these aggregates. This led to embezzlements which are difficult to identify. In one case, a union officer embezzled \$829,762 from the union by depositing checks which were to be deposited in the union’s Distribution Fund in another account from which the officer wrote himself checks.²⁴ Itemization of receipts will provide union members with a complete picture of their union’s workings and the means to independently identify embezzlements and financial irregularities.²⁵

Buyer and Seller Information

²¹ Including Dues and Agency Fees; Per Capita Tax; Fees, Fines, Assessments, Work Permits; Sales of Supplies; Interest; Dividends; Rents; Receipts on Behalf of Affiliates for Transmittal to Them; and Receipts From Members for Disbursement on Their Behalf.

²² 29 CFR 3692.

²³ 29 CFR 3693.

²⁴ Office of Labor-Management Standards, *2008 Annual Report*, pg. 3.

²⁵ 29 CFR 3693.

The 2003 Form LM-2 required unions to itemize the purchase or sale of \$5,000 or more in union assets, but it did not require information about the buyer or seller. The 2009 Form LM-2 expanded the information reported on the purchase or sale of union assets to include the name and address of the purchaser/seller and the date of the purchase/sale.²⁶ In response to multiple comments, an exception was created for bona fide market transactions over a registered market exchange.²⁷ In those cases, the labor organization is not required to itemize the purchase or sale of marketable transactions when the seller or purchaser is not known, i.e., sales of stock.²⁸

These additions provide union members with the tools necessary to determine whether a purchase or sale was done at arm's length and at market price. Prior to this revision, labor organizations listed transactions in the hundreds of millions of dollars and members had no idea as to the date of sale/purchase or the identity of the purchaser/seller.²⁹ More commonly, labor organizations are involved in the sale or purchase of lawn mowers and automobiles. For example, a labor organization reported that it had sold automobiles which had a book value of \$57,997.³⁰ However, the labor organization reported on its Form LM-2 that the sales price was \$0.³¹ Without information on the date of sale, a member could not accurately determine the value of the asset and without information on the purchaser or seller, a member cannot be sure that the transaction was at arm's length. These additions are essential to ensure that union officers and employees are not making sweetheart deals to the detriment of the union and its members.

Burden Estimate

The 2009 Form LM-2 final rule burden estimates are a fair and realistic representation of the costs to labor organizations for compliance with the Form LM-2. The 2009 burden estimates were based on 2003 estimates which were applied to actual data taken from 2007 Form LM-2s. Calendar year 2007 represented the most complete Form LM-2 data set available at the time of the rulemaking.³²

The initial 2003 burden estimates were based on the Department's detailed review of the recordkeeping and reporting requirements of the Form LM-2.³³ These numbers were then revised to take into account comments received in the 2003 rulemaking, including a survey of affected labor organizations submitted by the AFL-CIO.³⁴ Finally, the Department ran internal time trials to determine the amount of time needed to change

²⁶ 29 CFR 3685.

²⁷ Id.

²⁸ Id.

²⁹ 29 CFR 3684.

³⁰ Id.

³¹ Id.

³² 29 CFR 3703.

³³ Id.

³⁴ Id.

the accounting structure, document records, and fill out the Form LM-2.³⁵ In the end, the 2003 overall burden estimate was increased from 15.25 hours to 292.00 hours to complete the Form LM-2,³⁶ compared to 2,100 hours to complete Form 10-K (publicly traded company annual report).³⁷ These burden estimates were accepted by the district court when the AFL-CIO sued the Department in *American Federation of Labor and Congress of Industrial Organizations v. Choa*, 298 F.Supp.2d 104, 121-6 (D.D.C. 2004).

To estimate the number of new entries, as well as the cost of the 2009 Form LM-2, the Department mined data from 2007 Form LM-2s and the Federal Mediation and Conciliation Service (FMCS). First, to estimate the salary for union presidents and treasurers, the Department ran a proportionate stratified random sample on 2007 Form LM-2s.³⁸ Second, in response to multiple comments stating that the officer and employee cost estimates used in the notice of proposed rulemaking (NPRM) were low, the total compensation cost, including benefits, was used to calculate the officer and employee cost.³⁹ Third, the e.LORS⁴⁰ database and FMCS were used to determine the number of employers that would make dues payments.⁴¹ Fourth, the e.LORS database was used to estimate the number of labor organizations that will pay and receive per capita taxes.⁴² Fifth, aggregate receipts reported on 2007 Form LM-2s were divided by \$5,000 (itemization threshold) to estimate the number of itemized transactions on the new receipt itemization schedules.⁴³ Finally, indirect disbursements to officers and employees for lodging and travel were estimated from the number of direct disbursement for lodging or travel reported on 2007 Form LM-2s.⁴⁴ The Department estimated that the 2009 changes to the Form LM-2 increased the Form LM-2 burden by 150.06 hours in the first year⁴⁵ and 15.06 in subsequent years.⁴⁶

The Department received multiple comments attacking the burden analysis on conceptual and practical grounds, but it did not receive any comments that included an analytical burden analysis. As discussed above, the Department made many changes to the burden analysis in response to comments. For example, the market exchange exception was created in response to comments that indicated that it was impossible to determine the name and address of stock purchasers or sellers and the officer and employee costs were increased to account for benefits.⁴⁷

³⁵ Id.

³⁶ Id.

³⁷ United States Securities and Exchange Commission, Form 10-K General Instructions. Available at <http://www.sec.gov/about/forms/form10-k.pdf>.

³⁸ 29 CFR 3705.

³⁹ Id.

⁴⁰ OLMS database for Form LM-2 data.

⁴¹ 29 CFR 3705.

⁴² Id.

⁴³ Id.

⁴⁴ Id.

⁴⁵ The first year burden includes time needed to reprogram reporting software and adjust current recordkeeping requirements to meet the new demands of the 2009 Form LM-2.

⁴⁶ 29 CFR 3706.

⁴⁷ 29 CFR 3704.

Those comments that included cost estimates represented the cost estimates of a single labor organization and varied widely with little explanation as to how the estimates were reached.⁴⁸ The Department could not rely on these estimates on a broad scale as burden is correlated with a labor organization's annual receipts, labor organization with high annual receipts participate in more transactions. Form LM-2 filers range from \$250,000 to millions of dollars in annual receipts. To capture this difference, the Department used a weighted average to estimate each factor in the burden analysis so that neither large nor small labor organizations would be over represented in the final burden estimates.⁴⁹

The 2009 Form LM-2 final rule burden analysis was built on the most accurate data available to create a fair and accurate representation of the costs to labor organizations for compliance with the Form LM-2. The Administration has failed to present any burden argument upon which the final rule can be rescinded.

Conclusion

The Administration has failed to present any rational basis on which rescission of the 2009 Form LM-2 can be based. In the absence of such rational, the new Form LM-2 reporting standards must be retained for the benefit of all union members. I urge the Administration to implement the 2009 Form LM-2 final rule without further delay.

Sincerely,



Darrell Issa
Ranking Member
Committee on Oversight and Government Reform

⁴⁸ 29 CFR 3703.

⁴⁹ Id.