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OF THE
UNITED STATES OF AMERICA**
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December 14, 2020

Mr. Andrew R. Davis
Chief, Division of Interpretations and Standards,
Office of Labor-Management Standards
Department of Labor
200 Constitution Avenue NW, FP Building, Room N-5609,
Washington, DC 20210

RE: Comments Supporting Proposed Rulemaking “Labor Organization Annual Financial Reports: LM Form Revisions” (RIN 1245-AA10)

Dear Mr. Davis:

The U.S. Chamber of Commerce (Chamber) is pleased to submit these comments in support of the Department of Labor’s proposed amendments to the regulations governing the annual financial reporting requirements of labor organizations, notice of which was published in the Federal Register on October 13, 2020.¹

The Department’s effort to improve the Form LM-2 Labor Organization Annual Report and introduce a Form LM-2 Long Form (LF) would benefit members of the Chamber, individuals represented by unions, and the public more broadly by increasing the transparency of labor organizations’ financial activities.

The vast majority of the Chamber’s membership are employers as defined by the Labor-Management Reporting and Disclosure Act (LMRDA) and National Labor Relations Act (NLRA), and many of these employers have collective bargaining relationships with labor organizations as defined by the same statutes.² The Chamber’s membership also includes a significant number of law firms and trade associations. The Department’s proposal would have a significant impact on each of these groups.

The Department originally proposed a wide-ranging financial disclosure reform effort (LM-2 Reform) in 2002 and implemented it in a final rule in 2003 under the leadership of then-Secretary of Labor Elaine L. Chao, and the Chamber supported that effort at the time. In general,

¹ Labor Organization Annual Financial Reports: LM Form Revisions; Proposed Rule 85 FR 64726 to be codified at 29 C.F.R. 402, 403, 408.

² 29 U.S.C. § 401, *et seq.* and 29 U.S.C. § 151, *et seq.*

the Chamber supports this proposal, which further improves the modern reporting scheme for labor organizations.³

Purpose and Importance of Reporting and Disclosure Requirements

As the Chamber has stated in the past, Congress enacted the LMRDA in 1959 to ensure union democracy and transparency with the goal of making union officers and employees accountable to their members.⁴ It passed that landmark legislation after an investigation by the Congressional Select Committee on Improper Activities in the Labor or Management Field revealed “a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct.”⁵ The law provided a “Bill of Rights” for union members, established a reporting obligation for union financial and administrative practices, imposed on union officers and others a fiduciary duty, defined procedures for the election of union officers, and added criminal penalties, among other things.

The Department’s proposed regulation continues the vein of the original LM-2 Reform by implementing changes that reflect the nature of modern labor organizations and their practices. The LM-2 Reform of 2002-2003 cast light on troves of information that were cloaked in darkness for decades as unions became increasingly more complex, and that previously unseen information yielded myriad benefits including, among other things, the successful prosecution of union officials whose untoward deeds became subject to meaningful scrutiny for the first time.

The current proposal reflects the considerable experience garnered after almost twenty years with more detailed and informative reporting. Importantly, it also takes into account the views of the Department’s own investigators, who are intimately familiar with what information the LM-2 provides that is helpful in their investigations and that which is not. These perspectives support the Department’s suggestion that the proposed changes to the LM-2 would advance Congress’ objectives under the LMRDA.

Increased Transparency Benefits Multiple Constituencies

The Chamber supported the Department’s original LM-2 Reform and has steadfastly supported its continued efforts to improve it, including reporting requirements for trusts in which labor organizations are interested (Form T-1), coverage of intermediate bodies, and other proposals that have promoted increased transparency.⁶ The Chamber’s support for these collective proposals reflects the belief that employees benefit from having access to important financial information about labor organizations, whether they are represented by a labor organization or

³ Cf. Labor Organization Annual Financial Reports, 67 FR 79820 (Dec. 27, 2002) and 68 FR 58374 (Oct. 9, 2003).

⁴ Cf. U.S. Chamber of Commerce, “Comments Supporting Proposed Rulemaking Regarding Labor Organization Annual Financial Reports for Trusts in Which a Labor Organization Is Interested, Form T-1 (RIN: 1245-AA09),” July 29, 2019.

⁵ United States Department of Labor. *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959: Titles I-IV*, p. IX, undated.

⁶ Labor Organization Annual Financial Reports for Trusts in Which a Labor Organization Is Interested, Form T-1; Proposed Rule, 84 FR 25130; and Labor Organization Annual Financial Reports: Coverage of Intermediate Bodies; Proposed Rule 84 FR 68842.

not, as do others. Indeed, the Chamber agrees with the Department that this proposal would “provide additional valuable information to union members, the Department, and the public.”⁷

For those who are members of a labor organization, increased financial transparency strengthens union democracy and provides valuable information to ensure accountability from the officers and employees of their union. It is an unfortunate reality that financial malfeasance in the form of misspending and embezzlement exists in general, and it is even more unfortunate that labor organizations are not immune to it, as the Department highlights in its proposal. Members of labor organizations may have no other means of identifying potentially questionable financial activity than the Department’s disclosure reports, so the importance of its reporting regime to the individuals who financially support a union cannot be understated.

The information from the Department’s reports likewise benefits employers engaged in collective bargaining by promoting the integrity of the bargaining process. Information available from disclosure reports can assist employers in understanding the composition, structure, and financial health of a labor organization, all of which is helpful in evaluating a labor organization with which an employer may be bargaining or considering to bargain. Although perhaps not engaged in bargaining, members of the public benefit from understanding more information about labor organizations as it relates to employers as well as how it relates to unions’ other activities, such as involvement in the political process.

OLMS Investigators Provided Useful Insight about LM-2 Reform

The Department’s current proposal identifies seven particular changes that were made in the LM-2 Reform that elicited responses from OLMS field investigators. Without recounting them here, the Chamber offers the following observations about the investigators’ responses:

- The Chamber agrees that itemization of certain categories of receipts and disbursements exceeding \$5,000 is an important tool and “was the best of the seven [changes] as it provides more transparency to the membership...”⁸ Whereas labor organizations prior to the LM-2 reform routinely failed to provide meaningful disclosure with only aggregated information—sometimes involving millions of dollars—the LM-2 Reform’s itemization requirement provides substantially more useful information for myriad reasons.
- The Chamber agrees that the confidentiality exemption “reduces transparency by eliminating itemization” and therefore should be curtailed.⁹ Inasmuch as the LM-2 and associated reports exist for the purpose of maximizing disclosure, allowing labor organizations to self-determine that certain items should remain confidential opens the door for obfuscation. Just as prior to the LM-2 Reform some labor organizations would report tens of millions of dollars in “sundry expenses,” for example, the open-ended nature of the confidentiality exemption allows important information to remain undisclosed. Given that labor organizations presumably devote a significant portion of

⁷ Labor Organization Annual Financial Reports: LM Form Revisions Note 1, *supra*, at 64726.

⁸ *Id.* at 64731.

⁹ *Id.*

their members' dues to organizing activities, the potential for shrouding expenses related to such activities should be minimized, irrespective of any desire to assert confidentiality. The Chamber believes that labor organizations should be required to itemize all expenditures above the relevant reporting threshold. To the extent that claims of confidentiality may be allowed, they should not be allowed to hide incriminating or other information union officials may wish to withhold but which have nothing to do with organizing strategy. At a minimum, labor organizations should be required to disclose to the Department detailed written justification for any claim of confidentiality.

- The Chamber agrees that the functional categories for reporting are necessary and useful for better understanding the nature of financial transactions, but some clarification of them would lessen confusion (e.g., General Overhead vs. Union Administration).
- To the extent that OLMS investigators find that functional reporting of union officers' and employees' time "offers no valuable insight for case targeting and has provided no benefit in criminal investigations or compliance audits," the Chamber counters that this information still provides some meaningful insight for union members and the public but recognizes that having this information may be of limited utility.¹⁰
- The Chamber agrees that reporting of investments is a vital component of the LM-2 report, especially to the extent that it is useful for criminal investigations. It also is an important item for union members who may otherwise not be privy to information about how their dues are being invested and how those investments are performing.
- The Chamber agrees that the reporting of different membership categories provides helpful information not only for investigators but the broader public as well.

The Department's Proposed Changes Would Improve Disclosure

OLMS investigators also offered numerous other observations and suggestions that informed the Department's proposal and would improve disclosure. As the proposal observes "[t]oday's labor organizations are more like modern corporations in their structure, scope, and complexity than the labor organizations of 1959," and the Department's reporting regime must adapt to the ever-evolving nature of labor organizations.¹¹ The changes proposed by the Department would adapt the LM-2 in such a way as to take into account the operations of labor organizations today using the benefit of empirical knowledge.

The Chamber accordingly offers the following additional comments about specific elements of the proposed rule:

- The Chamber supports the creation of the Form LM-2 LF for labor organizations with receipts of \$8 million or more. That threshold is sufficiently high that it would achieve the objective of adequate reporting by larger, more prominent unions while also not adding undue burden for smaller ones. In addition, the threshold is consistent with the Small Business Administration's definition of a small entity, and consistency among government agencies is preferable as a general principle.

¹⁰ *Id.* at 64732.

¹¹ *Id.* at 64728.

- The Chamber supports the addition of Item 3(d) for trusteeships and believes labor organizations should be required to list on their report any entities they currently have under trusteeship. Labor organizations should also be required to provide the rationale for every trusteeship imposed.
- The Chamber supports the addition of Item 10(b), which would ask “whether, during the reporting period, an officer or employee who was paid \$10,000 or more by the reporting organization also received \$10,000 or more as an officer or employee of another labor organization in gross salaries, allowances, and other direct and indirect disbursements during the reporting period.”¹² Members of labor organizations and the public would benefit from better understanding the relationships—and potential conflicts of interest—that an official or employee may have with other labor organizations.
- The Chamber supports the addition of Item 11(c) to require the disclosure of separate strike funds because union members, employers, and the public would benefit from understanding the financial condition of such strike funds. Unfortunately, as the Department notes, strike funds have been the source of major embezzlement cases, and these types of crime are a byproduct of the lack of transparency surrounding these funds. Moreover, union members have little, if any, ability to obtain information about strike funds absent reporting to the Department; therefore, any concern about disclosing information that could impact negotiations with employers is outweighed by the interests of union members to information about the use of their dues money.
- The Chamber supports the Department’s proposal to change the language in Item 13 to require the disclosure of any loss or shortage of funds by the labor organization to prevent the withholding of disclosure about such losses or shortages.
- The Chamber supports the addition of Item 18(b) to provide union members and the public with information about the date of a labor organization’s current constitution and bylaws. This information would help ensure that those interested in such information possess the correct version of either document for whatever purpose they may need it. The Chamber also suggests that the Department require labor organizations to disclose changes to its constitution and/or bylaws on their respective annual disclosure forms.
- The Chamber supports the separation of the functional reporting categories in Item 43 (Sale of Investments and Fixed Assets) and the creation of Item 44 for Sale of Fixed Assets, as well as the corresponding schedules for each. The nature of these types of transactions is sufficiently different to warrant separate reporting, and the Department’s rationale is justified. Taking into account the examples provided, it is clear that transactions involving tens of millions of dollars currently lack meaningful reporting.
- The Chamber supports the separation of the functional reporting categories in Item 50 (Representational Activities) and the creation of Item 51 for Contract Negotiation and Administration and Item 52 for Organizing, as well as the corresponding schedules for each.
- The Chamber supports the separation of the functional categories in Item 51 (Political Activities and Lobbying) and the creation of Item 53 for Political Activities and Item 54

¹² *Id.* at 64735.

for Lobbying, as well as the corresponding schedules for each. These are distinct activities deserving of separate reporting. Moreover, the National Labor Relations Board (NLRB) ruled in its 2019 *Kent Hospital* decision that lobbying expenses are not part of a labor organization's representational function, and therefore they are not chargeable to *Beck* objectors.¹³ Having clearly identifiable functional categories would assist in ensuring that non-chargeable expenses are excluded from agency fee calculations.

- The Chamber believes that the reporting threshold for the LM-2 should remain at \$250,000. As the Department itself notes, 78.5% of labor organizations currently do not meet that threshold and therefore file less detailed Forms LM-3 or LM-4.¹⁴ The interests of the Department and the public lie in maximizing disclosure. Given that approximately four out of five labor organizations are exempt from filing the LM-2 already, the goal of maximizing disclosure is not advanced by exempting even more of them.
- The Chamber supports the proposition that union vendors and payees should be listed with their Employer Identification Number (EIN) in any schedule requiring itemized disclosure. This information would allow investigators and others reviewing financial transactions to better ascertain the legitimacy of a given transaction. As an OLMS investigator observed, “sham businesses often do not have an EIN,” so requiring the EIN would assist in identifying if not thwarting “sham” financial transactions.¹⁵
- The Chamber supports the inclusion of an item asking, “Does the Organization have a written whistleblower policy?” to the informational items on the Forms LM-2 and LM-2 LF. As the proposal states, it is against federal law for a nonprofit organization to retaliate against whistleblowers, and information about whether or not a labor organization has a whistleblower policy may assist union employees or officials to know that one exists.
- The Chamber also suggests that it could be useful to ask whether a labor organization has a formal training program for officers and/or employees with regard to their fiduciary obligation. This obligation is affirmatively imposed by the LMRDA, but inasmuch as that is a legal term of art, the average layperson in a labor organization may not understand the specific elements of their fiduciary obligation to the extent that they have one. Knowing whether or not labor organizations provide such training could benefit union members and others interested in knowing whether a labor organization takes that responsibility seriously.
- The Chamber believes that labor organizations should be required to clearly identify and report financial information for subsidiaries and/or related organizations supported by the labor organization. For example, in recent years labor organizations have increasingly turned to using so-called worker centers to perform activities traditionally associated with union organizing campaigns, but they purport to operate as nonprofit organizations under Section 501(c)(3) of the Internal Revenue Code. To the extent that these organizations do not file with the Department but receive support from one or more labor organizations,

¹³*United Nurses & Allied Professionals (Kent Hospital)* and *Jeanette Geary*, 367 NLRB 94 (March 1, 2019). See also *Communications Workers v. Beck*, 487 U.S. 735 (1988).

¹⁴ Labor Organization Annual Financial Reports: LM Form Revisions Note 1, *supra*, at 64753.

¹⁵ *Id.* at 64733.

those labor organizations should be required to provide adequate disclosure on their reports about them.

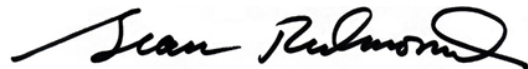
The Chamber appreciates the opportunity to provide these comments about the Department's proposal to improve the disclosure requirements for labor organizations, which would benefit union members as well as employers and help ensure the integrity of the collective bargaining process. As one federal court noted in the past, it is "difficult to argue against the proposition—which is the thrust and congressional purpose behind the [LMRDA]—that if detailed financial reports will keep leaders honest and help those they lead to choose their leaders, the more the merrier."¹⁶ Thus, the Chamber supports this effort and encourages the Department to adopt the proposed rule for the benefit of union members, employers, and the public.

Thank you for your consideration of these comments.

Sincerely yours,



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¹⁶ *Alabama Education Assn. v. Chao*, 539 F. Supp. 2d 378 (D.D.C. 2008), clarified on denial of reconsideration, 595 F. Supp. 2d 93 (D.D.C. 2009).