UNITED STATES DEPARTMENT OF LABOR
OFFICE OF LABOR-MANAGEMENT STANDARDS

Labor Organization Annual Financial Reports: LM Form Revisions — RIN 1245-AA10

COMMENTS ON BEHALF OF
THE AMERICIAN FEDERATION OF LABOR AND
CONGRESS OF INDUSTRIAL ORGANIZATIONS AND
THE SERVICE EMPLOYEES INTERNATIONAL UNION

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) and the Service Employees International Union (SEIU) submit these comments in opposition to the proposal issued by the Office of Labor-Management Standards (OLMS) on October 13, 2020 to make various revisions to the Form LM-2. 85 FR 64726 (Oct. 13, 2020).[1]

The present version of the Form LM-2 has been used for almost twenty years. Although the current proposal introduces a version called the "LM-2 Long Form," the truth is that for most filers the present version is already a very long form, frequently stretching to hundreds of pages and occasionally reaching one thousand pages. The mere length of the present version is sufficient to indicate how burdensome completing it is for the filing unions and how difficult to read it is for the union membership whose dues pay the considerable recordkeeping, accounting and reporting costs associated with completing the form. Nevertheless, in framing the current proposal, OLMS made no effort whatsoever to engage with the unions

[1] The AFL-CIO is a federation of 55 affiliated national and international labor organizations. The SEIU, CtW, CLC, is an independent international labor organization with 130 local affiliates.

that file this form or the membership who presumably turn to it for information about their unions.

A "2009 Final Rule, which ultimately did not go into effect[,] put forward similar revisions" to those now proposed by OLMS. 85 FR at 64730. "The [2009] rule [wa]s withdrawn because the revisions it made to the Form LM-2 were issued without an adequate review of the Department's experience under the relatively recent revisions to Form LM-2 in 2003, and because the comments received indicate that the Department may have underestimated the increased burden that the rule would place on reporting labor organizations." 74 FR 52401, 52402 (Oct. 13, 2009). Remarkably, the current proposal is, if anything, less adequately supported in both regards than the 2009 Final Rule. What is more, to the extent that the current proposal differs from the 2009 Final Rule it would revise the Form LM-2 in ways that would make reporting both more burdensome and less informative. Therefore, the current proposal should be withdrawn.

1. OLMS Has Once Again Failed to Adequately Consider the Reporting Experience Under the Current Form LM-2 or the Burden that Would Be Imposed by the Proposed Changes.

A. The Survey of OLMS Staff.

The sum total of OLMS's effort to consider the present reporting experience and the possible effect of proposed changes was a remote survey of field staff conducted during the months of July and September 2019. 85 FR at 64730. Staff members were given a list of 7 aspects of the current reporting requirements and a

list of 3 possible changes. Michael Delaney to File, DOL Canvas of Investigators (Oct. 13, 2020) (Delaney Memo). They were asked to submit their comments on two templates, one entitled LM Form Reform and the other LM Form Benefits of 2003 Changes. These inquiries generated five pages of comments on the benefits or detriments of the current reporting regime and six pages of comments on possible changes. Most comments consist of brief sentence fragments, with only a few comments extending to several sentences. There was no attempt to follow up on the staff comments to seek further elaboration.

While the Notice of Proposed Rulemaking (NPRM) coyly suggests that "some of the comments provided by OLMS staff are directly implemented as proposed revisions to the LM forms," it candidly adds that "[t]he Department [] does not, however, view itself as restricted to these comments when deciding how to revise the LM forms." 85 FR at 64730. This caveat is a gross understatement, for, in truth, the staff comments do not provide any support for carrying over the more burdensome aspects of the 2009 Final Rule.

The most burdensome aspects of the 2009 Final Rule were the itemization requirements with respect to each sale or purchase of a fixed asset or investment, no matter how low the price, and with respect to various categories of receipts from represented workers. 74 FR 3678, 3731-32 (Schedules 3 & 5) & 3737-38 (Schedules 14-16) (Jan. 21, 2009). Not a single OLMS staff member indicated that these itemization requirements should be reinstated.

One staff member did suggest carrying over from the 2009 Final Rule the

requirement that benefits attributable to individual officers and employees be reported in a separate column on Schedules 11 & 12. However, while the 2020 NPRM contains a comment indicating that such a column would be included, 85 FR at 64743, no such column actually appears on the proposed form. *Compare* 85 FR at 64841-42 (Schedules 13-14) *with* 74 FR at 3735-36 (Schedules 11-12). This is indicative of the carelessness with which the proposed rule was drafted.

In short, the cursory survey of OLMS staff had no bearing whatsoever on the decision to propose implementing these burdensome aspects of the 2009 Final Rule.

B. OLMS's Failure to Adequately Assess the Burden of Its Proposal.

The NPRM asserts that the proposed rule "meets the requirements of the [Paperwork Reduction Act] in that [] the information collection has practical utility to labor organizations [and] their members" and is being "implemented in ways consistent and compatible . . . with the existing reporting and recordkeeping practices of labor organizations." 85 FR at 64751. Despite these representations, OLMS does not even pretend to have engaged with either the regulated reporting community or the benefited membership community.

One of the reasons given for repealing the 2009 Final Rule was its apparently inadequate burden analysis. 74 FR at 52402. The section in the preamble to the 2009 Final Rule addressed to Hours to Complete and File Form LM-2 went on for six pages, considering the burdens associated with each proposed new schedule. 74 FR at 3707-13. By contrast, the similar section in the 2020 NPRM goes on for a scant four paragraphs. 85 FR at 64753-54. And, the 2020 analysis reduces to

nothing more than reliance on the Department's 2003 "estimate[s] that the new disbursement schedules would result in 5 hours of new burden." 85 FR at 64753. Since the 2020 proposal "would establish 12 new schedules," "[t]he Department applies this 5 hours per schedule burden to each 12 new schedules in the Form LM-2 LF, resulting in 60 additional reporting hours for the form." *Id.* at 64753-54.

The burden analysis in the 2020 NPRM is patently absurd. In the first place, the various schedules each call for reporting different items at various level of detail. The notion that each of the schedules would take the same additional five hours is contrary to common sense. Beyond that, after 17 years of reporting with the version of the Form LM-2 introduced in 2003, there is no reason to continue to rely on the Department's estimates made before any reporting had been done. OLMS has not even attempted to explain its failure to confer with the regulated unions in determining the actual burden entailed in the current reporting.

2. The New Reporting Requirements Added to the 2009 Final Rule Are Ill-Considered and Not in the Best Interest of Union Members.

A. Functional Reporting of Disbursements.

"By reviewing the [FormLM-2] reports, a member [is supposed to be able to] ascertain the labor organization's priorities" and "its direction." 85 FR at 64726. Ascertaining a union's "direction" obviously is made more difficult by changing the reporting categories over time. That being so, changes to the way costs are allocated by function should remain stable unless there are strong reasons for changing them. The current NPRM introduces two major changes to the functional

reporting of disbursements on the Form LM-2. Neither change will aid union members in ascertaining their unions' priorities and direction. To the contrary, each proposed change would distort the presentation of union expenditures to the membership.

i. The first change would no longer include salary-related expenditures in the functional allocation of union expenditures. 85 FR at 64739-40. This change would exaggerate the portion of expenditures going for overhead, which usually involve payments to third parties for things like rent, utilities and supplies. And it would concomitantly understate the portion of expenditures going for representation, as negotiations and grievance-handling are carried out directly by union officers and employees.

As the Supreme Court has observed,

> "The tasks of negotiating and administering a collective-bargaining agreement and representing the interests of employees in settling disputes and processing grievances are continuing and difficult ones. They often entail expenditure of much time and money. The services of lawyers, expert negotiators, economists, and a research staff, as well as general administrative personnel, may be required." *Abood v. Detroit Board of Education*, 431 U.S. 209, 221 (1977) (citation omitted).

These tasks are largely carried out by union staff members.

The NPRM explains this change as being based on suggestions from OLMS staff, but that is a patently deceptive explanation. 85 FR at 64731-32. What the

OLMS staff said is that functional allocation of officer and employee time has not aided them in generating criminal cases. However, no staff member denied that the time allocations provided union members with useful information about "the leadership of their labor organization and its direction." *Id.* at 64726

ii. The other proposed change would divide the representation category into separate collective bargaining and organizing categories and the political/lobbying category into separate political and lobbying categories. 85 FR at 64741-43. The original categorization reflects the facts that a union's organizing activity is directly related to its ability to effectively represent employees in collective bargaining and that its political activity is directly related to its ability to effectively lobby for employment-related benefits.

The direct connection between organizing and collective bargaining has been long understood. As Chief Justice Taft observed a century ago:

> "Union was essential to give laborers opportunity to deal on equality with their employer. * * * To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood." *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209 (1921).

There is a similar connection between union political activity and lobbying.

Justice Frankfurter, a renowned labor historian, found it to be a "familiar truth of industrial history" that the "political activity of American trade unions . . . indissolubly relat[e] to the immediate economic and social concerns that are the *raison d'etre* of unions." *Machinists v. Street*, 367 U.S. 740, 800 (1961) (dissent). Elaborating on this point he explained,

> "To write the history of the Brotherhoods, the United Mine Workers, the Steel Workers, the Amalgamated Clothing Workers, the International . Ladies Garment Workers, the United Auto Workers, and leave out their so-called political activities and expenditures for them, would be sheer mutilation. Suffice it to recall a few illustrative manifestations. The AFL, surely the conservative labor group, sponsored as early as 1893 an extensive program of political demands calling for compulsory education, an eight-hour day, employer tort liability, and other social reforms. The fiercely contested Adamson Act of 1916 was a direct result of railway union pressures exerted upon both the Congress and the President. More specifically, the weekly publication 'Labor' . . . has since 1919 been the organ of the railroad brotherhoods which finance it. Its files through the years show its preoccupation with legislative measures that touch the vitals of labor's interests and with the men and parties who effectuate them. This aspect—call it the political side—is as organic, as inured a part of the philosophy and practice of railway unions as their immediate bread-and-butter concerns." *Id.* at 800-01.

The point is that labor unions, not unlike corporations, engage in political activity in order to advance "their immediate bread-and-butter concerns" through lobbying. Thus, the distinction drawn by the proposal between political activity and lobbying is the same sort of false dichotomy as separating organizing expenditures from collective bargaining expenditures.

B. Disclosure of Confidential Information.

The proposed rule would require unions to disclose the amount held in any strike fund. 85 FR at 64735. The NPRM acknowledges that "employers may benefit from knowing the extent of their employees' union strike fund" and that "the information may lead to less favorable contracts, harming the members." *Ibid.* To demonstrate that "the benefits of disclosure outweigh completing considerations," the NPRM cites one instance of embezzlement and one instance in which a union officer received apparently excessive strike benefits. *Ibid.* But the NPRM makes no attempt to explain how reporting the total amount held in a strike fund would have disclosed these incidents.

Likewise, the NPRM suggests that OLMS might limit the confidentiality exception in some unspecified away. 85 FR at 64744-45. To justify limiting the exception, the NPRM cites two instances in which the exception was claimed for apparently excessive amounts. *Id.* at 64745. But the obvious answer to such situations is for OLMS to inquiry specifically as to the expenditures in question. That would not necessarily entail harmful public disclosure.

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The Form LM-2 is already a unnecessarily "Long Form." Completing the form is burdensome. Digesting the form's contents is not easy. In those circumstances, changing the form to make it even longer, and thus more burdensome to complete and more difficult to interpret would require very strong justification. The current proposal to further complicate and lengthen the Form LM-2 fails to meet that standard. Therefore, the proposed rule should be withdrawn.

Respectfully submitted,

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