UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA

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General President

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Submitted electronically at www.regulations.gov

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

RE: **Labor Organization Annual Financial Reports: LM Form Revisions (RIN 1245-AA10)**

Dear Sir or Madam:

On October 13, 2020, the U.S. Department of Labor ("DOL" or "Department") published a notice in the *Federal Register* of proposed rulemaking ("Proposed Rule" or "NPRM") and request for comments.[1] DOL "proposes to promulgate a rule that updates and revises [DOL] regulations in order to improve the Form LM-2 and establish a Form LM-2 Long Form (LF), in the interest of labor organization financial integrity and transparency." Public comments must be submitted on or before December 14, 2020. Please consider this submission to be the United Brotherhood of Carpenters and Joiners of America's ("UBC") comments regarding the Proposed Rule.

I. Introduction

DOL "proposes to introduce a new Form LM-2 Long Form,…and update and revise Form LM-2 labor organization annual financial disclosure report to provide additional valuable information to union members, the Department, and the public."[2] Given the limited comment period provided, however, it is not feasible to discuss each and every aspect of the Proposed Rule. Therefore, the UBC will limit its comments to a handful of areas, as noted below. For the reasons provided for herein, the UBC is opposed to the Proposed Rule and strongly urges that it be rescinded.

[1] 85 Federal Register No. 198, 64726, et. seq.
[2] *Id*., at 64726.

II. Statement of Interest

With approximately one half-million members employed primarily in the construction and wood products industries, the UBC is one of North America's largest building-trades unions. The UBC has a continent-wide presence composed of an international union headquarters in Washington, D.C., and approximately twenty-four councils, and 450 local unions, affiliated with it. In its capacity as an international labor organization, the UBC is familiar and experienced with the current reporting requirements under the Labor Management Reporting and Disclosure Act ("LMRDA"). As a result, the UBC believes that the current reporting requirements more than satisfy the LMRDA's transparency and reporting goals for labor unions and, therefore, the Proposed Rule is unnecessary, unwarranted, and unduly burdensome.[3]

III. Overview of the Proposed Rule

The UBC already devotes substantial time and resources to comply with current Form LM-2 filing requirements. Now, the Proposed Rule seeks to further expand on the current LM-2 reporting requirements. DOL also "proposes a long form version of the current Form LM-2, the Form LM-2 LF. This form will be applicable to labor organizations with annual receipts of $8,000,000 or more."[4] Thus, if the Proposed Rule becomes effective as presented, the UBC would apparently be required to file Form LM-2 Long Form ("Form LM-2 LF"). The focus of this submission will be the Form LM-2 LF in general and, specifically, aspects of the LM-2 LF.

After viewing the Proposed Rule, the UBC is convinced that the Department underestimated the burdens associated with complying with the new proposed requirements. In addition to making significant modifications to the UBC's recordkeeping system to comply with the Proposed Rule's requirements, the ongoing recordkeeping and reporting burden associated with the proposed changes would be substantial. Furthermore, the benefit that would be derived from the additional proposed disclosure requirements would not appear to outweigh the burden that would be imposed on labor organizations that already devote substantial time and resources to comply with the existing LM-2 reporting regime. Many of the proposed modifications would require the collection and reporting of detailed information that would appear to be of little value to union members.

It is also troubling that this rulemaking did not include any serious cost-benefit analysis justification of the changes to which the regulated community could respond. Instead the Department relied on speculation and generalizations informed by a limited survey of its own staff that was used in selective manner that is incompatible with the requirements of the Administrative Procedures Act. The rigor of Department's assessments of costs and burdens pales in comparison

[3] Indeed, the Department acknowledges that the Proposed Rule will impose additional burdens on labor organizations: "While this rule would incur some new burdens on labor unions, the Department views those burdens as necessary and appropriate to ensure transparency and prevent malfeasance before it happens." *Id.,* at 64730.
[4] *Id.,* at 64734.

to the analysis done for the 2009 revisions to the Form LM-2[5] that DOL later rescinded, in part, due to unrealistically low burden estimates. Now the Department not only seeks to use unrealistic analysis of the burdens its changes will impose, it also uses general normative assertions devoid of any empirical support. For instance, the final rule states the changes have "practical utility to labor organizations [and] their members"[6] in describing the supposed benefits of the rule. The Department's selective use of the 2019 survey of its field staff does not remedy these inadequacies. Only a small number of the changes DOL is making to the Form were included in this survey.[7] Thus, the survey provides little useful information on the burdens this rule imposes. DOL concedes the haphazard and inconsistent treatment of the survey results in stating "some of the comments provided by OLMS staff are directly implemented as proposed revisions to the LM forms," but that it does not "view itself as restricted to these comments when deciding how to revise the LM forms."[8] Below we detail deficiencies with some of the specific changes made by the final rule that provide examples of the Department's inadequate burden analysis.

A. New Proposed Schedule 3, and Schedule 4

Currently, under *Schedule 3-Sale of Investments and Fixed Assets* "a labor organization must report details of the sale or redemption of U.S. Treasury securities, marketable securities, other investments, and fixed assets, including those fixed assets that were expensed. The assets and the investments are totaled and the result is entered in Item 43."[9] DOL asserts that, among other ostensible shortcomings, current Schedule 3 "does not include adequate information to determine whether a particular sale of an investment or asset was at fair market value and at arm's length." According to the Proposed Rule, "(t)o address this lack of transparency, the Department proposes to divide this schedule into new Schedule 3-Sale of Investments and new Schedule 4-Sale of Fixed Assets."[10] Also, under the Proposed Rule, "Item 43 would be renamed Item 43-Sale of Investments. A new Item 44-Sale of Fixed Assets would be established."[11]

The proposal would add a new column to Schedule 3 in which filers would be required to disclose the name and address of purchasers of investments and fixed assets from the labor organization. In addition, a new column would be added in which a labor organization would be required to disclose the date of the sales. The Department also proposed that two similar columns be added to Schedule 4 with respect to the purchase of investments and fixed assets.

From the NPRM, it appears that the Department is primarily concerned about "insider" transactions involving the purchase or sale of investments and fixed assets. The proposed rule goes further, however, by requiring that the additional information pertaining to the sale and

[5]Labor Organization Financial Reports, 74 FR 3677, 3707-13 (January 1, 2009).
[6]*Supra* note 1 at 64751.
[7] *Id.*
[8] *Id.* at 64730.
[9] *Id.*, at 64738.
[10] *Id.*
[11] *Id.*

purchase of investments and fixed assets be provided with respect to sales to or purchases from any individual or entity - even if no potential conflict of interest exists.

UBC believes that the Department's burden estimates with respect to the proposed modifications to Schedules 3 and 4 are too low. The Department estimated that the proposed changes to Schedule 3 would impose an additional recurring burden on labor organizations of 5 hours per year. However, practically speaking it may take a significant amount of time just to log into an investment data base, input the search criteria, and begin the sorting activity.

Moreover, depending on the labor organization involved, the number of purchases and sales of investments during a year may be substantial. In this regard, a labor organization may have numerous investment transactions in a given month. Separately identifying and listing each required transaction would be incredibly time consuming.[12]

UBC also notes that a labor organization's sale or purchase of investments may involve publicly traded securities that are purchased or sold on a national securities exchange. In such cases, the labor organization does not know the identity of the seller or the purchaser. This does not appear to be addressed in the proposed instructions. The UBC does not support the proposed modifications to Schedules 3 and 4.

B. New Proposed Schedule 32: Foreign Transactions

In addition, DOL is seeking "comment on whether to establish a new Schedule 32-Foreign Transactions on the Form LM-2 LF if the labor union engages in a transaction with a foreign entity or a foreign individual."[13] Specifically, "the labor organization would report any individual receipt of $5,000 or more, or total receipts from any single entity or individual that aggregate to $5,000 or more during the reporting period, derived from a foreign entity or individual."[14]

Many international unions have Canadian membership. These entities would have normal business operations including salaries, benefits, rent, office and administrative expenses in

[12] The breakdown between investments and fixed assets may provide more information about how unions are using union funds, but listing individual purchases and receipts of investments is quite burdensome and would not provide information useful to the reader and would only reduce the readability of the form. Larger labor organizations have investment managers who operate under an investment policy with fixed income investments that are publicly traded including Federal National Mortgage Association ("FNMA") and Government National Mortgage Association ("GNMA") and other short term investments. Based on the nature of collateralized mortgage securities, payments are received monthly. Short term investments roll over frequently within any given month. Hundreds of receipts are received by a union within a month. Since these investments are publicly traded, the seller or buyer of these investments is unknown. Thus, this aspect of the Proposed Rule presents daunting, if not unworkable, reporting challenges.

[13] *Id*. at 64744.

[14] *Id.*

Canadian dollars. These operations are already reported in the categories required. U.S. and Canadian employees and officers are listed on current Schedule 11 and Schedule 12 of the LM-2 Form. Office expenses are listed on Schedule 18. The address of vendors are listed, which would provide information as to the vendor's country. Having a separate schedule(s) as contemplated by the Proposed Rule would not provide useful additional information, and the UBC is opposed to creating a new Schedule 32.

C. New Proposed Schedule 19: Sale of Supplies

Under this new schedule, "(t)he labor organization would be required to complete a separate itemization schedule for each individual or entity from which the labor organization has received $5,000 or more."[15] Keeping records for each transaction as proposed, e.g. "information about the individual, the purpose of the payment, the date of the payment, and the amount of the payment,"[16] would not provide any useful transparency to accounting operations.

Moreover, this added reporting requirement would result in a significant administrative burden for many labor organizations, including the UBC, that wou1d appear to exceed the estimates provided by the Department. For example, the UBC, which has hundreds of affiliates, sells supplies to its affiliates. It would be time consuming to collect and consolidate information regarding such sales. Affiliates may have multiple purchases of supplies throughout the year or even in a given month. Keeping track of this additional information would require modifications to the existing recordkeeping system and be time intensive.

Furthermore, proposed Schedule 19 would not appear to provide any useful information to members. In this regard, UBC is not convinced that the gathering and disclosure of this additional information regarding sales of a labor organization's supplies would be of any real value to members. UBC is therefore opposed to the addition of proposed Schedule 19.

D. Employer Identification Number

DOL also invites feedback on whether to require the disclosure of the Employer Identification Number (EIN) "for vendors that received payments that trigger itemized disclosure ($5,000 or more) on new schedules 24 through 30. This would require an additional column on these schedules…."[17]

Putting aside the questionable utility of requiring such information, public disclosure of tax identification numbers is ill-advised due to the high level and sophistication of individuals who could use tax identification information for fraudulent, or other, illegal activities. The UBC is opposed to this suggestion.

[15] *Id*. at 64743.
[16] *Id.*
[17] *Id*. at 64745.

E. New Schedules 13 and 14: All Officers and Disbursements to Officers/Employees

DOL is seeking to eliminate the reporting exception for indirect disbursements for travel-related expenses when payment is made by the labor organization directly. Currently, the disbursements listed for the officers (Schedule 11) and employees (Schedule 12) represent a clear picture of expenses that are under the representative's control to conduct the business of their union. If DOL eliminates this reporting exception it would significantly increase the expenses reported for vendors such as airlines, transportation services, and lodging which they have little to no control over, and since there aren't many of these public vendors to choose from most of their aggregate transactions are over $5,000.00 and is reported on current Schedules 15-19. The UBC is opposed to the new proposed schedules.

F. The Confidentiality Exception Needs to be Maintained.

UBC is also concerned that the Department appears to be considering narrowing or eliminating the confidentiality exception that currently applies to the Form LM-2. In comments that the UBC provided in response to the Department's proposed rule regarding the Form LM-2 that was issued in December of 2002, the UBC emphasized the need to protect the confidentiality of information in certain circumstances, such as to protect the identity of "salts." UBC continues to believe that the exception is necessary and is strongly opposed to the removal or any narrowing of this exception. Further comments regarding the confidentiality exception are set forth below.

The Department notes that, "(o)n October 9, 2003, [DOL] issued a final rule, 68 FR 58373, with an effective date of January 4, 2004."[18] Among the changes put into place was a "Confidentiality Exemption". Under the exemption, "labor organizations…may take advantage of special procedures for reporting confidential information, such as information that would expose the reporting union's prospective organizing strategy and information that would provide a tactical advantage to parties with whom the union engages in contract negotiations. Such information is not specifically reported or publicly disclosed."[19] Yet, now, more than seventeen years later, the Department sees the need to possibly do away with this exemption.

The Proposed Rule requests comments on whether "to modify, narrow, or eliminate the confidentiality exception in the Form LM-2 instructions."[20] Under the exception, a union does not have to report:

> (1) Information that would identify individuals paid by the union to work in a non-union facility in order to assist the union in organizing employees, provided that such individuals are not employees of the union who receive more than $10,000 in the aggregate from the union in the reporting year; (2) information that would expose the reporting union's

[18] *Id*., at 64728.
[19] *Id.*
[20] *Id*., at 64744.

> prospective organizing strategy; (3) information that would provide a tactical advantage to parties with whom the reporting union or an affiliated union is engaged or would be engaged in contract negotiations; (4) information pursuant to a settlement that is subject to a confidentiality agreement, or that the union is otherwise prohibited by law from disclosing; and (5) information in those situations where disclosure would endanger the health or safety of an individual.[21]

With respect to the above types of information, the current instructions indicate that if the reporting union can demonstrate that itemized disclosure of a specific major receipt or disbursement, or aggregated receipt or disbursement, would be adverse to the union's legitimate interests, the union may include the receipt or disbursement in Line 3 of the Summary Schedule 14 (Other Receipts) or on Line 5 of Summary Schedules 15 (Representational Activities) or 19 (Union Administration) as appropriate.

The exception to the itemized disclosure of major receipts and disbursements is already very narrow. The instructions make clear that the value of major receipts or disbursements must still be included in the "All Other Receipts" or "All Other Disbursements" portion of a reporting schedule. The union must also identify in Item 69 ("Additional Information") of Form LM 2 the schedules from which it has excluded itemized information about a major receipt or disbursement. This ensures that union members are on notice that a "major" transaction has been excluded from itemized reporting.

Furthermore, under Section 20l(c) of the LMRDA, labor organizations are under a duty to permit members for "just cause" to examine books, records and accounts necessary to verify the LM-2 report. Thus, union members for "just cause" have a right to examine books, records, and accounts necessary to verify an entry in their union's LM-2 report. This too is made clear in the instructions, and to date UBC is unaware, nor is there any mention of it in the Proposed Rule, of members being wrongly or routinely denied such information. The UBC continues to believe that the exception is necessary to protect the confidentiality of certain information and urges the DOL not to abandon it.

Critically, the current rule protects individuals who are engaged with the union assisting its legitimate organizing activities under the National Labor Relations Act ("NLRA")(29 USC §151, et seq.). While doing such, the UBC and its affiliates frequently find themselves confronted with construction employers steeped in illegal employment practices. Those practices can include subcontractors getting their labor through labor providers operating under shell company identities.[22] These labor brokers may be paying workers in cash obtained from money service

[21] *Id.* at 64744-45.

[22] David Borum and Geoffrey Branch, *Shell games: How construction cons steal workers-comp premiums*, Journal of Insurance Fraud in America, February 2017, reprinted by NU Property Casualty360, available at https://www.propertycasualty360.com/2017/04/25/how-construction-cons-steal-workers-comp-premiums/?slreturn=20201019152600, last visited November 19, 2020.

businesses, some of whom launder money for drug cartels and organized crime.[23] There are also contractors who engage in labor trafficking.[24] At times, the union needs to use "salts" in its efforts, which may unavoidably involve gathering information on illegal practices. Clearly, disclosure of information on a Form LM-2 LF available to the public that reveals individual sources, means, and methods can jeopardize a person's safety and ability to earn a livelihood by alerting an employer or future employers that the individual may be trying to organize the employer's workforce. The ability of a union to keep its sources confidential is important to secure their cooperation. Moreover, keeping sources confidential not only assists the union's objectives, it also benefits workers, the public, and state and federal governments, including law enforcement agencies.

The second and third parts of the confidentiality exception that pertain to prospective organizing strategies and contract negotiations are also necessary to ensure that such fundamental activities of labor organizations are not undermined. The right to organize is protected by the NLRA. Eliminating these parts of the exception would be very detrimental to lawful, protected organizing efforts and could compromise a labor organization's efforts to effectively engage in collective bargaining negotiations.

Similarly, the fourth part of the confidentiality exception, which applies to information that pursuant to a settlement agreement is subject to a confidentiality agreement, or that the union is prohibited by law from disclosing, protects important interests and should be maintained. Specifically, this exception is necessary to ensure that labor organizations are not prevented from entering into settlement agreements with confidentiality provisions because they may be forced to violate such provisions in order to comply with proposed Form LM-2 LF filing requirements. Settlement agreements with confidentiality clauses are a well-recognized means for resolving matters and settlements are encouraged as a matter of judicial and public policy. UBC also does not believe that labor organizations and their officers should be put in the position of violating the law in order to comply with Form LM-2 LF filing requirements.

In regards to the fifth part of the confidentiality exception, labor organizations should not be required to disclose information on the Form LM-2 LF if such disclosure, as noted above, would endanger the health and safety of members or other individuals. While disclosure of some financial information serves an important purpose, it must not be at the expense of the health and safety of union members or other individuals.

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[23] *Id.*

[24] *See, e.g.*, Press Release, Hennepin County Attorney, *Ricardo Batres pleads guilty to labor trafficking,* November 2019, available at, https://www.hennepinattorney.org/news/news/2019/November/batres-guilty-plea, last visited November 19, 2020 (Contractor convicted on criminal labor trafficking charges.). Adam Herbets, *Fox 13 Investigations: Construction 'Coyotes' Costing Utah Taxpayers Millions,* Fox 13, Salt Lake City, November 18, 2019, available at https://www.fox13now.com/2019/11/18/fox-13-investigates-coyotes-smuggle-workers-onto-construction-sites-across-utah, last visited November 19, 2020 (An investigative report on the use of labor brokers, or "coyotes," in Utah.).

The exception protects important union interests regarding means and methods of organizing and collective-bargaining negotiations. It is difficult to imagine the current DOL or any other federal agency compelling a business to disclose trade-secret information that would give advantage to a competitor who is not similarly compelled, but that is exactly what the DOL is contemplating. Certainly, such consideration must require a careful weighing of interests including DOL's ability to discover, sanction, or otherwise correct any abuse. The discussion in the Proposed Rule offers no such analysis. It details one example of abuse, one investigator who complained that the exception is a hinderance and comments on the benefits of transparency.[25] No data is offered of widespread abuse or that misreporting is intentional or negligent, nor is there any data or analysis on the difficulties or not of audits disclosing abuse and DOL's ability to correct and punish unlawful reporting. Moreover, no offer is made to weigh whether additional instruction can correct misreporting. Such an analysis is necessary in deciding whether to modify, narrow, or eliminate such a vital exception.

Because there is no compelling discussion, data, or analysis supporting the necessity of eliminating or narrowing the exemption, it must be maintained. In the alternative, education should be seriously considered for any faults that may exist.

G. Proposed Schedule 26: Political Activities and Schedule 27-Lobbying.

DOL "proposes to divide Item 51-Political Activities and Lobbying into two items. Item 51 would be renumbered Item 53, and renamed Item 53-Political Activities. There would be a new Item 54-Lobbying."[26] DOL further "proposes to divide Schedule 16-Political Activities and Lobbying into two schedules: Schedule 26-Political Activities and Schedule 27-Lobbying."[27] According to the Proposed Rule, "(u)nder current Schedule 16-Political Activities and Lobbying, the labor organization must report its direct and indirect disbursements to all entities and individuals during the reporting period associated with political disbursements or monetary contributions."[28]

Again, with little or no reason for doing so, DOL is revisiting an issue on which it took the opposite position almost twenty years ago. In 2002, the Department considered having "separate schedules for political activities and lobbying."[29] But in the final rule, the Department combined the categories, acknowledging that, "…the Department's decision to combine the two Schedules will increase the likelihood that the Schedule will be used to report a sufficient amount of information to prove useful to union members. [Citation omitted.]"[30]

[25] 85 Fed. Reg. at 64731 and 64745.
[26] *Id.*, at 64737.
[27] *Id.*, at 64742.
[28] *Id.*
[29] *Id.*, at 64743.
[30] *Id.*

The Department also concedes that it "based its previous decision to consolidate the schedule on the perception that distinguishing between 'political activities," in the election-specific sense of that term, and 'lobbying' is 'not always easy.' [Citation omitted.] The Department still agrees with this sentiment, but now posits that it cuts in favor of dividing the schedules."[31]

There is no useful information that can be gleaned from getting more granular on this topic. Labor organizations are already required, under the Lobbying Disclosure Act of 1995 (2 USC §1601, et seq., as amended), to submit detailed reports on a quarterly basis showing how much is spent on lobbying efforts. The Proposed Rule in this regard would be duplicative of those efforts and seems only designed to increase the administrative burden on unions without providing any meaningful or useful transparency to members. The UBC opposes the change now to the two schedules, as after many years DOL offers little persuasive support for this proposal.

H. New Proposed Schedule 24-Contract Negotiation and Administration, and Schedule 25-Organizing.

According to the Proposed Rule, for the new Form LM-2 LF, DOL "proposes to divide Item 50-Representational Activities [in the current LM-2 Form] into two items. Item 50 would be renumbered Item 51 and renamed Item 51-Contract Negotiation and Administration. There would be a new Item 52-Organizing. Schedule 15 would be divided in two and designated Schedule 24-Contract Negotiation and Administration and Schedule 25-Organizing."[32]

DOL acknowledges that almost 20 years ago it proposed "the use of two schedules, one for contract negotiation and administration and one for organizing. [Citation omitted.]"[33] However, "(b)ased on comments received from labor organizations and others, the Department decided in the 2003 final rule not to include the separate category for reporting organizing disbursements and to require that disbursements for organizing be reported in combination with contract negotiation and administration disbursements in a single Schedule entitled "Representational Activities."[34] Indeed, DOL acknowledges that "(b)y combining the categories, the Department also met the concerns expressed by the building trades unions [of which the UBC is one] that they would be unable to allocate precise amounts to contract negotiations and organizing efforts." Notably, "(t)he Building and Construction Trades Department of the AFL-CIO (BCTD) commented that it simply is not possible in the construction industry to separate disbursements made in connection with organizing efforts from disbursements made for contract administration. [Footnote omitted.]"

Yet, *seventeen years later,* and with no persuasive reason(s) for doing so, the Department now "believes it should not have consolidated these two schedules." The reason(s) for this abrupt change of heart are unconvincing, to say the least. There is little evidence put forth in the Proposed

[31] *Id.*
[32] *Id.*, at 64737; see, also 64741.
[33] *Id.*, at 64741.
[34] *Id.*

Rule that justifies this change, thus making the motivations for doing so suspect. This aspect of the Proposed Rule should be rejected.

IV. Conclusion: The DOL Should Rescind the Proposed Rule.

Now, the Department is seeking to further expand the LM-2 reporting requirements. When viewed in combination with prior, other increased reporting obligations, the burden that the proposed LM-2 changes and Form LM-2 LF would impose on labor organizations and officers is cause for even greater concern.

The current reporting requirements imposed on labor organizations under the LMRDA and applicable regulations are more than sufficient to promote transparency. The Proposed Rule is unnecessary, unwarranted, unduly burdensome and is not supported by adequate data. The UBC respectfully requests that the DOL rescind the Proposed Rule. The UBC appreciates the opportunity to comment on this important matter and hopes that its comments will be taken into consideration.

Respectfully submitted,

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