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Submitted Via Regulations.gov

The Honorable Eugene Scalia
Secretary
United States Department of Labor
200 Constitution Avenue NW
Washington, D.C. 20210

Andrew Davis, 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: Comments on Notice of Proposed Rulemaking, Labor Organization Annual Financial Reports: LM Form Revisions, 85 Fed. Reg. 64,726 (Oct. 13, 2020), RIN 1245-AA10.

Dear Secretary Scalia and Mr. Davis:

We write on behalf of Americans for Prosperity Foundation (“AFPF”), a 501(c)(3) nonpartisan organization that educates and trains citizens to be advocates for freedom, creating real change at the local, state, and federal levels.¹ AFPF appreciates this opportunity to comment on the Department’s Notice of Proposed Rulemaking regarding Labor Organization Annual Financial Reports: LM Form Revisions, RIN 1245-AA10, as published at 85 Fed. Reg. 64,726, (the “NPRM”).

I. Introductory Comments.

The NPRM proposes new regulations designed to “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.” 85 Fed. Reg. at 60,600. As the last update to these reporting requirements

¹ See AMERICANS FOR PROSPERITY FOUNDATION, <https://americansforprosperityfoundation.org/>.

went into effect on January 4, 2004,² AFPF agrees that it is appropriate for the applicable regulations to be updated at this time.

In 1959, President Dwight Eisenhower signed into law with bi-partisan congressional support the Labor-Management Reporting and Disclosure Act (LMRDA), also known as the Landrum-Griffin Act.³ Among other changes, this bi-partisan law required new financial reporting from unions as a result of significant concerns surrounding union corruption, racketeering, and other illegal activities. Congress enacted the LMRDA upon the finding that it was essential to the free flow of commerce “that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations.” 29 U.S.C. § 401(a). In response to “recent investigations in the labor and management fields,” Congress further found “that there have been 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 which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.” *Id.* § 401(b). The financial reporting requirements of the LMRDA are designed to serve this purpose, and that purpose remains relevant to the present time, as the NPRM demonstrates in its description of recent examples of corruption by union officials. *See* NPRM, 85 Fed. Reg. at 64,729.

AFPF agrees that the purpose behind the NPRM’s revised reporting requirements are supported by and consistent with the LMRDA. AFPF believes that labor union members must be empowered to maintain democratic control over their unions and that, to do so, they must have access to the information needed to ensure a proper accounting of how those unions steward and expend their funds. Members, as well as the Department and interested third parties, must be able to monitor a union’s financial affairs to ensure funds are not wasted, illegally diverted, or spent in ways contrary to the unions’ purposes. That information, in turn, allows union members, the Department, and the public to exercise necessary and proper oversight of union leadership. And union members can make informed decisions about who should lead their unions and which unions should represent them only if they know how existing leadership is performing in their exercise of control over union funds.

To achieve these purposes, financial reporting requirements must be easily accessible and transparent. They also must provide sufficient detail to allow for meaningful review and oversight by those not privy to the day-to-day decisions made by union leadership. AFPF believes the NPRM is designed with these goals in mind. Implementation of the NPRM will give union members, the Department, and the public a better understanding of how labor unions are spending their funds, including expenditures on politics and union leadership activities, and thereby help prevent union corruption and hold union officers accountable to the workers they

² These changes required unions to report greater detail in their receipts and disbursements instead of providing lump sum spending totals that provided no meaningful context for union members. The Department’s proposed changes will further this goal of increased transparency in union financial reporting.

³ *See* <http://www.govtrack.us/congress/votes/86-1959/h58>

represent. In this regard, AFPF applauds the Department's effort both to conduct and publish the results of a survey of field investigators regarding how the required reporting forms used by unions could be improved.⁴ This type of survey and analysis should be at the heart of all similar regulatory reform efforts.

II. Comments on Specific Provisions of the NPRM.

A. Proposed Addition of Form LM-2 LF

The NPRM proposes to add a new Form LM-2 LF, a long form version of the existing Form LM-2, that will apply to labor unions with annual receipts of \$8,000,000 or more. The NPRM states that “[t]he \$8,000,000 threshold is based on the Small Business Administration’s definition of a small entity, as identified by North American Industry Classification System (NAICS) codes. 13 CFR 121.201. Some small-entity thresholds are lower, and some are higher; the Department has sought a threshold that ensures proper coverage of large unions while not overburdening smaller unions. By setting this threshold, the Department will bring additional transparency to the largest and most prominent labor unions.” 85 Fed. Reg. at 64,734.

AFPF agrees with the purpose of creating a more detailed form, as this will increase transparency and provide interested parties with additional information to help oversee and hold accountable union officials. The addition of granularity in the reporting requirements is especially helpful, such as the addition of new schedules for items currently without them, the division of certain items into two schedules, and the addition of new categories of information. *See id.* at 64,734–45.

AFPF does believe, however, that the applicable threshold for filing the long form should be lower than \$8,000,000. Ideally, the Department should simply replace the current Form LM-2 with the proposed Form LM-2 LF. Those unions currently required to file LM-2 are already considered the largest unions in the country and they have the resources and ability to comply with the greater transparency the LM-2 LF is designed to bring. Replacing LM-2 with the long form also would simplify the reporting system, as no new category of union would be created.

Short of replacing the older form with the newer long form, the Department should consider a lower threshold. Unions with annual receipts of at least \$1,000,000, for example, fall into a large union category that could easily meet the additional reporting requirements without unduly adding to the burden of their existing reporting requirements.

B. The \$5,000 Itemization Threshold

Under current rules, unions that file Form LM-2 must itemize certain receipts and disbursements of at least \$5,000. Key information is not captured, however, because in many instances the reporting is by category rather than by individual transaction. For example, as the NPRM explains, because “the \$5,000 itemization occurs only within each category[,] disbursements of more than \$5,000 might not be itemized if the disbursement fell under more

⁴ U.S. Dep’t of Labor, Memo re: DOL Canvas of Investigators (Oct. 13, 2020), <https://beta.regulations.gov/document/LMSO-2020-0002-0004>.

than one category. Functional reporting [*i.e.*, by category] aids in understanding the purposes of labor union spending but it can cloak individual transactions because of the \$5,000 itemization threshold.” 85 Fed. Reg. at 64,731.

For this reason, AFPP agrees with the NPRM’s proposal to require unions “to complete a separate itemization schedule for each individual or entity from which the labor organization has received \$5,000 or more,” *id.* at 64,743, and it urges the Department to require reporting of disbursements by individual transaction in addition to the functional categories.

More generally, a key finding of the Department’s survey is that itemization is crucial to proper oversight of union activities. As one response stated, “Of the seven changes to the Form LM-2 in 2003, the consensus is that the \$5,000 itemization threshold was the best of the seven as it provides more transparency to the membership and can be utilized for targeting special report investigations.” The NPRM also explains that “[i]temization is important because it can reveal unlawful payments to identified individuals. It can reveal conflicts of interest that are reportable on other LMRDA forms. Absent itemization, this information would not be known.” *Id.* at 64,731. The NPRM further explains that “lack of itemization of most receipts on the current Form LM-2 makes it easier for wrongdoers to embezzle money from labor organization accounts.” *Id.* at 64,744.

It is clear, therefore, that itemization of both receipts and disbursements is a necessary and important feature of any robust reporting regime. Given the proliferation of and ease of using computer software for keeping accounts, coupled with the obvious utility of itemization, the Department should lower the \$5,000 threshold so as to capture greater granularity in a union’s finances. A threshold of \$1,000 or more, for example, would provide greater transparency without significantly adding to the existing reporting burdens. This change should apply to both LM-2 and LM-2 LF filers if the Department maintains that distinction.

C. Confidentiality Exemptions.

Current rules allow unions to avoid itemizing disbursements if to do so would reveal certain confidential information. The NPRM specifically seeks “comments on whether to modify, narrow, or eliminate the confidentiality exception in the Form LM-2 instructions.” 85 Fed. Reg. at 64,744.

As the NPRM explains, the current confidentiality exemptions apply to

- (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 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.

Id. at 64,744–45. AFPF believes the current confidentiality exemptions should be significantly narrowed and that only items 4 and 5 in the above list constitute valid confidentiality concerns. As the NPRM explains, “the current broad confidentiality exception makes it impossible to ascertain from reviewing the form the actual purpose and payer/payee of many receipts and disbursements.” *Id.* at 64,745. The Department also has found that unions often classify as confidential “many major receipts and disbursements that do not qualify for the confidentiality exception.” *Id.*⁵ At the same time, union members do have access to this information, but may only receive it by “requesting such information directly from the labor organization.” *Id.*

Given this background, there appears to be no further justification for retaining exemptions 1–3 as listed above. Unless the information would actually endanger the health or safety of an individual or is otherwise prohibited by law, information that is currently withheld as confidential should be revealed so as to provide the greater transparency the NPRM is designed to achieve.

D. Potential Conflicts of Interest.

The NPRM proposes adding a reporting requirement “concerning payments from more than one union. Item 10(b) [of proposed Form LM-2 LF] 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.” 85 Fed. Reg. at 64,735. In those situations where this new reporting requirement would apply, unions would be required “to list the name of the officer, amount paid, labor organization that made the payment, and file number of the labor organization.” *Id.*

AFPF agrees with this proposal. It believes it would promote greater accountability of union leadership and control by members because it would allow them to determine if the loyalty and interests of its leadership were divided. At the very least, union members should be able to learn whether and to what extent the time and effort of union leadership is split between different organizations.

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Just as the federal government has faithfully executed the bi-partisan intent of LMRDA for the past 60 years, AFPF urges the Department to implement the proposed new reporting requirements, which better fit the 21st century landscape where financial reporting is aided by technology. The new reporting requirements will improve transparency to the benefit of the

⁵ Further, as one respondent to the Department’s survey explained, “The \$5,000 itemization confidentiality exemption has been a hindrance in case targeting because it allows unions to hide transactions under the guise that it will hurt their organizational strategy. For example, there are some unions in the Minneapolis area that do not itemize market recovery payments, which can be in the \$100,000 range, because they allege it hurts their organizing strategy while other unions report these payments. In case targeting, being able to identify market recovery payments is useful information as they can be an area ripe for abuse and potential embezzlement.”

public broadly, government agencies that oversee unions, and the millions of workers represented by these unions.

Thank you for your time and attention. If we can provide any additional information or otherwise be of further assistance, please do not hesitate to contact us.

Respectfully submitted,

/s/ Lee A. Steven

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