January 24, 2003

The Honorable Victoria A. Lipnic
Assistant Secretary for Employment Standards
United States Department of Labor
200 Constitution Avenue, NW
Room S2321
Washington, DC 20210

RE: Comments on Notice of Proposed Rulemaking
Labor Organization Annual Financial Reports
29 CFR Parts 403 and 408

Dear Ms. Lipnic:

This letter presents the formal comments of LPA, Inc., the Labor Policy Association, regarding the Department's proposal to substantially revise the reporting requirements applicable to labor organizations under the Labor Management Reporting and Disclosure Act. We strongly support the proposed improvements to union reporting requirements. In our view the proposed rules provide greater transparency and accountability to labor organizations and significantly improve the current reporting regime. In addition to commenting on our view of the strengths of the proposed rulemaking, we outline certain concerns and suggestions that we believe can further improve the final rules.

LPA is a public policy advocacy organization representing senior human resource executives of more than 200 of the largest corporations doing business in the United States. LPA's purpose is to ensure that U.S. employment policy supports the competitive goals of its member companies and their employees. LPA member companies employ more than 19 million employees worldwide. LPA was assisted in preparing these comments by Labor Relations Institute, Inc. (LRI). LRI is one of the nation's leading providers of information resources regarding labor organizations to companies, labor attorneys, union democracy groups, and academics. Labor Relations Institute has, for over 20 years collected, reviewed, and studied the LM-2, 3 and 4 forms that are the subject of this proposed rulemaking.

The Labor Management Reporting and Disclosure Act ("LMRDA" or "Landrum-Griffin" hereafter) was enacted in 1959 after two years of Senate investigations on misconduct and corruption within the labor movement. Based on the numerous examples of corruption and misconduct uncovered during the McClellan Committee hearings, the LMRDA was overwhelmingly adopted by both parties in Congress.[1]

Labor organizations filed financial reports before Landrum-Griffin; however, these reports were not made available to members and were of basically no use in holding unions financially accountable. Robert F. Kennedy, counsel to the McClellan Committee, wrote in his book *The Enemy Within*, "the federal government was not functioning efficiently if thousands of reports,

LPA, INC. 1015 FIFTEENTH STREET NW
SUITE 1200
WASHINGTON, DC 20005-2605
TEL 202.789.8670
FAX 202.789.0064
INFO@LPA.ORG

filed each year, were never looked at—much less examined—and served only to take up space in government buildings." [2]

Title II of the LMRDA was drafted to overcome the problems with financial disclosure noted by Mr. Kennedy. Title II requires unions to report and file financial information with the Department of Labor and make these reports available to members.[3] Congress believed that these requirements provided union members with critical information that they could use to regulate the affairs of their unions. Supporters of the LMRDA felt that, with full disclosure of financial information and maintenance of democratic safeguards, union members could effectively regulate their unions.

The regulations enforcing the LMRDA have never lived up to the aspirations of Landrum-Griffin's supporters. Unfortunately, the reporting forms and regulations originally adopted by the Department of Labor, and largely unchanged today, fail in at least two important respects: financial information is reported in a manner that is useless for purposes of union accountability; and the reports are not widely disseminated to union members. Ironically, the reports filed in the decades since the passage of the Landrum-Griffin have, by and large, also "served only to take up space in government buildings."

There are two aspects to an effective reporting and disclosure regime as it relates to union accountability. First, the information must be disseminated to union members so that they have the opportunity to use it. Second, the information disclosed must be useful and understandable to members; the typical union member should be able to read, understand, and use the information to hold his or her leadership democratically accountable.

I. <u>Dissemination of LM Reporting Information</u>

Earlier this year the Department of Labor took a major step toward improving dissemination of financial information related to labor organizations by making LM reporting forms available to union members, at no charge, over the Internet.[4] This gives any union member with access to the Internet the ability to review his or her labor organization's most recent financial report. This is a highly laudable improvement.

However, one important hurdle to wide dissemination of this financial data is not addressed in the proposed rulemaking. Few union members even know that these reports exist, much less that they can be viewed on the DOL Web site. The LMRDA requirements are not well known by union members. There have been only 14 reported decisions regarding disclosure requests by union members since 1959. It could be argued that this is because unions open their books wide with virtually every request. However, reviewing the admittedly small sampling of case law available leads one to conclude that union members rarely ask to review this information and, when asked, unions generally do not welcome this review. Indeed, unions appear to use any legal maneuver possible to prevent disclosure.

Even though Section 105 of the LMRDA requires unions to notify their members of the existence of the Act and their rights under it,[5] many unions fail to comply with this requirement. Recently the Fourth Circuit Court of Appeals ordered the International Association of Machinists

to notify its members of their rights under the LMRDA, rejecting the union's argument that a one-time notification issued in 1959 was sufficient to comply with the Act's notice provision.[6] At least two other reported decisions allege that unions (the Teamsters and the IBEW specifically) failed to make the required notification to members under Section 105 (the court in each of those decisions denied requests for injunctive relief on procedural issues).[7] These cases represent 21 percent of all reported cases on disclosure requests by union members and indicate that labor organizations are often willing to engage in protracted litigation hoping to avoid notifying members about the information required under the LMRDA.

Requiring labor organizations to disseminate financial information to members is consistent with requirements on employers in the interests of transparency to their shareholders. Company filings have been available since the early 1990s on the SEC's EDGAR database.[8] After passage of the Sarbanes-Oxley Act of 2002,[9] the SEC adopted final rules requiring the majority of all publicly traded companies (and strongly encouraging all other companies) to either post required financial disclosures on their own company Web site or explain why they could not do so.[10] Additionally, all publicly traded companies are required to disclose to the SEC whether they send their financial disclosures to shareholders or, if not, provide a description of reports that may be requested by shareholders.[11]

LPA encourages DOL to adopt similar rules requiring unions to distribute LM information and/or promote the DOL Web site to all union members. Most union members are unaware that their labor organization's financial forms are available over the Internet. The new system is a tremendous improvement over the old, which required either a personal visit to the DOL or a Freedom of Information Act request (and a fee). Given the tremendous time and money commitment expended to get these reports on the Internet, it is well worth promoting the fact they are now accessible to almost anyone in real time and union members need to know about it.

II. Comments on Proposed Rulemaking

Access is just one aspect of an effective reporting regime. On December 27, 2002, DOL proposed rules to improve the second critical aspect of an effective disclosure system: the usefulness of the information reported. DOL submitted a notice of proposed rulemaking (and request for comments) on rules to substantially improve the Labor Organization Annual Financial Reports, commonly known as LM-2, LM-3, and LM-4 forms.[12] This remainder of this letter outlines the comments and suggested improvements from LPA, Inc.

A. E-Filing Requirement (e.LORS system)—More Information, Less Effort

One critical and very important change in the new regulations is the requirement that the largest unions in America submit their report electronically to the Department of Labor via the Internet. Labor organizations with annual receipts in excess of $200,000 (those that are required to file the more comprehensive LM-2 form) will now have to e-file their financial information.[13] This requirement is eminently sensible. It ensures the accuracy of data reported to the Department of Labor, significantly reduces the human resources associated with scanning and

preparing the reports for distribution over the Internet, and eases the reporting burden on unions (who will be able to merge data from their accounting software into the program).

Today, unions must transfer information from their accounting records into the LM document itself. This transfer of information must be done manually (although many unions input their information electronically by manually filling out computerized forms provided by DOL). Unions may continue to input this information manually under the proposed regulations, but they will also have the opportunity to download their financial information directly into software provided by the Department of Labor.[14] This will automate the reporting process.

There is a great likelihood that unions will find that the revised reporting arrangement (particularly once initial setup time is expended) actually reduces the amount of time required each year to comply with the reporting regulations. The vast majority of unions, particularly larger unions with more than $200,000 in annual receipts, already utilize computerized accounting information systems.[15] Most businesses currently utilize similar technology, and filling out required government forms (like tax reports) is automated and occurs in seconds. Labor organizations are likely to spend substantially less time in compliance than that estimated by DOL. This is so even though the amount of information disclosed will increase under the proposed regulations. The Department will receive more information with less effort on the part of labor organizations.

For this reason we believe that the Department should consider requiring electronic filing for all unions, even those with annual receipts of under $200,000. While the larger unions file the LM-2 form, there are still over 21,000 unions that file either the LM-3 or LM-4 Annual Report.[16] While the LM-2 filings are typically longer than either LM-3 or LM-4 filings, each LM-3 or LM-4 filing still represents a significant paperwork burden on DOL.[17] Assuming each union files only the minimum number of pages possible (most LM forms have several additional pages of schedules attached to the document, sometimes hundreds of pages for larger unions), the DOL will still be required to hand process 82,666 pages per year. While smaller unions account for less than 10 percent of all annual receipts from unions, they represent a large number of union members and a significant amount of the document-handling efforts of DOL personnel.

The Department of Labor's own compliance personnel note that many smaller unions currently utilize computerized accounting information.[18] Therefore, it is not burdensome to require smaller unions to electronically file. Forty percent of all filers, including those that file LM-3 and LM-4 forms, filled out their forms by computer using the Department of Labor's software in the first year that it was available.[19] Even if there is serious concern about the ability of small unions to comply, unions may request relief from the electronic filing requirement under the DOL's hardship provision.[20]

Electronic filing is nothing new for government reporting. Companies have been required to electronically file financial information with the SEC for nearly a decade. Beginning in 1993, publicly traded companies began reporting their Form 10-K and other financial information to the Securities and Exchange Commission under Regulation S-T.[21] By 1997, all publicly traded companies (other than those receiving specific hardship exemption from the SEC) were required

to electronically file their disclosures to the SEC.[22] Even small companies are required to meet the SEC electronic filing requirements.[23]

All unions should file electronically unless they can prove a hardship reason that prevents them from meeting the requirement. This will significantly reduce the paperwork burden on the Department of Labor and improve the timeliness and accuracy of information for union members. In order for the 20,000-plus LM-3 and LM-4 forms to be accessible over the Internet today they must be electronically scanned by employees of the Department of Labor. Even if only half of small unions can comply with the electronic filing requirement, this still represents hundreds of hours that DOL can utilize in other compliance capacities.

B. Jurisdictional Amount

The Department requests comment on the jurisdictional amount for the filing of the larger LM-2 document.[24] The last time the jurisdiction amount changed was 1994 and, accounting for inflation, the Department considered a $250,000 jurisdiction amount for LM-2 filers.[25] It is our view that increasing the jurisdiction amount by $50,000 would have a serious negative impact on the transparency and amount of information available to union members.

As noted by the Department, raising the jurisdiction level to $250,000 would result in over 650 unions being relieved of the obligation to report based on the functional categories (the proposed LM-3 and LM-4 reports retain only aggregate reporting).[26] These 654 unions have more than 950,000 members.[27] This means that each union exempted averages almost 1,500 members—these are not small labor organizations. If one assumes that the average union member in these 654 unions pays $25 per month in union dues, raising the threshold to $250,000 shields almost $3 billion of annual receipts from the more detailed functional accounting provided in the proposed regulations. In our opinion the greater reporting burden on these 654 unions is a small price to pay for increased transparency of almost $3 billion of union receipts and the democratic enfranchisement of almost 1 million union members.

C. Trust Financial Reporting and Form T-1

Perhaps the most important addition in the new regulations is the newly created Trust Annual Report or Form T-1.[28] The new Form T-1 is designed to ensure that funds transferred by unions to outside entities (like strike funds, building funds, training funds, credit unions, and other trust funds) are included in the reporting of the individual labor unions that contribute a significant amount to those organizations. In this way a union member who has a direct financial interest in these entities (through his or her labor organization's contribution) can obtain detailed and reliable information on the trust's financial operations. Without this regulation unions are able to hide financial transactions from public disclosure by having them occur in these unreported, "off-the-books" entities.[29]

Labor organizations may claim that these entities already file tax returns or other disclosures. The problem with the current reporting regime is that a local union member may have no idea to which of these unreported entities the union contributes union dues. This is because the current reporting regime only requires LM-2, 3 or 4 reports to be filed on subsidiary organizations that

are "wholly-owned, wholly-controlled, and wholly-financed by the reporting union."[30] Since there are a significant number of these organizations that are not wholly owned by unions, they will not show up on the LM report and any monies invested in those entities can be lumped into the large aggregate categories of the current form.

Requiring the T-1 for all entities to which the union contributes $10,000 or more during the reporting year will effectively eliminate this problem. Unions are required under other sections of the new regulations to report aggregate contributions to any person or entity that exceed $5,000 during the reporting year. Therefore, the vast majority of transactions in which a union member will have a significant interest will be transparently reported on either the LM-2 form or the Form T-1.

The Department of Labor regulation proposes to allow unions to avoid the requirement of filing the T-1 report if the entity in question is already required to file reports pursuant to 26 U.S.C. § 527, the Employee Retirement Income Security Act of 1974, 29 U.S.C. 1023 (ERISA), where annual audits are available under Section 302(c)(5)(B) of the Labor Management Relations Act 29 U.S.C. 186(c)(5)(B) (LMRA), or if the organization files publicly available reports with a federal or state agency as a political action committee (PAC).[31] In our opinion this requirement is insufficient.

We suggest that unions be required to either file the form T-1 or append the compliant non-T-1 filing as part of its LM-2 filing. The Department's wish to avoid double reporting is understandable from the perspective of avoiding unnecessary additional burdens on the part of the reporting labor organizations. However, the needs of union members and the underlying purposes of the LMRDA should override this concern. While unions should not be unduly burdened by their reporting obligations, it is vital that union members have easy access to the information disclosed in these trust reports. Any other rule impairs their ability to monitor their unions.

If unions are required to file the compliant documents or T-1 forms, a union member will have access in one place to all the information that that member needs to analyze whether the labor organization is meeting its fiduciary duties and expending membership dues appropriately. This is comparable to the SEC requirement that companies file, as exhibits to their Form 10-K, certain material contracts and management compensation plan documents entered into during the reporting period.[32] Although many of these plan documents (those required to be filed under ERISA, for example) are already on file elsewhere in the government, companies are nevertheless required to provide these documents to the SEC for public disclosure. This improves transparency by creating a centralized repository for all financially material information, available for review by individual investors. The Department of Labor should adopt a similar strategy.

Unions may object that appending forms filed with other agencies is duplicitous and increases the amount of paperwork for the Department of Labor. This objection fails on two counts. First, the Department of Labor is already requesting a T-1 form regarding these entities. Therefore, some form or another will be filed, so there is no net increase in effort for the employees of the Department of Labor. Second, most unions will electronically file their T-1

documents. Further, the T-1 information will normally be in the hands of the trust fund. Most entities subject to the T-1 reporting requirement will simply create a T-1 form that will then be issued to each labor organization that contributes $10,000 or more in any reporting year.

We agree that the Department should consider whether the $10,000 contribution limit that triggers the T-1 reporting requirement is the appropriate level.[33] We believe that the Department should also consider a threshold requirement that accounts for cases where a union contributes a substantial amount, but less than $10,000, of the yearly receipts of a reporting entity. For example, the T-1 reporting obligation might instead attach in any year that a labor organization contributes $10,000 or more or contributes 10 percent or more of the total receipts received by the entity in question.[34]

In this way *de minimis* contributions do not create a reporting obligation, while trusts or other entities that receive significant amounts of their total receipts from a labor organization will be required to issue the T-1 report. Setting the threshold this way accounts for transactions that will affect some of the smaller LM-3 or LM-4 organizations. In these organizations a $10,000 yearly contribution may rarely happen. However, a significant percentage of yearly receipts from these smaller unions may go into entities that, under the current regulatory regime, are hidden from the view of union members.

We appreciate the fact that the increased regulatory burden on smaller organizations may be difficult to bear. Nevertheless we feel that the right of union members to know how their money is spent, and particularly where it goes if it does not show up on the LM-2 form, is of vital interest to the members and a core concern to the drafters of the LMRDA. In larger labor organizations, with thousands of members, the dissemination and use of the LMRDA information may be less likely to affect the outcome of leadership elections. In smaller unions the information is easier to disseminate and may be a much more powerful tool for democratic accountability. For this reason, expanding the T-1 reporting information for these smaller unions, even though it covers a smaller number of members and affects a smaller aggregate amount of union receipts, is still worthy of LMRDA protection. These organizations were not exempted from reporting requirements by the original statute, nor should they be exempted now.

The Department suggests that another possible test for reporting the financial activities of trusts (instead of the $10,000 per year and $200,000 total asset thresholds discussed above) is to expand the definition of the entities whose assets, liabilities, receipts, and disbursements must be reported as part of a labor organization's own.[35] Currently a labor organization must only report this information on entities that are "wholly owned, controlled and financed" by that organization.[36] As the Department notes, untold millions of assets go unreported each year due to the fact that most of these entities, while substantially controlled by a labor organization, are not owned 100 percent by the union.[37] The Department suggests that another way to approach this issue is to require unions to include in their LM-2 filing the assets, liabilities, receipts, and disbursements of any entity that might legally be considered a "single entity" with the union.[38]

We prefer the bright-line threshold to the case-by-case analysis suggested by the Department of Labor. Requiring a case-by-case determination of "single entity" or substantial control is effectively impossible for union members. As the Department is well aware, union members

very infrequently exercise their rights under the LMRDA. With this knowledge, many unions will simply fail or refuse to disclose information on an entity, arguing that the entity does not meet the legal definition of "single entity" under the proposed rule. It is our opinion that union members should not be required to engage in protracted litigation to identify whether or not a particular fund is a "single entity" with a labor organization.

There is the additional issue of identifying these "off-the-books" entities in the first place.[39] A union member is unlikely to be aware of all the entities in which a union invests. If one of these entities is not reported by the labor organization, union members are unlikely to have the information necessary to even bring a claim that the union should be required to report on that entity. Ultimately, the bright-line test is less costly to enforce and more effective.

The Department notes that using the "single entity" test might increase the number of labor organizations that will have to file the LM-2 form for larger unions ($200,000 or more in annual receipts).[40] This is undoubtedly true. However, we believe that expanding the reporting obligation in this way is too ambiguous and will encourage under-reporting by unions at or near the $200,000 annual receipt threshold. There is a fear that some LM-3 and LM-4 filers have substantial control over assets that, if counted as under their control, would result in their filing the more detailed LM-2 form. If the key concern is under-reporting, that is easily corrected by either lowering the threshold for LM-2 filers or changing the LM-3 form to reflect the changes proposed for the LM-2.

In our opinion, there is no reason to exclude smaller unions from the reporting requirements of larger unions, since their reporting burden will be significantly lighter due simply to the fact that they have fewer assets, liabilities, receipts, and disbursements during the reporting year. Another option is to require the LM-2 report for any union, no matter its yearly receipts, that submits T-1 information on entities with combined assets over a certain threshold amount.

D. Hardship Exemptions

The DOL includes in its proposed rulemaking a provision allowing unions to claim a hardship exemption from the electronic filing requirements.[41] We are concerned about two issues. First, unions should not be able to avoid filing requirements altogether by requesting and receiving a temporary or continuing exemption from the electronic filing requirements. This appears to be considered by the Department in its proposed rules,[42] but is a key concern. What is the penalty for a delinquent paper filing?[43] Second, we are concerned with the conditions under which hardship exemptions will be awarded. Is there any appeal process through which members can protest if a union continually files for exemptions from the reporting requirements?

The Department of Labor has documented that a substantial number of unions file their required financial reports late and many unions fail to file at all.[44] The advantage to the new regulations is that union members can now identify whether or not their union has requested a hardship exemption from the Department of Labor. Under the prior enforcement regime this was impossible to discern. However, it is unclear what standard the Department of Labor plans to use when evaluating these hardship claims, or whether there will be any penalty imposed for

refusal to comply with the hardship provisions or underlying reporting deadlines. We would like to see some clarification of these requirements.

Further, it is unclear when an extension of time for filing the LM disclosures has in fact been granted to a labor organization. We suggest that the DOL create a form for requesting an extension, available for public review. In this way members who are unable to find their union's information will know whether an extension request was made or granted.

E. Schedules 1 & 8—Receivables and Payables Aging

We believe that the new Schedule 1 (accounts receivable aging) and Schedule 8 (accounts payable aging) are excellent additions to the reporting requirements.[45] An outstanding receivable (especially one that is later written off) is akin to an unsecured loan. This can be used as a way to make an in-kind transfer to another party that would never show up under the current reporting regime. An inability to pay outstanding payables is obvious evidence of cash flow problems and can be a symptom of deeper financial issues.

As noted in the Department of Labor supplementary information, the receivables and payables aging information can be a valuable early warning sign of potential illegal activity on the part of criminals within a labor organization.[46] Even if the information does not detect embezzlement, it certainly indicates mismanagement or malfeasance on the part of current leadership. This is clearly information that would be useful to union members in evaluating their current leadership.

F. Schedules 11 & 12—Disbursements to Officers and Employees

The proposed regulations include a requirement that unions report the percentage of time spent performing duties by officers and employees of the union.[47] The revised Form LM-2 requires unions to estimate, rounding to the nearest 10 percent of the actual time, the amount of time spent by union officers and employees on a variety of activities.[48] The categories for those activities include the following: contract negotiation and administration; organizing; political activities; lobbying; contributions, gifts, and grants; benefits; general overhead; and other disbursements.[49]

The Department noted that a similar request was removed from changes proposed in 1992 (which were never implemented) due to the significant difficulty in accounting for "incidental" activities.[50] The difference between the 1992 proposal and the current proposal is that the 1992 proposal expected unions to report the exact percentage of time spent on the various activities. The present proposal gives unions some significant leeway (rounding to the nearest 10 percent) in reporting these activities.

One expects that unions will raise the most objections to this reporting requirement (with the possible exception of the new reporting requirements on trust funds). The disclosures required will certainly require a significant amount of work on the part of unions, particularly larger ones. In evaluating these costs, one must consider the benefits of the information disclosed.

This information will be valuable to any union member. Such disclosures will help members evaluate whether officers and employees of the union are utilizing their time in a way to best serve the purposes of the labor organization. More important, agency fee payers will be able to quickly identify the percentage of receipts used for nonrepresentational matters and therefore determine whether their agency fee is calculated properly.

We suggest that the reporting of time expended in two categories (contributions, gifts, and grants—reported in Schedule 19; and benefits—reported in schedule 20) be removed from Schedules 11 and 12. We do not anticipate any employee or officer of a labor organization will be able to identify time expended in these two categories—their inclusion is probably an oversight. If these categories remain in the final schedule, their presence might lead to confusion and inaccurate reporting. Additionally, we suggest that unions be required to describe specifically the activities expended in the category of "other disbursements" and reported on Schedule 22. This information provides full transparency to members and helps avoid the possibility that a potential embezzler might characterize activities as "other disbursements" to avoid full disclosure. It may also assist the Department in identifying additional activities that should be subject to reporting under a separate schedule in the future.

In our opinion the time and expense required to comply with this new reporting obligation is outweighed by the benefit to union members. It first improves the ability of members to police their union. In many unions it will result in decreased expense and time spent in defending suits from agency fee payers attempting to ascertain the proper amount of their agency fee. While there will be a yearly time commitment attached to this disclosure, it is likely to go down considerably after the first year. The disclosure can be handled with an eight-question survey (six questions if our recommendation on removing estimates of time for Schedules 19 and 20 is adopted) administered to employees of the union once per year. Given the Department's liberalized rules for estimating time spent, the time commitment is significantly lower than the rule rescinded in 1992. Coupled with time savings in other areas, time spent on this disclosure should not be overly burdensome.

G. Schedule 13—Membership Status

Schedule 13 is a new schedule that provides extremely useful information to members. The Department's new regulations require labor organizations to break down membership into the following categories: active members; inactive members; associate members; apprentice members; retired members; other members; and agency fee payers.[51]

The new schedule provides significantly improved information over what has been required on the current LM-2. Unions historically have simply aggregated membership numbers. The current definition of "member" is unclear and is inconsistently applied by unions.[52] Since union members have no way of knowing what a "member" is or what categories of members are responsible for what percentage of dues income to the union, there is no way of making an accurate determination as to a union's financial health.

Without an accurate breakdown of membership categories, a union member is unable to ensure that the leadership is aligned with the needs of his or her union. For example, a union that

receives the vast majority of its dues from retired or inactive members may need to focus more heavily on organizing. If the current leadership is not investing significant resources in organizing, union members could exercise their democratic rights to pressure for more expenditures in this area or to elect new leadership that is better aligned with these goals. The existing form does not give union members the opportunity to learn or act on this information.

Membership category information, like the information on payables and receivables, is a "leading indicator" regarding the health of a union and can give members an early warning system for getting control of a poorly performing union before more significant damage is done to the organization.

In order to give union members the best possible information, the Department should revise the proposed Schedule 13 to include a column disclosing the fee amount paid by each category of member. Again, this information is critical in identifying the financial health of the union and can also be used to identify any inconsistencies or unfairness in the way the various categories of members are treated under the union's rules.

H. Schedules 14 through 22

Schedules 14 through 22 are welcome additions to the LM-2 form. These schedules require detailed reporting of receipts or disbursements of the labor organization during the reporting year, broken out by functional category.[53] Under the new schedules, aggregate amounts by category are further broken down by "major" receipts or disbursements within each category.[54]

These schedules overcome a critical deficiency in the prior LM reporting arrangement. In the past labor organizations reported receipts and disbursements in only large aggregate amounts by broad, nonfunctional category. The old form only required detailed schedules for Benefits (Schedule 11); Contributions, Gifts & Grants (Schedule 12) and Office & Administrative Expense (Schedule 13). Labor organizations reported all other receipts or expenditures on two additional schedules for Other Receipts (Schedule 14) and Other Disbursements (Schedule 15). Labor organizations reported only aggregate amounts on these schedules without reference to individuals or entities that received the monies or the reason for the expenditures.

There are two problems with the current LM schedules. First, aggregate amounts without more give union members little usable information about how their money is actually spent by their union. Besides general complaints about the amount of money spent on "professional fees," "office supplies;" or "printing," a union member has no way to complain about or even question expenditures. Second, supplying information in nonfunctional categories prevents members from accurately assessing how well they are being serviced by their labor organization. For example, a huge expenditure on legal fees may be justifiable if spent to fight an employer's refusal to bargain over an important contract provision. The same expenditure for some non-bargaining dispute may be less justifiable. Currently, a member has no way of knowing how his or her dues money is spent.

I. Schedule 14; Other Receipts

The new Schedule 14 covers "other receipts" and requires the labor organization to itemize receipts of $5,000 or more in the category of "other receipts" (i.e., receipts not otherwise accounted for on Statement B). In addition, the labor organization is required to report total receipts from any single entity or individual that aggregate to $5,000 or more during the reporting period.[55] We believe that this is a significant improvement over the prior reporting arrangement. We note, however, that it may be advisable to make the $5,000 limit the same as the dollar limit required for Schedules 15 through 22. As we note in our comments on those schedules, we believe the dollar threshold triggering itemized reporting should be no more than $2,000, and we ask the Department to consider whether it should be even less than that.

J. Schedules 15—22; Disbursements

Schedules 15 through 22 are designed to itemize reporting in several important categories: contract negotiation administration; organizing; political activities; lobbying; contributions, gifts, and grants; benefits; general overhead; and other disbursements.[56] The definition of "major" disbursement in this area has been given a range by the Department of Labor. The Department seeks comment on what the amount triggering itemized disclosure should be. They suggest a range between $2,000 and $5,000.[57]

We believe that the threshold should be no more than $2,000. We also believe that the Department should consider reducing the threshold amount below $2,000. The vast majority of embezzlement cases prosecuted by the Department do not find embezzlement of large transactions, but instead normally result from numerous small transactions.[58] Some will argue that the Department accounted for this by requiring labor organizations to itemize transactions if they aggregate over $2,000 to $5,000. Nevertheless, it remains possible for a union official who wants to defraud his or her membership to avoid itemized reporting by arranging disbursements from a variety of different sources and amounts under $2,000 to $5,000. Obviously, the lower this threshold is set the more difficult it becomes to steal large sums of money without triggering suspicion, if for no other reason than the number of additional parties that must be involved.

No matter what the ultimate threshold level (even if it is very low) it is still possible to steal from any union. However, it is our opinion that the regulations should make this as difficult as administratively feasible. The current Schedule 1 requires unions to report every loan in an amount greater than $250.[59] We believe the reason this threshold is set so low is because the loaning of money out of union funds to an officer or employee of the union would be a simple way to defraud union membership. Unions are also required to report PAC expenses in excess of $200 to the Federal Election Commission.[60] We believe that a similar reporting threshold should be in place for other disbursements from labor organizations.

While the Department of Labor may decide that a $250 threshold is too low for reporting of all disbursements by a union, we feel that the Department should seriously consider lowering the threshold from $2,000 to $1,000, or even $500. This area of the LM-2 form, more than any other, is most likely to be used by the membership to identify embezzlement or mismanagement. Union members, when armed with the list of entities that have received disbursements during the

year, will often know first hand whether those disbursements actually occurred. They will know whether the membership received any value for the disbursements.

A detailed reporting allows union members to hold their leadership accountable for expenditures that are not seen to be in the best interest of the organization. This is exactly the type of disclosure that is envisioned in the original LMRDA. Setting the thresholds at levels that allow under-reporting or nonreporting undercuts the goals of the statute. While nonitemized expenditures are captured in a catch-all "non-itemized" line on each schedule, this essentially becomes similar to the current reporting regime where a union can "hide" improper transactions in large aggregate amounts. The Department should take every step possible to prevent this type of activity.

K. Schedule 16; Organizing

With respect to Schedule 16 on organizing, the Department notes that labor organizations are sensitive about providing detailed disbursement information in this area (particularly the name of the employer or specific bargaining unit).[61] They feel that the disclosure of the amounts spent by unions on particular union campaigns could hurt unions in future campaigns. We respectfully disagree with this concern by unions. Currently, companies are required to report all amounts expended on labor relations consultants for persuading activity on LM-10 forms.[62] Individual consultants must file Forms LM-20 and LM-21.[63]

It is unclear why unions should have protection from this type of reporting when it is required of companies and is in fact used by unions during organizing campaigns as campaign propaganda against company targets. Allowing unions to avoid reporting amounts expended to organize specific bargaining units or companies is both inconsistent with the current burden on employers and counter to the purposes of the Act. If unions are to be exempted from reporting regarding specific campaigns, it seems that the employer reporting should similarly be exempt from public view. In our view the appropriate response is to require unions to meet the present employer reporting burden.

One option the Department may consider is to allow unions to file requests for confidential treatment of certain organizing information. This is similar to the system used by the SEC in corporate filings,[64] whereby unions would be required to disclose all details regarding organizing activity in an unredacted version of their financial report. They would simultaneously file a "Confidential Treatment Request" along with a redacted version of their LM disclosure, stating the grounds of the objection, arguing for any applicable exemption(s) from disclosure, and noting the period of time for which confidential treatment is sought. They would also be required to give a detailed explanation of why, based on the facts and circumstances of the particular case, disclosure of the information would be unnecessary for the protection of union members. The Department would then review the request, approve or deny the proposed redactions, and make available the resulting form for public disclosure and review.

Reporting amounts spent on organizing, without reference to specific campaigns, is useless. For example, a member is very likely to want to know how much dues money was expended to organize a particular target. If the amount spent is large as compared to the potential dues

income from the targeted unit, the member should have the right to question that expenditure. The present regulations make such a determination impossible.

L. Revised LM-3 and LM-4 Reports

With respect to the revised forms LM-3 and LM-4, we agree that it is appropriate to change the regulations to comply with the Ninth Circuit's opinion in *Chao v. Bremerton Metal Trades Counsel, AFL-CIO*, 294 F.3d 1114 (2002). In addition we believe that it is appropriate for the LM-3 and LM-4 filers to complete the T-1 form when appropriate. This only occurs if they meet the $10,000 contribution threshold during the reporting year into a trust fund with annual receipts of $200,000 or more. This affects less than 600 unions in the country and provides important information to union members on these significant expenditures by these smaller unions.

M. Effective Date of New Regulations

The Department of Labor proposes that the regulations go into effect for all reports filed beginning the first full fiscal year after the regulations become final.[65] This means the earliest a union will have to file under the new regulations will be late 2004, and many will not file under the proposed rulemaking until 2006.[66] The Department states that this is intended to give unions a chance to prepare for filing under the new rules as well as to give the Department time to develop and test the e.LORS software.[67]

We believe that the new regulations should be effective 90 days after being published as a final rule, and that all LM forms filed after that date should be on the new forms. There is no reason to give unions two or three years to adapt to the new regulations. While there are some additional reporting burdens, the basic information being reported is unchanged. The form may take somewhat longer to complete due to the increased level of detail, but unions have had to use the same detailed information in order to come up with the aggregate amounts they have reported in the past. Since most unions affected by the new regulations utilize computerized accounting, complying with the additional detail is for the most part a function of printing the schedules.

Even if the e.LORS system is not available, this should not prevent use of the new forms—they can be filed manually until the system is up and running, as they have for over 40 years. If a union is unable to get its information in the e.LORS system, it simply asks for a hardship exemption from the Department of Labor. Many unions are months and even years late in filing the LM documents as it is. There is no clear need to give them several years lead time to use a system that is easier to use than filing the current forms.

III. Washington Teachers' Union Scandal Illustrates Rulemaking's Potential Impact

What impact can DOL expect from its proposed rule changes? In our opinion the best way to analyze the rulemaking's impact is to consider a recent embezzlement case as it relates to the financial disclosure requirements. Recently the FBI investigated alleged embezzlement in the Washington D.C. Teachers' Union (WTU). The FBI alleges that three former officers (president Barbara Bullock, her assistant Gwendolyn M. Hemphill, and treasurer James O. Baxter II) spent more than $2 million in union money on luxury items such as furs, art, jewelry, silver, and

custom-made clothes.[68] A subsequent audit by the American Federation of Teachers (AFT) found that the amount misappropriated is at least $5 million, and likely to be much more.[69] The WTU case is a great example of how the new DOL regulations can help members catch and prevent embezzlement.

The new regulations would require unions to list their outstanding payables on Schedule 8. Coincidentally, the WTU had a history of being unable to pay its bills over the last several years.[70] However, the first public sign that something was wrong with the WTU came in August 2002 when the WTU overcharged members about $144 each for their dues.[71] For months only a third of the members were repaid.[72] Subsequent audits have discovered that WTU also failed to pay a number of other creditors, including premiums for retiree vision and dental care; back taxes to the IRS; rent, electric, and telephone bills; and about a quarter million in back per-capita taxes owed to the AFT.[73] These unpaid payables would be reported on the revised LM-2, Schedule 8, giving WTU members an early warning sign that something was wrong with the union's finances.

Under the proposed regulations unions are also required to specifically list disbursements over a certain dollar threshold. Under the new reporting regime, since many of the questionable WTU transactions occurred at local retailers (including a furrier, Nordstroms, Gucci, Tiffany, and local art dealers), these vendors would have shown up on the WTU's LM-2 form. WTU members would surely have questioned big expenditures on the union credit cards at upscale retail clothing and art stores, if only they had known.

Additionally, the new T-1 form would provide valuable information to WTU members. The audits over the past month identified that much of the money stolen from the union was ultimately financed through the retiree pension plan; one report stated that there was basically nothing left in the fund.[74] If WTU were required to report under the proposed rulemaking, a T-1 would very likely be required (assuming that at least $10,000 was invested in the fund each year). Union members would then see the large expenditures out of the pension fund. Under the current form there is no report of the fund's activity.

How could the WTU union leaders steal this much money without detection? One must only look at their 2000 LM-2 for a clue.[75] The WTU reported in fiscal year 2000 that it spent $850,566 (20 percent of its annual receipts) on "office and administrative expense."[76] It spent $228,155 on "professional fees," (none for an audit). Another $268,398 was spent on "other disbursements." The WTU reported that it spent $876,756 (21 percent of annual receipts) on "member services, negotiations, legal plan." Remember, these expenditures on "member services" and "negotiations" are in addition to whatever money is paid to officers and employees of the union or what is paid for professional fees. Bullock and her co-conspirators apparently found many places to hide their unauthorized purchases.

The proposed LM-2 reforms clearly would have raised red flags for WTU members several years before the house of cards came tumbling down. It is even possible that the revised form would make hiding embezzlement so much more difficult that Bullock and her co-conspirators would have decided against stealing from the union. In either event, the amount stolen from

members would have been greatly reduced, if not eliminated. This is exactly what the LMRDA's supporters hoped that financial disclosure might accomplish.

IV. **Conclusion**

President Truman once remarked, "[o]ne of the chief virtues of a democracy…is that its defects are always visible—and under democratic process can be pointed out and corrected."[77] Unfortunately the current LM reporting forms undermine this chief virtue of democracy in unions—many defects are hidden from view of members and remain uncorrected. The Department of Labor has made a significant step toward union transparency and improved accountability in its proposed rulemaking. We applaud the Department's efforts and hope that our comments and suggestions prove useful in developing a reporting framework that puts into practice the vision of union democracy embodied in the Landrum-Griffin Act.

This concludes the comments of the Labor Policy Association. We are available to clarify or elaborate on any of our comments and look forward to working with the Department of Labor in developing the best reporting regime possible for the LMRDA.

Sincerely,

Daniel V. Yager
General Counsel
Labor Policy Association

Of Counsel:

Phillip B. Wilson
Vice President and General Counsel
Labor Relations Institute, Inc.
7850 South Elm Place
Suite E
Broken Arrow, OK 74011

03-09

Endnotes

[1] The bill was approved in what is believed to be the most solidly bipartisan vote ever on any major labor law legislation. Landrum-Griffin passed by a vote of 95-2 in the Senate and a vote of 352-52 in the House.
[2] ROBERT F. KENNEDY, THE ENEMY WITHIN 30-31 (1960).
[3] Labor Management Reporting and Disclosure Act of 1959 (hereinafter LMRDA) §§ 201-211, 29 U.S.C. §§ 431-441 (1994).
[4] These reports can be accessed at http://www.dol-union-reports.gov/olmsWeb/docs/formspg.html.
[5] 29 U.S.C. § 105 (1994) provides as follows: "Every labor organization shall inform its members concerning the provisions of this Act."
[6] *See Thomas v. Grand Lodge, International Association of Machinists & Aerospace Workers,* 201 F.3d 517 (4th Cir. 2000).
[7] *See Boomer v. Schultz*, 239 F. Supp. 699 (E.D. Pa. 1965)(request for injunction against Teamsters local for failing to inform membership under section 105 denied on basis that members had not made formal request to union), *aff'd,* 356 F.2d 984 (3d Cir. 1966); *Case v. International Brotherhood of Electrical Workers, Local Union No. 1547*, 438 F. Supp. 856 (D.C. Alaska 1977) (request for injunction against local union for failing to inform members under section 105 denied on basis that union members failed to exhaust internal union remedies first), *aff'd*, 587 F.2d 1379, *cert. denied*, 442 U.S. 944 (1979), *reh'g denied,* 444 U.S. 889 (1979).
[8] *See* Rulemaking for the EDGAR System, 62 Fed. Reg. 36,451 (July 8, 1997).
[9] Pub. L. 107-204, 116 Stat. 745 (2002).
[10] *See* Regulation S-K, Item 101(e)(1)-(4), 17 C.F.R. § 229.101(e)(1)-(4); Acceleration of Periodic Report Filing Dates and Disclosure Concerning Web Site Access to Reports; Final Rule (hereinafter "Web Site Access to Reports"), 67 Fed. Reg. 58,501 (Sept. 16, 2002).
[11] Regulation S-K, Item 101(f), 17 C.F.R. § 229.101(f).
[12] *See* Labor Organization Annual Financial Reports, 67 Fed. Reg. 79,282–79,412 (proposed December 27, 2002) (to be codified at 29 C.F.R. pt. 403, 408).
[13] *See id*. at 79,281, 79,284, 79,292, 79,294 & 79,319.
[14] *See id*. at 79,294.
[15] *See id.* at 79,282.
[16] The DOL estimates that in each of the first three years that its proposed rules are in effect, 21,398 unions will file either the LM-3 (13,290 filers) or LM-4 (8,108 filers) form. *See id. at* 79,297.
[17] Each LM-3 filing is at least five pages long, plus any additional pages for other items. *See id. at* 79,376-80. Each LM-4 is at least two pages long, plus any additional pages for other items. *See id.* at 79,402-03.
[18] *See id*. at 79,282.
[19] *See id.* at 79,294.
[20] *See id*.
[21] *See* Rulemaking for the EDGAR System, 62 Fed. Reg. 36,451 (July 8, 1997); 17 C.F.R. §§ 232.100, 232.101.
[22] *Id.*
[23] Section 12(g)(1) of the Securities Exchange Act of 1934, ch. 404, 48 Stat. 881 (codified as amended at 15 U.S.C. § 78a et seq.) requires SEC registration and filing by any company with revenues over $1,000,000 and 500 shareholders.
[24] *See* Labor Organization Annual Financial Reports, 67 Fed. Reg. at 79,281.
[25] *Id.*
[26] *Id.*
[27] *Id.*
[28] For a copy of the new T-1 form *see id*. at 79,357-61.
[29] *Id.* at 79,282.
[30] *See id.* at 79,282.
[31] *Id.* at 79,283.
[32] *See* Regulation S-K, Item 601(b)(10), 17 C.F.R. § 292.601(b)(10).
[33] *See* Labor Organization Annual Financial Reports, 67 Fed. Reg. at 79,285.

[34] This is comparable to the current requirements on publicly traded companies. The Securities Exchange Act of 1934 requires certain "current report" disclosures of acquisitions involving a significant amount of assets, defined as an amount exceeding 10% of the acquired organization's assets. These disclosures are required within 15 days of the transaction in question. *See* SECURITIES EXCHANGE COMMISSION, FORM 8-K, ITEM 2 (2002); *see also* 61 Fed. Reg. 54,512 (Oct. 18, 1996).
[35] *See* Labor Organization Annual Financial Reports, 67 Fed. Reg. at 79,285.
[36] *See id.* at 79,282.
[37] *See id.* at 79,283.
[38] *See id.* at 79,282.
[39] The Sarbanes-Oxley Act of 2002, 107 Pub.L. No. 204, Title IV, § 401, 116 Stat. 745 (2002), amended section 13 of the Securities Exchange Act to require reporting of "off-balance sheet" transactions. This demonstrates Congress' judgment that off-the-books arrangements should be affirmatively disclosed. *See* 67 Fed. Reg. 68,054-68,079 (proposed Nov. 8, 2002)(proposed rulemaking implementing reporting requirements on off-balance sheet transactions).
[40] *See* Labor Organization Annual Financial Reports, 67 Fed. Reg at 79,285.
[41] *See*. *id.* at 79,284.
[42] *Id.* at 79,319-20.
[43] In the corporate context the SEC is authorized to take administrative action against a company, including administrative fines or even delisting a company from its stock exchange, if it fails to comply with reporting requirements. *See* Securities Exchange Act of 1934, Section 21, 15 U.S.C. §§ 78a et seq., at § 78u-u5 (2002).
[44] *See* PHILLIP B. WILSON, THE CASE FOR REFORM OF UNION REPORTING LAWS, 19-20 (2002), citing Letter of Deputy Assistant Secretary Don Todd, to House Committee on Education and the Workforce 4-5 (Aug. 15, 2001).
[45] *See* Labor Organization Annual Financial Reports, 67 Fed. Reg. at 79,303, 79,310.
[46] *See id.* at 79,285-86.
[47] *Id.* at 79,286.
[48] *Id.* at 79,286, 79,340.
[49] *Id.* at 79,316.
[50] *Id.* at 79,286.
[51] *See id.* at 79,315.
[52] *See id.* at 79,287.
[53] *Id.* at 79,316.
[54] *See id.* at 79,287.
[55] *Id.* at 79,287.
[56] *Id.* at 79,316.
[57] *Id.* at 79,287.
[58] The National Legal and Policy Center tracks union corruption, including cases of embezzlement by union officials, at its Web site: http://www.nlpc.org. The NLPC regularly reports embezzlement cases where union officials steal money in increments of a few hundred dollars at a time.
[59] EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPARTMENT OF LABOR, INSTRUCTIONS FOR FORM LM-2 8 (2000).
[60] *See* Section 434(b) of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, title III, § 304, 86 Stat. 14 (codified at 2 U.S.C. § 431 et seq.); 11 C.F.R. 104.3(a)(4)(i).
[61] Labor Organization Annual Financial Reports, 67 Fed. Reg. at 79,288.
[62] *See* 29 C.F.R. § 405.
[63] *Id.* at § 406.
[64] *See* 17 C.F.R. 230.406, 61 Fed. Reg. 30,397, 30,402 (June 14, 1996).
[65] Labor Organization Annual Financial Reports, 67 Fed. Reg. at 79,289.
[66] *Id.* Compare this to Section 401(b) of the Sarbanes-Oxley Act of 2002, 107 Pub.L. No. 204, Title IV, § 401, 116 Stat. 745. The SEC was required to have the regulations implementing Sarbanes-Oxley in effect within 180 days after the passage of the statute.
[67] Labor Organization Annual Financial Reports, 67 Fed. Reg. at 79,289.

[68] *See* Justin Blum, *Audit Says Union Lost $5 Million To Theft,* Wash. Post, Jan. 17, 2003, at A01.
[69] *Id.*
[70] *Id. See also* Valerie Strauss, *Union Tardy Paying Bills, Premiums, Sources Say*, Wash. Post, Dec. 25, 2002, at B01.
[71] *See* Valerie Strauss and Justin Blum, *Teachers Union Slow To Repay Members*, Wash. Post, Nov. 23, 2002, at B01.
[72] *Id.*
[73] *See* Valerie Strauss, *Union Tardy Paying Bills, Premiums, Sources Say*, Wash. Post, Dec. 25, 2002, at B01.
[74] *Id.*
[75] All figures from the 2000 LM-2 report are found at Washington Teachers' Union Local 0006, *Form LM-2 Labor Organization Annual Report*, File No. 511-940 (December 27, 2001).
[76] *Id.* The WTU showed total receipts of $4,203,243 in fiscal year 2000.
[77] Harry S Truman, Message to the Congress of the United States on Greece and Turkey (Mar. 12, 1947) (transcript available at http://www.trumanlibrary.org/exhibit_documents/index.php?pagenumber=8&titleid=226 &tldate=1947-03-12%20%20&collectionid=tdoc&PageID=1&groupid=3458).