



June 22, 2009

Denise M. Boucher
Director of the Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, NW
Room N-5609
Washington, DC 20210

Re: RIN 1215-AB62, *Labor Organization Annual Financial Report*

Dear Director Boucher:

In the *Federal Register* of April 21, 2009 (74 Fed. Reg. 18172) the U.S. Department of Labor's Office of Labor-Management Standards (Department) published a notice of proposed rulemaking (NPRM) in the above-referenced docket. According to the April 21 notice, the purpose of the proposed rulemaking is to solicit public comment on the Department's announced intention to rescind the final rule that was published in the above-referenced docket on January 21, 2009. The final rule had amended the annual financial reporting requirements set forth in 29 C.F.R. Parts 403 and 408 by, among other things, requiring the unions' LM-2 reports to provide more detailed information regarding certain financial transactions. Associated Builders and Contractors (ABC) hereby submits the following comments in response to the April 21 NPRM.

ABC is a national construction industry trade association representing 25,000 individual employers in the commercial and industrial construction industry. ABC represents both general contractors and subcontractors throughout the United States. The majority of ABC's member companies are "merit shop" companies, and our diverse membership is bound by a shared commitment to the construction industry's *merit-shop philosophy*. The merit-shop philosophy is grounded on the principal of full and open competition, without regard to labor affiliation. This philosophy helps ensure that taxpayers, consumers, and the government will receive the most for their tax and construction dollars.

Conservatively, ABC's members employ more than 2.5 million skilled construction workers, whose training and experience span all of the twenty-plus building trades that comprise the construction industry. Merit-shop companies comprise more than eighty (80) percent of the private commercial construction industry and the majority of ABC's contractor members are classified as small businesses by the Small Business Administration.

The outcome of this rulemaking is of particular interest to ABC and its members in two respects. First, the legislative history of the Labor Management Relations Disclosure Act (LMRDA) makes quite clear that the public was one of the three intended beneficiaries of LMRDA's financial reporting for unions. As the Committee report accompanying the Senate bill plainly explained: "*full disclosure* will enable the persons

whose rights are affected, *the public* and the Government to determine whether arrangements or activities are justifiable, ethical, or legal (emphasis supplied). S. Rep. No. 187, 86th Cong. 1 Sess. (1959) (hereafter Senate Report) at 5, reprinted in 1 *NLRB Leg. Hist. of the LRMDA* at 401. As members of the public, therefore, ABC and the 25,000 companies on whose behalf these comments are being submitted have a Congressionally-identified interest in the outcome of this rulemaking.

However, ABC's members are more than just members of the public. As merit-shop employers, ABC's members have been the direct targets of activities funded in whole or in part by unions, including ongoing union job targeting campaigns throughout the country, as well as a multitude of other activities paid for and sponsored by the construction unions, aimed either at organizing our members or putting them out of business. ABC provided details of the extent of the unions' job targeting expenditures that an independent study conducted by George Mason University's Olin Institute was able to identify from union LM-2 filings, together with a copy of the study itself, in the comments we submitted to this docket on April 7, 2009, between 2000 and 2007. The Olin study found that construction unions spent more than **\$1 billion in union member wages** on job targeting; it is noteworthy that the NPRM made no mention of the study or its submission into the record by ABC. Union job targeting expenditures, as well union expenditures for many other union programs, are aimed at and have a direct, adverse impact on the business opportunities of ABC member companies. Therefore, ABC's members (and ABC on their behalf) have an even greater interest in wanting to ensure that the Department does not depart from, or undermine, Congress' call for full disclosure by the unions of their financial transactions, including the details of those transactions.

ABC continues to support the final rule and emphatically opposes its rescission. The Department's claim that the final rule cannot be justified without further consideration of the 2003 rule, 74 Fed. Reg. at 18175, is simply without merit.

However, before we address this in greater detail below, ABC first wants to address a preliminary matter concerning the rationale that Department has given to justify both the delay of the final rule's implementation as well as its proposed rescission.

As the Department should well know from the previous comments that ABC has submitted to this docket, ABC has been opposed to the Department's decision to delay the implementation of the final rule. That remains our position. However, and solely for purposes of these comments concerning the proposed rescission, ABC will nonetheless concede, *arguendo*, that the rationale the Department provided in the NPRM to justify a rescission, *i.e.*, the final rule's failure "to appropriately consider the experience of reporting under the 2003 Form LM-2 rule, including the burden of the reporting requirements," 74 Fed. Reg. at 18175, may be sufficient reason to support the Department's delay of the final rule's effective and applicability dates. That same rationale, however, in no way justifies rescinding the final rule, as the Department is now proposing to do, and especially does not justify rescinding the final rule any time prior to the Department's completion of its "[f]urther consideration of that experience . . . to determine whether the Form LM-2, as revised by the 2003 rule, reflects a proper balance of the need for transparency and union autonomy," *id.* For purpose of our comments, ABC will refer to this hereafter as the Department's "further consideration."

At a minimum, unless and until the Department requires unions to comply with the additional reporting requirements adopted by the final rule, neither the unions nor the Department can, in good faith, claim that

any union would be harmed, or adversely affected, by a further extension of the final rule's effective and applicability dates pending completion of the Department's further consideration. Any such a claim was effectively eliminated by the Department when it announced its initial decision to delay the final rule's effective and applicability dates until at least October 19, 2009 and January 1, 2010, respectively. 74 Fed. Reg. 18132. Therefore, if the Department continues to believe it necessary to engage in further consideration of whether the final rule "reflects a proper balance of the need for transparency and union autonomy," as the NPRM states, then the precedent to continue delaying the final rule's implementation pending that further consideration has been established. The Department's action negated any arguments that could now be raised against a further extension of the current delay pending the Department's completion of its further consideration. In fact, based on the Department's reasoning for the current delay, it is hard to imagine how the Department would be able to turn around and conclude that unions would now be harmed or adversely affected by extending the existing delay pending the Department's completion of its further consideration of the 2003 rule.

While the unions would bear no harm from a further delay of the final rule, the same would not be true if the final rule is rescinded. Indeed, it is highly foreseeable that a premature rescission of the final rule, *i.e.*, a rescission which occurs before the Department completes its further consideration, could be highly detrimental not only to union members, but also to the public and the government. While the Department may believe that its further consideration will demonstrate that the final rule was not needed, clearly that supposition is not a foregone conclusion. Not only would it be arbitrary for the Department to presume this, but unless and until the Department's further consideration is actually completed and also vetted for public comment, the Department could easily and appropriately be accused of having prejudged the outcome of this rulemaking.

On the other hand, in the event the Department were to rescind the final rule prematurely and then find that its further consideration demonstrates the additional reporting the final rule would have required is in fact needed, the Department would have no effective recourse to reinstate the final rule. ABC would hope that the Department can see the adverse effect that such a premature rescission of the final rule would immediately have. A premature rescission of the final rule would not only compel the Department to begin the rulemaking entirely anew, but would also eliminate the Department's ability to dissolve its present stay so that the final rule could be implemented in a timely manner. To put it more plainly, should the Department go ahead and rescind the rule prematurely, it would be doing so with the full knowledge and understanding that its decision would add significant delay in its ability to reinstitute and implement the more detailed reporting requirements established by the final rule, should the facts demonstrate that the Department's adoption of the final rule be proven to have been correct in the first place.

However, aside from our fundamental opposition to the proposed rescission of the final rule, ABC submits that the rationale upon which the Department has relied to justify rescinding the rule is specious, *i.e.*, that "the proposed rescission is based on reasons that are consistent with the OMB guidance regarding regulatory review, in that the final rule did not reflect proper consideration of all relevant facts and was not based on reasonable judgment about the legally relevant policy considerations," 74 Fed. Reg. at 18134; that "[t]he Department agrees with the commenters and now believes that it was a mistake to propose further changes to the Form LM-2 reporting requirements so soon after the 2003 rule, without proper consideration of the effects of these changes, both in terms of benefits and costs," 74 Fed. Reg. at 18175; and, that "[t]he Department acknowledges that the January 21 rule did not adequately consider the effects of the 2003

changes, particularly regarding the assumed potential benefits of the changes. Further, the Department agrees that additional review would be beneficial to determine how the 2003 rule helped identify financial corruption before deciding that additional regulatory changes would facilitate this purpose,” 74 Fed. Reg. at 18175.

According to the April 21 NPRM, the Department appears to believe that legislative history of the LMRDA supports the Department’s above-referenced rationale for rescinding the final rule. While ABC agrees that the LMRDA’s legislative history is relevant and that it does provide useful insights into the need for and degree of financial reporting required by the LMRDA, the legislative history does not provide the support the Department claims.

First, the specific references to which the Department cited in the NPRM as justification for the proposed rescission, 74 Fed. Reg. 18175, are hardly authoritative. Floor statements by individual members of Congress to which the proposed rule cited expressed solely the thoughts of that member. The floor statements did not represent the collective position of either the House or Senate, or of Congress as a whole, at the time the LMRDA was enacted.

Second, the NPRM’s reliance on “a federation of labor unions” (federation) claim that “Congress expressed a preference that ‘the major recommendations of the [McClellan] select committee [*be implemented*] within a general philosophy of legislative restraint’” (emphasis added), 74 Fed. Reg. at 18175, is misplaced. The federation not only misquoted the text of the S. Rep. No. 187, 86th Cong. 1 Sess. (1959) (hereafter Senate Report), but, more importantly, misrepresented the context in which the statement was made. The specific text to which the federation referred, and which the Department cited in the NPRM, came from page 7 of the Senate Report, which is reprinted in 1 *NLRB Leg. Hist. of the LMRDA* at 403. That text was contained within the Report’s discussion of the “background and general approach of the bill,” which begins on page 5 of the Senate Report. A careful review of the specific statement cited by the federation, however, will clearly show that the Report’s authors were speaking solely to the legislative restraint which the Senate committee exercised in its drafting of the substantive content of the bill the Senate committee reported. Moreover, the relevant House Report, H. R. 741, 86th Cong., 1st Sess. (1959) (hereafter House Report) does not contain a similar statement of preference of restraint, whether legislative or regulatory.

To ensure that the NPRM’s record is accurate and complete, therefore, ABC provides the precise wording from page 5 of the Senate Report to which the federation referred:

The bill reported by the committee, while it carries out all of the major recommendations of the Senate select committee, does so within a general philosophy of legislative restraint. It does not spell out in detail all of the standards which every trade union should follow. It recognizes the variety of situations to which its provisions must apply, and especially, the inadvisability and injustice of compelling unions to conform to a uniform statutory rule with respect to *unimportant details of administration*. [Emphasis supplied.]

It is clear from the fuller text from page 7 of the Senate Report that no mention was made whatsoever that the committee ever discussed, let alone contemplated, the need for regulatory restraint in the implementation of the financial reporting requirements, post-enactment of the LMRDA. The only restraint that the Senate

Report expressly mentioned was expressed purely in the context of a legislative restraint, *i.e.*, the restraint that the Senate committee members exercised in drafting the bill. It is hard to imagine that the Department now considers the unions' financial transactions as "unimportant details of administration." ABC submits that the federation's extrapolation of the Senate Report, and, in turn, the Department's reliance on that extrapolation, are both entirely without merit.

Third, the partial quote from the floor statement of Senator John Kennedy upon which the Department seems to rely, 74 Fed. Reg. at 18175, is also misplaced. The portion of Senator's Kennedy's remarks that is quoted in the NPRM, comes from 105 Cong. Rec. 816 (daily ed. Jan. 20, 1959), reprinted in 2 *NLRB Leg. Hist. of the LRMDA* at 968-970. It is cited out of context and is hardly the expression of Congressional intent the Department claims it to be. Indeed, a more accurate understanding of Congress' intent is gleaned from reading a fuller version of Senator Kennedy's remarks, and not just an isolated snippet. As Senator Kennedy stated that day in relevant part:

* * *

Second. This bill is stronger and clearer than the 1958 version. The Kennedy-Ives bill of 1958, even after it passed the Senate by a vote of 88 to 1, was subject to fantastic distortion by extremists on both sides. Fears of its effects, particularly among businessmen, were unnecessarily aroused by the misinterpretation of isolated sections. To allay such fears and prevent further distortion, the bill has been revised to make clear that the employer reporting section cannot possibly interfere with normal, personal relations or communications, and that the section on bribes by employers cannot possibly include wage or other normal payments. At the same time, the bill has been strengthened and tightened in other respects – including, for example, the judicial remedies here made available to rank and file members to recover misappropriated dues when his union will not sue; the wider applicability of the provision for union democracy and election of officials; and the increased reports of improper payments to a union or its officers by an employer.

* * *

Fourth. This is a strong, effective reform bill. It carries out all of the recommendations of the McClellan committee. It is aimed at ending the abuses revealed before that committee; adds other legislative curbs on racketeering as well. It is based upon the bill drafted last year by two members of the McClellan committee, with strong support of the distinguished chairman of that committee himself. It is broader and stronger than any alternative proposal in this area. It is a bill designed to permit responsible unionism to operate without being undermined by either racketeering tactics or bureaucratic controls. It is designed to strike a balance between the dangers of to [sic] much and too little legislation in this field.

* * *

I wish to mention the key provisions of the bill introduced today – the basic weapon against racketeering which will be unavailable in the battle against corruption if such a measure is not enacted by Congress this year:

First. Comprehensive detailed disclosure to members, press, and public and government law enforcement agencies of union financial data.

105 Cong. Rec. 816-17 (daily ed. Jan. 20, 1959), reprinted in 2 *NLRB Leg. Hist. of the LRMDA* at 968-969.

It is abundantly clear from the Department's selective reading of the LMRDA's legislative history, as well as from its statements generally since issuing the final rule, that the Department's focus and concerns have moved dramatically away from protecting the rights and interests of the individual union members and the public. Instead, the Department has clearly chosen to subordinate those rights and interests to the administrative concerns raised in opposition to the increased reporting by unions in their corporate capacities. By giving greater priority to union autonomy over union transparency, 74 Fed. Reg. at 18175, the Department's actions and priorities not only contravene the LMRDA, but also the OMB's January 21, 2009 memorandum; which ironically gave the Department the initial license it needed to reopen the final rule.

In contrast to the Department's selective reading of the LMRDA's legislative history, an objective examination of the relevant Senate and House reports demonstrates quite clearly that the Department's post-final rule interpretation of the statute, and its prioritizing of the unions' administrative concerns over the interest of the unions' members, is contrary to the expressed intent of Congress.

The Senate Report's discussion of the bill's purpose states unambiguously:

The bill is designed to prevent, discourage, and make unprofitable improper conduct on the part of union officials, employers, and their representatives by requiring reporting of arrangements, actions, and interests which are questionable. In some instances, the matters to be reported are not illegal and may not be improper. But only full disclosure will enable the persons whose rights are affected, the public and the Government to determine whether arrangements or activities are justifiable, ethical, or legal.

In addition to comprehensive reporting

Emphasis added. Senate Report at 5, reprinted in 1 *NLRB Leg. Hist. of the LRMDA* at 401. *See, also*, House Report at 4, reprinted at 1 *NLRB Leg. Hist. of the LRMDA* at 762.

Further, both the House and Senate reports evidence a clear recognition by Congress that the corporate interests of the unions do not always coincide with, or serve the interests of, the members. As the House Report acknowledged:

Some trade unions have acquired bureaucratic tendencies and characteristics. The relationship of the leaders of such unions to their members has in some instances become impersonal and autocratic. In some cases men have acquired positions of power and forsaken their responsibilities to the

membership and to the public. The power and control of the affairs of a trade union by leaders who abuse their power and forsake their responsibilities inevitably leads to the elimination of efficient, honest, and democratic practices within such union, and often results in irresponsible actions which are detrimental to the public interest.

House Report at 6, 1 *NLRB Leg. Hist. of the LRMDA* at 764. The Senate Report contains a similar admonition. Senate Report at 6, 1 *NLRB Leg. Hist. of the LRMDA* at 402.

Further, in its discussion of the principal areas covered by the bill union financial and administrative, the Senate Report underscored the fact that:

Labor organizations are creations of their members; union funds belong to the members and should be expended only in furtherance of their common interest. A union treasury should not be managed as the private property of union officers, however, well intentioned, but as a fund governed by fiduciary standards appropriate to this type of organization. *The members who are the real owners of the money and property of the organization are entitled to a full accounting of all transactions involving their property.*

The financial conduct of labor unions and their officers is a proper concern of the Federal Government. This is so because the funds that pass through union treasuries and for which unions and their officers are responsible are very large, and the uses to which these funds are put have a substantial impact on the Nation's economy. Furthermore, if unions are to enjoy the protection of rights such as are guaranteed to them by the National Labor Relations Act and the Railway Labor Act, they ought to be held responsible for abuses that have accompanied the exercise of these rights by some union leaders.

* * * *

This bill insures that full information concerning the financial and internal administrative regulations of labor organizations shall be in the first instance available to the members of such organizations. In addition, this information is to be made available to the Government, and through the Secretary of Labor, is open for inspection of the general public. By such disclosure, and by relying on voluntary action by members of labor organizations, abuses can be eradicated.

Senate Report at 8, 1 *NLRB Leg. Hist. of the LRMDA* at 404, emphasis added. Moreover, the House Report contains virtually the identical text on pages 7-8, reprinted in 1 *NLRB Leg. Hist. of the LRMDA* at 765-766.

Clearly, Congress understood that, because the interests of union organizations do not always coincide with the interests and needs of their individual union members, it was – and remains – necessary to ensure the availability and access to “all of the vital information necessary for them [the union members] to take effective action in regulating affairs of their trade union, either through voluntary compliance of the labor organization

with the reporting requirements of the act or as a result of investigation and reports by the Secretary of Labor.” Senate Report at 9, *NLRB Leg. Hist. of the LRMDA* at 405. The Department’s actions since the final rule was issued indicate that the Department no longer appears to recognize this.

To this latter point, it is especially telling that the April 21 NPRM made no mention of the fact that the Department received at least two comments from union members voicing support for the additional reporting which the final rule would impose, nor addressed the specific concerns which the two union members expressed. See comments of Don Shuper, who filed three sets of comments (LMSO-2008-0002-0197; LMSO-2008-0002-0201; and LMSO-2008-0002-0208) also the comments of Michael B. Jewell (LMSO-2008-0002-0191), a member of the Maritime Engineers Beneficial Association (MEBA), who expressly voiced disagreement to the comments opposing the final rule that were submitted by Nils Djusberg, in-house counsel for the MEBA and Adman Bellotti, MEBA’s legal assistant. Jewell’s comments in particular begs the question of whether any of the unions that filed comments opposing the final rule – and now support its rescission – ever sought input from their members prior to formulating their position to oppose the rule and support its rescission. Further, how many other union members in addition to Jewell and Shuper might also have filed comments opposing the rescission had they known of this NPRM? It hardly seems unreasonable to presume that the answers to these questions would be information that the Department would clearly want to know, especially given Congress’ expressed recognition that it is the individual members of the unions who are the real owners of the money and property of their organizations. Senate Report at 8, 1 *NLRB Leg. Hist. of the LRMDA* at 404. It is also noteworthy that Jewell and Shuper identified themselves in their comments. The Department’s April 21 *Federal Register* notice announcing the further delay of the final rule acknowledged that “17 commenters submitted form letters generally supporting greater public disclosure of pay and benefits of union officers and employees afforded under the January 21 regulations and urging implementation of the new reporting requirements without further delay.” 74 Fed. Reg. at 18134. The fact that this acknowledgment was made in the notice to delay and not the NPRM strongly suggests that the Department gave little if any weight to the substance of those 17 comments, or that they may have been submitted as “form letters” by union rank and file because of a fear of union retaliation had they identified themselves.

Finally, any claims by the unions that the additional reporting is not necessary because their members can get the details during a meeting or by merely requesting the additional details, would be specious. The following are a few examples of where unions have made access to their financial information quite difficult and costly for their members by forcing them to go to court to obtain financial information, including when the information being provided in the LM-2 or LM-3 is believed insufficient to determine whether the union leadership was acting in their best interest:

English v. Local Union No. 46, 654 F.2d 473, 474-75 (7th Cir. 1981) (Union denied access to financial records to member who believed that LM-2 forms were inaccurate, then sought to have suit dismissed for lack of subject matter jurisdiction); *Waldron v. Dugan*, No. 07 C 286 (N.D.Ill. Dec. 13, 2007) (Union denied members information on officer’s \$100 monthly kickbacks and conversion of chapter assets); *Marceau v. Int’l Bhd. of Electrical Workers*, No. CV 05-02874-PHX-MHM (D.Ariz. Jul. 7, 2006) (Union members had to go to court to obtain proof of whether leadership was colluding with employers in violation of RICO Act and fiduciary duty); *King v. Jockey’s Guild, Inc.*, Civ. No. 04-57812 (D.N.J. Jul. 26, 2005) (Union denied members access to pension fund’s financial records); *Martinez v. Barasch*, No. 1 Civ. 2289 (S.D.N.Y. Aug. 16, 2005) (Union and pension fund members brought suit for breach of fiduciary duty); *Hoffman v. Kramer*,

362 F.3d 308, 313 (5th Cir. 2004) (Union members who believed leadership destroyed records and misappropriated funds denied access to accounting records by union); *Krokosky v. United Staff Union*, 291 F. Supp. 2d 835 (W.D.Wisc. 2003) (Union denied member access to detailed reports of outside counsel after member questioned over three-fold increase in “professional fees”); *Local 15, Int’l Bhd. of Electrical Workers v. O’Reilly*, No. 02 C 6464 (N.D.Ill. Dec. 31, 2002) (Former president and business manager failed to keep and/or disclose proper records and took improper salary and benefits); *Local 108, Laborers’ Int’l N. Am. v. Mongello*, 97-CV-6034 (E.D.N.Y. May 19, 2000) (Pension fund managers failed to maintain and make available proper financial records, misused money, discouraged claims, failed to pay legitimate claims, and engaged in self-dealing); *Givlin v. Fire*, 259 F.3d 749 (D.C. Cir. 2001) (Union misused facsimile of officer signature and denied officer access to essential accounting information, preventing a check on proper use of funds); *Carthas v. Local 134 IBEW*, 233 F.3d 508 (7th Cir. 2000) (Officers dealt with union as an adverse party and perpetuated office by taking money from employers for “social club”); *Snyder v. Freight, Construction, General Drivers, Warehousemen & Helpers, Local No. 287*, 175 F.2d 680 (9th Cir. 1999) (Union denied members access to union financial records despite disappearance of funds and evidence that money had been diverted for manager’s personal use); *Dunlop-McCullen v. Local 1-S, AFL-CIO*, 149 F.3d 85 (2nd Cir. 1998) (Union failed to provide proper accounting in a timely manner to members investigating wasteful and improper spending); *Int’l Ass’n of Machinists & Aerospace Workers, AFL-CIO v. Schimmel*, 128 F.3d 689 (8th Cir. 1997) (Union denied accounting of funds and continued to hold and expend funds in self-interest after membership voted to decertify); *George v. Local Union No. 639*, 98 F.3d 1419 (D.C. Cir. 1996) (Union denied member exploring financial discrepancies access to accounting); *Stomper v. Amalgamated Transit Union, Local 24*, 27 F.3d 316 (7th Cir. 1994) (Union allowed access to chapter financial records only after members filed suit); *Mallick v. Int’l Bhd. of Electrical Workers*, 814 F.2d 674 (D.C. Cir. 1987) (Union denied member access to settlement agreement because member planned to distribute to membership); *Landry v. Sabine Indep. Seamen’s Ass’n*, 623 F.2d 347 (5th Cir. 1980) (Union denied members who believed they were paying double dues access to union’s financial records); *Gabauer v. Woodcock*, 594 F.2d 662 (8th Cir. 1979) (Union members who believed leadership had breached its fiduciary duty denied access to financial records by union, which then moved to dismiss suit on procedural grounds); *Flaherty v. Warehousemen, Garage & Serv., Employees’ Local Union No. 334*, 574 F.2d 484 (9th Cir. 1978) (Union denied member concerned about dues increase access to financial records); *Conley v. United Steel Workers of Am., Local Union No. 1014*, 549 F.2d 1122 (7th Cir. 1977) (Union denied member ability to copy and maintain own set of records for later, individual review); *Dinko v. Wall*, 531 F.2d 68 (2nd Cir. 1976) (Union member who believed union leadership had breached fiduciary duty denied access to records by union); *Antal v. Dist. 5, United Mine Workers of Am.*, 451 F.2d 1187, 1188 (3rd Cir. 1971) (Member’s designated accountant denied access to records by union); *Behr v. Fortier*, 2008 WL 2323884 (D.Minn. 2008) (Union member who distrusted information provided in hard copy denied access to electronic records); *Mayes v. Local 106*, 1999 WL 60135 (N.D.N.Y. Feb 5, 1999) (Member sued union alleging fraudulent and excessive contributions to union pension funds managed by union officers and misuse of funds for personal gain); *Cook v. Teamsters Local 705*, No. 96 C 8009, 1997 U.S. Dist. LEXIS 11482 (N.D.Ill. Jul 28, 1997) (Union members seeking to verify LM-2 forms denied access to financial records by union); *Brennan v. Int’l Bhd. of Teamsters, AFL-CIO*, 1997 WL 445259 (D.D.C. 1997) (Union member investigating misappropriation of funds by national officers denied access to monthly expense and activity reports, unredacted billing statements, and activity reports by union); *Campbell v. Local 234, Transp. Workers Union of Am., AFL-CIO*, No. CIV. A. 93-2865, at 1-3 (E.D.Pa. Mar. 21, 1996) (Union denied member access to financial records, with or without an attorney or accountant present, because member planned to communicate findings to other union members); *Glover v. Chicago Truck Drivers, Helpers & Warehouse Workers Union*, 1995 WL 2578393 (N.D.Ill. 1995) (Union

denied members access to financial records, despite assertions that failure to review records would cause members to breach a fiduciary duty to others); *Patterson v. Pipefitters Ass'n, Local 597*, 1994 WL 395167 (N.D.Ill. 1994) (Union denied former members access to financial records after union pulled out of negotiations on former members' behalf, denied any responsibility, yet failed to notify former members of any change in position and continued to accept their union dues); *Moran v. Flaherty*, 1993 WL 60898 (S.D.N.Y. 1993) (Union denied members investigating breach of mismanagement by leadership access to chapter financial records); *Moran v. Walsh*, 759 F.Supp. 1067 (S.D.N.Y. 1991) (Union denied candidates for leadership positions access to financial records); *Smith v. McCarthy*, 723 F.Supp. 173, 173-74 (D.D.C. 1989) (Union denied membership reform group access to financial records); *Cumbea v. Local No. 400, Aluminum Workers' Int'l Union*, 460 F.Supp. 60 (E.D.Va. 1987) (Union denied member seeking further explanation of discrepancies in readily-available information access to financial records); *McGinnis v. Local 710, Int'l Bhd. of Teamsters*, 664 F.Supp. 1212 (N.D.Ill. 1987) (After member exhausted internal remedies to access information, union continued to deny access in spite of court order, including court-provided clarification; member told that union would only allow member access if member agreed not to publish information to membership or public); *Spinowitz v. Herrity*, 672 F.Supp. 670 (E.D.N.Y. 1987) (Union denied access to financial records to members seeking officer positions after decline in assets and increase in expenses); *Dale v. Major League Umpire's Ass'n*, No. 85-2669, 1986 U.S. Dist. LEXIS 28561 (E.D.Pa. Mar. 5, 1986) (Union denied member access to financial records); *Zaloga v. Ruggiero*, 529 F.Supp. 443 (E.D.N.Y. 1983) (Union denied members access to financial records and sought dismissal based on procedural grounds); *Lykins v. Aluminum Workers' Int'l Union*, 510 F.Supp. 21 (E.D.Pa. 1980) (Union denied access to financial records and accounting to member who requested that his dues be spent only on collective bargaining).

Despite the Secretary's proclamation to members of the American Federation of State, County and Municipal Employees (AFSCME) that there was a "new sheriff in town," it appears quite clear that the outcome of this rulemaking was predetermined. Validation of this conclusion was provided in part by the Secretary during her January 9 Senate confirmation hearing. When asked about union corruption and the need to enforce transparency measures, the Secretary replied: "I believe that wherever there's any corruption that we have a responsibility to end that and to go after those individuals that might be involved in any type of corruptive behavior. So I would look very closely, not only at the unions but also at the business sector. And I would look to find an approach that is balanced." Shortly after her confirmation, the Secretary slashed the OLMS budget; it was the only program office budget that was reduced. Even giving the Secretary the benefit of the doubt, it is difficult to understand how the Secretary's decision to reduce the OLMS budget and pending rescission of the final rule are in keeping with the commitment the Secretary made to Congress "that wherever there's any corruption that we have a responsibility to end that and to go after those individuals that might be involved in any type of corruptive behavior."

The "balance between too much and too little legislation" the Department claims it now feels obliged to achieve, 74 Fed. Reg. at 18175, is neither a balance nor does it have any legal basis. The so-called balance is merely an attempt to begin dismantling a decade's worth of union financial reporting requirements and the investigatory and enforcement framework that was put in place to protect the rights of individual workers, first and foremost.

The Department's current move to roll back union transparency comes at a time when corruption among union officials remains high. In our previous comments, ABC provided an abbreviated list of

corruption cases involving union officials reported by the National Legal and Policy Center just during the first two months of 2009. Docket at LMSO-2008-0002-0191.1. The NPRM appears to have given little if any weight to that information. However, even union officials themselves are calling attention to the suspect financial practices of their organizations. Bloomberg reported recently that a member of the AFL-CIO's finance committee circulated a report alleging that the federation has "used 'creative accounting' to disguise 'a crippling cash-flow situation,'" incurred as a result of last year's federal election cycle. Holly Rosenkrantz, "AFL-CIO's Finances Masked by Creative Accounting, Official Says" in *Bloomberg* at <<http://www.bloomberg.com/apps/news?pid=20601110&sid=akQDXBGvFcqM#>>. It begs credulity for the Department to proclaim that, in the face of such information, a rescission of the final rule is justified and would be beneficial.

In summary, ABC strongly opposes rescission of the January 21 Final Rule. The conclusions which the Department reached and expressed in the final rule were correct, and they are supported by the fuller examination of the LMRDA's legislative history. Rescission of the final rule would constitute a prejudgment of any reevaluation of the 2003 rule's effectiveness, and would therefore be a clear violation of the Administrative Procedures Act (APA). Any such action by the Department at this time provides a reasonably valid basis for a judicial challenge of any such action with respect to both a final rule. The final rule was necessary and its timely implementation is needed in order to carry out the Department's statutory mandate to combat union-related corruption.

Respectfully submitted,

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