



AFL-CIO 2008 Transition Project Recommendations for the Obama Administration

Regulation of Union Finances and Elections Under the Labor Management Reporting and Disclosure Act

Departments/Agencies Covered

Department of Labor

Employment Standards Administration (ESA)

Office of Labor Management Standards (OLMS)



Turn Around America

AFL-CIO Recommendations for the Obama Administration

REGULATION OF UNION FINANCES AND ELECTIONS UNDER THE LABOR MANAGEMENT REPORTING AND DISCLOSURE ACT

I. Overview of Issues

The Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. §§ 401-531, regulates the internal affairs of labor unions as well as the relationship between unions and their members. It also aims to curb the influence of employers and their consultants over workers' freedom to join a union. The LMRDA thus occupies a central role in the labor relations regime in the United States.

Congress passed the LMRDA in 1959 “primarily . . . to correct the abuses which ha[d] crept into labor and management” and which had come to light through the investigations of the Committee on Improper Activities in the Labor and Management Field (McClellan Committee).¹ At the same time, because Congress recognized that “[t]he overwhelming majority [of unions] are honestly and democratically run,” it took great care to draft a bill that would “neither . . . undermine self-government within the labor movement nor . . . weaken unions in their role as the bargaining representatives of employees.”²

The Secretary of Labor administers and enforces the Act. She has delegated her authority to the Office of Labor Management Standards, currently headed by the Assistant Secretary for Labor Management Programs.

Title II establishes a financial reporting regime to provide union members with “a full accounting” of the labor organization’s finances. Unions must file annual financial reports with the Secretary of Labor. The Secretary must prescribe simplified reports for smaller unions because of Congress’s concern with the reporting burden on these organizations. In addition, Title II aims “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.”³ “Union officers and employees must file reports with the Secretary of Labor disclosing to union members and the general public any investments or transactions in which their personal financial interests may conflict with their duties to the members.”⁴ The statute

¹ Senate Report (S. Rep.) No. 187 on S. 1555, 86th Cong. 1st Sess. (1959) (at 2), reprinted in Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (Leg. Hist.), vol. 1 (1959) 398.

² *Id.* at 5, 401; see also *Steelworkers v. Sadlowski*, 457 U.S. 102, 117 (1982).

³ S. Rep. No. 187 at 5, reprinted in Leg. Hist. at 401.

⁴ S. Rep. No. 187 at 14, reprinted in Leg. Hist. at 410.



defines the types of transactions that must be reported. All others “are left private because they are not matters of public concern.”⁵

As Congress noted, the McClellan committee describe[d] management middlemen flitting about the country on behalf of employers to defeat attempts at labor organization.”⁶ The drafters dealt with this problem by expanding the scope of impermissible criminal transactions under Section 302 of the Labor-Management Relations Act, 29 U.S.C. § 186. Title II of the LMRDA also “relies upon a system of reporting and disclosure to apply further corrective curbs on improper employer activity.”⁷ Under Section 203(a) of the Act, 29 U.S.C. § 431(a), employers must report any expenditures “where an object thereof, directly or indirectly, is to interfere with, restrain, or coerce employees in the exercise of their right to organize and bargain collectively through representative of their own choosing,” and “any agreement or arrangement with a labor relations consultant or other independent contractor or organization pursuant to which such person undertakes” such activities. In addition, under section 203(b), 29 U.S.C. § 431(b), “every person” who enters into an agreement or arrangement to undertake such activities must also file reports with the Secretary.

Title IV of the LMRDA sets forth standards for the conduct of labor organization elections and provides union members with the right to file a complaint with the Secretary of Labor alleging violations of those standards. The Secretary must investigate the complaint and if she finds that probable cause that a violation has occurred, she must file suit in federal district court to set aside the election and direct a rerun. Upon finding a violation, the court must set aside the election and order the rerun under the supervision of the Secretary.

II. LMRDA Misuse in the Hands of the Bush Administration

The LMRDA has become a primary anti-union weapon in the hands of the Bush Administration. Led by Deputy Assistant Secretary for Labor Management Programs Don Todd,⁸ and with the encouragement of Secretary of Labor Elaine Chao, the Office of Labor Management Standards has branded unions as major sources of corruption that shield their financial dealings from members through sophisticated corporate-type structures.

With this theme as its mantra, OLMS has imposed a series of costly, burdensome, and intrusive reporting requirements on unions and their officers, employees, and volunteers that are designed to produce vast quantities of information with little or no value to union members. At the same time, it launched a major initiative to conduct comprehensive financial audits of national/ international and local unions.

⁵ S. Rep. No. 187 at 15, reprinted in Leg. Hist. at 411.

⁶ S. Rep. No. 187 at 10, reprinted in Leg. Hist. at 406.

⁷ S. Rep. No. 187 at 11, reprinted in Leg. Hist. at 407.

⁸ Todd headed opposition research for the Republican National Committee. He won Republican of the Year award in 1988 for uncovering the Willie Horton story. Scott Lilly, *Beyond Justice: Bush Administration's Labor Department Abuses Labor Union Regulatory Authorities* (2008) at 5, available at http://www.americanprogress.org/issues/2007/12/beyond_justice.html.



These initiatives have been accompanied by large increases in the OLMS budget that dwarf those of the Department's worker protection agencies and reflect the Administration's priorities. OLMS now spends approximately \$2,700 per each labor organization under its jurisdiction, while OSHA and the Wage and Hour Division spend \$26 each per covered workplace.⁹

Revisions to LM-2 Report

In 2003, OLMS promulgated a massive revision of the Form LM-2, the annual report filed by the largest labor organizations,¹⁰ effective for fiscal years beginning in 2005.¹¹ The revised report requires itemization of every individual disbursement of \$5,000 or more (as well as total disbursements to any single entity or individual that aggregate to \$5,000 or more) during the reporting period, and allocation of these transactions over five "functional categories." Several types of receipts are also subject to these requirements, and officers and employees must also allocate their time over these categories.

Complying with the revised LM-2 entailed huge expenditures (for some unions in the millions of dollars) as unions purchased new software, revamped and/or expanded existing systems, and trained staff on the requirements of the new LM-2, and recordkeeping and reporting continues to impose significant financial burdens. Unions now produce an avalanche of minutely detailed information, much of which is not meaningful.

The AFL-CIO unsuccessfully challenged the Secretary's LM-2 revisions in federal court, with one exception. The U.S. Court of Appeals for the District of Columbia Circuit struck down a requirement that unions file detailed financial reports with respect to "significant trusts in which they are interested" on a new T-1 report.¹² The Secretary proposed another T-1 report in 2006,¹³ but the U.S. District Court for the District of Columbia, pursuant to the AFL-CIO's challenge, struck it down as well.¹⁴ The Secretary has now now promulgated a third T-1 requirement¹⁵ and is expected to promulgate a final rule before the end of 2008.

Revisions to LM-30 Report

Meanwhile, OLMS began focusing on the LM-30 report, which union officers and employees must file under the LMRDA if they engage in certain transactions that have the potential to raise a conflict of interest with their union. First, the agency launched a special initiative in 2005 to increase the number of officers and employees who filed the

⁹ John Lund, Ph.D., unpublished analysis derived from 2008 Congressional Budget Justifications for Employment Standards Administration and Occupational Safety and Health Administration, U.S. Department of Labor; 2005 LM-2, LM-3, and LM-4 filed with Office of Labor Management Standards.

¹⁰ Unions with annual receipts of at least \$250,000 file the LM-2. There are approximately 4,500 LM-2 filers.

¹¹ 68 Fed. Reg. 58374 (Oct. 9, 2003).

¹² *AFL-CIO v. Chao*, 409 F.3d 377, 391 (D.C. Cir. 2005).

¹³ 71 Fed. Reg. 57716 (Sept. 29, 2006).

¹⁴ *AFL-CIO v. Chao*, Civ. Ac. No. 86-2009 (JDB) (D.D.C. July 16, 2007).

¹⁵ 73 Fed. Reg. 57412 (Oct.1, 2008).



annual form. With voluntary assistance from the AFL-CIO and its affiliates, the Department now receives over 4,000 LM-3 reports each year.

Without waiting to analyze the results of the information received on the LM-30, the Department promulgated significant revisions to that report in 2007.¹⁶ These revisions radically expand the reporting universe by treating union volunteers, such as shop stewards, as union employees who must file annual LM-30 reports if they perform union-related tasks (like meeting on grievances) during their normal workday without having their pay docked. This change will impose annual reporting obligations on approximately 80,000 union volunteers.¹⁷

The revised LM-30 dramatically expands the types of transactions that individuals must report. For example, it will require disclosure of personal financial transactions, such as credit card bills and mortgage loans, with financial institutions that do any business with the union or with a union benefit fund or more than 10% of their business with an employer whose employees are represented by the union, will now have to be reported.

The new LM-30 went into effect for individuals' taxable years beginning in 2008, and the first report is due on March 30, 2009. The AFL-CIO's challenge to the revisions is now pending in U.S. District Court for the District of Columbia.¹⁸

Additional LM-2 revisions

Although unions have submitted revised LM-2 reports for three fiscal years, the Department has not conducted any study of union compliance costs or the value to union members of the information they now have access to on the revised reports (which are published on DOL's website). Nonetheless, in May 2008 the Secretary proposed substantial revisions to the LM-2 that would require unions once again to make costly changes to their accounting systems without producing meaningful information for union members, such as requiring unions to complete nine new itemization schedules for receipts.¹⁹ The Secretary is expected to promulgate a final rule revising the LM-2 by November 2008.

Procedures for Revoking the LM-3

Smaller unions file simplified financial reports under the LMRDA. The statute gives the Secretary the authority to revoke the right of a small union to file a simplified report after investigation, notice and an opportunity for a hearing, in order to prevent "circumvention or evasion of the Act's reporting requirements." However, no Secretary has ever done so.

At the same time as she proposed revisions to the already-revised LM-2, the Secretary proposed procedures for revoking the right of smaller unions to file the simplified LM-3

¹⁶ 72 Fed. Reg. 36106 (July 2, 2007).

¹⁷ John Lund, Ph.D., *Estimate of number of union representatives covered by new Form LM-30 reporting requirement* (2007), unpublished study.

¹⁸ *AFL-CIO v. Chao*, 1:08-cv-00069-CKK (filed Jan. 14, 2008).

¹⁹ 73 Fed. Reg. 27346 (May 12, 2008).



report, applicable to unions with annual receipts of at least \$10,000 but less than \$250,000.²⁰ Under the proposal, the Secretary may revoke the LM-3 right if the union filed a delinquent LM-3, a materially deficient LM-3 that remained uncorrected after notice, or if “other circumstances” warrant it. These unions, which have already experienced difficulties filing the simplified report, will now have to file the far more complex LM-2 report for at least two years.

The Secretary is expected to promulgate a final rule with respect to LM-3 revocation by the end of 2008.

Union Financial Audits

The Secretary has also placed tremendous emphasis on financial audits of both local and national/international unions. A newly-staffed division of OLMS, the Division of International Union Audits, is now responsible for carrying out comprehensive audits of national and international unions under the I-CAP program. These audits have lasted anywhere from several months to more than a year and unions to dedicate several staff members, often at the top level, to complying with document and information requests by the auditors. According to the OLMS website, the agency completed only 15 I-CAP audits in 2005-2006, five in 2007, and one to date in 2008. A review of the I-CAP closing letters (posted on the DOL website) fails to reveal any evidence of the widespread corruption and lack of transparency that the Department has used to justify its investment of resources in programs such as this one.

Relaxing of Employer Reporting Requirements

In contrast to its imposition of additional union reporting requirements, the Department has made it easier for employers and anti-union consultants to escape their LMRDA reporting obligations. In the waning days of the Clinton Administration, the Secretary issued an interpretation of the LM-21 or “persuader” report that reversed a longstanding interpretation under which anti-union consultants did not have to submit the report if they have no direct contact with employees.²¹ Before this reversal, consultants were able to orchestrate far-reaching union busting campaigns without having to disclose their financial arrangements to the Department. An early Bush Administration action staying agency actions that had not yet gone into effect nullified the Clinton interpretation, thus shielding anti-union consultants once again from the disclosure requirement.

Investigations of Union Elections

As discussed, the Secretary must investigate complaints from union members alleging violations of Title IV’s standards for the conduct of union elections. OLMS has repeatedly exceeded the scope of the complaints it receives and broadened its investigation into other areas of the election under scrutiny. In this way, the agency has attempted to undermine union self-government in violation of the intent of Congress.

²⁰ See n.19.

²¹ 66 Fed. Reg. 2782 (Jan. 11, 2001).



III. Orientation for a New Administration

The new Administration must realign OLMS's mission with the purpose of the LMRDA, discussed above, to provide union members with meaningful information about unions *and* employers without interfering in union self-government or undermining the unions' role as collective bargaining representative. Toward that end, OLMS must take swift action on several fronts. First, it must assure that the information it collects from unions is meaningful to union members and not simply a way to sap an increasingly large share of union resources. Second, it must assure an evenhanded approach to the collection of information by placing equal emphasis on employer and persuader reporting. Third, OLMS should carefully scrutinize the allocation of resources to auditing of both national/international and local unions, as this is an initiative that has not shown corresponding benefits. Many local unions simply lack the knowledge and understanding necessary to comply with the reporting requirements of the LMRDA. While compliance assistance should never replace enforcement, an appropriate compliance-oriented approach would produce far greater results than the punitive approach adopted by the current Administration.

Finally, as our statistics have shown, far too many resources have become concentrated in OLMS at the expense of OSHA and Wage and Hour. The overall DOL budget proposed by the Administration should reflect an emphasis on enforcing basic worker protections. OLMS has achieved huge growth in the hands of the Bush Administration. Now, resources must be placed in enforcement agencies such as OSHA, MSHA, and Wage and Hour. A baseline restoration measure is the 2001 allocation of resources among these agencies.

Below are specific recommendations with respect to our highest priorities.

IV. Key Priorities for New Administration

1. Priorities for Day 1

Highest

The Department should immediately stay all financial reporting regulations that have not yet gone into effect or that have gone into effect but for which the first reporting deadline has not yet occurred. This includes:

- T-1;
- revised LM-30 (effective 2008; first report due March 2009);
- revised LM-2 (anticipated effective date December 2008; first report due until March 2010);
- LM-3 revocation procedures (anticipated effective date December 2008; first report due until March 2010).



The stay should occur through an interim rule. Shortly thereafter, the Department should issue a Notice of Proposed Rulemaking seeking comment on whether to rescind all of these regulations, with a view toward rescission.

a. Priorities for First Hundred Days

High +

The Department should revise the LM-20 and LM-21 employer and anti-union consultant “persuader” reports. In order to make the revised reports meaningful to union members, the Department should first conduct stakeholder meetings, including meetings with labor organizations, to determine what information the reports should require employers and anti-union consultants to disclose.

A key component to a successful LM-20/LM-21 reporting regime is to obtain reports from as broad a segment of the anti-union consultant community as is possible. Therefore, in addition to revising the reports themselves, DOL should reinstate the Clinton-era interpretation of the reporting requirement under which consultants must file reports regardless of whether or not they have direct contact with employees.

With respect to elections under Title IV of the LMRDA, the Deputy Assistant Secretary should issue a directive to the field instructing OLMS staff not to exceed the scope of complaints when investigating allegations misconduct.

2. Priorities for the First Year

High+

Once the revised persuader reports have gone into effect, DOL should design a program to ensure maximum compliance with this requirement.

High

OLMS should conduct a study of the effectiveness of the I-CAP program, as well as the emphasis on local union audits. There are tremendous resources within these initiatives that could be more profitably used on compliance assistance or in other agencies within the Department.

The current LM-2 does not comply with generally accepted accounting principles and imposes huge costs on unions. OLMS should evaluate what changes should be made to the LM-2 that would produce meaningful information without imposing greater burdens on unions.

**Key Federal Agency Positions – Regulation of Union Finances and Elections**

Department	Agency	Position	Nature of Position
DOL	Office of the Secretary	Secretary of Labor	PAS
DOL	ESA	Assistant Secretary for Employment Standards	PAS
DOL	ESA/OLMS	Deputy Assistant Secretary for Labor Management Programs	NA