COMMENTS OF AMERICANS FOR LIMITED GOVERNMENT ON RIN 1245-AA03

"LABOR MANAGEMENT-REPORTING AND DISCLOSURE ACT; INTERPRETATION OF 'ADVICE' EXEMPTION"

SEPTEMBER 7, 2011

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INTRODUCTION

Americans for Limited Government is a national research and advocacy organization that is dedicated to putting the principles of limited government into action by working to keep the government within the confines set for it by the U.S. Constitution.

These comments are submitted pursuant to the Proposed Rule published in the Federal Register on June 21, 2011 at 76 Fed. Reg. 36,178.

Amazingly, the Obama Administration has suddenly discovered a passionate love for the concept of disclosure. This is curious given the activities of the Administration in general and those of OLMS in the area of labor-management reporting and disclosure during the last two and a half years.

As will be analyzed in detail below, there are significant problems in the NPRM. The NPRM does not discuss many of the collateral consequences that will occur if the mandates found therein are promulgated as a final rule. Instead, the NPRM is organized as if its mandates operate in a vacuum. There is no analysis of the interplay between how the proposed change in interpretation will affect the Form LM-21and, by extension, negatively affect the ability of employers to retain competent legal counsel to advise on matters concerning the workplace. There is also very little discussion on the substantial issue of the First Amendment right of employers to speak on issues concerning their workplaces and the chilling affect that the proposed interpretation will have should a final rule be promulgated.

I. BACKGROUND – THE OLMS WAR ON LABOR ORGANIZATION FINANCIAL TRANSPARENCY

To put the specifics of the instant NPRM into proper context, a thorough examination is necessary of the Administration's vigorous efforts to reduce disclosure and transparency as it applies to labor organizations and their officers and employees.

After reviewing what remains of the charred wreckage of the reporting system applicable to labor organizations due to the carpet bombing campaign that the Department has waged against it, the Department's disparity in treatment of employers versus labor organizations will be obvious. First, to be examined is Department's efforts to reduce labor organization transparency on the Form LM-2.

A. OLMS WEAKENED THE FORM LM-2 THUS REDUCING TRANSPARENCY

1. OLMS RESCINDED THE ENHANCEMENTS TO FORM LM-2

On February 3, 2009, less than two weeks after President Obama was sworn into office the Department published a Notice of Proposed Extension of Effective Date on the Form LM-2 regulation. Members of the public were allowed a meager ten days to comment on this proposal to delay the effective date and only thirty days to comment on the substance of the Form LM-2.[1] On February 20, 2009 OLMS published a Final Rule extending the effective date of the Form LM-2 regulation.[2] On March 19, 2009 OLMS published yet another Notice of Proposed Extension of Effective date for the Form LM-2 regulation.[3] On April 21, 2009 OLMS published a Notice of Proposed Rulemaking to completely withdraw the then existing Form LM-2 regulation.[4] On October 13, 2009 OLMS published a Final Rule that withdrew the then existing Form LM-2 regulation.[5]

Here is what the rescinded regulation would have done.

Before describing the effect of that regulation, a news item aptly demonstrates the vital importance of the enhancements in disclosure that were made by the January 21, 2009 final rule. On May 11, 2009 the *Washington Times* reported on a situation where an officer of a national labor organization returned money that had been disbursed to him.[6] This officer returned the money to the union after the newspaper questioned the officer regarding the amount of the disbursement. According to the article there does not appear to be a problem with the disbursement in that the officer was legally entitled to the disbursement. Interestingly the money returned was not a salary disbursement but was rather a disbursement from the union's "retirement equalization" plan. Of particular note, the article did not mention that under the requirements for the Form LM-2 in effect at the time the disbursement occurred, the union was not required to report the disclosure on an individual basis, but rather it should have been reported as part of the union's aggregate disbursements for "benefits" in Schedule 20. However, the information reported would be required to be reported an on individual by

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[1] 74 Fed. Reg. 5,899 (February 3, 2009).
[2] 74 Fed. Reg. 7,814 (February 20, 2009).
[3] 74 Fed. Reg. 11,700 (March 19, 2009).
[4] 74 Fed. Reg. 18,172 (April 21, 2009).
[5] 74 Fed. Reg. 52,401 (October 13, 2009).
[6] Jim McElhatton, *Union head returns some of the $1.2M pay*, THE WASHINGTON TIMES, May 11, 2009. Available online at: http://www.washingtontimes.com/news/2009/may/11/union-boss-returns-some-of-12-million-pay/?page=1 (accessed September 7, 2011.)

individual basis if the Form LM-2 as promulgated in the January 21, 2009 final rule was in effect.

The instructions to the Form LM-2 as found in the January 21, 2009 final rule stated as follows regarding disbursements for pension benefits to officers (Schedule 11):

> Column (F): Enter all direct or indirect disbursements made to or on behalf of each officer. Benefit disbursements include, for example, disbursements for life insurance, health insurance, and pensions.[7]

The benefits required to be reported in this column were previously not disclosed by individual officer or employee but were instead reported on an aggregated basis in Schedule 20. The instructions for the previous Form LM-2 as promulgated on October 9, 2003 included language instructing the filer to not report in Schedule 11 "disbursements for benefits to officers which must be reported in disbursement Schedule 20 (Benefits)."[8] The net result of the enhancements in this area found in the January 21, 2009 final rule is that benefits, such as pension benefits, are now reported on an individual by individual basis rather than in the lump sum for all officers and employees.

The lump sum loophole was one of the primary reasons why the Department promulgated the January 21, 2009 final rule, in an effort to more fully apprise union members of the total compensation packages received by their unions' officers and employees. In the January 21, 2009 final rule the Department stated as follows on this point:

> In proposing the identification of total benefits paid to officials on an individual by individual basis, the Department explained that the current Form LM–2 fails to provide sufficient information on disbursements by the labor organization to or on behalf of its officers. See 73 FR at 27350. In the Department's view, labor organization members should know the value of benefits paid by the union to its officers. Benefits received by officers for life insurance, health insurance, and pensions, for example, make up an important part of the compensation package paid for by the union and its members. Reporting benefits disbursed in the aggregate on Schedule 20 (i.e., reporting the total benefits paid to all union officials)

[7] 74 Fed. Reg. 3,678, 767 (January 21, 2009).
[8] 68 Fed. Reg. 58,374, 494 (October 9, 2003).

does not provide a complete picture of compensation received by individual labor organization officers.[9]

Since the Department reversed course on this point by rescinding the rule which made this transparency possible one could easily conclude that the Department no longer believes that it is important to disclose the total compensation packages of union officers and employees. This is unfortunate because disclosure of this information is required by LMRDA Sec. 201(b)(3) which states that, "salary, allowances, **and other direct or indirect disbursements** (including reimbursed expenses) to each officer and also to each employee…" are to be disclosed. (Emphasis added.)[10] For too long the Department ignored the statutory language and allowed unions to hide pension and other benefits disbursements in a schedule at the bottom of the form. This changed in the January 21, 2009 final rule. By rescinding the January 21, 2009 final rule the Department moved in the wrong direction, against the grain of the LMRDA and will be depriving union members of vital information.

This is not the only area where OLMS weakened the Form LM-2. Other areas include reduced transparency in the following areas:

1. Sales of Investments and Fixed Assets;
2. Purchase of Investments and Fixed Assets;
3. Disclosure of Benefits Disbursements to or on Behalf of Officers and Employees;
4. Itemizations of Additional Categories of Receipts.

2. OLMS RESCINDED THE REGULATION THAT FLESHED OUT THE REVOCATION AUTHORITY GRANTED TO THE SECRETARY PURSUANT TO LMRDA SEC. 208

Another action taken by OLMS in that same rulemaking was to rescind the rules that implemented LMRDA Sec. 208 that provides for the revocation of the labor organization privilege of filing a simplified annual report in certain circumstances. The authority of the Secretary found in LMRDA Sec. 208 is clear and unambiguous. If the Secretary finds that circumstances warrant, she may revoke the privilege of filing simplified reports if doing so furthers the purpose of the section. As such, rulemaking to implement LMRDA Sec. 208 was unnecessary and the Secretary retains the authority granted by the statute. Given the fact that the Department rescinded this regulation which fleshed out further the procedures for how this authority would be used, it was

[9] 74 Fed. Reg. 3,678, 89 (January 21,2009).
[10] 29 U.S.C. § 431(b)(3).

highly unlikely that the Secretary would have sought to use that authority in the first place. As such, rescinding the revocation procedures part of the January 21, 2009 final rule was completely unnecessary. However, that didn't stop the Department from doing so anyway.

3. OLMS CHANGED ITS INTERPRETATION OF "INTERMEDIATE BODIES"

On July 21, 2009 OLMS held a stakeholder meeting for the purpose of soliciting comments on, among other things, reversing its interpretation regarding the coverage under the LMRDA of "intermediate bodies." Under the then existing interpretation more financial transparency was given to labor organization members, OLMS, and the public. On February 2, 2010 OLMS published a NPRM to reverse this interpretation and thus eliminate transparency in this area.[11] On December 1, 2010 OLMS published the Final Rule to reverse its interpretation.[12]

In reversing its interpretation on this point, OLMS completely ignored the benefit of transparency that will flow to those union members whose dues are transferred into an intermediate body. The Department now denies that transparency to union members and the public. In the Final Rule OLMS would have us believe that transparency and accountability are the highest of evils that could possibly be imposed on an intermediate body. The Department alludes to objections from the regulated community while failing to note that those who rip off their members are naturally disinclined to acquiesce to full transparency and accountability.

The Department also attacks its previous interpretation by claiming that the final rule "was based on only two examples concerning the flow of money in two unions."[13] In so doing the Department completely failed to realize that the examples used were illustrative not exhaustive. The examples used prove the point and as such any further examples would have been entirely superfluous.

Nonetheless, OLMS reversed its interpretation of the term "intermediate bodies" and now union members receive less financial information regarding these entities.

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[11] 75 Fed. Reg. 5,456. (February 2, 2010).
[12] 75 Fed. Reg. 74,936 (December 1, 2010).
[13] 75 Fed. Reg. 5,456, 63 (February 2, 2010).

B. OLMS RESCINDED THE FORM T-1 REGULATION THUS REDUCING TRANSPARENCY

On July 21, 2009 OLMS held a stakeholder meeting for the purpose of soliciting comments on among other things rescinding the Form T-1 regulation. The Form T-1 was an annual financial report that would have been filed by labor organizations to report the finances of trusts in which they are interested. On December 3, 2009 OLMS published a Notice of Proposed Rulemaking to delay the effective date of the Form T-1 regulation for one year.[14] On December 30, 2009 OLMS published the Final Rule delaying the effective date of this form for one year.[15] On February 2, 2009 OLMS published a Notice of Proposed Rulemaking to rescind the Form T-1 regulation altogether.[16] On December 1, 2010 OLMS published the Final Rule to rescind the Form T-1 regulation.[17]

The best way to describe what the Form T-1 would have done is to repeat some of the examples previously provided by OLMS for promulgating the form in the first place. In the 2008 Final Rule establishing the Form T-1 the Department stated as follows:

> The Department has discovered numerous situations, as illustrated by the following examples, where funds held in section 3(l) trusts have been used in a manner that, if reported, would have been scrutinized by the members of the labor organization and this Department:
>
> • A case in which no information was publicly disclosed about the disposition of tens of thousands of dollars (over $60,000 on average per month) by participating locals into a trust established to provide statewide strike benefits. No information was disclosed because the trust was established by a group of labor organization locals and not wholly controlled by any single labor organization.
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> • A case in which a credit union trust largely financed by a local labor organization had made large loans to labor organization officials but had not been required to report them because the trust was not wholly owned by any single local. (One local accounted for 97 percent of the credit union's funds on deposit.) Membership in the credit union was limited to members of three locals; all of the credit union directors were local

[14] 74 Fed. Reg. 63,335 (December 3, 2009).
[15] 74 Fed. Reg. 69,023 (December 30, 2009).
[16] 75 Fed. Reg. 5,456. (February 2, 2010).
[17] 75 Fed. Reg. 74,936 (December 1, 2010).

> officials and employees. Four loan officers, three of whom were officers of the Local, received 61 percent of the credit union's loans.

Under the final rule, each labor organization in these examples would have been required to file a Form T–1 because each of these funds is a 3(l) trust. In each instance, the labor organization's contribution to the trust, including contributions made on behalf of the organization or its members, made alone or in combination with other labor organizations, represented greater than 50 percent of the trust's revenue in the one-year reporting period.

Now, because OLMS has rescinded the Form T-1 reporting requirements, the financial details of these organizations are less transparent than they would have been if the form was still in effect.

C. OLMS IS IN THE PROCESS OF WEAKENING THE FORM LM-30

The Department, after decades of neglect, began the task of revising and updating the Form LM-30 in the early 2000s. On August 29, 2005, the Department published a NPRM and sought public comment on its proposal.[18] The Department subsequently extended the initial 60 day comment period for an additional 90 days, giving the public a generous period of 150 days to comment.[19] After carefully reviewing the comments the Department then drafted a Final Rule which was published almost two years later on July 2, 2007.[20]

On March 19, 2009 OLMS publicly announced via its listserve that it had decided to no longer enforce its Form LM-30, which regardless is still legally required, so long as the union officers and employees covered by the form comply "in some manner." On this point OLMS stated:

> Accordingly, OLMS will refrain from initiating enforcement actions against union officers and union employees based solely on the failure to file the report required by section 202 of the Labor-Management and Reporting Disclosure Act (LMRDA), 29 U.S.C. § 432, using the 2007 form, **as long as individuals meet their statutorily-required filing obligation**

[18] 70 Fed. Reg. 51,166 (August 29, 2005).
[19] Contrast this with the much shorter period that the public will have to comment on the instant proposal.
[20] 72 Fed. Reg. 36,106 (July 2, 2007).

> **in some manner**. OLMS will accept either the old Form LM-30 or the new one for purposes of this non-enforcement policy.[21]

(Emphasis added.)

Since the universe of persons subject to the filing requirements of the pre-2007 form is smaller than that of the 2007 form, this action significantly reduced the level of financial transparency in this area.

On August 10, 2010 OLMS published a NPRM to revise the Form LM-30 by significantly shrinking the universe of persons covered by the form as well as reducing the amount of information disclosed on the form.[22] On July 14, 2011 a draft Final Rule was sent to the Office of Management and Budget for Review under Executive Order 12,866.[23] That Final Rule is currently under review.

Since as of September 7, 2011 a Final Rule has not yet been promulgated on this issue, following is a discussion of some of the problematic parts of the Proposed Rule and analysis regarding each.

As will be seen from the discussion below, the Department at times misreads its own regulations and at other times takes positions that are inconsistent. For some reason while OLMS apparently now believes that the universe of persons subject to the Form LM-30 should be reduced, it is simultaneously increasing the size of the universe of persons covered by the Form LM-20, the Form LM-21, and the Form LM-10.

1. REPORTING OF UNION LEAVE AND NO DOCKING PAYMENTS AND THE BONA FIDE EMPLOYEE EXCEPTION

The Department in the LM-30 NPRM proposed to reverse its 2007 decision to require the reporting of payments made to labor organization officers and employees by

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[21] OLMS listserve message (March 19, 2009). *See also*, Forms—All Others, Office of Labor Management Standards. Available online at: http://www.dol.gov/olms/regs/compliance/GPEA_Forms/blanklmforms.htm#FLM30 (accessed September 7, 2011).

[22] 75 Fed. Reg. 48,416 (August 10, 2010).

[23] *Executive Order Submissions Under Review*, Office of Information and Regulatory Affairs, Office of Management and Budget. Search conducted September 7, 2011.

employers for time spent on labor organization work by these officers and employees.[24] The Department gave three reasons why it "now believes" that this change should be made. These reasons are as follows:

(1) The Department now believes that "the approach taken in the 2007 rule does not comport with what the Department considers to be the best reading of the language in section 202;"

(2) The Department now believes that this reporting requirement "creates substantial burden for union official on matters unlikely to pose conflicts of interest, thus unduly interfering with the internal workings of labor unions and labor-management relations;" and

(3) The Department now believes that "as a matter of policy, there is no persuasive reason why union officials must report such payments, while employers making such payments are under no similar obligation."[25]

Thus, the Department proposed to reduce the amount of information made available to labor organization members, the government, and the public regarding payments made to labor organization officials.

Reading the LM-30 NPRM, one could be forgiven for believing that the 2007 Final Rule requires all payments from employers for labor organization work to be reported. This is simply not the case as the Department completely failed to discuss that the reporting requirements for "no-docking" or "union leave" do not arise until after 250 hours of pay for such leave has occurred. The only place that the 250 hour threshold even appears is in a footnote that quotes from the instructions for the Form LM-30.[26]

The failure to discuss and provide analysis of the 250 hour threshold in the LM-30 NPRM is utterly inexcusable. Because the 250 hour threshold is an integral part of the reporting requirement, it is hard to believe that the omission of discussion of this in the LM-30 NPRM was an accident. One would have to be willfully blind to not see the 250 hour threshold. As such it appears that the Department is deliberately misleading the public as to the actual reporting requirements found in the 2007 Final Rule.

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[24] In this context "employers" means the employers employing the labor organization officials.
[25] 75 Fed. Reg. 48,416, 22 (August 10, 2010).
[26] 75 Fed. Reg. 48,416, 21-22 (August 10, 2010).

Contrary to what the Department asserted, here is what the 2007 Final Rule actually said:

> The Department adopts a revised definition of ''bona fide employee,'' as set forth in the next paragraph. Under today's rule, payments to a union officer or employee under a union-leave or nodocking arrangements set forth in a collective bargaining agreement **are exempt from reporting unless payment is for greater than 250 hours of union work during the filer's fiscal year.** Payments for union work totaling greater than 250 hours over the course of the filer's fiscal year are reportable as are any payments that are not made pursuant to arrangements set forth in a collective bargaining agreement. The revised definition of ''bona fide employee'' reads:
>
> *Bona fide employee* is an individual who performs work for, and subject to the control of, the employer.
>
> **Note:** A payment received as a bona fide employee includes wages and employment benefits received for work performed for, and subject to the control of, the employer making the payment, as well as compensation for work previously performed, such as earned or accrued wages, payments or benefits received under a bona fide health, welfare, pension, vacation, training or other benefit plan, leave for jury duty, and all payments required by law.
>
> Compensation received under a ''unionleave,'' or ''no-docking'' policy is not received as a bona fide employee of the employer making the payment. Under a union-leave policy, the employer continues the pay and benefits of an individual who works full time for a union. Under a nodocking policy, the employer permits individuals to devote portions of their day or workweek to union business, such as processing grievances, with no loss of pay. Such payments are received as an employee of the union *and thus, such payment must be reported by the union officer or employee unless they (1) totaled 250 or fewer hours during the filer's fiscal year and (2) were paid pursuant to a bona fide collective bargaining agreement. If a filer must report payments for union-leave or no-docking arrangements, the filer must enter the actual amount of compensation received for each hour of union work. If union-leave/no-docking payments are received from multiple employers, each such payment is to be considered separately to determine if the 250 hour threshold has*

been met. For purposes of Form LM–30, stewards receiving union-leave/ no-docking payments from an employer or lost time payments from a labor organization are considered employees of the labor organization.[27]

(Emphasis added.)

By omitting any discussion of the 250 hour threshold the Department omitted critical information that destroys its stated rationale for undoing this particular reporting requirement. The second of the Department's stated rationales for undoing this requirement is based on a belief that the reporting requirement here is a "substantial burden." However, since the reporting obligation does not arise until over 250 hours under a union leave or no-docking policy have occurred, the burden is minimal. In order to have any reporting obligation for payments received under a union leave or no-docking policy, the labor organization officer or employee would have to work on labor organization business in excess of one hour per day every day during the work year. Thus, most labor organization officers and employees who engage in labor organization work under a union leave or no-docking policy would not ever have a reporting obligation for this work.

Even the Department's own burden estimates bear this out. The Department in the NPRM estimates that the elimination of the requirement to report union leave or no-docking payments will save the average filer **five minutes per year** that they would have otherwise spent on recordkeeping.[28] That the Department would make such a dramatic shift in transparency in order to save the average filer five minutes of recordkeeping time is unbelievable. Even if you make the assumption that all labor organization officers and employees who receive union leave or no-docking payments have no other reportable holdings or payments and thus were not otherwise required to file the Form LM-30, this still only saves the average labor organization official so situated an average of 90 minutes of time for reporting burden per year.[29] The five minutes of recordkeeping burden and 90 minutes of total burden per year the Department now deems to be a "substantial burden."

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[27] 72 Fed. Reg. 36,106, 26 (July 2, 2007) (emphasis added).
[28] 75 Fed. Reg. 48,416, 37 (August 10, 2010).
[29] 75 Fed. Reg. 48,416, 38 (August 10, 2010). See Table 1—Reporting and Recordkeeping Burden (In Minutes). The Department estimates the total Form LM-30 recordkeeping burden per filer to be 15 minutes and the total reporting burden per filer to be 75 minutes for a total of 90 minutes of estimates burden per filer per year.

Even if one believes the Department's assertion that the reporting of union leave or no-docking payments was a "substantial burden" there still remain very good reasons why that reporting requirement was made part of the 2007 Final Rule.

The 2007 Final Rule was narrowly tailored to require reports only in those situations where the labor organization official spent a considerable amount of time during the fiscal year working on labor organization business under a union leave or no-docking policy. A labor organization official was not required under the 2007 Final Rule to report payments for such work until after 250 hours of such work had occurred. As such, a labor organization official could work one hour per day, five days a week, for the entire fiscal year (assuming they took two weeks of vacation time) and would still not be required to report this because they would not have exceeded the 250 hour threshold. (5 hours a week x 50 weeks = 250 hours.) Thus, a large percentage of shop stewards would have no filing obligation for this work. The 2007 Final Rule severely limited the universe of potential filers because of this high threshold. This threshold separates out those labor organization officials who perform significant labor organization work on the employer's time from those officials who perform only small amounts of labor organization work on the employer's time.

Further, the Department ignores the need for transparency in situations where double dipping occurs, *i.e.*, where a labor organization official receives payment from both a labor organization and the employer for the same work. The same applies to no-show jobs. In the LM-30 NPRM the Department would have us believe that this isn't a problem and that filing the Form LM-30 in these instances is a "substantial burden."

The act of an employer paying a labor organization official to perform labor organization work has the definite possibility of becoming a conflict of interest because "union negotiators who may agree to reduced benefits for the employees in exchange for financial support for the union."

Caterpillar v. UAW, 107 F.3d 1052, 60 (3rd Cir. 1997) (Mansmann, J. dissenting).

Even if the act of an employer paying a labor organization official to perform labor organization work is legal this act still is a conflict of interest that should be disclosed. In the 2007 Final Rule the Department recognized this and stated as follows:

> Disclosure aids union governance. Reporting and publication will enable unions ''to better regulate their own affairs. The members may vote out of

> office any individual whose personal financial interests conflict with his duties to members,'' and reporting and disclosure would facilitate legal action by members against ''officers who violate their duty of loyalty to the members.''[30]

As further noted by the Department in quoting the Senate Report on the bill that became the Act:

> For centuries the law of fiduciaries has forbidden any person in a position of trust subject to such law to hold interests or enter into transactions in which self-interest may conflict with complete loyalty to those whom he serves. * * * The same principle * * *should be equally applicable to union officers and employees [quoting the AFL–CIO's Ethical Practices Code]: ''[A] basic ethical principle in the conduct of union affairs is that no responsible trade union official should have a personal financial interest which conflicts with the full performance of his fiduciary duties as worker's representative.''[31]

At a minimum if such a conflict of interest exists it should be disclosed so that the members of the labor organization are fully informed and can appropriately exercise their democratic rights when making decisions about who represents them as officers of the labor organization.

Unfortunately, the Department proposed to make it harder for labor organization members to exercise their democratic rights because these members will have less information on the financial activities of their representatives. In so doing, the Department is siding with the powerful labor organization officials instead of siding with the rank and file labor organization members.

The Department also attempted to justify the change to eliminate reporting of union leave and no-docking payments on the grounds that they just don't like the structure of the Act and that it is somehow unfair that employers have one set of reporting obligations and labor organization officials have another set of obligations.

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[30] 72 Fed. Reg. 36,106, 12 (July 2, 2007).
[31] 72 Fed. Reg. 36,106, 12 (July 2, 2007).

If the Department believes that such reporting requirements are unreasonable due to the structure of the statute then their correct recourse is to petition, in their private capacity as a U.S. citizen, their Member of Congress to make a statutory change. These Department officials should not now be changing the regulatory landscape to meet their own perceived notions of what type of reporting is unreasonable just because the statute sets reporting in such a manner. This is not the proper role of the Executive Branch, but is rather the role of Congress. The LMRDA, like almost all federal legislation, is a product of the give and take process of bills becoming law. Just because Department officials don't like the structure of that law, that doesn't give them free rein to create administrative exemptions to create a result that they like better. On the contrary, the Department should leave to Congress the task of changing any structural issues in the LMRDA.

2. REPORTING OF LOANS UNDER LMRDA SEC. 202(A)(3) AND (4)

In the LM-30 NRPM, the Department stated a fear that private information regarding mortgages and other loans would become public if the Form LM-30 requirements for reporting loans remained in place. Thus the Department proposed to create an exception to the reporting requirements that will exempt loans made unless made "on other than market terms."[32] On this point the Department stated as follows:

> Without such exception, a union official would have to report each mortgage or other bank loan received from any credit institution that deals with his union, section 3(l) trust, or, in substantial part, with his or her represented employer.[33]

The Department misses the point that mortgages are already public documents under state recording statutes. Not only can any person get a copy of the mortgage information from the respective recorder's office, but in many instances that information is also available online. As such, the fear that seemingly private mortgage information will somehow become public due to the reporting requirements of the Form LM-30 is misplaced.

Also, in the LM-30 NPRM, the Department continues to parrot back the easily disproved assertion that somehow more disclosure results in less useful information. It is as if the Department is stuck in the early part of the last century before the advent of

[32] 75 Fed. Reg. 48,416, 25 (August 10, 2010).
[33] 75 Fed. Reg. 48,416, 26 (August 10, 2010).

computer technology. The Department would have the public believe that more reports being filed makes it harder to find real problems. On this point the Department stated as follows:

> Furthermore, by establishing a routine business exemption to loan reporting under sections 202(a)(3) and (a)(4), the Department would prevent the submission of superfluous reports that would overwhelm the public with unnecessary information, thus inhibiting the discovery of true conflict of interest payments.[34]

Again, maybe if computers didn't exist this fear would be justified. However, in the 21st Century environment in which we find ourselves this fear is misplaced. The OLMS has computer systems capable of handling all incoming Form LM-30s that are filed and it has systems in place to cross check data that is submitted on those reports with other reports that are required under the LMRDA and other acts. Even members of the public can access the Form LM-30 data via the OLMS website that is specially setup for this purpose, www.unionreports.gov. Anyone who spends even a little time on a computer can easily navigate this website and find whatever information they seek. The Department is being disingenuous to say the least by suggesting that more information actually means less useful information. This simply isn't true. What is true, however, is that OLMS is somehow unconcerned about applying this standard in the instant NPRM. There OLMS is in fact mandating the reporting of superfluous reports. This double standard should not exist.

3. REPORTING OF PAYMENTS FROM EMPLOYERS COMPETITIVE TO THE REPRESENTED EMPLOYER, CERTAIN TRUSTS, AND UNIONS

a. REPORTING OF PAYMENTS FROM "ANY EMPLOYER" PURSUANT TO LMRDA SEC. 202(A)(6)

The Department in the LM-30 NPRM played around with the definition of the term employer and the scope of employers, the payment from which results in a filing obligation under LMRDA Sec. 202(a)(6).

The Department used an example as an illustration of their purported claim to be solving a problem by making changes to the reporting requirements under LMRDA

[34] 75 Fed. Reg. 48,416, 25 (August 10, 2010).

Sec. 202(a)(6). Ironically the fact scenario used in that example was already exempt from reporting pursuant to the 2007 Final Rule.

Here is the example:

> An individual employed part-time by a union to handle computer problems works full time for a technology company that is a competitor to a company whose employees are represented by the union. Under the 2007 rule, the individual would have to file a Form LM–30 to report the payments he receives from his full-time job. Under the proposed rule, he would not have to report these payments.[35]

This is an example used by the Department to describe payments that are reportable under the "any employer" provision of LMRDA Sec. 202(a)(6) as interpreted by the 2007 Final Rule. However, the 2007 Final Rule does not require reporting in this type of situation nor could it because LMRDA Sec. 202(a)(6) exempts from reporting "payments of the kinds referred to in section 302(c) of the Labor Management Relations Act, 1947, as amended."

Section 302(c) of the Labor Management Relations Act describes, among other things, payments of "money or other things of value" to "any officer or employee of a labor organization, who is also an employee or former employee of such employer, as compensation for, or by reason of, his service as an employee of such employer."[36] Because the LMRDA itself exempts from disclosure these types of payments, the Department recognized this in the 2007 Final Rule where it stated that these types of payments were in fact exempt. There the Department stated as follows:

> As noted, section 202(a)(6) excepts ''payments of the kinds referred to in section 302(c) of the Labor Management Relations Act.'' These payments notably include payments received as compensation for services as a current or former employee of the employer making the payment and *as a general rule* payments made to or received from a trust fund set up for the sole and exclusive benefit of employees and their dependents.[37]

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[35] 75 Fed. Reg. 48,416, 27 (August 10, 2010).
[36] LMRA Sec. 302(c)(1), 29 U.S.C. § 186(c)(1).
[37] 72 Fed. Reg. 36,106, 29 (July 2, 2007).

Further, the instructions for the 2007 version of the Form LM-30 also spell this out under the section of items "you are not required to report" that applies to the payments from "any employer." There the instructions state as follows:

> Payments of the kinds referred to in Labor Management Relations Act (LMRA) Section 302(c), as summarized below and set forth in full on pages 20-21, and payments your spouse or minor children receive as compensation for, or by reason of, their service to their employer:
>
> (1) any money or other thing of value payable by an employer to
>
> (a) an employee acting openly for the employer in matters of labor relations or personnel administration, or
>
> (b) any officer or employee of a labor organization who also is an employee or former employee of such employer, as compensation for or by reason of, his service as an employee of such employer.[38]

The language of LMRA Sec. 302(c) is clear. That language was repeated again in the 2007 Final Rule and the instructions for the Form LM-30. Under the 2007 Final Rule, no person who was a part time employee of a competitor to the employer whose employees the labor organization represented would be required to file a Form LM-30 under the requirements of LMRDA 202(a)(6). The Department's analysis to the contrary is in error. The Department is either intentionally misleading the public as to the actual requirements of 2007 Final Rule or the personnel who drafted the LM-30 NPRM do not understand what the 2007 Final Rule actually requires. In either case the lack of accuracy that the Department now displays casts into question the Department's reasons for making the changes that are now proposed. If the officials running the Department cannot accurately describe basic filing obligations then they should not be proposing changes to those obligations—at least until such time as those officials are proficient enough to understand what they are dealing with.

[38] 72 Fed. Reg. 36,106, 73 (July 2, 2007).

b. **REPORTING OF PAYMENTS FROM TRUSTS AND LABOR ORGANIZATIONS PURSUANT TO LMRDA SEC. 202(A)(6)**

In the LM-30 NPRM the Department proposed to not require reporting of payments falling under LMRDA Sec. 202(a)(6) from employers which, pursuant to LMRDA Sec. 3(l), constitute "trusts in which a labor organization is interested."[39] The Department cites no good reason for making this change, it has found no problems that will be solved by making this change, and the change is primarily based on a very old internal Department opinion dated December 20, 1967. As such the Department now wants to return to what it deems a "historical position", *i.e.*, that payments from trusts should not be included in the definition of payments falling under LMRDA Sec. 202(a)(6).[40]

The Department also proposed to remove labor organizations from the definition of employer.[41]

As an initial matter the Department should look to the definition of employer that is set forth in the LMRDA itself. Congress specifically defined both "employer" and "employee" in LMRDA Sec. 3 as follows:

> (e) "Employer" means any employer or any group or association of employers engaged in an industry affecting commerce (1) which is, with respect to employees engaged in an industry affecting commerce, an employer within the meaning of any law of the United States relating to the employment of any employees or (2) which may deal with any labor organization concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, and includes any person acting directly or indirectly as an employer or as an agent of an employer in relation to an employee but does not include the United States or any corporation wholly owned by the Government of the United States or any State or political subdivision thereof.
>
> (f) "Employee" means any individual employed by an employer, and includes any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice or because of exclusion or expulsion from a labor organization in

[39] 75 Fed. Reg. 48,416, 27-28 (August 10, 2010).
[40] 75 Fed. Reg. 48,416, 27 (August 10, 2010).
[41] 75 Fed. Reg. 48,416, 29 (August 10, 2010).

> any manner or for any reason inconsistent with the requirements of this chapter.

The only employees found in the LMRDA are those who work for an employer. If you do not work for an employer you are not an employee according to the definition above. Here we have a clearly defined term that Congress expressly applied to titles I, II, III, IV, V (except section 505), and VI of the LMRDA.

In the 2007 Final Rule the Department came to the conclusion that it would define the word "employer" as Congress had done so and would not exclude from the definition of that word certain entities that are a subset of employers, *e.g.*, trusts and labor organizations.

The Department in the LM-30 NPRM stated a new conclusion that "a preferred reading of the LMRDA would not consider labor unions or trusts as employers, as each of these entities is treated separately under the Act."[42] This interpretation causes many problems from a structural standpoint as will be discussed below.

Based upon the definition above, any labor organization that has employees is an employer because labor organization is a subset of employer.

In the LM-30 NPRM the Department ignores the fact that the terms "employer" and "employee" are necessarily applied to labor organizations for the purposes of reports other than the Form LM-30. For instance, the Form LM-2 mandates reporting of information regarding disbursements to employees of the labor organization. Since only employers have employees, a labor organization, if not considered an employer, cannot have employees.

The applicable rule of statutory construction regarding terms is that terms within a statute are to be applied in a consistent manner throughout the statute. The U.S. Supreme Court has adopted this rule as follows:

> **A term appearing in several places in a statutory text is generally read the same way each time it appears.** See *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 479, 112 S.Ct. 2589, 2596, 120 L.Ed.2d 379 (1992). We have even stronger cause to construe a single formulation, here § 5322(a),

[42] 75 Fed. Reg. 48,416, 29 (August 10, 2010).

> the same way each time it is called into play. See *United States v. Aversa*, 984 F.2d 493, 498 (CA1 1993) (en banc) ("Ascribing various meanings to a single iteration of [§ 5322(a)'s willfulness requirement]-- **reading the word differently for each code section to which it applies--would open Pandora's jar. If courts can render meaning so malleable, the usefulness of a single penalty provision for a group of related code sections will be eviscerated and ... almost any code section that references a group of other code sections would become susceptible to individuated interpretation.**").

Ratzlaf v. U.S., 510 U.S. 135, 143 (1994) (emphasis added).

The Court has frequently applied this rule in numerous cases. The most frequently used language is highlighted below and comes from *Gustafson v. Alloyd*, 513 U.S. 561, 70 (1995):

> The 1933 Act, like every Act of Congress, should not be read as a series of unrelated and isolated provisions. Only last Term we adhered to the "**normal rule of statutory construction" that "identical words used in different parts of the same act are intended to have the same meaning.**" *Department of Revenue of Ore. v. ACF Industries, Inc.*, 510 U.S. 332, 342, 114 S.Ct. 843, 849, 127 L.Ed.2d 165 (1994) (internal quotation marks and citations omitted) (emphasis added).

Not only is this rule the "normal rule," but agencies are prohibited from giving a term two different definitions in two sections of a statute. As the Fourth Circuit stated in a 2005 case:

> When Congress mandates that two provisions of a single statutory scheme define a term identically, the agency charged with administering the statutory scheme cannot interpret these identical definitions differently.[43]

In the LMRDA Congress expressly applied the definitions of employer and employee to titles I, II, III, IV, V (except section 505), and VI. Thus Congress has mandated a definition that applies across these sections and the Department cannot apply these

[43] *U.S. v. Duke Energy Corporation*, 411 F.3d 539, 46-7 (4th Cir. 2005).

definitions one way as concerns certain sections of the statute and another way as concerns other sections.

Based upon the holdings in these cases the definition of employee and employer should be applied consistently across the entire LMRDA (except LMRDA Sec. 505 which is exempted in the definitions).

The "Pandora's jar" the Court speaks about in *Ratzlaf, supra*, applies as follows in the LMRDA context if the term "employer" does not include labor organizations:

LM-2 Reporting on Employees

Since the only employees that exist for the purposes of the LMRDA are those that work for an employer, no labor organizations would have any employees if the labor organization is not an employer. Thus, the labor organization would not be required to report any disbursements to employees on the Form LM-2 per LMRDA Sec. 201(b)(3) because they would not have any persons fitting the definition of employee. Since Congress clearly intended to have reporting of disbursements to persons working for labor organizations, it would turn the LMRDA upside down if those persons working for labor organizations are not considered employees.

LM-30 Reports by Officers and Employees of Labor Organizations

If no labor organizations have any persons defined as employees, then the only persons who would be subject to the reporting requirements of LMRDA Sec. 202 are the officers of labor organizations. The plain language of LMRDA Sec. 202 clearly shows that Congress intended those working for labor organizations to file the reports required under this section. Thus, exempting labor organizations from the definition of employer and in turn defining those persons who work for labor organizations as non-employees would mean that no persons (other than officers) who work for a labor organization would be required to file LM-30s. This is clearly contrary to Congressional intent. If Congress intended only officers to be subject to this requirement it would not have included employees in LMRDA Sec. 202.

If Congress did not intend for labor organizations to also be considered employers, it could have easily stated as such in the definition of labor organization. Because Congress did not specifically exclude labor organizations from the definition of

employer but instead expressly applied the definition of employer and employee across the LMRDA, labor organizations should be included within the definition of employers. Exempting labor organizations from the definition of employer would lead to the results described above which is clearly not what Congress intended.

The Department argued that the interpretation proposed in the LM-30 NPRM makes sense from a structural standpoint because "Congress mandated separate requirements for the discrete statutory actors: 'labor organization,' 'labor organization officers' and 'labor organization employees,' 'employers,' 'labor relations consultants,' and 'trusts in which a labor organization is interested'."[44] The Department noted, "the statute separately defined five of these six terms." The Department would have us believe that labor organizations and employers are "separate and distinct entities" [45] and that if an entity happens to fall into one of these classifications that they cannot also fit within another classification. To bolster this argument the Department in a footnote points to LMRDA Interpretative Manual Sec. 260.005 to claim that no reports should be filed under LMRDA Sec. 203 by a person who "meets the definition of 'labor relations consultants' under section 3(m)." The Department in so doing pushed the argument that employer actually means the employer employing the employees that the labor organization represents or seeks to represent.

However, this is contrary to the position the Department successfully took in *Warshauer v. Chao*, 2008 U.S. Dist. LEXIS 78094 (N.D. GA 2008), *aff.*, *Warshauer v. Solis*, 577 F.3d 1330 (11th Cir. 2009).[46] At issue in *Warshauer* was a filing obligation imposed on the plaintiff, an employer, due to certain payments made to labor organizations or their officers or employees. The filing obligation comes from LMRDA Sec. 203 which requires reports of employers in, among others, the following circumstances:

> (a) Every employer who in any fiscal year made—
>
> (1) any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement, therefor, to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of a labor organization, except (A) payments or loans made by any national or State bank, credit union, insurance company, savings and loan association or other credit institution and (B) payments of the kind

[44] 75 Fed. Reg. 48,416, 29 (August 10, 2010).
[45] 75 Fed. Reg. 48,416, 29 (August 10, 2010).
[46] Party name substituted pursuant to Fed R. Civ. P. 25(d) due to the separation from office of Secretary of Labor Elaine L. Chao due to the change in presidential administration.

> referred to in section 302(c) of the Labor Management Relations Act, 1947, as amended.

Plaintiff Warshauer argued that the term "employer" as found in LMRDA Sec. 203(a)(1) applies "only to employers in actual or potential bargaining relationships with unions."[47] Both the district court and the 11th Circuit disagreed.

> The plain language of *§ 203(a)* applies to all employers who made non-exempt payments. Contrary to Warshauer's suggestion, it contains no requirement that the employer participate in persuader or other labor relations activities. The statutory definition of "employer" includes any employer under any federal law. *29 U.S.C. § 402(e)* (defining an "employer" as "an employer within the meaning of any law of the United States. . . ."). As such, under the plain language of the LMRDA, § 203(a)(1) covers all DLCs who are employers, without qualification.[48]

The 11th Circuit also discussed the plaintiff's structural argument that the defined terms found in the LMRDA forever lock an entity into one category and found that argument unpersuasive because the plain language of the LMRDA states otherwise. On this point the court stated as follows:

> There is no doubt that Congress intended to target employers in actual or potential bargaining relationships with labor organizations, exposing those who dissuade employees from exercising their rights to organize and bargain collectively, so that the employees could be aware of that information when listening to the persuader's message. As DLCs often do not play any role in labor relations, applying § 203(a)(1) to DLCs would not serve this purpose.
>
> However, the plain language of § 203(a)(1) may reflect Congress' intent to cast light on other types of potential conflicts of interest or corruption that could harm union members. A real-life scenario serves as an example: a conflict of interest could occur where a union appoints a DLC and recommends him to its members only after the DLC has made significant payments to union officials. *See United States v. Boyd, 309 F. Supp. 2d 908, 910 (S.D. Tex. 2004)* (discussing indictments against UTU officials who

[47] *Warshauer v. Solis*, 577 F.3d 1330, 5 (11th Cir. 2009).
[48] *Id*.

> solicited and collected cash payments from attorneys who sought to become DLCs). Indeed, Congress found that there have been a "number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct. . . ." *29 U.S.C. § 401(b)*. Such activity could reach beyond persuader activity.
>
> Although perhaps digressive from the primary purpose of the LMRDA, the Secretary's application of § 203(a)(1) to DLCs is a faithful interpretation of the plain language of the LMRDA. As such, we find that it is not arbitrary and capricious. Because the language of § 203(a)(1) is clear and unambiguous, we need not look to the legislative history.[49]

The 11th Circuit agreed with the Department when it argued that the structure of the LMRDA does not mean that employer only means the employer whose employees the labor organization represents or seeks to represent. It should be noted that oral arguments in this case occurred on May 22, 2009, during the tenure of the Obama Administration. After the Department won the case Mr. Warshauer subsequently filed the Form LM-10 for fiscal years 2000-2008.[50] If the Department really now believes that the structure of the LMRDA means that the LMRDA defined entities are "separate and distinct" and that employers are on one side, labor organizations on one side, and labor consultants on another side, then why did the Department argue how it did in the 11th Circuit?[51]

Simply put, the Department cannot have it both ways. The Department cannot litigate a case in the 11th Circuit arguing that the plain language of LMRDA means that "employer" means one thing and then a few months later argue, without referencing that case, that "employer" means something different. Doing so makes it apparent that the Department has a variable definition of the word "employer" that they apply in an inconsistent manner. If you are a legal counsel who makes payments to labor organizations or their employees you are an employer, but if you are another type of employer, i.e., a labor organization or trust who makes the same payments you are not an employer.

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[49] *Id*.

[50] These Form LM-10s are available online at www.unionreports.gov (accessed September 7, 2011). If a Form LM-10 was required to be filed for fiscal year 2009 it has either not been filed or the Department has not yet processed and placed it online if it was filed.

[51] The Department also won a similar case in the U.S. District Court for the Southern District of Illinois. *See*, *Kujawski v. Solis*, No. 07-cv-330-JPG (S.D. IL 2009). Kujawski appealed the district court decision to the 7th Circuit but later moved to dismiss his appeal and that motion was granted.

Further, even if the Department's structural argument in that NPRM were accepted, and the 11th Circuit ignored, this still ignores the fact that the various defined entities can and do act in different capacities depending on the circumstances. For instance, labor organizations are in fact employers most of the time as they employ employees. Labor organizations themselves can find themselves on the opposite side of the bargaining table when the employees of the labor organization [employer] are represented by another labor organization. In these situations the first labor organization also often resists the unionization of its employees. If that labor organization was to enter into an agreement or arrangement with any "person" where a direct or indirect object thereof was the persuasion of employees regarding their right to join or not join a labor organization, then employer reports under LMRDA Sec. 203 would be owed. The LM-30 NPRM would have us ignore this reality.

Assuming that the draft Final Rule that is currently under review at the Office of Management and Budget finalizes the Proposed Rule as written, labor union members and the public will be deprived of information that was clearly meant to be disclosed pursuant to the LMRDA. The net effect will be less transparency of actual and potential conflicts of interests of labor organization officers and employees.

D. OLMS HAS SLASHED ITS STAFF AND RESOURCES

While OLMS has been working hard to reduce the level of transparency that applies to labor organizations and their officers and employees, it has also shot itself in the foot by reducing its budget and full time equivalent (FTE) requests. As our Counsel testified before the U.S. House Committee on Education's Subcommittee on Health, Employment, Labor and Pensions on March 31, 2011:

> Additionally the Department has aggressively slashed the staff of OLMS. In Fiscal Year 2006 OLMS had a full time equivalent allocation (FTE) of 384.[52] For Fiscal Year 2012 the Department's request is for 249 FTE.[53] This is a 35% reduction in staff from the Fiscal Year 2006 level. It is thus only a matter of time before these staff cuts turn into reduced enforcement activities. Indeed, the Department's Fiscal Year 2012 budget request details this. In Fiscal Year 2010 OLMS conducted 356 criminal investigations, up from its target of 354.[54] For Fiscal Year 2011 OLMS sets

[52] FY 2012 Congressional Budget Justification, Office of Labor-Management Standards, at 12.
[53] *Id*.
[54] FY 2012 Congressional Budget Justification, Office of Labor-Management Standards, at 20.

a target of only 300 criminal investigations, and the same is true for Fiscal Year 2012.[55] This is a 15% reduction for this target. For Fiscal Year 2012 OLMS sets a target of 200 compliance audits, down from the estimate of 300 for Fiscal Year 2010 and the 541 audits actually conducted that year.[56] Even though the Fiscal Year 2010 target for compliance audits was only 200 the actual result was more than double the target. Further, this target is much lower than the results in Fiscal Year 2009 where OLMS conducted 746 audits, up from its target of 650.[57] Comparing the 746 audits conducted in Fiscal Year 2009 with the Department's desired result of 200 for Fiscal Year 2012, it is clear that the Department is harming the ability of OLMS to do its job.

As part of its reduction in the staff of OLMS, the Department completely disbanded the Division of International Union Audits, a division that had the responsibility of auditing the largest labor organizations in the country, some with receipts and disbursements exceeding $600 million.[58] On page 21 of its Fiscal Year 2012 budget justifications OLMS flatly states that it plans to conduct "zero I-CAP audits in FY 2012." The "I-CAP audits" are audits of the national and international labor organizations. This means no audits of the largest labor organizations will occur in Fiscal Year 2012. Imagine the outrage that would occur if the Securities and Exchange Commission disbanded a division with responsibility for overseeing the largest organizations under its jurisdiction and publicly announced that it would perform no audits of them in the coming year.[59]

The regulatory, FTE, and budgetary actions of OLMS, as outlined above during the Obama Administration, demonstrate without doubt that it now has an extreme bias against financial transparency and accountability by labor organizations and their officers and employees. However, as also noted above, it would appear that there is a different standard when the disclosure requirements apply to employers and consultants. There OLMS apparently does believe in transparency and disclosure—to the point where it is risking the violation of some of the most treasured rights that are possessed by Americans in order to get the information.

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[55] *Id*.
[56] *Id*.
[57] FY 2011 Congressional Budget Justification, Office of Labor-Management Standards, at 22.
[58] See for instance the Form LM-2 filed by the Electrical Workers IBEW AFL-CIO on September 24, 2010. Available online at www.unionreports.gov, under OLMS File 000-016 (accessed March 25, 2011).
[59] Testimony of Nathan Paul Mehrens, Counsel, Americans for Limited Government Research Foundation, U.S. House Committee on Education and the Workforce, Subcommittee on Health, Employment, Labor and Pensions, Marcy 31, 2011. Available online at: http://edworkforce.house.gov/UploadedFiles/03.31.11_mehrens.pdf (accessed September 7, 2011).

A few of the problems present in the instant NPRM are outlined in the discussion that follows.

II. ANALYSIS OF THE PROBLEMS IN THE INSTANT NPRM

As will be discussed in more detail below, the instant NPRM contains many problems. There are problems with how information that is subject to attorney client privilege is handled. The NPRM is inconsistent with the Department's existing regulation concerning confidential information that is reported by labor organizations on the Form LM-2. The historical interpretation of the "advice exemption" is the better interpretation. The NPRM contains mandates that are vague and overbroad. These mandates violate due process rights. These mandates trample the First Amendment rights of many types of entities. The NPRM fails to discuss situations where labor organizations engage labor persuaders. The Department's burden analysis is inconsistence with its stance in previous rulemakings.

A. ATTORNEY DISCLOSURES MANDATED BY THE NPRM VIOLATE THE MANDATORY PROFESSIONAL RESPONSIBILITY RULES APPLICABLE TO ATTORNEYS

The Department would have everyone believe that there is no protection in the law to prevent the disclosure of the fact that a client has retained an attorney. The Department believes that information relating to the fact that an attorney client relationship exists is not privileged from disclosure.

This is false.

As will be discussed in detail below, in the Commonwealth of Virginia an attorney is not permitted to disclose the existence of an attorney client relationship if the client does not consent. The NPRM completely fails to discuss this.

With scarce analysis OLMS boldly states:

> In general, the fact of legal consultation, clients' identities, attorney's fees and the scope and nature of the employment are not deemed privileged. *Id.*; see also Restatement (Third) of the Law Governing Lawyers § 69.[60]

This conclusory statement is both incorrect and a hyper-simplification of a complex issue involving over 50 sets of state court and bar rules and interpretations.

Returning to the Virginia rules, attorneys have the mandatory duty to protect client confidences and secrets. The general rule applicable to the confidentially of client confidences and secrets comes from Rule 1.6(a) which states as follows:

> A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).[61]

The Virginia Legal Ethics Opinions (LEOs) interpreting these mandatory duties expressly prohibit an attorney from releasing a list of their clients without the consent of each client:

> The Committee is of the view that even a client's identity may be construed to be a confidence or secret, even when such information is a matter of public record, where the client has specifically requested that such information be kept secret or held inviolate (see *In re Kozlov*, 79 NJ 232, 398 A.2d 882 (1979)). Ethical Consideration 4-4 [EC:4-4] provides in part that the ethical obligation of a lawyer to guard the confidences and secrets of his client extends beyond the evidentiary privilege without regard to the nature or source of information or the fact that others share the knowledge.[62]

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[60] 76 Fed. Reg. 36,178, 92 (June 21, 2011).
[61] Virginia State Bar, *Rules of Professional Conduct*, Rule 1.6 Confidentiality of Information. (Available online at: http://www.vsb.org/pro-guidelines/index.php/rules/client-lawyer-relationship/rule1-6/ (accessed September 7, 2011.)
[62] Virgina Legal Ethics Opinion 1284 (1989). Available online at: http://www.vacle.org/opinions/1284.htm (accessed September 7, 2011).

The opinion further states:

> Thus, the Committee would opine that a lawyer's ethical obligation may properly preclude him from refusing to disclose a client's identity when in the lawyer's judgment or when it is obvious that disclosure of the same would cause embarrassment or would be detrimental to the client or, in particular, when the client has specifically requested that such information be kept secret.

In the case cited in this LEO, *In Re Kozlov*, the Supreme Court of New Jersey in a unanimous decision held that an attorney could not be held guilty of contempt for refusal to disclose the identity of a client. In this case the attorney had been given information by a client regarding juror misconduct in an unrelated matter. Because the attorney had information regarding juror misconduct he was under a mandatory duty to disclose this to the court. The information regarding juror misconduct had been transmitted to the attorney on condition that that the attorney not disclose the identity of the client. The trial court in investigating the charge of juror misconduct attempted to force the attorney to disclose the identity of the client. The attorney refused and was slapped with contempt. On appeal the Supreme Court of New Jersey reversed. In so doing the court stated,

> We have the most serious doubt, in the context of the case before us, of the validity of any inflexible thesis that the identity of the client, as distinguished from the substance of his professional confidence, is outside the ancient privilege deemed to exist between attorney and client.[63]

Because the court didn't buy the argument that the identity of a client was not a privileged fact and thus protected from disclosure, it held that the attorney could not be held in contempt for refusing to disclose the identity of the client. Regarding the important need to protect client confidences and secrets the court quoting from *Hatton v. Robinson*, 31 Mass (14 Pick) 416, 22 (1833) stated:

> This principle we take to be this; that so numerous and complex are the laws by which the rights and duties of citizens are governed, so important is it that they should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, both in ascertaining their rights in the country, and

[63] *In Re Kozlov*, 398 A.2d 882, 5 (N.J. 1979).

> maintaining them most safely in courts, without publishing those facts, which they have a right to keep secret, but which must be disclosed to a legal adviser and advocate, to enable him successfully to perform the duties of his office, that the law has considered it the wisest policy to encourage and sanction this confidence, by requiring that on such facts the mouth of the attorney shall be forever sealed.[64]

The attorney client privilege should be held in high esteem and should not be gutted by a federal agency with no expertise in either licensing attorneys or in administrating professional discipline for members of the bar.

Returning once again to Virginia law, another aspect of the duty of an attorney to protect client confidences and secrets, that being billing records, would be severely affected if the NPRM is promulgated as a final rule. Virginia LEO 1540 discussed the issue of whether an attorney may disclose a former client's billing records to a third party, in this case another attorney. The LEO stated,

> The committee has repeatedly and consistently opined that an attorney may not disclose confidences and secrets of a client.
>
> ***
>
> The committee is of the opinion that the professional activities performed by an attorney for a client in pending litigation may be considered "secrets" under DRs 4-l0l(A) and (B).
>
> ***
>
> The committee is of the opinion that if Attorney B knowingly revealed Client's confidences and secrets to Defendant's counsel, **a substantial question is raised as to his fitness to practice law in other respects**.[65]

(Emphasis added.)

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[64] *In Re Kozlov*, 398 A.2d 882, 7 (N.J. 1979).
[65] Virginia Legal Ethics Opinion 1540 (1993). Available online at: http://www.vacle.org/opinions/1540.htm (accessed September 7, 2011).

The billing records at issue in the discussion in LEO 1540 are exactly the type of records that would be required be disclosed on the attorney's Form LM-21 if OLMS promulgates the requirements of the NPRM into a final rule. If it is a violation of the rules of professional responsibility for an attorney to disclose this type of information to another attorney, an attorney who would have certain duties to maintain the confidentially of that information, then it is even more a violation of these rules for an attorney to publicly disclose these billing records in a form that is published on a federal website. Further, as stated in the LEO, disclosing this type of client confidences and secrets casts substantial doubt on the lawyer's "fitness to practice law in other respects." As such, the requirements found in the NPRM, if followed, would put an attorney in substantial jeopardy of professional discipline.

This is problematic to say the least. Among other things these problems are illustrative of the issues that arise when a federal agency engages in mission creep and attempts to regulate conduct that is traditionally left to the jurisdiction of the states. Neither the Department nor OLMS is a state bar; nor are they state supreme courts. The latter are charged with regulating attorney conduct, not the former.

While there is some room to argue the Rule 1.6(b)(1)[66] would allow the attorney to disclose the identity of a client to OLMS, this not something OLMS should mandate. The state supreme courts and the state bars of the respective states already have extensive ethical standards that apply to attorney conduct. Neither the Department of Labor nor OLMS are experts in attorney regulation. Even ignoring the legal problems with the NPRM, from a policy standpoint the Department and OLMS should not be in the business of regulating the rules of professional conduct as apply to the mandatory duty to protect client confidences and secrets. The Department in the NPRM is inserting itself between the lawyer and client. This should not be the case. The state supreme courts and the state bars are more than capable of prescribing rules in this area.

The licensure of attorneys is a traditional state function, not a federal function. The NPRM essentially makes OLMS a partner with the state supreme courts and state bars in determining how much protection clients will receive.

At a minimum OLMS, before it promulgates a Final Rule, should perform a comprehensive analysis of the 50 state laws, as well as the laws of the District of Columbia and those of the territories on the mandatory rules of professional conduct

[66] "(b) To the extend a lawyer reasonably believes necessary, the lawyer may reveal: (1) such information to comply with law or a court order;" Virginia State Bar, *Rules of Professional Conduct,* Rule 1.6(b)(1).

for attorneys. The analysis should also include the professional conduct rules applicable to attorneys in the District of Columbia as well as those of the Territories. A written report on this analysis should be inserted into the docket for the NPRM. The report should thoroughly explain why after performing the analysis OLMS does or does not now believe that following the requirements of the Form LM-20 as proposed, would result in the violation of state law.

In the event that OLMS does promulgate a Final Rule, it should insert language into that Final Rule that protects client confidences and secrets and allows attorneys to withhold this information unless "the client consents after consultation." Inserting language such as this will help protect the ability of clients to obtain legal representation because other clients of the same lawyer will not have to worry that their confidences and secrets will be disclosed on a federal website.

Even if one were to take the position that the federal regulation preempts state law this then puts the attorney in a situation where it would be a violation of the rules of professional conduct for that attorney to disclose, without client consent, to a private party, the existence of the attorney client relationship, but this same information once disclosed to OLMS would be almost immediately published on its website. In the first scenario, disclosure without client consent, to a third party, the attorney risks professional discipline. In the second scenario the attorney risks a jail term and a fine for willful failure to file if he or she decides to not file the Form LM-20.

There is no justification for OLMS risking the professional licenses of attorneys. Attorneys should not be put into a position by OLMS where they have to decide between violating their oath of office by disobeying the rules of professional conduct, and a jail term for willful failure to file.

B. THE REPORTING REQUIREMENTS IN THE NPRM WHEN CONTRASTED WITH OLMS' TREATMENT OF "CONFIDENTIAL INFORMATION" ON THE FORM LM-2 DEMONSTRATES THE DEPARTMENT'S PATENT FAVORITISM FOR LABOR ORGANIZATIONS

Reading the NPRM, one is left with the inescapable conclusion that there is no information regarding organizing efforts or efforts to oppose organizing that is not subject to public disclosure. However, this is far from being true. The Department is running full steam ahead to mandate the reporting of almost every conceivable situation where a consultant performs almost any task for an employer. At the same time the Department is protecting information related to organizing efforts when that

information is in the possession of a labor organization. The disparity in treatment could not be more glaring.

The Department should remember how it currently deals with confidential information when that information is in the possession of a labor organization and the labor organization fears that disclosure of this information would harm its organizing efforts or other interests that the labor organization deems worthy of protection. Unfortunately, the language used by the Department to discuss how labor organizations' organizing expenses are disclosed is incredibly misleading. The Department selectively quotes from a section of the legislative history:

> see also S.Rep. 187 at 39-40, LMRDA Leg. Hist. at 435-436, stating in part, that "if unions are required to **report all their expenditures, including expenses in organizing campaigns**, reports should be required from employers who" use third-party consultants.[67]

(Emphasis added.)

Here the Department would have the public believe that there is complete disclosure of labor organization finances in the area of organizing expenses. This is far from true as shown by the instructions to the Form LM-2.

The instructions for the Form LM-2 on this point state as follows:

> Special Procedures for Reporting Confidential Information
>
> Filers may use the procedure described below to report the following types of information:
>
> - Information that would identify individuals paid by the union to work in a non-union bargaining unit in order to assist the union in organizing employees, provided that such individuals are not employees of the union who receive more than $10,000 in the aggregate in the reporting year from the union. Employees

[67] 76 Fed. Reg. 36,178, 88 (June 21, 2011).

receiving more than $10,000 must be reported on Schedule 12 – Disbursements to Employees;

- Information that would expose the reporting union's prospective organizing strategy. The union must be prepared to demonstrate that disclosure of the information would harm an organizing drive. Absent unusual circumstances, information about past organizing drives should not be treated as confidential;

- Information that would provide a tactical advantage to parties with whom the reporting union or an affiliated union is engaged or will be engaged in contract negotiations. The union must be prepared to demonstrate that disclosure of the information would harm a contract negotiation. Absent unusual circumstances information about past contract negotiations should not be treated as confidential;

- Information pursuant to a settlement that is subject to a confidentiality agreement, or that the union is otherwise prohibited by law from disclosing; and,

- Information in those situations where disclosure would endanger the health or safety of an individual.

With respect to these specific types of information, if the reporting union can demonstrate that itemized disclosure of a specific major receipt or disbursement, or aggregated receipt or disbursement would be adverse to the union's legitimate interests, the union may include the receipt or disbursement in Line 3 of Summary Schedule 14 (Other Receipts) or in Line 5 of Summary Schedules 15 (Representational Activities) or 19 (Union Administration). In Item 69 (Additional Information) the union must identify each schedule from which any itemized receipts or disbursements were excluded because of an asserted legitimate interest in confidentiality based on one of the first three reasons listed above. No notation need be made for exclusion of information disclosure of which is prohibited by law or that would endanger the health or safety of an individual. The notation must describe the general types of information that were omitted from the schedule, but the name of the payer/payee, date, and amount of the

transaction(s) is not required. This procedure may not be used for Schedules 16 through 18.[68]

The difference in OLMS' treatment of labor organizations versus employers is especially stark when it comes to disclosure of information regarding unionization campaigns. In the labor organization context OLMS protects information which would disclose consultants hired by the labor organization to work as an employee of the employer that the labor organization seeks to unionize.

If an employer were to hire a consultant to work as an employee of the labor organization that is seeking to unionize the employer, both the employer and the consultant would be subject to disclosure obligations, thus severely reducing their effectiveness.

The labor organization is allowed to keep confidential information that would expose its "prospective organizing strategy."[69] There is no similar protection in the instant NPRM for employers who wish to use a counter-organizing strategy.

The labor organization is allowed to keep confidential information that would, "provide a tactical advantage to parties with whom the reporting union or an affiliated union is engaged or will be engaged in contract negotiations."[70] There is no similar protection in the instant NPRM for employers to protect this same information.

The labor organization is allowed to keep confidential information that would reveal "information pursuant to a settlement that is subject to a confidentiality agreement, or that the union is otherwise prohibited by law from disclosing."[71] However, OLMS in the instant NPRM proposes to require attorneys to disclose certain client confidences and secrets, ignoring the duty that the attorney has under law to protect this information. If a labor organization is allowed by OLMS to obey other laws by withholding certain information, then OLMS should also allow employers and consultants to obey other laws which prohibit the release of the information OLMS

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[68] Office of Labor-Management Standards, *Instructions for Form LM-2 Labor Organization Annual Report*, p. 23 (2010).
[69] Office of Labor-Management Standards, *Instructions for Form LM-2 Labor Organization Annual Report*, p. 23 (2010).
[70] Office of Labor-Management Standards, *Instructions for Form LM-2 Labor Organization Annual Report*, p. 23 (2010).
[71] Office of Labor-Management Standards, *Instructions for Form LM-2 Labor Organization Annual Report*, p. 23 (2010).

seeks. The Department has provided no rationale for allowing one class of covered entities to obey other laws while requiring another class of covered entities to violate other laws. As a matter of equal protection and equity OLMS should provide the same protection to all covered entities. No covered entity should be placed into a position where they have to choose which law to follow. As such, at a minimum, if a final rule is promulgated to implement the requirements of the NPRM, employers, consultants, and all other persons should be afforded the same protections that are given to labor organizations.

The labor organization is allowed to keep confidential "information in those situations where disclosure would endanger the health or safety of an individual."[72] There is no similar protection in the instant NPRM for employers to protect this same information. This begs the question as to why OLMS will allow a labor organization to protect the life of an individual but the employer and consultants are prohibited from protecting a life. It is unconscionable to grant the power to protect the life of an individual if one type of covered entity posses the information which is to be withheld, while at the same time not allowing another type of covered entity to protect the life of an individual. Why does the Department deem one life worthy of protection but denies that same protection to another life? As a matter of equal protection and equity the protections should apply to everyone. As such, at a minimum, if a final rule is promulgated to implement the requirements of the NPRM, all covered entities should be allowed to withhold "information in those situations where disclosure would endanger the health or safety of an individual."[73]

C. OLMS IGNORES PARTS OF THE LMRDA LEGISLATIVE HISTORY

The legislative history of the LMRDA is cited numerous times by OLMS in an effort to support its current view regarding the types of activities that are included in the advice exemption. However, OLMS ignores parts of the legislative history, including parts of S. Rep. No. 187. For instance, OLMS does not include any discussion of the point that the Committee made in regards to employer payments when it said, "Also exempt from the reporting requirements are expenditures which an employer makes in his own name to communicate information to his employees including any kind of written or

[72] Office of Labor-Management Standards, *Instructions for Form LM-2 Labor Organization Annual Report*, p. 23 (2010).
[73] Office of Labor-Management Standards, *Instructions for Form LM-2 Labor Organization Annual Report*, p. 23 (2010).

oral statement, or advertisement." [74] As a result, if a final rule is promulgated, OLMS should take another look and present a more balanced view of the legislative history.

D. THE DEPARTMENT'S HISTORICAL FOCUS OF THE ADVICE EXEMPTION HAS RIGHTLY BEEN ON THE ACTOR COMMUNICATING MESSAGE, NOT ON OTHER PARTIES WHO MAY HAVE HELPED DRAFT MESSAGE

The historical interpretation of the advice exemption focused primarily on the actor, *i.e.*, whether a speech was given by an employer or whether it was given by a person other than the employer.

When employers give speeches, they are taking ownership of the words spoken and they are spoken in their own name. By way of analogy, no one would seriously suggest that the President of the United States when giving a speech is merely reading the words of his staff writer or as is the case in recent years, outside speech writing consultants. To the contrary, the words that are spoken become those of the President himself and it makes no difference to the audience whether those words were written by the President, his staff, a third party consultant, or a third grader. Regardless of the source of the words once spoken they belong to the President alone. These words become part of our history and no one gives any thought to whether the President himself or anyone else drafted the speech. Notable Presidential speeches are published widely and even at times engraved into stone as a reminder of the power and historical significance of these words. Words, phrases, speeches, and the like are cited as coming from the President, not the staff member who may have assisted in the drafting process.

The same can be said of regulatory documents. The instant NPRM was signed on June 6, 2011 by "John Lund, Director, Office of Labor-Management Standards."[75] By this act Director Lund becomes the person who will be cited on matters concerning the NPRM. Yet, Director Lund was undoubtedly not the sole drafter or reviewer of the NPRM. Many offices in Department likely contributed to the drafting process. Among the likely offices to have done so are the Division of Interpretations and Standards within OLMS, the Office of the Assistant Secretary for Policy, the Office of the Deputy Secretary, the Office of the Secretary, the Office of the Solicitor, including its Division of Civil Rights and Labor-Management, the Office of Information and Regulatory Affairs within the White House Office of Management and Budget. Additionally, other offices including the Office of the Assistant Secretary for Administration and Management, the Office of Public Affairs, and the Office of Congressional affairs were likely briefed on

[74] S. Rep. No. 187, reprinted in *Legislative History of the Labor-Management Reporting and Disclosure Act of 1959*, Vol. 1, National Labor Relations Board (1959), at p. 407.
[75] 76 Fed. Reg. 36,178, 206 (June 21, 2011).

the NPRM. Yet, because Director Lund signed the NPRM he is considered the author of this document.

In the same way that Director Lund turned to others to assist in drafting and review of the NPRM employers also turn to others to assist in the drafting and review of communications. At the end of this process it is the orator or signatory who "owns" the words.

The same principle had been the long standing interpretation of OLMS concerning whether the drafting of a speech by someone other than the employer means that the employer and that person have reporting obligations. The freedom to "accept or reject" a draft of a speech means that the true ownership of a speech belongs to the orator, not the drafter.[76] In the case where an employer, per an agreement with a consultant, may not alter the text of a speech or other communication, then attributing that speech of other communication to the third party makes more sense. Nonetheless, even in this type of situation the employer still retains some level of control over the communication and thus the focus of the advice exemption is properly on the orator and not the drafter.

At times there is a need for someone other than the orator or signatory to draft the message. There are multiple reasons for this. A good reason is the enormous body of law that applies to labor-management relations and the conduct of communications with employees. For instance, the NLRB's *Casehandling Manual, Part One, Unfair Labor Practice Proceedings*, is 367 pages long.[77] This is but one example as the NLRB also has several other manuals numbering hundreds of additional pages. Excepting perhaps the largest employers, few others will be in position to know how, without counsel, how to go about drafting a communication that is in full compliance with applicable law. Thus, in order to comply with the law, employers turn to consultants who have the experience and expertise to help the employer. Part of this assistance from consultants comes in the form of drafting communications.

An employer who desires to communicate with employees would be foolish to do so without counsel. The danger of an employer inadvertently committing an unfair labor practice charge is real. As unfair labor practice charges are known to be used by unions as organizing tool the employer must be extremely careful. As such, unless the employer is a labor-relations attorney with significant experience and expertise, they

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[76] *See*, "Donahue memorandum," as cited in the NPRM at 76 Fed. Reg. 36,178, 80 (June 21, 2011).
[77] National Labor Relations Board, *Casehandling Manual, Part One, Unfair Labor Practice Proceedings* (2009). Available online at: http://www.nlrb.gov/sites/default/files/documents/44/chm_ulp_2011.pdf (accessed September 7, 2011).

will need to rely on a consultant to help formulate communications. These consultants often provide a type of compliance assistance that is not entirely unlike the type of assistance that OLMS regularly gives to the public through its seminars. The alternative is an increase in unfair labor practice charges. This being an undesirable outcome, the better approach would be for OLMS to retain the historical focus of the advice exemption and apply it as it has done for decades.

E. THE MANDATES IN THE NPRM ARE VAGUE AND OVERBROAD AND THUS EXCEED THE SECRETARY'S RULEMAKING POWER AUTHORITY THE LMRDA

The Secretary of Labor does not have absolute rulemaking authority concerning entities and subjects that are covered by the LMRDA. Instead, that rulemaking power is limited by LMRDA Sec. 208 which states in relevant part as follows:

> The Secretary shall have authority to issue, amend, and rescind rules and regulations prescribing the form and publication of reports required to be filed under this title and such other reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements.[78]

In order for regulations implementing the LMRDA to be valid, they must be reasonable. The historical interpretation of the "advice exemption" was, while not perfect, reasonable. Members of the regulated community knew clearly what the rules were and how they were applied. Traps for the unwary did not exist. The NPRM changes this. In a number of instances it is impossible to know where the line between advice and persuasion exists. In the NPRM the Department has taken a shotgun approach in an attempt to hit every activity that can possibly be imagined that might in some tangential way indirectly persuade an employee concerning the employee's rights.

This has lead to some absurd situations that would nonetheless be covered by the reporting requirements of the NPRM. A few of these situations are as follows:

- Under the NPRM, a person who, pursuant to an agreement or arrangement with an employer that is in a labor dispute with a labor organization, provides that employer with a copy of a labor organization's

[78] LMRDA § 208, 29 U.S.C. § 438.

Form LM-2, a copy obtained from the public OLMS website www.unionreports.gov, would be required to file a Form LM-20 within 30 days and the Form LM-21 after the end of the person's fiscal year. Pursuant to Section 11.a. of the proposed LM-20, this activity could be considered "Surveillance of employees or union representatives (video, audio, Internet, or in person)."[79]

- Under the NPRM, a sixteen-year-old summer intern working on contract who pursuant to an agreement or arrangement with an employer that is in a labor dispute with a labor organization, "Googles" the name of a labor organization and puts the search results into a document which is then emailed to the employer, would be required to file a Form LM-20 within 30 days and the Form LM-21 after the end of the person's fiscal year. Pursuant to Section 11.a. of the proposed LM-20, this activity could be considered "Surveillance of employees or union representatives (video, audio, Internet, or in person)."[80]

- Under the NPRM, a person who pursuant to an agreement or arrangement with an employer designs an employment policy whereby the employer pays higher wages than a similarly situated, unionized employer, would be required to file a Form LM-20 within 30 days and the Form LM-21 after the end of the person's fiscal year, if the employer pays higher wages to employees as a way of showing that they are better off without a union.

- Under the NPRM, a person who pursuant to an agreement or arrangement with an employer designs an employment policy whereby the employer pays a higher share of the employees' healthcare costs than a similarly situated, unionized employer, would be required to file a Form LM-20 within 30 days and the Form LM-21 after the end of the person's fiscal year, if the employer pays the higher share of the employees' healthcare costs as a way of showing that they are better off without a union.

- Under the NPRM, a person who pursuant to an agreement or arrangement with an employer designs an employment practice whereby the employees' lunch room contains copies of OLMS press releases announcing OLMS obtained indictments and convictions of labor organization officials, would be required to file a Form LM-20 within 30 days and the Form LM-21 after the end of the person's fiscal year, if the

[79] Proposed Form LM-20 as printed in the NPRM at 76 Fed. Reg. 36,178, 208 (June 21, 2011).
[80] Proposed Form LM-20 as printed in the NPRM at 76 Fed. Reg. 36,178, 208 (June 21, 2011).

employer posts the OLMS press releases as a way of showing employees that they are better off without a union.

- Under the NPRM, a person who pursuant to an agreement or arrangement with an employer designs an employment practice whereby all solicitors, including union organizers, are not allowed onto the employer's property, would be required to file a Form LM-20 within 30 days and the Form LM-21 after the end of the person's fiscal year, if the employer does this as a way to persuade employees that they are better off without a union.

- Under the NPRM, a person who pursuant to an agreement or arrangement with an employer non-profit organization which believes that the economy and the lives of individuals will be better without unionized workplaces, engages in activities such as public advocacy, legislative advocacy, regulatory advocacy, or litigation that has an object of decreasing the unionization rate within the U.S., would be required to file a Form LM-20 within 30 days and the Form LM-21 after the end of its fiscal year.

- Under the NPRM, a free-lance journalist who pursuant to an agreement or arrangement with an employer newspaper, drafts an opinion editorial that is designed to convince workers not to join a union, would be required to file a Form LM-20 within 30 days and the Form LM-21 after the end of the person's fiscal year. Even writing stories about union corruption using real-life examples from the case files of OLMS would be considered persuader activity under the NPRM.

In each of these situations the corresponding employer would also have a duty to file the Form LM-10.

Put bluntly, the mandates of the NPRM go too far. No reasonable person would expect to be subject to federal disclosure requirements by engaging in the activities described above. These reporting requirements create a trap for the unwary and will result in increased legal compliance costs for employers, thus depressing the already injured job market. This is not a desirable result given the current status of the U.S. economy.

F. THE MANDATES IN THE NPRM VIOLATE DUE PROCESS RIGHTS

As a matter of constitutional jurisprudence, criminal prohibitions must be sufficiently clear so as to place a reasonable person into a position to know whether their conduct violates the law. Laws which are not sufficiently clear will be struck down by the courts. The basic question is whether the law gives a "fair warning" as to what is actually prohibited. As the U.S. Court of Appeals for the 6th Circuit recently stated:

> At the heart of the fair-warning doctrine is one of the central tenets of American legal jurisprudence, that "living under a rule of law entails various suppositions, one of which is that '(all persons) are entitled to be informed as to what the State commands or forbids.'" *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453, 83 L. Ed. 888, 59 S. Ct. 618 (1939)); *see also Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 70 L. Ed. 322, 46 S. Ct. 126 (1926) ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."); *Columbia Natural Res., Inc. v. Tatum, 58 F.3d 1101, 1105 (6th Cir. 1995)*, *cert. denied*, *516 U.S. 1158, 134 L. Ed. 2d 189, 116 S. Ct. 1041 (1996)* ("Because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.'") (quoting *Grayned v. City of Rockford, 408 U.S. 104, 108-09, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972))*.[81]

This principle applies to both statutes and their implementing regulations. This is especially true when the statute cannot operate without the regulation because the regulation defines conduct to which a statutory penalty attaches.

> But it is the statute which creates the offense of the willful removal of the labels of origin and provides the punishment for violations. The regulations, on the other hand, prescribe the identifying language of the label itself, and assign the resulting tags to their respective geographical areas. Once promulgated, these regulations, called for by the statute itself, have the force of law, and violations thereof incur criminal prosecutions, just as if all the details had been incorporated into the congressional

[81] *U.S. v. Caseer*, 399 F.3d 828, 34-5 (6th Cir. 2005).

> language. The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other.[82]

This is exactly the situation presented by the instant NPRM which implements parts of Title II of the LMRDA; the statutory prohibitions on certain conduct are fleshed out by the requirements of the NPRM. Not only is certain conduct brought into the domain of regulation by the NPRM but the universe of covered entities is thereby enlarged as well.

Willful violations of the reporting requirements of LMRDA Title II are punishable as a criminal offense by LMRDA Sec. 209 which states as follows:

> (a) Willful violations of provisions of 29 USCS §§ 431 et seq. Any person who willfully violates this title shall be fined not more than $ 10,000 or imprisoned for not more than one year, or both.
>
> (b) False statements or representations of fact with knowledge of falsehood. Any person who makes a false statement or representation of a material fact, knowing it to be false, or who knowingly fails to disclose a material fact, in any document, report, or other information required under the provisions of this title shall be fined not more than $ 10,000 or imprisoned for not more than one year, or both.
>
> (c) False entry in or willful concealment, etc., of books and records. Any person who willfully makes a false entry in or willfully conceals, withholds, or destroys any books, records, reports, or statements required to be kept by any provision of this title shall be fined not more than $10,000 or imprisoned for not more than one year, or both.
>
> (d) Personal responsibility of individuals required to sign reports. Each individual required to sign reports under sections 201 and 203 [29 USCS §§ 431, 433] shall be personally responsible for the filing of such reports and for any statement contained therein which he knows to be false.[83]

[82] *U.S. v. Mersky et al.*, 352 U.S. 431, 7-8 (1960).
[83] LMRDA Sec. 209, 29 U.S.C. § 439.

If the Department promulgates a final rule implementing the NPRM's requirements, the willful violation of those requirements by any person will subject them to criminal penalties. Given the potential for criminal prosecutions, a close and careful examination of the requirements of the NPRM is warranted to ascertain whether they pass constitutional muster. An examination is warranted to see whether these requirements are sufficiently definite so as to place a reasonable person into position to know whether his conduct violates what is required. "In the context of criminal prosecution, we must apply the rule of strict construction when interpreting this regulation and statute."[84] Thus the law must be extremely clear, "businessmen must not be left to guess the meaning of regulations."[85] "In the framework of criminal prosecution, unclarity alone is enough to resolve the doubts in favor of defendants."[86]

While the reporting requirements of LMRDA Sec. 203 have been litigated in the past on the basis of vagueness, at that time the Department was operating on its long-standing interpretation of the "advice exemption."[87] Under the long-standing interpretation it was much clearer whether the activities of third party consultants were covered. The focus was on the actor and whether that actor was the employer or a consultant. Under the long-standing interpretation the courts held that "the level of disclosure required is carefully tailored to the goals of the Statute."[88] Now, however, the disclosure requirements are not "carefully tailored" under any reasonable definition, but instead are intended to sew together the largest net possible to catch any activity that is even in the same neighborhood as persuasion activity.

Turning to the requirements of the instant NPRM, the question is whether they are sufficiently clear, unambiguous, and definite in describing conduct such that a prosecution for their violation would not offend constitutional principles by violating a person's substantive due process rights.

In the list of activities specified in the NPRM that would trigger the filing requirement, many are not well defined but are extremely open ended and subject to multiple interpretations.

Starting the list of "Reportable Agreements or Arrangements" is the following: "drafting, revising, or providing a persuader speech, written material, website content, audiovisual or multimedia presentation, or other material or communication of any

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[84] *U.S. v. Mersky et al.*, 352 U.S. 431, 40 (1960).
[85] *U.S. v. Mersky et al.*, 352 U.S. 431, 41 (1960).
[86] *U.S. v. Mersky et al.*, 352 U.S. 431, 41 (1960).
[87] *See generally*, *Master Printers v. Donovan*, 751 F.2d 700 (4th Cir. 1984).
[88] *Master Printers v. Donovan*, 751 F.2d 700, 14 (4th Cir. 1984).

sort, to an employer for presentation."[89] Reading this description while at the same time keeping in mind the proposed confines of the new "advice exemption," one is left to wonder where the line is between advice and "persuasion." No longer is there a clear focus on the actor. The NPRM defines advice as "an oral or written recommendation regarding a decision or course of conduct."[90]

As such, suppose an employer comes to an attorney with a speech that the employer intends to give its employees. The employer drafted the entire speech. The attorney reviews the speech and advises that if the employer gave the speech that it would result in an unfair labor practice charge being filed against the employer. The employer then asks what can be changed in the speech to make it compliant with the law.

This is the difficult part. If the attorney gives "an oral or written recommendation regarding a decision" to cut a sentence, has the attorney crossed the line from giving advice to "persuasion"? Reading the definition of the new interpretation of the "advice exemption," one would be inclined to think that this type of advice is still exempt.

However, reading from the list of "Reportable Agreements or Arrangements" one would be inclined to believe that the advice to cut one sentence from a speech would constitute "revising" that speech and as such would be reportable persuader activity.

So which is it? In one instance there is no reportable activity. In the other instance there is reportable activity and the willful failure to report is subject to criminal penalties. If the latter is what the Department intends, then the only feasible way for the "advice exemption" to have any practical application to advice concerning whether a speech is lawful is where the attorney and employer adhere to the following procedure:

(1.) Employer comes to attorney with speech;
(2.) Attorney reviews speech for compliance with applicable law;
(3.) Attorney orally or in writing advises employer that speech does not comply with applicable law, but does not inform employer regarding any letter, word, phrase, or sentence that is in violation of applicable law;
(4.) Employer goes back to the drawing board and drafts second version of speech;
(5.) Employer comes to attorney with second version of speech ;
(6.) Attorney reviews speech for compliance with applicable law; and

[89] "*Reportable Agreements or Arrangements*" as found in the instructions for the proposed Form LM-20, 76 Fed. Reg. 36,178, 211 (June 21, 2011).
[90] 76 Fed. Reg. 36,178, 82 (June 21, 2011).

(7.) [Repeat above steps until employer, on its own figures out how to draft speech that complies with applicable law].

Is this really the regulatory world that the Department intends to create? That the only real "advice" that an attorney can give to an employer regarding a speech is a "yes" or "no" answer regarding whether it is lawful to give the speech? In any event one is left in the dark because the answer is not clear. One reading of the NPRM leads to the conclusion that advice regarding cutting a sentence from a speech would fit within the "advice exemption" while another reading of the NPRM would lead to the conclusion that this type of advice is actually considered "persuasion." This lack of clarity is problematic in that it will be impossible for attorneys in this type of situation to know exactly where the line is between regulated and non-regulated activities. Because criminal penalties attach to certain types of activities under the NPRM, it must be extremely clear what activities are covered.

Next in the list of "Reportable Agreements or Arrangements" is "planning or conducting individual or group meetings designed to persuade employees." One is hard pressed to conceive of the bounds of the outer limits of meetings that would not fall within this definition. Suppose that an employer had a meeting with an attorney, such as the meeting described in the scenario above. Suppose further that this meeting was solely for the purpose of the employer receiving a "yes" or "no" answer on whether it is lawful for the employer to give the speech it drafted. Under the "planning or conducting individual or group meetings" standard it would appear that the mere holding of this type of meeting would be a reportable activity. But what if the meeting was not in person, but was held over the phone, or via webconference? Would conversations of this type be considered "meetings" for the purpose of the NPRM? Also, if the employer is to be able to receive "advice" regarding its operations, how can this advice be transmitted without a meeting of the minds? Does the Department really mean that this advice must be transmitted outside the forum of a meeting in order for the advice to remain within the "advice exemption"? If the advice is given at a meeting whether that meeting is in person, over the phone, or online, one could conclude from reading this part of the instructions that this advice crosses the line from advice and becomes persuasion due to the forum in which it was transmitted. This begs the question of whether a reasonable person is really given "fair notice" that this type of activity is reportable to the Department. This lack of clarity is problematic in that it will be impossible for attorneys in this type of situation to know exactly where the line is between regulated and non-regulated activities. Because criminal penalties attach to certain types of activities under the NPRM, it must be extremely clear what activities are covered.

Next in the list of "Reportable Agreements or Arrangements" is "developing or administering employee attitude surveys concerning union awareness, sympathy, or proneness." One is hard pressed to conceive of the bounds of the outer limits of public opinion polling that would not fall within this definition. Suppose that an employer engages a polling company pursuant to an agreement or arrangement to conduct polling of the population in its area. The polling touches on a number of issues including whether the respondents favor unions. Is this type of polling covered by the NPRM? Suppose further that the employer has no presence in that locale would this change the answer? From the language used in the NPRM it is impossible to ascertain whether the "employee attitude surveys" are surveys of the employees of the employer or whether these are employees in the sense that they are employed by any employer. This begs the question of whether a reasonable person is really given "fair notice" that this type of activity is reportable to the Department. This lack of clarity is problematic in that it will be impossible for employers and consultants in this type of situation to know exactly where the line is between regulated and non-regulated activities. Because criminal penalties attach to certain types of activities under the NPRM, it must be extremely clear what activities are covered.

Another item in the list of "Reportable Agreements or Arrangements" is "establishing or facilitating employee committees." One is hard pressed to conceive of the bounds of the outer limits of a "committee" that would not fall within this definition. The NPRM does not discuss whether "employee committee" is a term of art or whether it is meant to encompass any coordination between two or more persons, such as in "meeting," the "planning or conducting" of which is also conserved a reportable activity. As a practical matter it would be very difficult to have a "committee" without "meetings." In any event, the public is left to wonder just exactly what type of committees fall under the NPRM. This lack of clarity is problematic in that it will be impossible for employers and consultants in this type of situation to know exactly where the line is between regulated and non-regulated activities. Because criminal penalties attach to certain types of activities under the NPRM, it must be extremely clear what activities are covered.

Another item in the list of "Reportable Agreements or Arrangements" is "developing employer personnel policies or practices designed to persuade employees." This category borders on the absurd. One is hard pressed to conceive of the bounds of the outer limits of a "policy" or "practice" that would not fall within this definition. Suppose that a consultant pursuant to an agreement or arrangement with an employer tells the employer it should have a policy of paying its employees higher wages in order to lessen the likelihood that the employees would be convinced to join a labor organization. Is this type of activity reportable? Because whether the activity is reportable or not comes down to intent, this could lead to situations where the drafting

of employment policies for one employer would be reportable (where the employer wants a union-free workplace) but the drafting of the same employment policy would possibly not be reportable if the employer was ambivalent regarding unionization of its workplace. The next question then is this: who has the burden of proof? Does the Department have the burden to prove intent before it could seek to force disclosure of the drafting of this employment policy? Or, does the employer have the burden to prove they didn't intend to persuade employees but that the employment policy was merely meant to manage their workplace in an efficient manner? This lack of clarity is problematic in that it will be impossible for employers and consultants in this type of situation to know exactly where the line is between regulated and non-regulated activities. Because criminal penalties attach to certain types of activities under the NPRM, it must be extremely clear what activities are covered.

The main problem with all of the activities in the list is the nexus between the actor and the employee. In any activity in life there is always some tangential affect on others, sometimes in ways that are unknown and unseen. However, the list specified by the NPRM here goes too far and encompasses actors and activities that no reasonable person would normally believe would lead to a reporting obligation.

G. THE MANDATES IN THE NPRM TRAMPLE THE FIRST AMENDMENT RIGHTS OF ORGANIZATIONS TO SPEAK ON ISSUES OF PUBLIC CONCERN

Reading the NPRM, the Department clearly has patent animus for employers and consultants who would dare to do something so brash as to exercise their First Amendment right to engage in speech. Apparently, according to the Department's analysis, the right to speak as guaranteed in the First Amendment is among the chief ills plaguing labor-management relations today, thus necessitating a reduction in these rights in order to further employee's rights to associate. Ironically these same associational rights are also guaranteed by the First Amendment. So, the Department would disparage one type of First Amendment right in order to further another First Amendment right. This should not be the case.

Though not discussed in the NPRM, the Department's change in interpretation affects not just those employers and their consultants when the employer is in the midst of a union organizing campaign, but all employers and consultants. This is case even if there is no organizing campaign by a union of the employees of that employer. For instance, the reporting requirements now reach to ordinary speech, such as an opinion editorial, on the issue of whether unionization is a good thing or not.

Under the long standing interpretation, this was not the case.

Even under *Master Printers v. Donovan*, there had to be some direct communication between the consultant and the employees in order for a reporting obligation to arise for the consultant and the employer.[91] Now that the Department has proposed removing the focus of the interpretation on whether communications to employees occurred, there is nothing left to shield the speech rights of associations from what is essentially a licensure scheme that extends even to newspapers. Now, merely drafting a communication, regardless of whether it is delivered to employees or not, results in a reporting obligation.

As the Department states in the NPRM:

> When a consultant or lawyer, or her agent, communicates directly with employees in an effort to persuade them, the "advice" exemption does not apply. The duty to report can be triggered **even without direct contact between a lawyer or other consultant and employees**, if persuading employees is an object, direct or indirect, of the person's activity pursuant to an agreement with an employer.[92]

(Emphasis added.)

Consider the following scenario:

> A non-profit public interest organization exists to advocate in the media and other forums regarding the economic conditions of the country. This organization believes that the economic well being of the country is better served if workplaces remain union free because unions distort the laws of supply and demand in the free market. Every publication from this organization regarding the labor market could be construed as encouraging employees to not join labor organizations. Suppose further that this organization receives funding from employers to further its work. The employers fund the organization on the agreement that the organization will continue its advocacy. After the employer funds the organization, the organization places an opinion editorial in a newspaper.

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[91] *Master Printers of America v. Donovan*, 751 F.2d 700 (4th Cir. 1984).
[92] 76 Fed. Reg. 36,178, 91 (June 21, 2011).

> This opinion editorial discusses the problems with organized labor, including the hundreds of union corruption convictions obtained by OLMS in recent years, and advises employees that they should not join unions.

In this scenario, under the Department's new interpretation, the non-profit organization would be considered a consultant that has, pursuant to an agreement or arrangement with an employer, engaged in activities where an object thereof is the persuasion of employees regarding whether they should join a union. Because the Department has removed the focus of the interpretation from whether the consultant has engaged in persuasion activities directly with the employees of the employer, both the employer and the non-profit organization in this scenario would have reporting obligations under the NPRM. In this scenario the non-profit organization would have an obligation to file a Form LM-20 within 30 days of the arrangement and a Form LM-21 after the end of its fiscal year. The employer would have an obligation to file the Form LM-10 after the end of its fiscal year.

Consider another scenario:

> A non-profit public interest organization exists to advocate in the media and other forums regarding the economic conditions of the country. This organization believes that the economic well being of the country is better served if workplaces remain union free because unions distort the laws of supply and demand in the free market. Every publication from this organization regarding the labor market could be construed as encouraging employees to not join labor organizations. The organization, pursuant to an arrangement, places an opinion editorial in a newspaper that is an employer. This opinion editorial discusses the problems with organized labor, including the hundreds of union corruption convictions obtained by OLMS in recent years, and advises employees that they should not join unions.
>
> Because the Department has removed the focus of the interpretation from whether the consultant has engaged in persuasion activities directly with the employees of the employer, both the employer newspaper and the non-profit organization in this scenario would have reporting obligations under the NPRM. In this scenario the non-profit organization would have an obligation to file a Form LM-20 within 30 days of the arrangement and a Form LM-21 after the end of its fiscal year. The employer newspaper would have an obligation to file the Form LM-10 after the end of its fiscal year.

Consider yet another scenario:

> A non-profit public interest organization that is an employer exists to advocate in the media and other forums regarding the economic conditions of the country. This organization believes that the economic well being of the country is better served if workplaces remain union free because unions distort the laws of supply and demand in the free market. Every publication from this organization regarding the labor market could be construed as encouraging employees to not join labor organizations. The organization, pursuant to agreement, contracts with a free-lance writer for the drafting of an opinion editorial. This opinion editorial discusses the problems with organized labor, including the hundreds of union corruption convictions obtained by OLMS in recent years, and advises employees that they should not join unions.
>
> Because the Department has removed the focus of the interpretation from whether the consultant has engaged in persuasion activities directly with the employees of the employer, both the employer non-profit organization and the free-lance writer in this scenario would have reporting obligations under the NPRM. In this scenario the non-profit employer organization would have an obligation to file a Form LM-10 after the end of its fiscal year. The free-lance writer would have the obligation to file the Form LM-20 within 30 days of the agreement, and the Form LM-21 after the end of his fiscal year.

The reason why these employers and consultants would have a filing obligation under the instant NPRM is because the LMRDA defines "employer" in a very broad manner and does not solely relate to the employees that a union represents or seeks to represent. The term even applies to law firms that have employees, firms that have only a tangential nexus with any union business. As discussed above, the Department successfully argued this construction of the LMRDA in a recent case in the 11th Circuit, *Warshauer v. Chao*, 2008 U.S. Dist. LEXIS 78094 (N.D. GA 2008), *aff.*, *Warshauer v. Solis*, 577 F.3d 1330 (11th Cir. 2009).[93] At issue in *Warshauer* was a filing obligation imposed on the plaintiff, an employer, due to certain payments made to labor organizations or their officers or employees. The filing obligation comes from LMRDA Sec. 203 which requires reports of employers in, among others, the following circumstances:

[93] Party name substituted pursuant to Fed R. Civ. P. 25(d) due to the separation from office of Secretary of Labor Elaine L. Chao due to the change in presidential administration.

(b) Every employer who in any fiscal year made—

(2) any payment or loan, direct or indirect, of money or other thing of value (including reimbursed expenses), or any promise or agreement, therefor, to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of a labor organization, except (A) payments or loans made by any national or State bank, credit union, insurance company, savings and loan association or other credit institution and (B) payments of the kind referred to in section 302(c) of the Labor Management Relations Act, 1947, as amended.

Plaintiff Warshauer argued that the term "employer" as found in LMRDA Sec. 203(a)(1) applies "only to employers in actual or potential bargaining relationships with unions."[94] Both the district court and the 11th Circuit disagreed.

> The plain language of *§ 203(a)* applies to all employers who made non-exempt payments. Contrary to Warshauer's suggestion, it contains no requirement that the employer participate in persuader or other labor relations activities. The statutory definition of "employer" includes any employer under any federal law. *29 U.S.C. § 402(e)* (defining an "employer" as "an employer within the meaning of any law of the United States. . . ."). As such, under the plain language of the LMRDA, § 203(a)(1) covers all DLCs who are employers, without qualification.[95]

The 11th Circuit also discussed the plaintiff's structural argument that the defined terms found in the LMRDA forever lock an entity into one category and found that argument unpersuasive because the plain language of the LMRDA states otherwise. On this point the court stated as follows:

> There is no doubt that Congress intended to target employers in actual or potential bargaining relationships with labor organizations, exposing those who dissuade employees from exercising their rights to organize and bargain collectively, so that the employees could be aware of that information when listening to the persuader's message. As DLCs often do not play any role in labor relations, applying § 203(a)(1) to DLCs would not serve this purpose.

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[94] *Warshauer v. Solis*, 577 F.3d 1330, 5 (11th Cir. 2009).
[95] *Id*.

> However, the plain language of § 203(a)(1) may reflect Congress' intent to cast light on other types of potential conflicts of interest or corruption that could harm union members. A real-life scenario serves as an example: a conflict of interest could occur where a union appoints a DLC and recommends him to its members only after the DLC has made significant payments to union officials. *See United States v. Boyd, 309 F. Supp. 2d 908, 910 (S.D. Tex. 2004)* (discussing indictments against UTU officials who solicited and collected cash payments from attorneys who sought to become DLCs). Indeed, Congress found "that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct. . . ." *29 U.S.C. § 401(b)*. Such activity could reach beyond persuader activity.
>
> Although perhaps digressive from the primary purpose of the LMRDA, the Secretary's application of § 203(a)(1) to DLCs is a faithful interpretation of the plain language of the LMRDA. As such, we find that it is not arbitrary and capricious. Because the language of § 203(a)(1) is clear and unambiguous, we need not look to the legislative history.[96]

The 11th Circuit agreed with the Department when it argued that the structure of the LMRDA does not mean that "employer" only means the employer whose employees the labor organization represents or seeks to represent. Based on the holding in this case and the Department's new interpretation in the instant NPRM, any time that any employer, not just one connected in some way with a union, enters into an agreement or arrangement with a consultant, both the employer and consultant have filing obligations. Thus, OLMS will essentially become the "news police" because it will have to keep track of every instance where an employer newspaper pursuant to an agreement or arrangement with any other person prints an opinion editorial on the subject of the labor market that could be construed as advocating on the issue of unionization. This obviously goes far beyond the intent of Congress in passing the LMRDA and presents serious constitutional problems. This is also contrary to the Department's past position. For instance, on November 13, 1972 the Solicitor of Labor in a letter to the General Counsel of the United Auto Workers (UAW) provided the following analysis of the reporting requirements under LMRDA Sec. 203:

[96] *Id*.

> Sections 203(a)(4) and 203(b) must be read in tandem. We would not consider these sections pertinent for several reasons. We do not think contributions by employers to an organization like the National Right to Work Committee assume the status of an agreement or arrangement within the meaning of these sections. The provisions of the Act are essentially designed to disclose a covert arrangement by an employer and consultant whereby the consultant attempts to influence or persuade that employer's employees in connection with a labor dispute. There are passages in the legislative history clarifying this point (Cong. Record 19759-62, Senate, 10/2/59), followed by a discussion of section 203(d) wherein it was said that no employer or consultant reports need be filed unless the specific circumstances set forth above are present. Section 203(d) of the Act also exonerates from reporting any employer unless he was a party to an agreement or arrangement. It would appear from this language that the Act contemplates more than a mere contribution to trigger the reporting requirement. In addition, we do not believe the Act suggests a massive reporting program such as might result if all contributors to associations, or dues paying members of employer associations, were required to report.[97]

This too apparently has changed.

While the LMRDA reporting requirements for speech related activities have up until now withstood legal challenge, the long standing interpretation of the "advice exemption" meant that many speech related activities in the past were not within the reporting mandates of the regulation.[98] That changes under the instant NPRM.

Even if one accepts the Department's overall premise that "union-busting middlemen"[99] are the cause of labor-management relations strife today, no reasonable person can say that the dissemination of opinion or advocacy communications outside of the labor-relations context is a problem for labor-management relations. To the contrary, the dissemination of these opinions and advocacy is a celebrated American ideal, one that should be protected.

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[97] *See*, *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, et al. v. National Right to Work Legal Defense and Education Foundation, Inc., et al.*, 590 F.2d 1139, 55 (D.C. Cir. 1978).

[98] *See*, *for instance*, *Master Printers of America v. Donovan*, 751 F.2d 700 (4th Cir. 1984).

[99] S. Rep. No. 85-1684, 85th Cong., 2d Sess. 7-8, quoted in the NPRM at 76 Fed. Reg. 36,178, 89 (June 21, 2011).

In the NPRM the Department mentions "middlemen" in some form at least 11 times. Any governmental interest in stopping these "middlemen" ends at the border of labor-management relations and does not extend into the area of public opinion and news. As such the Department's stated interest in stopping these "middlemen" cannot be used to justify a regulatory scheme that requires the filing of reports by non-profit organizations or newspapers such as those described in the scenarios above.

There is no legitimate Department interest in stopping a disaffiliated employer who is commissioning opinion editorials on issues of national public concern. There is no compelling governmental interest, no substantial governmental interest, and no legitimate governmental interest present at all in such situations.

Therefore the NPRM encroaches, without justification in reason or law, on the legitimate right of these entities to engage in speech.

H. THE NPRM FAILS TO DISCUSS SITUATIONS WHERE LABOR ORGANIZATIONS ENGAGE CONSULTANTS TO PERSUADE EMPLOYEES REGARDING JOINING A UNION

While the Department devotes considerable text in the NPRM to discussing the supposed ills of middlemen that would attempt to convince employees to not join a union, the Department devotes no text to union middlemen (consultants) who would attempt to convince employees to join a union.

Yet, despite the Department's failure to discuss union consultants who operate as labor persuaders, they do exist. For instance, the Service Employees International Union (SEIU) in 2009 paid $1,584,390 to the Direct Organizing Group the purpose of "Support for organizing."[100] The SEIU also previously paid as much as $935,623 a year to another labor persuader, the Prewitt Organizing Group.[101]

Since most unions, such as the SEIU, are employers per the definitions set forth in the LMRDA, if they utilize the service of consultants to persuade employees to join a union then they must file a Form LM-10 and the consultant must file the Form LM-20 within 30 days of the agreement or arrangement as well as the Form LM-21 after the end of its fiscal year.

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[100] 2009 Form LM-2 of the Service Employees International Union, filed March 31, 2010, OLMS file # 000-137 (accessed online at www.unionreports.gov on September 7, 2011).
[101] 2006 Form LM-2 of the Service Employees International Union, filed March 30, 2007, OLMS file # 000-137 (accessed online at www.unionreports.gov on September 7, 2011).

Somehow, the Department neglected to even mention this type of "middlemen." While the universe of covered entities is greatly expanded by the NPRM, unions, entities that are well known to utilize labor persuaders, are omitted from the NPRM. This is yet another reason to withdraw the NPRM.

I. BURDEN ANALYSIS USED IN THE INSTANT NPRM IS FAULTY

In the "Regulatory Procedures" section of the NPRM the Department estimates that the new requirements in the NPRM would result in "2,601 proposed Form LM-20 **filers**."[102] (Emphasis added.) In the very next sentence the Department refers to this as an increase in the number of "**reports**" *i.e.*, Form LM-20s that will be filed. (Emphasis added.) As the Department should realize, "filers" and "reports" are not the same thing. Yet, the Department uses these term interchangeably. Contrary to the Department's characterization, "filers" actually means the universe of covered persons who will be subject to the filing requirements and "reports" are the forms that are filed by these "filers." This is a rudimentary error which assumes that all "filers" only file one "report." The OLMS database clearly demonstrates that this is not the case.

A few examples are in order.

Looking through the OLMS database at the list of consultants that filed Form LM-20s, it is obvious that many consultants file numerous forms, not just one as is presumed in the NPRM. For instance consider the following five consultants that appear near the top of OLMS' alphabetical list:

- Action Resources in 2008 filed five Form LM-20s;[103]
- Agri-Labor Relations in 2006 and 2007 filed two Form LM-20s;[104]
- Alex, Joseph H, Jr. in 2010 filed two Form LM-20s;[105]
- American Consulting Group filed twelve form LM-20s in 2000, nine in 2001, two in 2002, five in 2003, nine in 2004, and seven in 2005;[106] and

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[102] 76 Fed. Reg. 36,178, 98 (June 21, 2011).
[103] Online Report Selection, Form LM-20, Organization: C-400, Consultant: ACTION RESOURCES. Available online at www.unionreports.gov (accessed September 7, 2011).
[104] Online Report Selection, Form LM-20, Organization: C-428, Consultant: AGRI-LABOR RELATIONS. Available online at www.unionreports.gov (accessed September 7, 2011).
[105] Online Report Selection, Form LM-20, Organization: C-461A, Consultant: ALEX, JOSEPH, JR. Available online at www.unionreports.gov (accessed September 7, 2011).
[106] Online Report Selection, Form LM-20, Organization: C-367, Consultant: AMERICAN CONSULTING GROUP. Available online at www.unionreports.gov (accessed September 7, 2011).

- American Employee Education Corp filed four Form LM-20s in 2000.[107]

These five are but just a very small sampling of the universe of filers. If the Department were to conduct a thorough analysis of the consultants that file the Form LM-20 it would likely find that its estimated burden per filer is off by a multiple of what it assumes it to be. Therefore, the Department should take another look at the universe of consultants that file the Form LM-20 and give a realistic estimate as to the total time burden that each will incur under the NPRM.

Looking at one of the Department's recent regulatory actions, the NPRM for the LM-30, there the Department deemed five minutes to be a "substantial burden." (See discussion, supra, on the Form LM-30 NPRM.)

As to the utility of these reports, in the Form LM-30 NPRM, the Department even stated that the filing of a large number of these forms would be counterproductive and would only serve to confuse the public. On one point where the Department attempted to justify the removal from the reporting requirements of situations that are clearly covered by the statute, it stated:

> Furthermore, by establishing a routine business exemption to loan reporting under sections 202(a)(3) and (a)(4), the Department would prevent the **submission of superfluous reports that would overwhelm the public with unnecessary information**, thus inhibiting the discovery of true conflict of interest payments.[108]

Curiously, however, OLMS has not seen fit to apply this own, self-created standard to the instant NPRM. Does OLMS or the public really need or want to know every time an employer engages a contractor to search Google for information? Under the OLMS standard articulated in the Form LM-30 rulemaking the answer would be no. Under the standard articulated in the instant NPRM the answer appears to be yes. Why the dichotomy?

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[107] Online Report Selection, Form LM-20, Organization: C-481, Consultant: AMERICAN EMPLOYEE EDUCATION GROUP. Available online at www.unionreports.gov (accessed September 7, 2011).
[108] 75 Fed. Reg. 48,416, 25 (August 10, 2010).

CONCLUSION

As described above, the problems present in the NPRM are numerous and substantial. The Department is intentionally trampling on the First Amendment rights of employers to speak on issues of concern regarding their workplaces. The Department is chilling the ability of employers to obtain legal advice. The Department is inserting itself into the attorney client relationship. The Department is requiring attorneys to make unauthorized disclosures that cause the question to be "raised as to his [the attorney's] fitness to practice law in other respects." At the same time the Department is continuing its practice of protecting information regarding organizing efforts so long as that information is in the possession of labor organizations and not other employers. Similarly, the Department is allowing labor organizations to protect information from disclosure when necessary to protect the health or safety of an individual, but the Department is not protecting individuals when this information is held by other employers or consultants. The huge disparity in treatment of employers and consultants versus labor organizations is repugnant.

Based on the foregoing, the NPRM should be immediately withdrawn.