

resides with the Secretary of Homeland Security.

Pursuant to section 641 of the Tariff Act, part 111 of title 19 of the Code of Federal Regulations sets forth the conduct and licensing requirements for customs brokers. Section 111.11 sets forth the basic requirements for obtaining a broker's license, including the requirement that the applicant must obtain a passing grade on the written examination within a 3-year period before submitting the application for a broker's license. 19 CFR 111.11.

Section 111.13(f) provides that an examinee can appeal a failing grade on the written examination by first filing a written appeal with Trade Policy and Programs, Office of International Trade, U.S. Customs and Border Protection (CBP), within 60 calendar days after the date of the written notice of the examination results. 19 CFR 111.13(f). After reviewing the submission, CBP provides the examinee with a written notice setting forth the decision on the appeal. If CBP's decision on the appeal reaffirms the result of the examination, the examinee may subsequently request review of CBP's decision on the appeal by writing to the Secretary of Homeland Security, or her designee, within 60 calendar days after the date of the notice from CBP.

#### Explanation of Amendment

As noted above, the Secretary of the Treasury delegated to the Secretary of Homeland Security the authority to prescribe rules and regulations relating to customs brokers. The Secretary of Homeland Security, in turn, delegated some of this authority to the Commissioner of CBP including the authority to regulate brokers. *See* Delegation Number 7010.3, dated May 11, 2006.

On October 19, 2007, CBP published a final rule in the **Federal Register**, at 72 FR 59166, setting forth technical corrections to the CBP regulations to reflect changes in CBP's organizational structure. Among the many technical changes in that document, consistent with the Homeland Security Act and Treasury Delegation 100-16, CBP amended 19 CFR 111.13(f) to remove the Secretary of the Treasury as the official with the authority to issue the final administrative appeal on a failing grade on the broker's exam and gave the Secretary of Homeland Security or her designee that authority.

Since the publication of the final rule regarding this particular technical amendment, CBP has determined that the Assistant Commissioner in CBP's Office of International Trade is the most appropriate official to issue the final

administrative appeal on a failing grade on the written customs broker's exam. This designation is consistent with DHS Delegation Number 7010.3, which delegates the authority to regulate customs brokers to the Commissioner of CBP. In addition, CBP notes that the Office of International Trade is staffed with examination subject matter experts and is uniquely positioned to independently and expeditiously review examination appeals. Accordingly, § 111.13(f) is being amended in this document by removing "Secretary of Homeland Security, or his designee" and adding, in its place, "Assistant Commissioner, Office of International Trade, U.S. Customs and Border Protection."

#### Administrative Procedure Act

Since this rule pertains to matters relating to rules of agency organization, procedure, or practice, this rule is not a substantive rule and is exempt from the notice and comment rulemaking requirements under the Administrative Procedure Act. *See* 5 U.S.C. 553(b)(A). In addition, the delayed effective date requirement of 5 U.S.C. 553(d) does not apply to this rule for these same reasons.

#### Regulatory Flexibility Act

Because this rule is not subject to the notice and public comment procedure requirements of 5 U.S.C. 553, it is not subject to the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*).

#### Executive Order 12866

These amendments do not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866. Therefore, the Office of Management and Budget (OMB) has not reviewed this rule.

#### Signing Authority

This document is being issued by CBP in accordance with § 0.1(b)(1) of the CBP regulations (19 CFR 0.1(b)(1)).

#### List of Subjects in 19 CFR Part 111

Administrative practice and procedure, Brokers, Customs duties and inspection, Imports, Licensing, Reporting and recordkeeping requirements.

#### Amendments to the CBP Regulations

■ For the reasons set forth above, part 111 of title 19 of the Code of Federal Regulations (19 CFR part 111) is amended as follows:

#### PART 111—CUSTOMS BROKERS

■ 1. The general authority citation for Part 111 continues to read as follows:

**Authority:** 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States), 1624, 1641.

■ 2. In § 111.13, paragraph (f) is revised to read as follows:

#### § 111.13 Written examination for individual license.

\* \* \* \* \*

(f) *Appeal of failing grade on examination.* If an examinee fails to attain a passing grade on the examination taken under this section, the examinee may challenge that result by filing a written appeal with Trade Policy and Programs, Office of International Trade, U.S. Customs and Border Protection, Washington, DC 20005 within 60 calendar days after the date of the written notice provided for in paragraph (e) of this section. CBP will provide to the examinee written notice of the decision on the appeal. If the CBP decision on the appeal affirms the result of the examination, the examinee may request review of the decision on the appeal by writing to the Assistant Commissioner, Office of International Trade, U.S. Customs and Border Protection, within 60 calendar days after the date of the notice on that decision.

Dated: September 21, 2009.

**Janet Napolitano,**

*Secretary.*

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#### DEPARTMENT OF LABOR

#### Office of Labor-Management Standards

#### 29 CFR Parts 403 and 408

RIN 1215-AB62

#### Labor Organization Annual Financial Reports

**AGENCY:** Office of Labor-Management Standards, Employment Standards Administration, Department of Labor.

**ACTION:** Final Rule; Rescission of January 21, 2009 rule.

**SUMMARY:** This final rule withdraws a rule published in the **Federal Register** on January 21, 2009, which revised the Form LM-2, an annual financial report required by the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA), and established standards and procedures by which the Department can revoke, when

warranted, the authorization for smaller labor organizations to file the Form LM-3, a less detailed annual financial report also required pursuant to the LMRDA. Upon consideration of the comments received following an April 21, 2009 notice of proposed rulemaking (NPRM), the Department withdraws the January 21 rule. The rule is withdrawn because the revisions it made to the Form LM-2 were issued without an adequate review of the Department's experience under the relatively recent revisions to Form LM-2 in 2003, and because the comments received indicate that the Department may have underestimated the increased burden that the rule would place on reporting labor organizations. Additionally, upon consideration of the comments received, the Department withdraws the provisions of the rule pertaining to the revocation of a small union's authorization to file a Form LM-3 report due to delinquency or deficiency in filing such report, because the revocation standards and procedures are not based upon realistic assessments of such a union's ability to file the more complex Form LM-2 and thus are unlikely to achieve the intended goals of greater transparency and disclosure. Moreover, the revocation provisions did not adequately balance the need for transparency with the burden placed upon smaller labor organizations.

**DATES:** Effective October 13, 2009, the Final Rule published January 21, 2009 amending 29 CFR parts 403 and 408 (74 FR 3678), for which the effective date was delayed on February 20, 2009 (74 FR 7814) and April 21, 2009 (74 FR 18132), is withdrawn.

**FOR FURTHER INFORMATION CONTACT:** Denise M. Boucher, Director, Office of Policy, Reports and Disclosure, Office of Labor-Management Standards, Employment Standards Administration, U.S. Department of Labor, 200 Constitution Avenue, NW., Room N-5609, Washington, DC 20210, (202) 693-1185 (this is not a toll-free number), (800) 877-8339 (TTY/TDD).

**SUPPLEMENTARY INFORMATION:**

**I. Statutory Authority**

This rescission of the January 21, 2009 rule (January 21 rule) is issued pursuant to section 208 of the LMRDA, 29 U.S.C. 438. Section 208 authorizes the Secretary of Labor to issue, amend, and rescind rules and regulations to implement the LMRDA's reporting provisions. Section 208 also provides that the Secretary shall "establish simplified reports for labor organizations or employers for whom [s]he finds that by virtue of their size a

detailed report would be unduly burdensome," and to revoke this authorization to file simplified reports for any labor organization or employer if the Secretary determines, after such investigation as she deems proper and due notice and opportunity for a hearing, that the purposes of section 208 would be served by revocation. Secretary's Order 01-2008, issued May 30, 2008, and published in the **Federal Register** on June 6, 2008 (73 FR 32424), contains the delegation of authority and assignment of responsibility for the Secretary's functions under the LMRDA to the Assistant Secretary for Employment Standards and permits re-delegation of such authority.

**II. Background**

**A. Introduction**

The rescission of the January 21 rule is part of the Department's continuing effort to fairly effectuate the reporting requirements of the LMRDA. The LMRDA's various reporting provisions are designed to empower labor organizations and their members by providing the means and information to ensure a proper accounting of labor organization funds. The Department believes that a fair and transparent government regulatory regime must consider and balance the interests of labor organizations, their members, and the public. Any change to a union's recordkeeping, accounting, and reporting practices must be based on a demonstrated and significant need for additional information, consideration of the burden associated with such reporting and any increased costs associated with reporting additional information.

On January 21, 2009, OLMS published in the **Federal Register** (74 FR 3678) a rule revising the Form LM-2 (used by the largest labor organizations to file their annual financial reports). The rule would require labor unions to report additional information on Schedules 3 (Sale of Investments and Fixed Assets), 4 (Purchase of Investments and Fixed Assets), 11 (All Officers and Disbursements to Officers), and 12 (Disbursement to Employees). The rule also would add itemization schedules corresponding to categories of receipts, and establish a procedure and standards by which the Secretary of Labor may revoke a particular labor organization's authorization to file the simplified annual report, Form LM-3, where appropriate, after investigation, due notice, and opportunity for a hearing. The rule was scheduled to take effect on February 20, 2009, and apply to labor

unions whose fiscal years began on or after July 1, 2009.

Consistent with the memorandum of January 20, 2009, from the Assistant to the President and Chief of Staff, entitled "Regulatory Review" and the memorandum of January 21, 2009, from the Director of the Office of Management and Budget (OMB), entitled "Implementation of Memorandum Concerning Regulatory Review," on February 3, 2009, the Department's Office of Labor-Management Standards (OLMS) published a request for comments (74 FR 5899) on a proposed 60-day extension of the effective date of the January 21 rule and invited comment on legal and policy questions relating to the rule, including the merits of rescinding or retaining the rule.

On February 20, 2009 (74 FR 7814), OLMS extended the effective date of the January 21 rule until April 21, 2009, to allow additional time for the Department to review questions of law and policy concerning the rule, for the public to comment on the merits of it, and, meanwhile, to permit unions to delay costly development and implementation of any necessary new accounting and recordkeeping systems and procedures pending this further consideration. On March 19, 2009 (74 FR 11700), OLMS published a proposed rule to further extend the effective date until October 19, 2009 and to extend the applicability date until January 1, 2010. The Department published, on April 21, 2009 (74 FR 18132), a final rule delaying the effective date until October 19, 2009, and the applicability date until January 1, 2010.

Upon consideration of the comments received on questions of law and policy raised by the January 21 rule, the Department proposed the rule's withdrawal on April 21, 2009 (74 FR 18172), because we were concerned that it may not have been informed by an adequate review of the Department's experience under the relatively recent revisions to Form LM-2 in 2003, and because the comments indicated that the Department may have underestimated the increased burden that would be placed on reporting labor organizations by the January 21 rule. Finally, the Department concluded, based on the comments received, that the provisions related to the revocation of a small union's authorization to file a simpler form because it has been delinquent or deficient in filing that form are not based upon realistic assessments of such a union's ability to file the more complex form and are unlikely to achieve the intended goals of greater transparency and disclosure.

The Department initially published the NPRM with a 30-day comment period to expire on May 21, 2009. However, in response to comments requesting extension of the comment period, the Department extended the comment period to June 22, 2009. 74 FR 23811.

This final rule addresses the comments received on the NPRM, and withdraws the January 21 rule. This rule takes effect upon publication, thereby relieving labor organizations from complying with the requirements of the January 21 rule and incurring the attendant burden of that rule. By withdrawing the January 21 rule, today's rule operates to continue the Form LM-2 reporting requirements that have been in place since 2003. Delaying the effective date of today's rule would not alter reporting obligations (given that no report would be due under the January 21 rule until the close of a fiscal year beginning on or after January 1, 2010), but could confuse labor organizations about their reporting obligations, add unnecessary planning and recordkeeping burden on these organizations, and potentially delay the submission of Form LM-2 reports.

#### *B. The LMRDA's Reporting Requirements*

In enacting the LMRDA in 1959, a bipartisan Congress sought to protect the rights and interests of employees, labor organizations and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers, employees, and representatives. The LMRDA was the direct outgrowth of a Congressional investigation conducted by the Select Committee on Improper Activities in the Labor or Management Field, commonly known as the McClellan Committee. The LMRDA addressed various ills through a set of integrated provisions aimed at labor-management relations governance and management. These provisions include financial reporting and disclosure requirements for labor organizations, their officers and employees, employers, labor relations consultants, and surety companies. See 29 U.S.C. 431-36, 441.

The Department has developed several forms for implementing the LMRDA's union financial reporting requirements. The annual reports required by section 201(b) of the Act, 29 U.S.C. 431(b) (Form LM-2, Form LM-3, and Form LM-4), contain information about a labor organization's assets, liabilities, receipts, disbursements, loans to officers and employees and business enterprises, payments to each officer, and payments to each employee

of the labor organization paid more than \$10,000 during the fiscal year. The reporting detail required of labor organizations, as the Secretary has established by rule, varies depending on the amount of the labor organization's annual receipts. 29 CFR 403.4.

Forms LM-3 and LM-4 were developed by the Secretary to meet the LMRDA's charge that she develop "simplified reports for labor organizations and employers for whom [s]he finds by virtue of their size a detailed report would be unduly burdensome," 29 U.S.C. 438. A labor organization not in trusteeship that has total annual receipts of less than \$250,000 for its fiscal year may elect to file Form LM-3 instead of Form LM-2. See 29 CFR 403.4(a)(1). The Form LM-3 is a five-page document requiring labor organizations to provide particularized information by certain categories, but in less detail than Form LM-2. A labor organization not in trusteeship that has total annual receipts less than \$10,000 for its fiscal year may elect to file Form LM-4 instead of Form LM-2 or Form LM-3. 29 CFR 403.4(a)(2). The Form LM-4 is a two-page document that requires a labor organization to report only the total aggregate amounts of its assets, liabilities, receipts, disbursements, and payments to officers and employees.

In 2003, the Department enacted extensive changes to the Form LM-2, the largest regulatory change to that form in the history of the LMRDA (2003 rule, 68 FR 58374 (Oct. 9, 2003)). As a result of the changes, labor organizations with annual receipts of \$250,000 or more are required to file a Form LM-2 report electronically and to itemize receipts and disbursements of \$5,000 or more, as well as receipts not reported elsewhere from, or disbursements to, a single entity that total \$5,000 or more in the reporting year. Such disbursements are required to be reported in specific categories such as "Representational Activities" and "Union Administration." The changes eliminated a category entitled "Other Disbursements" and, overall, sought much more detailed reporting. Labor organizations were permitted to report sensitive information for some categories that might harm legitimate union or privacy interests with other non-itemized receipts and disbursements, provided the labor organization indicated that it had done so and offered union members access to review the underlying data upon request pursuant to the statute (29 U.S.C. 431(c); 29 CFR 403.8(b)).

The 2003 rule also included schedules for reporting information

regarding delinquent accounts payable and receivable, and it required labor organizations to report investments with a book value of over \$5,000 that exceed 5% or more of the union's investments. Another new schedule required labor organizations to report the number of members by membership category, and allowed each labor organization to define the categories used for reporting. Finally, the 2003 rule required reporting labor organizations to estimate the proportion of each officer's and employee's time spent and the corresponding percentage of gross salary in each of the functional categories on the Form LM-2 and to report that percentage of gross salary in the relevant schedule.

### **III. Rescission of the 2009 Changes to the Form LM-2 Reporting Requirements**

For the reasons discussed below, the Department withdraws the January 21 rule. Its withdrawal, however, does not affect a labor union's continuing obligation to file detailed annual financial disclosure reports, as prescribed by the 2003 rule for Form LM-2 filers, thereby ensuring disclosure of financial information to union members, the Department, and the public as required under the LMRDA. The Form LM-3 was not changed by the January 21 rule and the existing form, therefore, continues in effect.

#### *A. Background*

The January 21 rule modified Form LM-2 by requiring labor organizations to disclose additional information about their financial activities. On the revised form, labor organizations would provide additional information in Schedule 3 ("Sale of Investments and Fixed Assets") and Schedule 4 ("Purchase of Investments and Fixed Assets"), which the rule justified by stating that the changes would allow verification that these transactions were performed at arm's length and without conflicts of interest. 74 FR at 3684-87. Schedules 11 and 12 were also revised to require reporting of the value of benefits paid to and on behalf of officers and employees. 74 FR at 3687-91. Labor organizations would report on Schedules 11 and 12 travel reimbursements indirectly paid on behalf of labor organization officers and employees. 74 FR at 3687-88. The preamble to the rule stated that these changes would provide a more accurate picture of total compensation received by labor organization officers and employees. 74 FR at 3689. The Form LM-2 changes also included additional schedules corresponding to the following categories of receipts: Dues

and Agency Fees; Per Capita Tax; Fees, Fines, Assessments, Work Permits; Sales of Supplies; Interest; Dividends; Rents; On Behalf of Affiliates for Transmittal to Them; and From Members for Disbursement on Their Behalf. 74 FR at 3691–93. These new schedules would require the reporting of additional information, by receipt category, of aggregated receipts of \$5,000 or more. *Id.*

#### *B. Discussion of Comments and Reasons for Withdrawing the January 21 Rule*

In its NPRM proposing rescission of the changes to the Form LM–2, the Department justified its proposed rescission on two grounds. First, the additional reporting requirements were imposed without an adequate review of the Department’s experience under the relatively recent revisions to Form LM–2 in 2003, with the result that the Department may have underestimated the increased burden that would be placed on reporting labor organizations and overestimated the additional benefits to union members and the public of the increased data disclosures. 74 FR 18173, 18175. Second, this failure to consider the utility of increased reporting and its attendant burdens may have resulted in a reporting regime that lacks the balance between the need for transparency in union financial reporting and the need to protect unions from excessive burdens attendant with such reporting, a result contrary to the purpose of the LMRDA. *Id.* After considering carefully the comments received on the proposal to withdraw the January 21 rule, the Department, for the reasons just mentioned and those discussed below, has concluded to withdraw the rule.

The Department received comments from 27 individuals or entities on the proposed withdrawal of the January 21 rule. Four unions and a federation of unions supported the withdrawal of the rule. The remaining 22 commenters opposed rescission, arguing that the rule should be allowed to take effect. Of this total, 18 were submitted by individuals, including nine form letters. An employer trade association, a business federation, two public policy groups, and a Congressman submitted comments. For discussion, the comments and the Department’s responses to them have been grouped as follows: the Department’s process for withdrawing the January 21 rule, the necessity to balance transparency with burden in setting reporting requirements, and the adequacy of the Department’s review of the 2003 Form LM–2 changes as a predicate to the January 21 rule.

#### 1. The Department’s Process for Withdrawing the January 21 Rule

A few of the commenters asserted that the Department was mistaken in delaying the effective date of the January 21 rule and proposing its rescission. They asserted that the rule did not raise questions of law or policy of the nature contemplated by the instructions provided Executive Branch agencies. See memorandum of January 20, 2009, from the Assistant to the President and Chief of Staff, entitled “Regulatory Review” and the memorandum of January 21, 2009, from the Director of OMB, entitled “Implementation of Memorandum Concerning Regulatory Review.” The Department disagrees. Agencies were directed to consider extending the effective date of regulations for the purpose of reviewing questions of law and policy raised by the regulations in question. Thus, on February 3, 2009, the Department published a request for comments (74 FR 5899) on a proposed 60-day extension of the effective date of the January 21 rule, inviting comment on legal and policy questions relating to the rule, including the merits of rescinding or retaining the rule.<sup>1</sup> To the extent these commenters may be suggesting that it should have been self evident that the January 21 rule did not pose any questions of policy or law warranting review, the Department disagrees. As noted in the Department’s proposal to withdraw the January 21 rule, the rule presented issues warranting the delay of its effective date and ultimately its withdrawal. These issues, which are discussed at length below, rebut any contention that the rule’s further review by the Department was unwarranted.

These same commenters assert that the Administrative Procedure Act, 5 U.S.C. 551, (APA) effectively prevents the Department from lawfully withdrawing the January 21 rule. The commenters apparently believe that the Department may not withdraw the rule without first conducting a

<sup>1</sup> The guidance identified the following factors to be considered in identifying rules that should be reviewed: (1) Whether the rulemaking process was procedurally adequate; (2) whether the rule reflected proper consideration of all the facts; (3) whether the rule reflected due consideration of the agency’s statutory or legal obligations; (4) whether the rule is based on a reasonable judgment about legally relevant policy considerations; (5) whether the rulemaking process was open and transparent; (6) whether objections to the rule were properly considered, including whether interested parties had fair opportunities to present contrary facts and arguments; (7) whether interested parties had the benefit of access to the facts, data, or other analyses on which the agency relied; and (8) whether the final rule found adequate support in the rulemaking record.

comprehensive study, including a new burden analysis in place of the analysis perceived as inadequate.<sup>2</sup> A commenter suggested that the withdrawal of the rule operates as prejudice of the requirements established by the 2009 rule.<sup>3</sup> One commenter asserted that the rulemaking record underlying the January 21 rule fails to support the conclusion that the Department, in promulgating that rule, was remiss in considering the benefits and burdens associated with that rule. As stated below, the Department holds the view, based on its consideration of the January 21 rule and the rulemaking record, that the January 21 rule was promulgated without undertaking a comprehensive review of experience under the 2003 rule. Given this material deficiency, the only logical option is to withdraw the January 21 rule. Any future proposals to change the reporting requirement would be shaped by such review of experience under the 2003 rule. The Department’s approach comports fully with the APA.

<sup>2</sup> The Department disagrees that a review of the 2003 changes is a necessary precursor to this final rule, as the rescission of the January 21 rule preserves the status quo for LM–2 filers and users of Form LM–2 information. This rule does not impose any additional reporting on labor unions, nor does it relieve labor unions from any reporting currently in effect. Similarly, the Department disagrees with the suggestion that the January 21 rule should remain in place until a meaningful review of experience under the 2003 rule has been completed. The Department believes that a better course of action would be to conduct a meaningful review of the 2003 revisions as a first step in proposing any changes to the Form LM–2. In this manner, the Department would be able to articulate the need for any proposed changes, and the public would be able to comment on the Department’s review of the 2003 revisions at the same time as they comment on the proposed changes. Continuing to extend the effective and applicability dates of the rule would continue the uncertainty for all stakeholders. Labor organization members and the public would likely not know what information labor organizations were required to report and when that information would be available through DOL disclosure, and Form LM–2 reporting labor organizations would experience confusion with respect to their reporting requirements and any needed modifications to their recordkeeping and accounting systems.

<sup>3</sup> The Department rejects the suggestion that the withdrawal of the January 21 rule will somehow affect any future judgment by the Department about any particular reporting requirement that now exists or may be proposed in the future. In this regard, the Department notes that some of the commenters on the proposed rescission of the January 21 rule have addressed particular aspects of that rule, identified particular benefits or problems with the rule, or suggested additional reporting requirements. The Department has not reached a determination on the merits of these contentions in deciding to withdraw the rule. These comments, along with the other information submitted in connection with the proposed rescission of the January 21 rule, will help inform any future rulemaking.

## 2. The Necessity for a Balancing of Transparency With Burden

The Department noted that a failure to consider adequately the utility of increased reporting and its attendant burdens on unions may result in reporting requirements at odds with the reporting regime intended by the Congressional authors of the LMRDA. The Department is obliged to “strike a balance between the dangers of too much and too little legislation in this field.” 105 Cong. Rec. 816 (daily ed. Jan. 20, 1959) (quoting Senator John F. Kennedy), reprinted in 2 *NLRB Leg. Hist. of the LMRDA*, at 969. The Department pointed out that Congress expressed a preference that “the major recommendations of the [McClellan] select committee [be implemented] within a general philosophy of legislative restraint.” S. Rep. No. 187 (1959), reprinted in 1 *NLRB Leg. Hist. of the LMRDA*, at 403. The Department further noted that the January 21 rule failed to take into account an imperative underlying the LMRDA, *i.e.*, that restraint and great care must be taken in regulating union internal affairs so as not to undermine union self governance by union members. 74 FR at 18175. Finally, the Department noted that Congress expressed a preference to avoid impeding legitimate unionism, citing to remarks by Senator Frank Church (105 Cong. Rec. 6024 (daily ed. Apr. 25, 1959), reprinted in 2 *NLRB Leg. Hist. of the LMRDA*, at 1233), and by Senator John F. Kennedy, who observed that Congress intended “to permit responsible unionism to operate without being undermined by either racketeering tactics or bureaucratic controls.” 105 Cong. Rec. 816 (daily ed. Jan. 20, 1959), reprinted in 2 *NLRB Leg. Hist. of the LMRDA*, at 969.

Multiple commenters agreed that the Department has an obligation to balance the need for transparency with the need to protect unions from excessive burdens when implementing the LMRDA’s reporting and disclosure requirements. A federation of unions stated that the new provisions in the January 21 rule did not have any demonstrated utility that would justify their imposition, nor did the rule provide the information necessary to balance the competing interests.

An international union stated that Congress gave the Secretary the discretion to prescribe the categories and details of the annual financial disclosure reports, in order to ensure that it properly maintains the balance Congress sought between transparency and not overburdening unions. The union asserted that Congress intended a

balance, citing the right of members to examine the union’s books pursuant to section 201(c) of the Act. Further, it specifically expressed concern over the potential release of “trade secrets” to employers and management consultants, such as those related to job targeting, market recovery, and union organizing programs. The union also asserted that detailed reporting requirements are unnecessary because union members are sophisticated enough to seek information about union financial matters from their unions, as well as seek publicly available information, such as that provided by IRS. The union thus concluded that the January 21 rule failed to achieve the balance required by the LMRDA.

Only two commenters who opposed the proposal to rescind the January 21 rule specifically addressed the intent of Congress in this regard. One commenter, a trade association, rejected the Department’s conclusions on the need for balancing interests. Another commenter, a business federation acknowledged that the “Department is certainly obliged to consider the intent of Congress” but expressed its view that the January 21 rule “carefully considered the intent of Congress to ‘strike a balance between too much and too little legislation in the field.’” Therefore, although the business federation disagreed with the Department regarding whether or not it conducted an adequate review of the 2003 changes and whether it carefully considered congressional intent in drafting the regulations, it did not disagree with the Department’s conclusion that reporting requirements should reflect Congressional desire to “strike a balance.” The trade association offered its view that Congress did not evidence an intent to strike a balance between too much and too little legislation in this field, but rather desired to establish union financial transparency, an object it believed to have been achieved by the January 21 rule. The Department disagrees. As stated in the key Senate Report on the legislation that ultimately became the LMRDA:

In acting on this bill, the committee followed [these] principles:

1. The committee recognized the desirability of minimum interference by Government in the internal affairs of any private organization. Trade unions have made a commendable effort to correct internal abuses; hence the committee believes that only essential standards should be imposed by legislation. Moreover, in establishing and enforcing statutory standards great care should be taken not to undermine union self-government or weaken

unions in their role as collective-bargaining agents.

2. Given the maintenance of minimum democratic safeguards and detailed essential information about the union, the individual members are fully competent to regulate union affairs. The committee strongly opposes any attempt to prescribe detailed procedures and standards for the conduct of union business. Such paternalistic regulation would weaken rather than strengthen the labor movement; it would cross over into the area of trade union licensing and destroy union independence.

S. Rep. No. 187, reprinted in 2 *NLRB Leg. Hist. of the LMRDA*, at 403.<sup>4</sup>

These principles (which are not referenced in the trade association’s comments) show an effort to strike a balance between regulation of union affairs and interference with such affairs, *i.e.*, on the exercise of “legislative restraint.” Further, there is nothing in the House Report, H. Rep. No. 741, reprinted in 1 *NLRB Leg. Hist. of the LMRDA*, at 759–33, or other legislative materials suggesting an alternative regulatory approach. Moreover, as a matter of policy, the Department believes that it should achieve the goal of transparency in union financial reporting without imposing unnecessary requirements.

The Department acknowledges the commenter’s important observation that the Senate Report recognizes that “[t]he members who are the real owners of the money and property of the organization are entitled to a *full accounting* of all transactions involving their property” and “[t]his bill insures that *full information*” concerning the unions’ financial operations are “available to the members of such organizations.” S. Rep. No. 187, at 8, reprinted in 1 *NLRB Leg. Hist. of the LMRDA*, at 404 (emphasis added). At the same time, this statement in no way suggests that the Department was to achieve transparency in a way that would overburden unions with “bureaucratic controls.” Congress provided the members an additional right through section 201(c) of the Act, which permits them to see the underlying documents of the submitted annual financial reports if they provide “just cause.” 29 U.S.C. 431(c). The language of that section, which of necessity confers on members a right to receive information unavailable to others, logically imposes bounds on the information available to individuals and entities lacking that status.

<sup>4</sup> The report also identified as a third principle the need to avoid imposing sanctions on the union or its members where officer conduct is at issue. This principle, like the two quoted, evidences a purpose of balance and restraint in regulating union affairs.

In this regard, the Department agrees with the statement of an international union, which argued that Congress never intended that the annual reports designed by the Secretary should disclose to members, much less the general public, every "bit of probative financial information." Rather, section 201(c) of the Act exists to enable the members, and not the general public, to have access to their unions' books if they can show "just cause." The union cited decisions that illustrate that the "just cause" requirement is nominal, and that it does "not pose any barrier to a union member's honest inquiry into the supporting records [of the union]." *Fruit & Vegetable Packers' Local 760 v. Morley*, 378 F.2d 738, 743 (9th Cir. 1967). The union also asserted that Congress did not want management agents or consultants to unfairly take advantage of the financial disclosure requirements, relying on the remarks of Senator Javits on the justification for requiring union members to show good cause to examine the data underlying a union's financial reports. See 105 Cong. Rec. 5853-54 (daily ed. Apr. 23, 1959), reprinted at 2 *NLRB Leg. Hist. of the LMRDA*, at 1127-28. The union stated that preventing public disclosure of certain areas of union finances does not deprive union members of this information, but it would prevent employers from exploiting this information in order to prevent workers from organizing or for the employers to otherwise engage in "union avoidance." At the same time, the Department acknowledges, as pointed out by a trade association, that litigation, with the attendant costs of time and money, is sometimes necessary to obtain such information and that a union's refusal to provide the information may not always be reasonable. Nonetheless, Congress established this procedure to protect the interests of both the union and its members and financial reporting cannot be justified on the basis that the protections embodied in section 201(c) may be trumped on the claim that the Department possesses unbounded authority under section 201 to require complete and unlimited disclosure of union financial information.

### 3. Failure To Conduct a Meaningful Review of the 2003 Form LM-2 Changes

Several commenters expressed support for withdrawing the January 21 rule, agreeing with the Department's observations in the NPRM that the rule was promulgated too soon after the 2003 changes to the Form LM-2 reporting regime and without an adequate review of the benefits and costs of the changes. In support of the proposed rescission, a

federation of unions stated that the Department had failed to properly consider the benefits and costs associated with such changes. It referenced earlier comments it had submitted, in which it stated the principle that a regulatory agency's first obligation in establishing and improving financial accounting and reporting is "to determine that a proposed standard will fill a significant need and that costs imposed to meet that standard, as compared with other alternatives, are justified in relation to the overall benefits of the resulting information." FASB, Statement of Financial Accounting Standards No. 117; Financial Statements of Not-for-Profit Organizations (June 1993) Section 38. In the federation's view, the January 21 rule failed this test. It asserted that the Department had ignored the experience under the 2003 rule in imposing additional reporting requirements; instead, it merely relied on the explanation it had offered in support of the 2003 rule. The federation explained that the 2003 rule imposed unprecedented itemization requirements on unions, necessarily requiring the Department at that time to make a speculative assessment of costs and benefits. However, it argued that this approach was an unacceptable substitute four years later when actual data and experience under the 2003 rule was available. Because itemization costs impose the principal recordkeeping and reporting burden on unions, it was imperative, in the federation's opinion, to obtain information on such costs before imposing additional itemization requirements. With respect to the anticipated public benefit of the reporting imposed by the 2003 rule, the federation asserted that the Department's own annual reports failed to show a significant increase in the number of enforcement actions—an expected outcome if the 2003 rule was fulfilling the objective of disclosing financial improprieties. Thus, it concluded that there was no basis for the Department's assessment that additional reporting would achieve the benefits predicted.

One international union recognized that the Department has collected "vastly increased amounts of information" from unions since the 2003 changes, but it has not conducted any empirical study of the costs or effects of those revisions. Further, the 2003 changes contained significant "start-up" costs, such as revising computer programs and accounting practices and training staff, which the union alleged cost millions of dollars for

some unions, as well as more long-term costs regarding ongoing compliance. The union provided as an example the hundreds of additional pages that it filed in 2007 as opposed to 2004, the last year before the 2003 changes became effective. The 2007 report, in its view, was filled with "financial minutia" costly to track and without any purpose or benefit. Ultimately, it views the 2003 changes as "punitive and unnecessary." The federation of unions and an international union explicitly supported the Department's assertion that a review of the information received since 2003, as well as an examination of the data regarding burden since 2003, would provide a foundation on which the Department could determine whether or not additional changes are needed. One national union offered several suggestions for calculating the burden on unions following the 2003 rule and the January 21 rule. For example, it asserted that the Department should have considered the increased costs incurred by unions in using outside accountants as opposed to internal ones in complying with Form LM-2 reporting, a practice that this national union and other large ones like it employ.

Other commenters related concerns with regard to the burdens and benefits of the 2003 rule, and opined that such a review would reveal undue burden, and thus militate against any additional reporting requirements such as those imposed by the January 21 rule. These union commenters argued that the Department should rescind the January 21 rule until it can accurately assess both the benefits and burdens of the 2003 rule. One international union referred to the 2003 revisions as "punitive and excessive" and urged the Department to examine their impact with a goal of significantly reducing the recordkeeping burden to a "more rational level, consistent with the LMRDA." A national union stressed the "onerous" burden that the 2003 rule created for it and its affiliates, in terms of economics and operations, and argued that any additional burdens imposed by the rule are not justified by any meaningful benefits, the existence of which it doubted.

The remainder of the commenters opposed rescission of the January 21 rule. Most emphasized the general importance of union financial reporting and disclosure requirements, some asserting that withdrawal of the rule ran counter to the President's focus upon transparency. Six commenters opposed the rescission of the rule on substantive grounds. One individual, a retired union

associate member, argued in support of the January 21 rule. While commenting on the value of the reports submitted under the 2003 rule, he also expressed the view that the additional reporting by union officials would be beneficial to union members. Three commenters offered several recent examples of union corruption as support for the January 21 rule. An employer trade association referenced several comments from individuals, including union members, who offered support for the January 21 rule. The trade association emphasized its interest in disclosure of union job targeting expenditures. The trade association submitted a study as support for its view that unions significantly underreport the amount they spend on job targeting, a problem recognized and partially addressed by the January 21 rule.<sup>5</sup> In its view, the study also demonstrated that the 2003 rule required additional reporting requirements if union members were to be given a true picture of their unions' financial health and its use of members' funds, especially in reconciling membership and dues numbers.

Another individual commenter opposing rescission of the January 21 rule stressed the Department's enforcement record (e.g., the number of indictments and convictions recorded) over the past eight years as a reason not to reduce the financial disclosure requirements and "weaken the government's ability to fight" union corruption. A Congressman cited similar enforcement statistics and highlighted other aspects of the Department's enforcement efforts. He also outlined arguments for the additional reporting obligations—to better understand officer and employee compensation by identifying benefits payable to particular individuals, to allow union members to see the travel and related expenses incurred by the union in

connection with an individual's travel and lodging, the itemization of receipts received by unions in excess of \$5,000, and the names and other information about the purchase and sale of union assets. He also relied on a 1999 legislative report (as did another commenter) as support for the requirement to disclose all payments made to particular union officials. Subcomm. on Oversight and Inv. of the Comm. on Education and the Workforce, *Report on the Financial Operating and Political Affairs of the International Brotherhood of Teamsters* (1999). The Congressman also summarized the steps taken by the Department in revising its burden estimates, concluding that the estimate reflected the most accurate data available to create a fair and accurate representation of the compliance costs associated with the January 21 rule.

The Department disagrees that rescinding the rule will weaken the agency's ability to fight fraud and embezzlement. The Department has not carefully reviewed the potential deterrent effect, if any, associated with the 2003 revisions to the Form LM-2, and there is no support in the rulemaking record for drawing a reasonable inference about the probable impact of the additional reporting requirements prescribed by the January 21 rule. Indeed, the prior eight-year period of 1993–2000 actually yielded slightly higher results than the eight-year period of 2001–2008, with 1,193 indictments and 1,159 convictions. The year 2000 totals, 204 indictments and 191 convictions, are higher than any of the yearly totals from 2001–2008. Moreover, these results all derive from a period prior to the 2003 changes to the Form LM-2. In making this point, however, the Department does not suggest that previous versions of the Form LM-2 were more effective tools in fighting union corruption, or that there is a link between any specific Form LM-2 data and the overall rate of fraud and embezzlement. These figures are offered solely to show that there is an insufficient record to justify increases or reductions in reporting form data collection by reference to changes in enforcement statistics.

In particular, there has been no review as to whether the 2003 changes resulted in increased indictments or convictions; improved compliance; offered members information needed for self-governance, accountability or fiscal management; or otherwise aided the Department or the public in exposing union fraud or corruption. The Department concurs with commenters who have suggested that before moving

forward with the additional reporting requirements imposed by the 2009 final rule, it should have engaged in a meaningful review to assess the benefits, effectiveness, and usefulness of the 2003 changes. The lack of such a review justifies today's rescission of the January 21 rule.

The Department fully recognizes and supports the importance of union reporting and disclosure to the union members and to the public, but it also believes that the LMRDA requires a balancing of transparency with the need to maintain union autonomy without overburdening unions with reporting requirements. The Form LM-2, as established by the January 21 rule, did not adequately consider this balance. In this regard, the Department does not believe that this necessary balancing is possible without a review of the 2003 changes to the Form LM-2, which the rulemaking process that culminated in the January 21 rule did not undertake. The commenters did not provide any contrary reasoning.

In proposing rescission of the January 21 rule, the Department stated that it was a mistake to propose further changes to the Form LM-2 reporting requirements so soon after the 2003 rule without proper consideration of the effects of these changes. Without undertaking such review, the Department could not adequately weigh the merits of the increased disclosure against the associated burdens on the union filers. 74 FR 18175. As there stated, the Department recognized that the January 21 rule did not adequately consider the effects of the 2003 changes, particularly regarding the assumed benefits of the changes. The January 21 rule did not adequately show that the 2003 changes either succeeded or failed in achieving their intended purpose. Further, the Department explained that additional review of the post-2003 reporting history would be beneficial before deciding that additional regulatory changes would facilitate these purposes. Additionally, the Department recognized that financial transparency is necessary to protect against union fraud and corruption, enhance accountability among union officials, and that it is necessary for members to effectively engage in union self-governance. However, it also noted that a review of the usefulness of the information that has been reported since the Form LM-2 was revised in 2003, as well as the burden placed on unions by that revision, would provide a better basis for determining whether additional changes are necessary than the unverified assumptions underlying the January 21 rule. This review would

<sup>5</sup> Armand J. Thieblot, *Job Targeting and Market Recovery Practices of Construction Unions: Their Apparent and Hidden Costs* (2008) (John M. Olin Institute for Employment Practice and Policy, George Mason University). Rescinding the January 21 rule leaves in place the 2003 instructions concerning the reporting of expenses involved in job targeting. The Department takes no position on the observations and conclusions made by this author. It deserves mention, however, that this private study, which focuses primarily on only a small aspect of union financial reporting, involved considerable research and review of reporting data under the 2003 rule, including the review of a considerable number of Form LM-2s. (The study is not part of the January 21 rulemaking record, presumably because it was published after the close of the comment period for that rule). The author describes his research and explains his methodology and the reasoning in arriving at his conclusions. The study highlights the absence of anything comparable in the January 21 rule or its rulemaking record.

permit the Department to properly balance the need for transparency with the need to protect unions from excessive burdens imposed by reporting and disclosure requirements.

In contrast to the Department's assessment that no meaningful review of prior Form LM-2 changes had been undertaken in connection with the January 21 rule, one commenter expressed the view that the rule reflects a "well reasoned culmination to eight years of solid work", while another characterized it as a product of the "expertise" of Department officials and others in identifying and reviewing areas of the Form LM-2 that could be improved. A business federation stated that the rule is supported by comments that verified the assumptions underlying the 2003 burden estimates and that the Department had made significant changes to improve the methodology for estimating burden and improve the accuracy of its burden estimates.

After carefully considering the competing points of view among the commenters, the Department continues to hold the opinion that the Department failed to conduct an adequate analysis of the effects of the 2003 Form LM-2 revisions before it developed the additional reporting requirements adopted in the January 21 rule. Although the Department justified the January 21 rule, in part, on experience under the 2003 rule, see 74 FR 3681-82, that experience was neither documented nor comprehensively analyzed. The informal, anecdotal information on which the Department relied was simply inadequate for the task. It was no substitute for a more comprehensive review such as, for example, a survey of all Department investigators or a documented review of the thousands of filings received by Department under the 2003 rule. See 74 FR at 3681 (referring to "opportunity to review thousands of forms and to tap the experience gained by its staff in investigating Form LM-2 issues and from their dialogue with union officials and union members while providing Form LM-2 compliance assistance to them"); 74 FR 3684 (citing to "OLMS experience over years of auditing and investigating union financial activities"). While such experience is valid, it is a poor substitute for a comprehensive review of experience under the 2003 rule.<sup>6</sup> It is the

Department's opinion that, as a matter of policy, the regulated community and the public should have the benefit of the Department's best analysis of its regulatory experience before it proposes to place additional burdens on unions. Despite "the benefit of three cycles of reviewing forms," the Department did not undertake a comprehensive review of the 2003 changes, and it did not provide any assessment in the January 21 rule of benefits obtained from such changes. 74 FR 3681. Instead, it merely provided arguments as to why further reporting changes were needed, rather than addressing the impact of the previous changes in terms of benefits and burdens. See 74 FR 3681-84.

The Department attempted to partially account for the absence of appropriate review by characterizing the January 21 rule as "incremental" reform to the Form LM-2. 74 FR at 3681. Indeed, the 2008 NPRM proposing the January 21 rule stated that the 2003 changes to the Form LM-2 "helped to fulfill the LMRDA's reporting mandate." 73 FR 27348. However, the NPRM provided no indication that this conclusion was based on a comprehensive review of experience under the 2003 rule. Only when the Department has engaged in such review can it determine if "incremental" changes to the 2003 Form LM-2 reporting regime, such as those implemented in the January 21 rule, are justified in light of the need to balance competing interests. While increased disclosure provides beneficial information to members, it is by no means clear that such benefits outweigh the institutional cost to unions and the members themselves by disclosing information, in some instances comparable to trade secrets, to the general public. Thus, a review of experience under the 2003 rule should include an assessment of the burden that such increased reporting imposes on unions, not merely in terms of cost but also in terms of its impact on the unions' ability to represent its members. Yet the January 21 rule fails altogether to account for this cost to unions and their members. The Department, therefore, disagrees with the business federation's assertion that the Department evidenced "a meaningful and adequate review" in its January 21 rulemaking. A general reference in the preamble to the January 21 rule—to "the benefit of three cycles of reviewing forms \* \* \* to assess the utility of the form and to identify areas in which improvement was needed"—falls short of a meaningful review of the benefits of the form to the reader or the burden to the filer. Such analysis simply cannot be

completed within the four corners of the filed reports.

The same commenter asserted that the Department in revising its initial burden estimates for the January 21 rule had taken into account "actual costs and data that were identified by labor organizations in their comments and other data sources." On the contrary, the Department expressly rejected the concept of using actual post-2003 costs. See 74 FR 3703. In the burden analysis to the January 21 rule, the Department conceded that "after considering the comments regarding actual costs associated with the LM-2 revision in 2003, the Department has decided to retain the approach adopted in the NPRM and use the costs *estimates developed in 2003* as a baseline for the costs associated with this [2009] revision." 74 FR 3703 (emphasis added). A Congressman, commenting on this issue, acknowledged that "the 2009 burden estimates were based on 2003 estimates which were applied to actual data taken from 2007 Form LM-2s."

The business federation asserted that the Department provided for comment its 2006 publication of its paperwork burden package in the **Federal Register**, and that no comments were received from any union or anyone else indicating that there were any problems or issues with the Department's 2003 burden hour estimates or the methodology used to calculate those estimates (OMB ICR Reference No. 200609-1215-016). In the Department's view, the absence of comments does not excuse the failure to undertake a proper review of reporting burdens. The Department believes that there is a need for a meaningful review of the consequences of the 2003 changes, a review that has not yet been performed, and such a review is necessary to determine the actual benefits and burdens of the 2003 changes.

In the course of this rulemaking, the Department received comments from labor organizations regarding burden issues that merit review. Even though such comments would be helpful in gauging the 2003 rule's impact on union members, information from a much larger sample of union members would be needed to provide a reasonable benchmark for considering changes in the reporting regimen. Review of such experience, among other lines of inquiry, might include the effects of the 2003 changes in such areas as the detection, prosecution, and deterrence of fraud and corruption; compliance assistance; the aiding of members in exercising their rights to view additional materials under section 201(c); the support of members in utilizing their

<sup>6</sup> Although the rulemaking record contains support for the various examples used to illustrate a concern about a particular aspect of Form LM-2 reporting, the record does not allow an inference to be drawn about the frequency at which the circumstances described occur.

rights under the trusteeship, election, and other provisions of the LMRDA in furthering union accountability, fiscal management, and self-governance; the provision to the public of tools that advance labor-management transparency and union democracy; or in ascertaining the actual, as opposed to estimated, costs to unions in reshaping and maintaining their recordkeeping and accounting systems to comply with the 2003 changes. Therefore, the Department does not know the extent to which the need of union members and the public for transparency has been met by the 2003 rule, or whether the rule appropriately balances that need for transparency without overburdening unions.

The failure to conduct appropriate review as a predicate for the new reporting requirements in the January 21 rule is compounded by the weaknesses in the 2003 data that was used to estimate the compliance burden. A national union asserted, based on its experience, that the 2003 burden estimates were “grossly underestimated.” This union estimates that the 2003 rule resulted in a 40–45% increase in its initial compliance costs, which were substantially larger than the Department’s estimates in 2003, and the union offered similar data for its annual cost to comply with the 2003 changes, which it alleges are also multiple times higher than the Department’s estimates. The commenter expressed fear that these errors led to equally erroneous calculations in the January 21 rule. As an example, the union states that the itemization for interest and dividends will result in substantially greater costs than estimated, because its accounting system does not maintain information on payment sources, payment amounts, payment dates, or payment purposes.

The Department agrees with the comments that the Department, in fashioning the January 21 rule, effectively overlooked the problem of relying on the necessarily speculative estimates for costs associated with the itemization of substantial disbursements, as required by the 2003 rule. In crafting that rule, the Department had no real cost experience to draw on in making the estimates. Indeed, as the Department’s own explanation makes plain, see 74 FR at 3704–05, the Department had to substantially revise its own estimates of the burden associated with the 2003 rule, based on comments it received from labor organizations.

The Department agrees with a national union’s comments regarding the necessity to review the post-2003 data in terms of the perceived benefits

of the 2003 changes in such areas as protecting unions against fraud and corruption, assisting the Department in enforcing compliance, and providing meaningful information to union members so they can engage in self-governance. The union asserted that no evidence exists as to whether those objectives have been met by the 2003 changes. It shared its own experience under the 2003 rule: no instances of fraud or embezzlement have been uncovered; the new schedules have had no impact on the governance of the union; and no questions or issues related to the information reported on the new schedules have been raised by any member of the union, as evidenced by a review of correspondence from the members to the union’s president, as well as member meetings attended by the president. As noted above, these issues need to be considered in reviewing the costs and benefits associated with the 2003 rule and that such review is a necessary predicate to any proposal to revise the 2003 reporting requirements.

For the reasons articulated above, the Department disagrees with a business federation’s defense of the process and conclusions leading up to the January 21 rule, suggesting that the review was adequate and that at best the proposed rescission was merely a “policy disagreement” with the past Administration. Regardless of whether the Department agrees or disagrees with the January 21 rule, the rescission is based primarily on the Department’s failure to undertake meaningful review of experience under the 2003 rule, including the benefits and burdens associated with the rule, leaving the Department unable to assess whether the reporting requirements achieve the balance intended by Congress.

A public policy group requested the Department to engage in a burden analysis, viewing the absence of a new burden analysis for the January 21 rule as fatal to the proposed rescission of that rule. Such analysis is not required for this action, as the Department is not proposing any changes to the existing Form LM–2 but, rather, is rescinding the changes made on January 21, 2009.

Additionally, the Department disagrees with the contention of a commenter that it was an improper use of government resources to engage in further rulemaking on the Form LM–2. The Department believes that resources spent on rescinding a poorly-justified rule are well-spent. Moreover, the burden on the public and the Department from permitting the January 21 rule to go into effect far outweigh the costs of rescinding them.

The Department’s current view is that before implementing additional financial reporting requirements, a more comprehensive review of the experience under the 2003 rule should have been completed, along with engagement in a meaningful dialogue with labor unions and public policy groups interested in union financial reporting. The parties with a particular interest in financial reporting should be able to fully understand the Department’s support for its proposals and, as appropriate, to comment on its sufficiency as rulemaking begins. In promoting transparency and accountability—purposes served by the disclosure and reporting provisions of the LMRDA—the Department must share with the public all the information it relies on in support of a proposed rule change.

#### **IV. Rescission of the Procedure To Revoke the Form LM–3 Filing Authorization**

##### *A. Background*

The January 21 rule established standards and procedures for revoking the simplified report filing authorization provided by 29 CFR 403.4(a)(1) for those labor organizations that are delinquent in their Form LM–3 filing obligation, fail to cure a materially deficient Form LM–3 report after notification by OLMS, or where other situations exist where revoking the Form LM–3 filing authorization furthers the purposes of LMRDA section 208.

Under the revocation procedure, where there appear to be grounds for revoking a labor organization’s authorization to file the Form LM–3, the Department could conduct an investigation to confirm the facts relating to the delinquency or other possible basis for revocation. If the Department after investigation finds grounds for revocation, the Department could send the labor organization a notice of the proposed Form LM–3 revocation stating the reason for the proposed revocation and explaining that revocation, if ordered, would require the labor organization to file the more detailed Form LM–2. The letter would provide notice that the labor organization has the right to a hearing if it chooses to challenge the proposed revocation, and that the hearing would be limited to written submissions due within 30 days of the date of the notice.

In its written submission, the labor organization would be required to present relevant facts and arguments that address whether (1) the report was delinquent or deficient or other grounds for the proposed revocation exist; (2) the deficiency, if any, was material; (3) the

circumstances concerning the delinquency or other grounds for the proposed revocation were caused by factors reasonably outside the control of the labor organization; and (4) any factors exist that mitigate against revocation.

After review of the labor organization's submission, the Secretary would issue a written determination, stating the reasons for the determination, and, as appropriate based on neutral criteria, inform the labor organization that it is required to file the Form LM-2 for such reporting periods as she finds appropriate.

#### *B. Reasons for Rescission of the Revocation Standards and Procedure*

In proposing to rescind the Form LM-3 standards and procedure for revocation, the Department justified its proposal on two grounds. First, the Department stated that the January 21 rule did not adequately assess the burden placed on smaller labor organizations by the standards and revocation procedure. The Department also stated its belief that, in light of that burden, there was no realistic likelihood that the standards and procedure would accomplish the intended results of increased transparency and more disclosure. The Department explained that there is no realistic likelihood that most small unions would have the information or means to file the more detailed Form LM-2. 74 FR 18176-77. Second, the Department explained, as discussed above, that the LMRDA requires a balancing of transparency and union autonomy, a balance that the January 21 rule failed to achieve. *Id.*

After having considered the comments received on this issue, the Department remains of the view that the standards and procedure for revocation should be withdrawn. As discussed below, the January 21 rule predicted that less than 100 labor unions per year would suffer revocation. Nevertheless, many times this number of unions would be drawn into the process, requiring the expenditure of time and effort without any demonstrated showing that Form LM-3 filers subject to revocation will be able to properly file a Form LM-2. Furthermore, as discussed below, the Act requires a balancing of transparency and union autonomy, and the January 21 rule did not take this mandate into account in formulating the standards for revocation (*i.e.*, delinquency or deficiency in filing, which it argued indicated a greater need for transparency, as those unions were more likely to experience financial corruption). There is nothing in the preamble to establish what percentage

of filers delay their filings or file incomplete reports for "benign," as distinct from more culpable reasons, and nothing to suggest that a significant number of filers delay their filings or submit incomplete reports because they have reason to conceal financial information. For these reasons, the Department is not persuaded that the approach crafted in the January 21 rule ensures the required balance or is likely to improve compliance. Instead, this approach seems less likely to achieve compliance than establishing cooperative arrangements between the Department and national/international unions to assist smaller unions with fulfilling their reporting obligations.

The January 21 rule establishing the standards and procedure for revocation stated that unions that are deficient or delinquent in their Form LM-3 filings are more likely to experience financial corruption and, therefore, are in greater need of increased financial transparency through Form LM-2 reporting. 74 FR at 3697. However, as stated in the April 21 NPRM, the Department reevaluated the efficacy of the standards and procedure in achieving this end. 74 FR at 18176-77. In coming to this view, the Department determined that the January 21 rule did not adequately assess the burden on smaller unions in filing a Form LM-2 report and, therefore, misjudged the effectiveness of the revocation as a means to increase transparency. As stated in the proposal to rescind the January 21 rule, the revocation provisions of the rule are counter-intuitive and the rule fails to demonstrate that Form LM-3 filers required to file the more detailed and complicated Form LM-2 reports are likely to submit timely, complete, and accurate Form LM-2 reports. 74 FR at 18176. Moreover, the Department stated that there was insufficient support in the rule for the conclusion that revocation will reduce delinquency and deficiencies in reporting. *Id.*

As explained in the NPRM, the January 21 rule projected that 96 filers would be required to file the Form LM-2 and calculated the associated burden on that projection. This burden is necessarily understated due to the fact that some associated burden applies to all Form LM-3 filers, not merely those whose right to file a Form LM-3 is revoked. In order to file a Form LM-2, steps must be taken at the start of the fiscal year. Accounting systems and procedures must be in place that will track and maintain the data required by the Form LM-2. Therefore, as explained in the NPRM, the Department concluded that there is no realistic likelihood that most small unions

would have the information or the means to file the more detailed Form LM-2, and that the revocation standards and procedure established by the rule will be unlikely to result in more disclosure. *Id.*

As stated in the NPRM, the Department agreed with comments that had previously been submitted that advocated a compliance assistance approach, particularly one drawing upon the cooperative efforts of national and international unions, rather than a revocation procedure. As stated in the NPRM, a revocation procedure is not likely to improve delinquency and deficiencies in Form LM-3 reporting, and it could actually contribute to continuing non-compliance since filers may have greater difficulty successfully meeting the Form LM-2 reporting requirements. The Department explained that a compliance assistance approach is more likely to increase proper reporting than a revocation approach that is counter-intuitive and likely to damage compliance assistance efforts. *Id.*

In response to the NPRM, four union commenters expressed specific support for the Department's proposal to rescind the revocation standards and procedure. A federation of unions stated that with outreach and compliance assistance, it would be a rare event that a small union would not comply with its Form LM-3 filing obligation, noting that in such instances it would be appropriate to use the enforcement mechanism provided by the LMRDA. The federation also referenced its earlier comments where it stated "[t]here is no reason to believe that a small labor organization that was not set up to fil[e] a timely or complete Form LM-2 report would be able to meet the enormous burden of retroactively adjusting its accounting system in a manner sufficient to file Form LM-2 reports."

A national union offered specific evidence in support of the notion that smaller unions would not be able to file the Form LM-2, and it noted that the retroactive nature of the revocation procedure particularly impacted Form LM-3 filers. This union also felt that the "enormous financial strain" that revocation would cause could lead to further compliance problems, and it therefore stressed compliance assistance in its place. An international union expressed similar concerns, noting that Form LM-2 preparation requires electronic accounting and the professional assistance that will not be available to small unions. Another union concurred with the view expressed in the NPRM that the Department did not adequately consider

the burden on smaller unions to file the Form LM-2 in place of the Form LM-3, and went further to propose that the Department consider raising the threshold for Form LM-2 filers from the current \$250,000 in annual receipts due to the burden on smaller unions. Finally, an international union agreed that the revocation is unlikely to achieve its intended goals, and instead promoted the idea of devoting the Department's resources to education of the regulated community.

The Department received three comments that specifically opposed the proposal to rescind the Form LM-3 revocation standards and procedure. Only one commenter, a business federation, addressed the Department's concerns, as outlined in the NPRM, that the January 21 rule failed to adequately assess the burden the procedure would impose on the smaller labor organizations and the likelihood that, in light of that burden, the rule would accomplish the intended results of increased transparency and more disclosure. This commenter argued that the rulemaking record illustrated that smaller unions could file the Form LM-2, and cited Form LM-3 filers who ordinarily have less than \$250,000 in annual receipts, but due to the sale of an asset or other reason, finish a fiscal year with greater than \$250,000 in receipts and, therefore, must file a Form LM-2 report. The business federation also cited unions in trusteeship, for which a Form LM-2 must be filed on their behalf, regardless of the annual receipts of the union in trusteeship. Additionally, this commenter challenged the NPRM's reference to the "counter-intuitive" nature of the revocation procedure, explaining its view that the approach outlined in the January 21 rule was a sensible one that augmented other enforcement tools such as criminal enforcement and voluntary compliance.

The Department disagrees with those commenters questioning the NPRM's conclusions pertaining to the burden on smaller unions. The Department continues to believe that revocation is unlikely to result in the increased transparency and greater disclosure intended by the January 21 rule in view of the Form LM-2 burden it places on Form LM-3 filers. Initially, the Department notes that its argument is not that all Form LM-3 filers are unable to file a Form LM-2, but that those that do not properly or timely file a Form LM-3 are not likely to properly or timely file a Form LM-2, particularly given the retroactive nature of the revocation procedure, as several commenters noted. The Department

finds the revocation procedure's steps of notification and voluntary cooperation only reinforce this notion, as unions that have difficulty properly filing a Form LM-3 are unlikely to properly submit a written statement contesting the revocation of the Form LM-3 filing authorization and unions that do not properly file a Form LM-3 after these efforts would seem less likely to properly file a Form LM-2.

Moreover, assuming that the revocation procedure is a tool available to the Department to address delinquent and deficient reporting, the problem remains that the revocation procedure is a poorly designed, burdensome method of resolving this problem. In fact, the stated goal of the revocation standards and procedure was to increase transparency in unions with reporting deficiencies and delinquencies, which the January 21 rule concluded were in need of greater disclosure. However, the Department, on its review of the rule, does not believe that increased transparency is likely through the revocation provisions, because it is unreasonable to expect delinquent and deficient Form LM-3 filers to properly and timely file the more complicated Form LM-2. No commenter adequately refuted this assertion.

In response to comments referencing those Form LM-3 filers that, under the 2003 rule and certain conditions, must file a Form LM-2 report, the Department stresses the statutory distinction between the requirement for the Secretary to establish simplified reports for certain smaller unions and the discretionary authority to revoke such authorization for simplified reports under certain conditions. The fact that some Form LM-3 filers during occasional fiscal years are required to alter their reporting procedures and file a Form LM-2 does not negate the fact that the burden placed on Form LM-3 filers by revocation makes the goal of increased transparency unlikely to be met. Indeed, as commenters have attested, their experience demonstrates that even smaller Form LM-2 filers, those only marginally exceeding the \$250,000 filing threshold, have a great deal of difficulty meeting their requirements, thus justifying the mandate for simplified forms for smaller unions. Further, the Department recognizes that nonexistent records cannot be created retroactively. In this regard, the Department notes that section 206 of the Act, 29 U.S.C. 436, requires "[e]very person required to file any report under this title" to "maintain records on the matters required to be reported which will provide in sufficient detail the necessary basic

information and data from which the documents filed with the Secretary may be verified \* \* \*." (emphasis added). Therefore, each person required to file a report under LMRDA Title II must keep sufficient records for the matters required to be reported in the particular report that such person must file. Thus, a Form LM-3 filer would not ordinarily be required to maintain records sufficient to complete a Form LM-2 report, and only acquires such an obligation upon reaching \$250,000 in annual receipts for a given fiscal year. Moreover, the union that places the subordinate union in trusteeship is obliged to file the Form LM-2, not the union placed in trusteeship. The trustee union, which generally will be larger than the union in trusteeship, likely will possess the experience, resources and information necessary to file a Form LM-2.

In its NPRM proposing the rescission of the January 21 rule, the Department also defended its proposal to withdraw the revocation standards and procedure by arguing that the LMRDA requires a balancing of transparency and union autonomy, a balance that the January 21 rule failed to achieve. All three of the commenters opposing rescission of the standards and procedure, asserted, in essence, that the Secretary possesses "clear and unambiguous" authority under section 208 to establish the revocation procedure. Two of these commenters contend that section 208 is self-operative, asserting that the Secretary retains the authority to revoke the simpler filing authorization even if the rule is rescinded. According to their view, the regulations merely "flesh[] out" the necessary procedures to implement the existing authority. As explained by one of commenters, the language of section 206 of the LMRDA (requiring covered unions to maintain records underlying required reports) prevents the Department from finding that "there is no realistic likelihood that most small unions would have the information" necessary to complete the Form LM-2.

The Department is not persuaded that section 208 is self-operating. As the commenters themselves point out, section 208 contemplates that the Department follow required procedures, the details of which are not prescribed. Thus, it is necessary for the Department to establish procedures as a condition for rescinding a filer's authorization to file a Form LM-3. In proposing rescission, the Department noted both that section 208 specifically mandates that the Secretary must issue simplified reports for labor organizations for which she finds that "by virtue of their size a

detailed report would be unduly burdensome,” and that she is permitted to revoke such filing authorization if “the purposes of this section would be served thereby.” Therefore, consistent with the language of section 208 and the required balance between disclosure and unnecessary burden, the “purposes” of section 208 must include ensuring that a more detailed report for a smaller union would not be “unduly burdensome” by virtue of its size.

The third commenter opposing rescission also addressed the Secretary’s authority under section 208. This commenter stressed the “unambiguous authority” granted to the Secretary and argued that section 208 thus does not require the Department to “balance” the need for financial transparency with burden. Further, the commenter emphasized that revocation was just one “tool” that the Secretary has to ensure compliance with the statute, and that the “purpose” of the section is preventing the “circumvention or evasion” of the Act’s reporting requirements, not ensuring that the requirements are not unduly burdensome. The Department rejects these arguments, as it notes that section 208 grants the Secretary authority to rescind only if she determines that the “purposes” of the section would be served. The Department maintains that section 208 explicitly intends, among other purposes, that smaller labor organizations should not be subject to “unduly burdensome” reporting requirements.

Section 208 requires the Department to properly balance the size of the union and its burden to file the Form LM–2 with the need of greater transparency for that union. An international union asserted that revoking the Form LM–3 filing authorization for smaller unions merely because of delinquency or deficiency in their Form LM–3 reporting is “overkill,” constituting “collective punishment.” As such, it asserted that the Department had failed to properly balance these concerns, noting that the rule failed even as a “prophylactic” means to detect a “lack of sophistication and awareness” or “the rare instances” of financial corruption. The union stated that the root causes of delinquent and deficient reporting are “honest mistakes” and other “benign reasons” such as “over-worked, under-trained, part-time, officials often lacking both technical expertise in union administration and any institutional knowledge base from which to draw,” and not “the rare instances” of financial corruption. An international union predicted that if small unions were required to file the Form LM–2 local

officials likely would quit their positions.

The Department concurs with these assertions, as it does not believe that the purpose of balancing the need for transparency without overburdening smaller unions is met by standards for revocation (delinquency or deficiency in reporting) that are so sweeping in nature, *i.e.*, revoking the Form LM–3 filing authorization for potentially any delinquent or deficient smaller unions, even though most are not plagued by financial corruption. The standards established by the January 21 rule potentially increase the filing burden for all Form LM–3 filers, a result that is not justified by the “relatively benign” (see the January 21 rule at 74 FR 3696) causes of most delinquent or deficient reporting. Therefore, they do not properly balance the size of the unions and reporting burden with the need for greater transparency for such smaller unions. Indeed, for those unions that are delinquent or deficient in their filing as a result of “relatively benign” reasons, there is no justification for more stringent reporting requirements.

Additionally, instead of risking the loss of union officials who may quit rather than assume the burden associated with the revocation procedure, an international union urged the Department to address the root causes of delinquent reporting by educating smaller unions. The union noted that where education and voluntary compliance efforts are unsuccessful, criminal investigations and prosecutions are effective tools to address financial corruption in smaller unions. The Department agrees with these comments. As stated in the proposal to rescind the January 21 rule, the Department, as a matter of policy, does “not intend to encourage or discourage the participation of union members from running and serving in union office, nor does it otherwise desire to unnecessarily interfere in the internal affairs of unions.” 74 FR at 18176–77. The Department further stated that it intends to implement the LMRDA with as little interference as possible, with an overarching goal of empowering members to govern their unions democratically. It also addressed other possibly detrimental consequences of the revocation procedure, such as the diversion of union officials from grievance handling and other core business, and stated its view that revocation cannot be justified by merely lessening or downplaying the acknowledged increased burden imposed by the Form LM–2 reporting requirements. *Id.* Compliance assistance is a vital aspect of this approach, as are

audit and enforcement options, and both are better approaches than a revocation procedure that is viewed as punitive to Form LM–3 filers. The unions commented that criminal investigations and prosecutions are better used in addressing financial corruption in smaller unions. The Department agrees that the selective use of criminal investigation and enforcement is preferable to the approach in the January 21 rule because it is doubtful that the Department will discover embezzlements and other corruption through revocation (which theoretically would result in the filing of a Form LM–2), since the procedure is unlikely to result in increased reporting.

Finally, the Department disagrees with the commenter that suggested that, even if the revocation procedure is now deemed to be overly burdensome, the Department should not rescind the rule without first establishing a replacement procedure. In its view, section 208 requires the Department to have a published revocation procedure available in case it is needed. The commenter stated that if the Department is dissatisfied with the procedure in the rule, it should have proposed a procedure based on a “realistic assessment” of the ability of smaller unions to complete a Form LM–2, with the goal of preventing the circumvention or evasion of section 208. The Department believes that, for the reasons stated above, the revocation procedure and standards established by the regulations are flawed and, therefore, rescinds them. The Department retains the authority under section 208 to propose a new revocation procedure and standards, based upon a necessary balancing of transparency with union autonomy as required by the section and the Act, if it decides that such an action is necessary and appropriate.

## V. Regulatory Procedures

### *Executive Order 12866*

This rule is considered to be a significant regulatory action within the meaning of Executive Order 12866, and was submitted to OMB for review before publication, because the proposed rule may raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in Executive Order 12866.

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act of 1980, 5 U.S.C. 601 *et seq.*, requires agencies to prepare regulatory flexibility analyses, and to develop alternatives wherever possible, in drafting

regulations that will have a significant impact on a substantial number of small entities. The Department does not believe that this rule will have a significant economic impact on a substantial number of small entities, as the rule relieves the additional burden imposed upon labor organizations through the rescission of the regulations published on January 21, 2009. Therefore, a regulatory flexibility analysis under the Regulatory Flexibility Act is not required. The Secretary has certified this conclusion to the Chief Counsel for Advocacy of the Small Business Administration.

#### *Unfunded Mandates Reform*

This rule will not include any Federal mandate that may result in increased expenditures by State, local, and tribal governments, in the aggregate, of \$100 million or more, or in increased expenditures by the private sector of \$100 million or more.

#### *Paperwork Reduction Act*

This rule contains no new information collection requirements for purposes of the Paperwork Reduction Act of 1995 (PRA) (44 U.S.C. 3501 *et seq.*). If the January 21 rule had gone into effect, it would have increased the burden of reporting under OMB No. 1215-0188. Under the January 21 rule, the total burden hours per Form LM-2 respondent would have increased by approximately 60.06 hours, and the total burden hours would have increased by 274,539. The average cost per Form LM-2 respondent would have been increased by \$1,939 and the total cost would have increased by \$8,863,038. Since this rule rescinds the January 21 rule, the increases in reporting burden under OMB No. 1215-0188 will not occur. The Department will seek OMB approval of any revisions of the existing information collection requirements, in accordance with the PRA.

#### *Small Business Regulatory Enforcement Fairness Act of 1996*

This rule is not a major rule as defined by section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 804. This rule will not result in an annual effect on the economy of \$100,000,000 or more; a major increase in costs or prices; or significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based companies to compete with foreign-based companies in domestic and export markets.

#### **List of Subjects in 29 CFR Part 403**

Labor unions, Reporting and recordkeeping requirements.

■ For the reasons set forth in the preamble, the Final Rule published January 21, 2009 amending 29 CFR parts 403 and 408 (74 FR 3678), for which the effective date was delayed on February 20, 2009 (74 FR 7814) and April 21, 2009 (74 FR 18132) is withdrawn.

Signed in Washington, DC, this 7th day of October 2009.

**Shelby Hallmark,**

*Acting Assistant Secretary for Employment Standards.*

**John Lund,**

*Deputy Assistant Secretary for Labor-Management Programs.*

[FR Doc. E9-24571 Filed 10-9-09; 8:45 am]

**BILLING CODE 4510-CP-P**

## **DEPARTMENT OF HOMELAND SECURITY**

### **Coast Guard**

#### **33 CFR Parts 155 and 157; 46 CFR Part 162**

[Docket No. USCG-2004-18939]

RIN 1625-AA90

#### **Pollution Prevention Equipment**

**AGENCY:** Coast Guard, DHS.

**ACTION:** Final rule.

**SUMMARY:** The Coast Guard is finalizing its January 16, 2009, interim rule establishing oil pollution prevention equipment requirements with one minor amendment to the rule's effective date for vessels with equipment installed on or after January 1, 2005. The rule harmonizes Coast Guard regulations with new International Maritime Organization (IMO) guidelines and specifications issued under the International Convention for the Prevention of Pollution from Ships (MARPOL) Annex I. It implements these MARPOL Annex I regulations and, ultimately, is intended to reduce the amount of oil discharged from vessels and eliminate the use of ozone-depleting solvents in equipment tests. All vessels replacing or installing oily-water separators and bilge alarms must install equipment that meets these revised standards. Newly constructed vessels carrying oil in bulk must install monitoring systems that meet the revised standards.

**DATES:** This final rule is effective November 12, 2009, except that paragraphs 33 CFR 155.350(a)(3), 155.360(a)(2), and 155.370(a)(4) are

effective October 13, 2009. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register on November 12, 2009.

**ADDRESSES:** Comments and material received from the public, as well as documents mentioned in this preamble as being available in the docket, are part of docket USCG-2004-18939 and are available for inspection or copying at the Docket Management Facility (M-30), U.S. Department of Transportation, West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal holidays. You may also find this docket on the Internet by going to <http://www.regulations.gov>, inserting USCG-2004-18939 in the "Keyword" box, and then clicking "Search."

**FOR FURTHER INFORMATION CONTACT:** If you have questions on this rule, call or email Mr. Wayne Lundy, Systems Engineering Division (CG-5213), Office of Design and Engineering Standards, U.S. Coast Guard, telephone 202-372-1379, e-mail [Wayne.M.Lundy@uscg.mil](mailto:Wayne.M.Lundy@uscg.mil). If you have questions on viewing the docket, call Renee V. Wright, Program Manager, Docket Operations, telephone 202-366-9826.

#### **SUPPLEMENTARY INFORMATION:**

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##### **I. Abbreviations**

- CFR Code of Federal Regulations
- DHS Department of Homeland Security
- FR Federal Register
- IMO International Maritime Organization
- IOPP International Oil Pollution Prevention
- ISO International Organization for Standardization
- MARPOL International Convention for the Prevention of Pollution from Ships
- MEPC Marine Environment Protection Committee
- NEPA National Environmental Policy Act
- NPRM Notice of Proposed Rulemaking
- NTTAA National Technology Transfer and Advancement Act