January 26, 2006

Ms. Kay H. Oshel
Director
Office of Policy, Reports and Disclosure
Office of Labor-Management Standards
U.S. Department of Labor
200 Constitution Avenue, N.W., Room N-5605
Washington, D.C. 20210

RE: RIN 1215-AB49

Dear Ms. Oshel:

On behalf of the Investment Company Institute, the American Council of Life Insurers, the Investment Adviser Association, and the Securities Industry Association, we are writing to comment on proposed amendments to Form LM-30 and related issues concerning Form LM-10.[1]

We represent financial services firms and professionals who provide support to pension plans, including Taft-Hartley plans whose trustees may include union officers. Our members have never before been subject to reporting requirements under the Labor Management Reporting and Disclosure Act ("LMRDA"), but will be subject to those requirements retroactively under the Department's newly-announced view. This dramatic and unprecedented expansion of the scope of LMRDA reporting—without appropriate notice and comment rulemaking for Form LM-10—will impose an extraordinary burden on financial services providers to maintain detailed records of ordinary business activities that is not justified by considerations of sound public policy. Further, the Department's legal justification for its actions cannot withstand scrutiny, and its strained imposition of the LMRDA's requirements in

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[1] *See* Notice of Proposed Rulemaking and Request for Comments, 70 Fed. Reg. 51166 (Aug. 29, 2005).

this inapplicable context will cause much confusion. The LMRDA was designed to address labor relations matters, not service provider/plan trustee interactions, which are already governed comprehensively by ERISA and securities law.

I. We Represent Service Providers to Taft-Hartley Pension Plans Who Would Be Subject to LM-10 Reporting Requirements Under the Department's Unprecedented Expansion of the LMRDA

Our members include financial services firms and professionals who provide a significant amount of the financial services used by pension plans in managing their portfolios. Our members' pension plan clients include a variety of types of plans, including Taft-Hartley plans for which union officers serve as trustees. Under the Department of Labor's unprecedented reading of the Form LM-10 reporting requirements, these service providers—because they happen to be "employers" under "any law of the United States relating to the employment of any employees"—would be required to file reports regarding their ordinary educational, client service and marketing activities when dealing with plan trustees who are union officials. Our members engage in these activities in the normal course of business with all of their pension plan clients, not just those who happen to be Taft-Hartley plans with union officer trustees. Because the Department has chosen to pursue this expansive interpretation of the Form LM-10 requirements without notice and comment rulemaking, we are submitting these comments in response to the Form LM-30 rulemaking, the only current forum available for our formal input.[2]

The Investment Company Institute ("ICI") is the national association of the U.S. investment company industry. ICI members include 8,537 open-end investment companies (mutual funds), 669 closed-end investment companies, 157 exchange-traded funds, and 5 sponsors of unit investment trusts. Mutual fund members of the ICI have total assets of approximately $8.672 trillion (representing 98 percent of all assets of U.S. mutual funds); these funds serve approximately 89.5 million shareholders in more than 52.6 million households. Additional information regarding ICI is available at www.ici.org.

The American Council of Life Insurers ("ACLI") is a Washington, D.C.-based trade association whose 377 member companies account for 91 percent of the life insurance industry's total assets, 90 percent of the life insurance premiums, and 95 percent of annuity considerations in the United States. ACLI member companies offer life insurance; annuities; pensions, including 401(k)s; long-term care insurance; disability income insurance; reinsurance; and other

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[2] In its posting, "Frequently Asked Questions About Form LM-10," the Department encouraged persons interested in the Form LM-10 to submit comments in response to the Form LM-30 rulemaking. *See* Frequently Asked Questions Nos. 15, 25 (available at http://www.dol.gov/esa/regs/compliance/olms/LM10_FAQ.htm). As discussed below, the Department is required by law to provide a separate opportunity for LM-10 comments and we urge the Department to provide us with a timely opportunity to submit comments directly on Form LM-10.

retirement and financial protection products. Additional information regarding ACLI is available at www.acli.org.

The Investment Adviser Association ("IAA") is a not-for-profit organization that exclusively represents the interests of federally registered investment adviser firms. The Association was founded in 1937 as the Investment Counsel Association of America and played a major role in the enactment of the Investment Advisers Act of 1940, the federal law regulating the investment adviser industry. Today, the IAA consists of more than 400 investment adviser firms that collectively manage in excess of $5 trillion in assets for a wide variety of institutional and individual clients. Additional information regarding IAA is available at www.investmentadviser.org.

The Securities Industry Association ("SIA") was established in 1972 through the merger of the Association of Stock Exchange Firms (1913) and the Investment Banker's Association (1912). The Securities Industry Association brings together the shared interests of approximately 600 securities firms to accomplish common goals. SIA's primary mission is to build and maintain public trust and confidence in the securities markets. SIA members (including investment banks, broker-dealers, and mutual fund companies) are active in all U.S. and foreign markets and in all phases of corporate and public finance. According to the Bureau of Labor Statistics, the U.S. securities industry employs nearly 800,000 individuals, and its personnel manage the accounts of nearly 93-million investors directly and indirectly through corporate, thrift, and pension plans. In 2004, the industry generated $236.7 billion in domestic revenue and an estimated $340 billion in global revenues. Additional information regarding SIA is available at www.sia.com.

II. The Department's New View of LM-10 Requirements Represents a Sea Change in the Interpretation of the LMRDA

The Labor Management Reporting and Disclosure Act ("LMRDA"), or the Landrum-Griffin Act, was enacted in 1959 to curb union abuses. Among other things, the Act requires certain financial disclosures by unions, union officers and employees, employers and labor relations consultants. *See* 29 U.S.C. §§ 431-33. For the 40-plus years since its enactment, the regulated community has understood the reporting requirements of the LMRDA to focus on financial transactions involving unions and union-organized employers, as well as non-union employers that are the subject of union-organizing campaigns.

In June 2005, the Department announced for the first time—by way of guidance posted on the Office of Labor Management Standards website—that service providers to "trusts in which a labor organization is interested," including financial advisors, accountants and attorneys, would "most likely" be subject to the Form LM-10 reporting requirements. *See* Trusts and Form LM-30 and Form LM-10 (available at http://www.dol.gov/esa/regs/compliance/olms/

LM30_LM10_Trusts_Info.htm).[3] Never before had the Department sought to use the LMRDA to require financial disclosure reports from non-unionized service providers who do business with Taft-Hartley plans. The Department stated that receptions at educational conferences, dinners following trustee meetings, Christmas parties, and the like, provided by service providers to plan trustees who also serve as union officers, would be reportable payments on Forms LM-10 and LM-30 unless they qualify for the de minimis exception. *See id.*

Thus, under the Department's newly-announced view, the following would be reportable on Forms LM-10 and LM-30 if the aggregate de minimis limit is exceeded:

- A service provider sponsors an educational seminar or focus group at which food and drinks are served, and pension plan trustees, some of whom also serve as union officers, attend.

- A service provider sponsors a reception or meal at a conference, such as those held by the International Federation of Employee Benefit Plans, and pension plan trustees, some of whom also serve as union officers, attend.

- A service provider distributes novelty items at its booth at a trade show or conference to attendees, including pension plan trustees, some of whom also serve as union officers.

- A service provider serves coffee or provides meals during meetings with pension plan trustees, some of whom also serve as union officers.

These kinds of service provider activities, which have no connection to labor relations and which occur in the ordinary course of business interactions with pension plans (whether Taft-Hartley or not), have not previously been viewed as being subject to Form LM-10 reporting.

III. The Department Does Not Have the Legal Authority to Require Union Officers or Service Providers to Make Reports in Connection With Service Provider/Plan Trustee Interactions

A. The LMRDA Was Enacted to Address Union Abuses, Not Trust Fiduciary Issues

Interactions between service providers to Taft-Hartley trusts and trustees who happen to be union officers fall outside of the scope of the LMRDA. The Act was adopted not to address

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[3] A "trust in which a labor organization is interested" is defined as "a trust or other fund or organization (1) which was created or established by a labor organization, or one or more of the trustees or one or more members of the governing body of which is selected or appointed by a labor organization, and (2) a primary purpose of which is to provide benefits for the members of such labor organization or their beneficiaries." 29 U.S.C. § 402(l).

the responsibilities of pension plan fiduciaries and service providers (a topic since comprehensively regulated by the Employee Retirement Income Security Act), but rather to address more traditional relations between management and organized labor. In particular, it was passed in 1959 in response to union abuses identified by the Select Committee on Improper Activities in the Labor or Management Field, or the McClellan Committee. 70 Fed. Reg. 51166, 51167 (Aug. 29, 2005).

As set forth in the Act, Congress found:

> from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

29 U.S.C. § 401(b) (emphasis added).

Congress further found and declared that the LMRDA was "necessary to eliminate or prevent improper practices on the part of labor organizations, employers, labor relations consultants, and their officers and representatives which distort and defeat the policies of the Labor Management Relations Act, 1947, as amended, and the Railway Labor Act, as amended, ..." *Id.* § 401(c) (emphasis added). The LMRDA was adopted within a very specific context—labor-management relations—and was not intended to reach activity beyond this scope.

B. The Statute Does Not Empower the Department to Require Reporting From Union Officials in Their Capacity as Pension Plan Trustees

The LMRDA authorizes the Department to require union officials to make certain financial disclosures on Form LM-30. *See* 29 U.S.C. § 432. The Department, however, went beyond the statutorily-prescribed list of LM-30 reportable transactions by including on the Form LM-30, "Interests in, income from, or transactions with, a business a substantial part of which consists of dealing with your union or a trust in which your union is interested."

To support this expansion of the scope of Form LM-30 reporting, the Department must rely on the supplemental authority granted to it by 29 U.S.C. section 438, which allows the Secretary to issue "reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of [the LMRDA] reporting requirements." This anti-circumvention authority, however, is severely limited. It grants power to require reports relating to trusts in which a labor organization is interested only when necessary to avoid circumvention of the reporting requirements expressly delineated in the LMRDA, and only after the Secretary has made an express finding of such necessity. *See AFL-CIO v. Chao*, 409 F.3d 377, 390 (D.C. Cir. 2005).

Here, the Secretary has not made any such finding, nor could she. *See* 70 Fed. Reg. 51166.[4] The expansion of LM-30 (and LM-10) reporting requirements to trustee-service provider interactions is not designed to prevent circumvention of other reporting requirements; instead, it is designed to address a wholly independent concern about improper attempts to influence pension plan trustees. *See* 70 Fed. Reg. 51166, 51173. While this purpose may be salutary, it goes well beyond the purview of the LMRDA (and, as discussed below, is comprehensively addressed by ERISA and the Criminal Code). As the D.C. Circuit noted in striking down the Department's similarly unauthorized attempt to require reporting by Taft-Hartley trusts, "[S]ection 208 limits the Secretary's authority to require reporting on trusts to instances where necessary to avoid . . . circumvention or evasion of [the] Title II reporting requirements; the statute does not provide general authority to require trusts to demonstrate that they operate in a manner beneficial to union members." *AFL-CIO*, 409 F.3d at 390.

C. Neither Does the Statute Empower the Department to Require Reporting from Service Providers

1. The Department's Lack of Authority to Impose These Requirements on the Form LM-30 Leads to the Same Conclusion for the Form LM-10

The Department contends that reporting of service provider-plan trustee transactions on Form LM-10 is required to create a check and balance system for related LM-30 reports by plan trustees who are union officials. As the Department explained in a tacit acknowledgment of the sea change its new view of LM-10 reporting represented:

> Another Department form, long in existence, further indicates that payments from service providers to trusts are covered under the LMRDA. In some ways, the Form LM-30 is the counterpart to the Form LM-10. Broadly speaking, employers report payments to union officials on Form LM-10 and union officials report payments from employers on Form LM-30. The Form LM-30, which has been in effect since 1963, requires union officers and union employees to report payments from a "business . . . any part of which consists of buying from, selling or leasing to, or otherwise dealing with . . . a trust in which your labor organization is interested." Form LM-30 Instructions, Part B. Thus, since 1963, union officials have been specifically informed of the need to report payments from service providers to trusts, such as pension and welfare plans, in which their union had an interest. Although the language in the Form LM-10 is different, requiring reports of

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[4] The Department first imposed this requirement on the Form LM-30 in 1963 without making such a finding or soliciting comment on the exercise of the anti-circumvention authority. The language including transactions with "businesses . . . dealing with . . . a trust in which your labor organization is interested" did not appear in the LM-30 rule as originally proposed, *see* 27 Fed. Reg. 10459 (Oct. 26, 1962), and while the order publishing the final rule notes that as one of three differences between the proposed and final versions, it fails to offer any explanation for it. 28 Fed. Reg. 10333 (Sept. 21, 1963).

> payments from "any employer," its breadth plainly covers service providers. This inference is made unavoidable by the specificity of the Form LM-30, which expressly singles out these transactions.

Frequently Asked Questions About Form LM-10, Question No. 13.

This discussion is illuminating for two reasons. First, it underscores the fact that the Department's view regarding the reach of Form LM-10 with respect to these transactions is inextricably intertwined with its view regarding the reach of Form LM-30. As set forth above, the Department's authority to reach these transactions on Form LM-30 is non-existent. Thus, any derivative requirement that transactions be reported on Form LM-10 likewise lacks legal authority. Moreover, it would be non-sensical to require reports on Form LM-10 where they are not legally required (or permitted to be required) on the counterpart Form LM-30.

Second, contrary to the Department's view that the "inference" that Form LM-10 extends to service provider-trustee interactions is "made unavoidable by the specificity of the Form LM-30," the opposite is true. Because the Form LM-10 lacks the express reference to "trusts in which a labor organization is interested" that appears on the Form LM-30, and because, unlike union officials, service providers have not been "specifically informed" of the need to report payments to trustees who are union officials, the logical conclusion would be that the Department was not intending to exercise its anti-circumvention power to reach trust-related transactions on Form LM-10.

2. The Department's Reliance on the Broad Definition of Employer Under the LMRDA is Unavailing

The Department also contends that the use of the term "employer" in 29 U.S.C. section 433(a) authorizes it to require Form LM-10 reports from any entity constituting an "employer" under an employment law of the United States. This would presumably include every employer in the country, including traditional union employers, non-union employers, service providers with employees (but not sole proprietor service providers), and even Members of Congress (*see, e.g.*, 2 U.S.C. § 1301 *et seq.*).

At the same time, even the Department recognizes that there are some limits to the LMRDA, and that the use of the term "employer" in section 433(a) does not (and could not reasonably be interpreted to) extend the reach of the statute to every employer in the United States. Thus, the Department does not seek to impose Form LM-10 requirements on every

employer, indicating instead that some nexus to a labor organization is required. *See* Frequently Asked Questions No. 6.[5]

Among its list of employers subject to Form LM-10 requirements, the Department includes employers dealing with a "trust in which a labor organization is interested,"—that is, service providers to Taft-Hartley trusts—as well as employers in competition with those service providers. These grounds can only be supported by an exercise of the anti-circumvention power set forth in 29 U.S.C. section 438. As discussed above, however, an express finding of the necessity for the anti-circumvention power is necessary to support its use, as is notice and comment rulemaking, neither of which is present here for the Form LM-10. *See AFL-CIO*, 409 F.3d at 390.

Moreover, section 433(a)(1), which provides for the collection of LM-10 reports from employers making payments "to any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of a labor organization . . . .", is a "catch all" provision that must be read in concert with the remaining provisions of section 433(a). *See generally Breininger v. Sheet Metal Workers Int'l Ass'n*, 493 U.S. 67, 91 (1989). These surrounding provisions clearly limit the application of the LM-10 reporting requirement to payments made by employers in their capacity as employers for the purpose of influencing labor relations matters. *See, e.g.*, 29 U.S.C. § 433(a)(2), (3), (4), and (5) (all relating to payments with a nexus to labor relations).

The provisions of section 433(a) also must be read in concert with the parallel union officer reporting requirements of section 432. Those requirements, too, make clear that section 433 is intended to capture payments by employers in their capacity as employers. Indeed, in the Form LM-30 Notice of Proposed Rulemaking, the Department recognizes that the "catch all"

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[5] In response to Frequently Asked Question No. 6, "Must every payment from every employer to any union officer be reported?", the Department replied:

No. Generally, payments from only the following employers are reportable:

1) An employer whose employees the recipient's labor organization represents or is actively seeking to represent;
2) An employer a substantial part of which consists of buying from, or selling or leasing directly or indirectly to, or otherwise dealing with an employer whose employees the recipient's labor organization represents or is actively seeking to represent;
3) An employer that buys from, or sells or leases directly or indirectly to, or otherwise deals with the recipient's labor organization;
4) An employer that buys from, or sells or leases directly or indirectly to, or otherwise deals with a trust in which the recipient's labor organization is interested; or
5) An employer in active and direct competition with an employer described in paragraphs 1 through 4.

provision of section 432 requires a nexus to labor relations activity (70 Fed. Reg. 51166, 51192-93); likewise, the "catch all" provision of section 433 requires such a nexus.[6]

The legislative history reinforces this conclusion. For example, the Senate Report characterizes the various types of payments for which LM-10 reporting is required, including those specified in section 433(a)(1), as "expenditures in connection with labor-management relations." (emphasis added).[7]

IV. Considerations of Sound Public Policy Weigh Strongly Against the Imposition of This Reporting Requirement on Plan Trustees and Service Providers

A. There is No Gap to be Filled Here; ERISA and Other Laws Comprehensively Regulate Plan Trustee/Service Provider Interactions

The Department offers only one example in the Notice of Proposed Rulemaking to support its view that including service provider-plan trustee interactions within the LM-30 (and LM-10) reports would be beneficial. This example involved "a contractor, an investment firm that managed pension and investment accounts for unions." As explained in the NPRM:

> This company collapsed in September 2000, costing its clients about $355 million. The company's former chairman was indicted on counts of fraud, money laundering, witness tampering and making illegal payments to union benefit plan trustees. As part of its scheme to buy the influence of pension fund trustees, who were union officers, the investment firm hired relatives of pension trustees as well as provided plan trustees with gifts including rifles, season tickets to sporting events, and fishing and hunting trips to various locations in the western U.S., Canada, Africa, Argentina and Mexico.

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[6] Section 432, for example, uses "business," as distinguished from "employer," when it intends broader application. *See* 29 U.S.C. § 432(a)(3). There is no corresponding "business" reporting requirement in section 433.

[7] The flaws in the Department's strained reading of this section are illustrated by its efforts to address section 302(c) of the Labor Management Relations Act. Section 433(a)(1) of the LMRDA generally requires reporting only of unlawful payments; those payments authorized by law—which fall under LMRA section 302(c)—are expressly exempted from reporting. Thus, to deem a payment reportable under section 433(a)(1) is to suggest, strongly, that it is criminal. In order to avoid the inference that ordinary and appropriate service provider marketing, client service and educational activities would be criminal violations under the LMRA, the Department simply notes that its guidance is not binding on the Justice Department "in carrying out its criminal enforcement responsibilities." *See* Frequently Asked Questions No. 26. This response, in the context of potential criminal liability, is woefully inadequate.

70 Fed. Reg. 51166, 51173.

Although the misconduct described in this example is clearly wrong, it would be just as wrong (and the Department would be equally as concerned) if it involved pension plan trustees who were not union officers, or if it involved a service provider, such as a sole proprietor, who was not an employer. These are ERISA issues, not labor-management issues, and ERISA, not the LMRDA, is the appropriate vehicle to address this scenario. The LMRDA approach unduly targets Taft-Hartley plans, which represent only a segment of the larger universe of pension plans.

This type of misconduct is already illegal for all types of pension plans. ERISA comprehensively regulates the conduct of pension plan fiduciaries and, in particular, prohibits self-interested transactions and conflicts of interest. *See* 29 U.S.C. § 1106. Reports of such transactions on Form 5330 are required, and an excise tax is imposed upon them. *See* 26 U.S.C. § 4975. Moreover, federal criminal law prohibits the offer, acceptance, or solicitation of improper payments intended to influence actions of benefit plan trustees, authorizing stiff penalties of up to three years imprisonment. *See* 18 U.S.C. § 1954.

In addition, many service providers are subject to comprehensive regulation under the federal securities laws, and are overseen by government regulators and self-regulatory agencies.[8] These regulators may impose their own restrictions and requirements with respect to gifts. The National Association of Securities Dealers, for example, requires members to maintain records of "all payments or gratuities in any amount" . . . "where such payment or gratuity is in relation to the business of the employer of the recipient of the payment or gratuity." *See* NASD Conduct Rule 3060(a), (c). The NASD also generally prohibits gifts in excess of $100 per individual per year. *See id.* The NASD recently proposed interpretive guidance "to more explicitly outline the policies and procedures a member must adopt in connection with its business entertainment practices with employees of a customer." *See* "Gifts and Business Entertainment," NASD Notice to Members (Jan. 2006) (available at http://www.nasd.com/web/groups/rules_regs/documents/notice to members/nasdw_015876.pdf). As should be the case here with the Department's proposed expansion of the Form LM-10 requirements, the NASD is seeking comments before imposing its proposed guidance on the regulated community. *See id.*

Moreover, to the extent that the payments are marketing expenses, they are subject to the requirements of the Internal Revenue Code. *See* 26 U.S.C. § 162; *see also* Frequently Asked Questions Nos. 9 and 10 (recognizing that service provider payments to plan trustees may be deductible marketing expenses under the Internal Revenue Code).

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[8] For example, all investment advisers are subject to a strict fiduciary duty that is intended to eliminate or require disclosure of conflicts of interest and to prevent an adviser from overreaching or taking unfair advantage of a client's trust. As a fiduciary, the adviser must act in the best interests of the client and must disclose material information. *See, e.g.*, 15 U.S.C. § 80b-6; *Securities and Exchange Commission v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180 (1963).

B. The Rationale Offered for the Rulemaking Does Not Support the Application of LMRDA Reporting Requirements to Service Provider-Plan Trustee Interactions

The Department stated in the Notice of Proposed Rulemaking that two of its key objectives are to "alleviate confusion" and to "reduce errors." *See, e.g.*, 70 Fed. Reg. 51166, 51177, 51194, 51195. Forcing the square peg of service provider-plan trustee interactions into the round hole of the LMRDA, however, will inevitably create these very problems.

The lack of clear guidance for LM-10 filers, combined with the overlay of other regulatory schemes such as ERISA, securities laws and self-regulatory organization rules (like those promulgated by the NASD), will foster confusion in the regulated community and produce errors on Forms LM-10. As noted below, for example, the Form LM-10 instructions are not currently written to address service provider-plan trustee interactions, and the Frequently Asked Questions leave many likely service provider questions unanswered. Moreover, imposition of LMRDA requirements in an area already highly regulated under other statutes creates the potential for inconsistent and conflicting requirements.

As the Department acknowledges in the NPRM, "To be as effective as possible, a reporting and disclosure statute . . . depends on a known and easily applied standard regarding what must be reported." 70 Fed. Reg. 51166, 51179. Here, the Department is creating a vague standard for service providers without providing any clear regulatory guidance. Instead, the Department has undertaken to address some of the many questions that have arisen by publishing "frequently asked questions" on its website. As discussed below, regulation by "FAQs" is not appropriate, nor does it provide a "known and easily applied standard" upon which the regulated community can rely.

C. Imposition of LMRDA Reporting and Disclosure Requirements Will Have a Chilling Effect on Positive Interactions Between Service Providers and Plan Trustees

An unintended consequence of the Department's position will be the discouragement of productive dialogue between service providers and plan trustees that often occurs over meals or coffee. This dialogue includes periodic reviews of service provider performance, discussion of contract terms and other valuable relationship-building activities. The Department has specifically recognized the importance of such dialogue in its EBSA Fact Sheet. *See, e.g.*, "Tips for Selecting and Monitoring Service Providers for Your Employee Benefit Plan" (available at dol.gov/ebsa/newsroom/fs052505.html).

To require reporting of service provider entertainment of union trustees occurring in the normal course of business is to suggest that it is somehow improper, especially when communication is otherwise encouraged and no reporting of entertainment of management trustees is required. The stigma of reporting in accordance with the Department's interpretation would chill this individualized commercial dialogue between service providers and trustees that better informs plan decision-making. Moreover, as service providers struggle to find viable means of complying with these newly-imposed reporting requirements, some may choose to forego potentially reportable expenditures in order to avoid the burdens of recordkeeping.

V. The Department Must Engage in Notice and Comment Rulemaking in Order to Impose Form LM-10 Recordkeeping Requirements on Service Providers

A. Rulemaking is Required to Reach Trust-Related Activity

As discussed above, the Secretary is authorized to expand the LM-10 and LM-30 recordkeeping requirements to activities involving "trusts in which a labor organization has an interest" only by rulemaking, and only when she has made a finding that such an expansion is necessary to avoid circumvention of the primary reporting requirements. *See* 29 U.S.C. § 408; *AFL-CIO*, *supra*. With respect to the Form LM-10, she has done neither. Thus, the purported expansion of Form LM-10 requirements to service providers doing business with Taft-Hartley trusts without the requisite Administrative Procedure Act rulemaking is *ultra vires*.

B. Imposition of These Requirements Without an LM-10 Notice and Comment Rulemaking Would Violate the Paperwork Reduction Act

The Paperwork Reduction Act requires an assessment of, among other things, "the need for the collection of information" and "a specific, objectively supported estimate of burden," as well as consultation with the public through the notice and comment process. *See* 44 U.S.C. § 3506(c). The discussion of the paperwork burden for individual filers of Form LM-30 in the NPRM cannot substitute for the required analysis with respect to the Form LM-10. Indeed, the Department even concedes that its estimates with respect to Form LM-30 are subject to "considerable uncertainty." 70 Fed. Reg. 51166, 51199.

The challenges faced by service providers, many of whom have large workforces across the country (and even the globe), and who deal with a multitude of plan trustees, are radically different and substantially more difficult than those faced by an individual filer. The Department estimates that it will take a typical union officer eight additional minutes "to maintain and to gather the books and records . . . including those concerning the dealings between a business and . . . a trust in which the filer's union is interested." Even assuming that this estimate is accurate for Form LM-30 filers, it does not purport to address the burden imposed on service providers subject to Form LM-10 requirements, nor could it reasonably do so. Eight minutes grossly understates the burden that would be imposed on a service provider filer of Form LM-10, who would have to maintain and to examine a multitude of corporate records detailing transactions among many employees and many plan trustees.

Even a brief overview of service provider activities reveals the enormous burden this requirement will impose. As discussed above, service providers often engage in relationship-building and educational activities for pension plan trustees. They do not currently maintain detailed records of such activities to the extent necessary to support LM-10 reporting, and maintenance of these records would be extremely onerous and pose complex problems. Service providers, for example, may sponsor receptions or meetings for which attendance is not tracked. In some cases, no record may be kept at all. In others, RSVP responses, but not actual attendance, may be recorded. Moreover, even where attendance is tracked, service providers do not record whether particular attendees are union officials, and whether they availed themselves of the food and drink that might be available at the event.

In order to support executive level certifications by the president and treasurer of the service provider, particularly when such certifiers are subject to criminal penalty, Sarbanes-Oxley like internal controls and sub-certification systems will be required. As evidenced by the experience of companies under the Sarbanes-Oxley Act, the development and implementation of such control systems is very expensive. AMR Research, for example, estimated technology spending for Sarbanes-Oxley compliance at $1.7 billion for 2005. Foley & Lardner LLP, in a report on the costs of being a public company in the "Sarbanes-Oxley era," estimates a 33% increase from fiscal year 2003 to fiscal year 2004 in the compliance cost for a company with revenues less than $1 billion, and a 45% increase for companies with revenues of $1 billion or more over the same period. Financial Executives International estimated in 2004 that the cost of first-year compliance with Sarbanes-Oxley could exceed $4.6 million for each of the largest U.S. companies.

Before proceeding to impose such a burden on service providers, the Department is obligated by law to prepare an assessment of "the need for the collection of information" and a "specific, objectively supported estimate of burden," and to seek input from the regulated community in a separate rulemaking designed for that purpose.[9]

C. The Difficult and Complex Issues Posed by Imposition of LM-10 Requirements on Service Providers Deserve Their Own Notice and Comment Process

The Office of Labor Management Standards has never before regulated service providers to Taft-Hartley trusts. We respectfully submit that OLMS lacks the requisite expertise to impose regulatory requirements on this community without first engaging in an interactive dialogue to gain a better understanding of how service providers function. OLMS needs to engage the industry in order to appreciate the unique and difficult issues posed by the proposed expansion of the LMRDA to cover service provider-plan trustee interactions. Only through such dialogue—appropriately facilitated by the legally required notice and comment process—can OLMS properly evaluate the need for, and scope of, potential changes to the reach of the LM-10 reporting requirements.

The LM-30 rulemaking is not the appropriate context in which to undertake this necessary effort. The rulemaking itself does not address, much less resolve, the complex issues posed by imposition of LM-10 requirements on service providers. Indeed, the examples offered to clarify the Form LM-30 do not cover any of the typical service provider-plan trustee interactions mentioned above, such as educational conferences, marketing activities, client service meetings, and the like. Moreover, the current set of LM-10 Frequently Asked Questions do not fully resolve many of the issues that have arisen even at this early stage, much less the

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[9] The LM-30 NPRM also fails to address other required issues in the context of the LM-10, including the impact on small business or the ability of U.S. based businesses to compete with foreign-based businesses who may not be subject to Form LM-10 requirements. *See* 70 Fed. Reg. 51166, 51195.

multitude of other issues that will no doubt surface as service providers attempt to comply with these requirements. For example, although we understand from informal dialogue with the Department that the $250 de minimis limit is intended to be applied separately to each union and union official, this is not clear from the language of the FAQs. Moreover, the FAQs do not provide clear guidance on the treatment of payments from affiliated companies, or from brokers representing more than one affiliate. Furthermore, the FAQs do not explain how the grace period would apply, if at all, to a service provider with no reportable transactions for 2005. Nor do the FAQs address whether the Form LM-10 requirements would apply to gifts to plan trustees who are union members, but not union officers. These and potentially many other issues should be fully and thoroughly vetted in an LM-10 rulemaking.

Moreover, an LM-10 rulemaking is necessary to clarify the Form LM-10 and its instructions. As currently written, the Form LM-10 provides no clear guidance to service providers with respect to their filing responsibilities. It does not even contain, for example, the newly-minted $250 de minimis exception. It is unfair to ask the chief executive officers and chief financial officers of service providers to attest under penalty of perjury to the contents of Form LM-10 without providing clear instructions applicable to the nuances of service provider-plan trustee interactions, something the current Form LM-10 fails to do. Thus, the Form LM-10 must be updated, and, like its update to the Form LM-30, the Department's updating of the Form LM-10 must be accomplished through notice and comment rulemaking.

VI. The Proposed LM-30 Regulations and LM-10 Guidance are Deficient in Other Respects

A. Retroactive Application of the LM-10 Reporting Requirement to Service Providers is Unfair

Service providers to Taft-Hartley plans have never before been advised that they are subject to the Form LM-10 reporting requirements for activities in which they engage in their capacity as service providers (as distinguished from their activities as employers). Although the Department argues that its view of the LMRDA's requirements has always encompassed service provider-plan trustee interactions, it has identified no source of LM-10 guidance in which this view was articulated to the regulated community. Indeed, in recognition of the surprise with which its new position was greeted, the Department has adopted an enforcement "grace period" for new filers of Form LM-10 who did not know they were subject to these requirements.

Service providers do not currently maintain records sufficient to support Form LM-10 reporting. Their records of educational, client service and marketing activities do not typically contain the level of detail necessary to allow them to complete Form LM-10. Given the issuance of the Form LM-10 guidance on the OLMS website in late 2005, it would be manifestly unfair to require full compliance for 2006. It is unreasonable to expect large service providers with multiple offices, many employees, many pension plan clients, and numerous affiliates to develop and implement reporting and recordkeeping systems necessary for full compliance, with executive level certifications under penalty of perjury, as of the beginning of their 2006 fiscal year. Furthermore, for 2005, even with the relaxed requirements of the grace period, reasonable estimation and reconstruction of data will be difficult and time-consuming. (And, as noted

above, it is unclear how the grace period will assist service providers who do not file for 2005 because they have no reportable payments above the de minimis threshold.)

We suggest that, at a minimum, the Department engage in a separate Form LM-10 rulemaking, and not impose these new requirements on service providers unless and until that process has been completed. Furthermore, we believe that substantial advance notice must be provided in order to allow for implementation of appropriate data collection and reporting systems.

B. The De Minimis Exception Does Not Relieve Service Providers of the Burden of Tracking Transactions of Insubstantial Value

The Department proposes to exclude from reporting those transactions with an aggregate annual value, per person or per union, of $250 or less. The Department proposes to require that employers track all expenditures, however small, in order to determine whether the $250 limit has been reached. Indeed, the Department's guidance could be read to require that employers (and union officials) track items as minimal in value as a cup of coffee. While they may not ultimately have to report such gratuities if they do not exceed the $250 limit, service providers and union officials will be subject to the tremendous burden of monitoring and keeping records of these day-to-day courtesies. Thus, requiring aggregation with no minimum threshold effectively negates any benefit of the $250 aggregation amount.

The Department should, at a minimum, adopt standards similar to those of the Office of Government Ethics, cited as a model in the NPRM. *See* 70 Fed. Reg. 51166, 51175-86. The Office of Government Ethics does not require federal employees to count gifts valued at $122 or less toward the reporting trigger. *See* 70 Fed. Reg. 12111, 12111-12 (Mar. 11, 2005). In this way, the Office of Government Ethics avoids imposing the burden of counting every cup of coffee or other minor courtesy.

In addition, the NPRM explains that the $250 exception is intended to avoid imposing reporting requirements for items of "insubstantial" value. Given the nature of ordinary service provider-plan trustee interactions, including educational conferences and the other activities described above, all of which are desirable and serve the interests of pension plans and their participants, the $250 aggregate amount is insufficient to capture the universe of "insubstantial" gifts. Many positive service provider activities, such as one or two day educational conferences with meals, may exceed $250 per person. We respectfully urge the Department to reconsider the $250 threshold for the de minimis exception, to solicit comment from LM-10 filers as to its application, and to re-set the amount at a higher level sufficient to exclude "insubstantial" transactions.[10]

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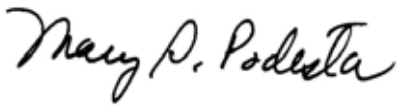
[10] Office of Government Ethics regulations currently establish a $305 reporting threshold, subject to periodic revision. *See* 70 Fed. Reg. 12111, 12111-12. The NPRM also notes, in the context of certain investments, that $1,000 would be considered an "insubstantial" amount. *See* 70 Fed. Reg. 51166, 51176, 51186.

* * * *

We urge the Department to withdraw the incredibly burdensome and unprecedented imposition of Form LM-10 requirements on service providers and not to proceed unless and until such time as it conducts a separate Form LM-10 notice and comment rulemaking, as legally required.

Thank you for the Department's consideration of these comments. Please feel free to contact us or our counsel, William J. Kilberg, P.C., of Gibson, Dunn & Crutcher LLP (202/955-8573), should you wish to discuss these issues further.

Respectfully submitted,



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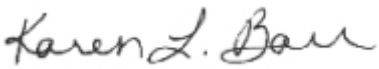

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