APPENDIX B: AGENCY'S RESPONSE TO THE REPORT

U.S. Department of Labor

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April 24, 2024

MEMORANDUM FOR: CAROLYN R. HANTZ
Assistant Inspector General for Audit

FROM: JEFFREY FREUND
Director, Office of Labor-Management Standards

SUBJECT: Response to Office of Inspector General Report: OLMS Can Do More to Protect Workers' Rights to Unionize Through Enforcing Persuader Activity Disclosure

This Memorandum is in response to the Department of Labor's Office of Inspector General (OIG) Report and Recommendations to the Office of Labor-Management Standards (OLMS) regarding the need and desirability for OLMS to expand its enforcement of the Labor-Management Reporting and Disclosure Act's (LMRDA) requirements that employers and labor relations consultants timely and accurately report on their expenditures, agreements and arrangements to persuade employees "to exercise or not to exercise, or as the manner of exercising" their rights protected under the Labor-Management Relations Act (LMRA), to "interfere with, restrain, or coerce employees in the exercise of the right to organize and bargain collectively," and "to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute" as required by Section 203 of the LMRDA (collectively "Reportable Activities"). 29 U.S.C. 433. These reports are denominated Form LM-10 (for employers) and Forms LM-20 and LM-21 (for labor relations consultants).

OLMS agrees entirely with OIG's overarching conclusion that employers and consultants regularly fail to comply with these statutory reporting requirements and that OLMS should increase its enforcement activities in this important area of labor-management relations. Indeed, it was precisely because we believed there was more to be done in this area that OLMS suggested that OIG audit this aspect of our work when OIG proposed an OLMS audit. Not only does OLMS agree with that overarching conclusion, it also accepts all of OIG's recommendations, some as proposed and others with reservations noted.

Notwithstanding our general agreement with OIG's conclusions and recommendations, we submit this Response because OIG has significantly understated the structural and statutory impediments to more effective enforcement of these reporting requirements, the historical focus on union reporting obligations and the efforts OLMS has undertaken since 2021 to increase timely and accurate reporting of these Reportable Activities notwithstanding those impediments. We address these three points below.

I. There Are Significant Structural and Statutory Impediments that Make Enforcement of Employer and Consultant Reporting Requirements Extremely Difficult

Understanding the challenges surrounding enforcement of the requirement that employers and labor relations consultants timely and accurately file reports of their Reportable Activities begins with a comparison to the regime surrounding labor union reporting requirements. Under Title II of the LMRDA, unions must file a report (LM-1) when they first come into existence and thereafter must file annually a financial report (LM-2, LM-3, LM-4) (Union Annual Report) within 90 days after the close of their fiscal year (the majority of which coincide with the calendar year) unless they terminated their existence in the reporting year, in which case they would have to have filed a terminal report. More than 20,000 unions have filed Forms LM-1 with OLMS. In short, there is a known and readily identifiable universe of entities required to file a Union Annual Report.

The environment regarding employer and labor relations consultant reporting is not as readily identifiable. There are some general similarities. Just as consultant reports must be filed when the consultants engage in Reportable Activities, unions must file the Form LM-1 report upon coming into existence with the purpose of dealing with employers. However, a closer examination reveals a different, much more complicated environment for employer and consultant reporting. A consultant must file a Form LM-20 report for *each* agreement it enters. Thus, while a new union must file, on just one occasion, a Form LM-1 report, within 90 days of coming into existence, a consultant must file a new Form LM-20 report within 30 days of agreeing to engage in Reportable Activities. There is no preexisting listing of all employers or consultants who engage in Reportable Activities in any particular year, and there is no requirement that employers or consultants who have not engaged in Reportable Activities file a "negative report," i.e. a report identifying themselves and stating they have nothing to report. Accordingly, as to employers, there is no organized way to identify those who have engaged in Reportable Activities in the prior fiscal year and therefore no organized way to know whether any particular employer is delinquent. To borrow a line from the OIG Report, there are "approximately 12 million employers in the U.S. according to [the] Bureau of Labor Statistics," any one of which (or none of which) may have engaged in Reportable Activities. There is simply no way for OLMS to know, without investigation, which ones have and which ones have not engaged in Reportable Activities, although as discussed in Part III below, one of OLMS' initiatives with the National Labor Relations Board (NLRB) helps identify some employers who may have engaged in Reportable Activities.

The same holds true for labor relations consultants but with an additional structural impediment. While employers who are required to file LM-10 reports have a knowable date on which they must file – 90 days after the close of their fiscal year if they engaged in Reportable Activities at any time in that year – consultants must file LM-20 reports within 30 days after they enter into an agreement or arrangement with an employer to perform Reportable Activities, whether those agreements are written or verbal. Thus, there is no regularized, fixed or knowable date by which OLMS could know whether a report is due from any particular consultant. Like employers, they are not required to file negative reports. Thus, on any given day of the year, there may be a consultant who is required to file a report, but there is no structural way for OLMS to know that fact without investigation.

This is not to say that OLMS does not take these filing requirements seriously or that it has not taken organizational actions to create mechanisms to enforce them. We discuss those in

Section III below. But those actions all require full-time employee (FTE) resources, i.e., at bottom they are largely investigative actions. OLMS operates with around 195 employees – 43 at headquarters and 152 in 12 field offices around the country. OLMS' statutory responsibilities that call upon investigative resources are expansive:

- OLMS enforces Title IV of the LMRDA. That Title requires that union members who believe the Act was violated during a union officer election file their complaints with OLMS after exhausting available internal union remedies. OLMS is required by statute to file suit on these complaints, if they are actionable, within 60 days of receiving them. In 2023 there were 126 Title IV complaints filed and investigated by OLMS.
- When OLMS finds that there was a violation of the LMRDA that may have affected the outcome of a challenged election and sues or settles resulting in setting the election aside, OLMS must supervise the re-run election. In 2023 there were 13 OLMS-supervised rerun elections.
- OLMS has a vigorous compliance audit program (CAP) under which it audits local and intermediate union financial books and records to ensure that union funds are being managed in accordance with the fiduciary standards imposed on union officers and an international union audit program (I-CAP) under which it does the same for large national and international unions. In 2023 OLMS conducted 222 CAP audits and 2 I-CAP audits.
- OLMS investigates circumstances where there is a basis to suspect that a union officer or employee, or someone working with them, has misused union funds in a way that violates criminal laws or has otherwise used their position in a way that violates those laws. This law enforcement function is OLMS' highest priority, although even this work must be put aside when the investigations of complaints concerning union elections require immediate attention. In 2023, OLMS completed 155 criminal investigations and our investigative activities resulted in 39 indictments and 57 criminal convictions.
- OLMS also engages in vigorous compliance assistance with our regulated community – unions, union members, employers, and consultants – all with an object of educating that constituency in an effort to minimize violations of the LMRDA's various requirements. In 2023, OLMS conducted 116 compliance assistance seminars, providing assistance to 4,409 participants and recorded 12,984 contact hours (i.e., the number of participants multiplied by the number of hours of instruction). While some of this work is performed by non-investigators out of the National office, much of it that is conducted through OLMS district offices is performed by investigators.[1]

[1] OLMS also investigates, e.g. whether trusteeships were properly imposed under Title III of the LMRDA, and whether the bonding requirements and prohibitions against certain persons holding office under Title V have been met. These matters, however, consume a significantly smaller portion of investigators' collective time.

It is in the context of these activities that OLMS' enforcement of the various statutory reporting obligations must be assessed, because it is largely the same investigators who do the work set out above who are responsible for investigating delinquent or deficient employer and consultant reports.

There are other structural impediments to OLMS enforcement of these filing requirements. Even collecting the investigative information to determine whether a report is due can be challenging. Section 601 of the LMRDA expressly affords the Secretary broad investigative powers "to make an investigation and in connection therewith he may . . . inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto" when the Secretary believes someone has violated or is about to violate the law. Because of the clarity of that authority, one would expect employers and consultants to voluntarily produce documents when OLMS requests them during an investigation. Yet that is not the case; in two recent cases involving large national employers, OLMS has been forced to issue subpoenas for records to which it is clearly entitled and to initiate subpoena enforcement actions in Federal court to obtain records necessary to decide whether an employer report is either due or incomplete. As your Report notes, while civil enforcement is available (and while OLMS is pursuing it in several civil cases), the LMRDA contains no civil penalties for a failure to timely or correctly file a required report and a civil enforcement case definitionally will not result in the timely filing of a required report. Finally, while there are criminal penalties for the "willful" failure to file or for filing a false report, OLMS does not have the authority to initiate these criminal processes and there are significant challenges to pursuing criminal cases for reporting violations even when the evidence might support such.

II. In Carrying Out Its Statutory Obligations to Enforce the LMRDA's Reporting Requirements, OLMS' Historical Focus has Been on Enforcing the Union Reporting Requirements and there has Been No Organized, Comparable and Sustained Effort to Enforce the Employer and Consultant Reporting Requirements Until 2021

Since the creation of the Bureau of Labor-Management Reports (the predecessor agency to OLMS responsible for enforcing the reporting requirements of the LMRDA) in 1959, the principal focus of the Agency has been on enforcing the Act's provisions regarding unions. While enforcement priorities changed over time from one Administration to another, OLMS carried out these responsibilities without regard to partisan politics throughout the balance of the century.

In 1992, however, a memorandum to the then-Secretary of Labor Lynn Martin recommended a policy shift with apparent partisan political objectives. The memo, attached hereto, recommended two initiatives regarding unions. The first was to require that employers post a notice advising employees of their right to pay less than full union dues even when paying those dues was a condition of employment contained in a collectively bargained union security clause. The second was to institute changes in the LM- 2 union reporting and disclosure form to provide union-represented employees with detailed information on union expenditures, making it easier for them to object to paying a portion of their dues. While there may have been legitimate policy reasons for these changes, the stated reason for them in the memo was to "weaken our opponents and encourage our allies.

While those recommendations were not implemented in 1992, in 2003 OLMS issued a Rule adopting what is now the electronic Union LM reporting regime requiring much more detailed expenditure reporting than previously required. Separately, OLMS required employers to post the notice to employees described in the 1992 memorandum. At the same time, OLMS ramped up its program for auditing international unions, hiring approximately 6 auditors expressly for that purpose.

Nothing in the 2003 initiative focused on employer or consultant reporting. Indeed, there was no comparable, sustained effort to enforce the Act's employer and consultant reporting requirements until 2021. There have been intermittent efforts to strengthen enforcement of those provisions. For example, starting around 2010 OLMS began "cross-matching" employer-filed LM-10s and consultant-filed LM-20s to try to ascertain whether both an employer and a consultant party to a persuader arrangement filed their LM reports. In 2011, OLMS began sending letters to employers named in NLRB Representation Petitions advising them of their and their consultants' reporting obligations. That program ended in 2016 but has since been reinstated and expanded. However, many OLMS initiatives regarding employer and consultant Reports moved in the opposite direction. For example, in 1983 OLMS abandoned what was known as its "split income" method of employer reporting, thereby shielding from scrutiny certain payments by employers to their own employees made to encourage them to persuade other employees about their LMRA-protected rights. In 2016, OLMS adopted a "Special Enforcement Policy" that had the effect of freeing consultants from providing certain financial information on their annual LM-21 reports. In 2018, OLMS withdrew a prior Rule (and abandoned an appeal from an adverse District Court decision enjoining the Rule), adopted just two years earlier, which would have increased the amount of financial information employers and consultants were required to report.

III. Despite These Historical, Structural and Statutory Impediments to Enforcement of the LMRDA's Employer and Consultant Reporting Requirements, Starting in 2021 OLMS Began Instituting Substantial Changes in its Approach to Enforcement of those Requirements

In an effort to take a more even-handed and comprehensive approach to the full range of the LMRDA's reporting requirements and give life to largely overlooked sections of the Act, OLMS began to make larger changes to its approach to employer and consultant reporting commencing in early 2021. While the OIG Report recognizes some of the changes OLMS has instituted, it does not capture them all. And its discussion of the changes it does recognize – without contextualizing them against the historical, structural, and statutory impediments to enforcement – does not paint an accurate picture of the current state of OLMS' enforcement efforts. For completeness, we list below all the measures OLMS has taken since January 2021 to upgrade its enforcement of these reporting requirements.

- Expanded Form LM-10/20 cross-match efforts.
- Initiated a persuader tip line in early 2022, which is highly visible on the OLMS website and is easily reached via an Internet search. It has led to 131 persuader tips processed and 110 tip-related persuader reports received.

- Engaged in extensive promotion of the tip line, such as issuing a blog post about the tip line, a listserv message highlighting the blog, and a tweet, as well as through an expanded Persuader Reporting Orientation Program (PROP) letter that now goes not only to employers who are parties to a union representation matter but to union officials who file the NLRB election petitions.
- Direct outreach to union officials broadly, and meetings with lead union organizers of national and international labor unions, advising them of OLMS' focus on employer and consultant reporting obligations.
- Updated the employer-consultant reporting fact sheet to provide further examples of both direct and indirect persuader activity.
- Created a new employer reporting fact sheet that focusses upon surveillance and unfair labor practice Form LM-10 reporting.
- Published a Form LM-20 common errors fact sheet.
- Conducted a webinar for employers and consultants in September 2022.
- Engaged in direct, compliance assistance outreach with filing labor relations consultants.
- Revised the Form LM-21 special enforcement policy, in April 2024, expanding the scope of consultant reporting on that form.
- The OLMS Director posted multiple persuader-related blogs on his From the Director's Desk page.
- Published a revision to the Form LM-10, requiring federal contractors to indicate their status on the report.
- Finalized a Memorandum of Agreement, with the NLRB, on information sharing.
- Formed a persuader and surveillance reporting workgroup, which led to the opening of multiple cases.
- Selected four senior investigators to focus a significant portion of their time towards persuader reporting, including the development of a compliance review program for consultants.
- Increased the number of "special reports" cases (including persuader) completed, from just 70 in FY 21 to 106 in FY 22 and 100 in FY 23.

These efforts have led to a significant increase in persuader reports, from just 314 Form LM-20 reports in FY 21, to 747 in FY 22, and 761 in FY 23. See the LM historical filing data page on the OLMS website.

As noted at the outset of this Response, and notwithstanding the efforts it has already undertaken in this area, OLMS appreciates OIG's recognition of the need to continue to expand its enforcement efforts in this area and is committed to doing so. More specifically, it has the following responses to OIG's Recommendations:

Recommendation No. 1: Outline requirements needed to strengthen enforcement authority to align with the Act's intentions to protect workers' rights and interests to unionize by recommending rule changes or legislative changes to increase employer and consultant compliance.

OLMS neither concurs nor disagrees with this recommendation regarding legislation, as it believes that the legislative changes component is outside of the purview of the individual agency. OIG recognizes in its report that OLMS' enforcement authority is constrained by the terms of the LMRDA, which can only be changed through legislation. It is OLMS' view that, while the timely and accurate filing of all reports required by the LMRDA should be encouraged by whatever means available, if legislative efforts are to be directed to any particular filing requirement, efforts to maximize the timely and accurate filing of LM-20 reports deserves the most emphasis. Congress' decision to require that these reports be filed contemporaneously with the activity (within 30 days of the entry into an agreement or arrangement) reflects the policy judgment that workers should know about the existence of these agreements and arrangements while work under them is occurring, not months afterwards. Accordingly, OLMS is prepared to provide technical assistance in the event a legislator requests such assistance in drafting a provision subjecting labor relations consultants to civil monetary penalties for noncompliance with the reporting requirements as a means to maximize such compliance.

In regard to regulatory changes, the LMRDA provides that the Secretary has the authority to adopt regulations "prescribing the form and publication of reports required to be filed under this subchapter and such other reasonable rules and regulations (including rules prescribing reports concerning trusts in which a labor organization is interested) as he may find necessary to prevent the circumvention or evasion of such reporting requirements." 29 U.S.C. 438. OLMS has used that authority to, among other things, modify the format of LM forms for all filers, create new reporting obligations, require electronic filing of reports, and require reporting of categories of employer payments not previously required (although we note that its effort to expand through rulemaking the expenses employers incur for persuader activities was enjoined by a federal court and later rescinded). Additionally, OLMS constantly reviews regulatory and discretionary enforcement options available to increase the scope of Employer and Consultant reporting. For example, in 2023 OLMS modified through rulemaking its LM-10 Employer Report Form to require filing employers who were federal contractors to indicate that fact on its LM-10 and to describe under which federal contract it was engaging in reportable persuader activities. Additionally, in the Fall 2023 Regulatory Agenda, OLMS advised that it intends to explore the scope of split income reporting on the Form LM-10 Employer Report, where the employer would be required to report, for example, its supervisors' income on a split basis that is, the pro rata share of the supervisor's wages that were spent undertaking the reportable activity. Further, on April 4, 2024, OLMS revised its Special Enforcement Policy regarding Form LM-21 (Consultant Annual Report) and announced that revision to the regulated community.

There are other areas of regulation and exercise of enforcement discretion OLMS may consider, including various revisions to the Forms LM-10, LM-20, and LM-21 such as requiring that both employers and consultants report their employer identification numbers (EIN) on their respective forms (discussed in connection with Recommendation 2). If adopted, such changes would affect the nature and quality of the information required to be reported and would provide OLMS with greater investigative tools to detect employers and consultants who were required to file reports but who did not. But those changes would not – in and of themselves – advance the goal of maximizing the timeliness or accuracy of such reports in the first instance.

Recommendation No. 2: Implement quality control measures to improve the usefulness of reported information by—at a minimum—ensuring requirements for: completion of required fields, validated addresses, ability to efficiently cross-match corresponding reports, and tax identification number inclusion.

OLMS largely concurs with this two-part recommendation and looks forward to working diligently to complete these tasks.

Regarding the first portion of the recommendation surrounding updating the required fields and validation of addresses, OLMS intends to fully explore this through development and coordination with the Office of the Chief Information Officer (OCIO). While the Electronic Forms System (EFS) already has form validation requirements that include the completion of identified required fields, such as addresses, OLMS will more fully explore this area and the potential addition of a process to validate correct addresses accordingly. We anticipate completing this step by the end of the calendar year with the assistance of OCIO, a step that will promptly improve the accuracy and thoroughness of the reports being filed.

OLMS further acknowledges that, with the addition of tax identification number requirements to the forms LM-10, LM-20, and LM-21, we will be better able to cross-match forms and, therefore, improve OLMS' ability to ascertain whether required reports have been filed. With the inclusion of a tax identification number, OLMS will be able to identify those individual employers and/or consultants who have failed to disclose those transactions and agreements required under the LMRDA. However, it is important to note that the adjustments to the employer and consultant forms and instructions to include the tax identification number will require notice-and-comment rulemaking, which is a lengthy process. As a result, the Chief of the Division of Interpretations and Regulations (DIR) will explore necessary regulatory steps needed to include a tax identification number on all employer and consultant reports and will shepherd this recommendation through the rulemaking process. Realistically, however, this second part of the recommendation may take a year or more to complete.

Recommendation No. 3: Develop an online system to intake, track, and monitor tips from receipt to completion, including anonymity protection.

OLMS has already begun researching and analyzing electronic form submissions utilized by other agencies within the Department, in order to develop and implement this recommendation with the maximum success possible. OLMS intends to develop and implement a reinvented online submission procedure and make it available to the public by March 30, 2025. We will develop a new vision for what the OLMS electronic form submission will look like and, once that vision is fully developed and memorialized, we will work with OCIO to develop the new platform for submission and incorporate it into the OLMS public website.

It is important to note, however, that OLMS does not wish to develop an online system that requires extensive field completions. OLMS often receives tips from individuals or organizations that have limited or partial information; information that OLMS still finds valuable and useful. As a result, we plan to develop an online submission form that still allows for the submission of partial information and anonymity. While acknowledging that such a system may

facilitate the submission of tips with insufficient information for OLMS, we are accustomed to receiving such information and plan to continue to handle such while avoiding the pitfalls of an insufficient tracking system. The Director of the Office of Program Operations will be responsible for ensuring the development and implementation of the online system to intake, track, and monitor tips from receipt to completion, including anonymity protection.

Recommendation No. 4: Implement written tip line policies and procedures to standardize the intake, tracking, and resolution processes.

OLMS concurs with this recommendation and has already taken steps to implement it. The Chief of the Division of Compliance Assistance has drafted new policies and procedures to track tip intake and processing. These procedures are currently being reviewed internally, and OLMS anticipates the finalization of this draft no later than June 30, 2024.

Recommendation No. 5: Increase awareness of the tip line through enhanced publicity, such as posting it on DOL's complaint webpage.

OLMS agrees with this recommendation as well. When OLMS initially implemented the tip line, it prominently displayed the information on its website..[2] From the OLMS homepage, a member of the public can click a link and submit their tip. OLMS took steps to broadly publicize this new tool when it was first implemented. In addition to posting the tip line on our website, OLMS publicized it through its listserv, thereby providing the information to a broad spectrum of stakeholders. OLMS also provided information about the tip line to union PROP letter recipients (i.e., unions who filed Representation Petitions with the NLRB) and through OLMS' Voluntary Compliance Partnership (VCP) program, which consists of 50 national and international unions. Finally, the OLMS Director has made a concerted effort to speak on this topic to all stakeholders – including specifically union organizers - throughout the country. These union organizers are most likely to learn about, and bring to OLMS' attention, reportable activities.

Notwithstanding these efforts, OLMS agrees that it can take more steps to publicize the tip line. OLMS plans to develop compliance slides to provide to the district field offices for inclusion in compliance assistance events hosted throughout the country that describe the tip line. Annually, each district office provides compliance assistance within their respective jurisdictions, inviting all labor organizations. This should dramatically increase the grass-roots publicity the tip line receives. Additionally, OLMS will publicize the deployment of the new online portal being developed in Recommendation 4 by prominently placing it on the OLMS homepage, utilizing the listserv again, and simultaneously reaching our stakeholders through both the VCP program, PROP, and compliance assistance events. The Chief of the Division of Compliance Assistance will be responsible for the completion of this recommendation.

Recommendation No. 6: Implement specific collaborative processes for sharing persuader activity and other relevant information with the National Labor Relations Board, including

[2] OIG suggests that the tip line does not appear in internet searches "without using specific search terms or questions." With respect, that is not OLMS' view – our use of the general or specific kinds of search terms one would use regularly produced the tip line as the first or second listed site.

specifying information needs, procedures and timelines for sharing information, resource sharing, and interagency training needs.

OLMS agrees with this final recommendation of the OIG as well. With the initiative to improve timeliness and accuracy of employer and consultant reporting, and to more fully implement a preexisting Memorandum of Understanding (MOU) between the agencies, OLMS entered into a Memorandum of Agreement (MOA) with the NLRB to promote information sharing between the agencies. While the MOU and MOA have improved information exchange, OLMS has determined that interagency training is needed to ensure greater collaboration, and the MOU includes such training as an option. OLMS plans to address the training needs of the respective organizations, which we anticipate will lead to increased and improved information sharing. By first obtaining an accurate and complete understanding of the breadth and scope of each agency's missions, programs, activities, and limitations, OLMS and the NLRB should be better positioned to increase and improve information sharing. A mutual understanding of the intricacies of the agencies' missions, programs and statutory limitations should facilitate the collaborative process and result in a more effective exchange of information. The Director of the Office of Program Operations will be responsible for development of a joint training initiative. OLMS anticipates completing this recommendation by September 30, 2024.

Enclosure

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PLEASE RETURN TO ROOM S-2523

February 19, 1992

To: Lynn Martin
Clayton Yeutter

From: Newt Gingrich

A letter is being circulated in the House (attached) calling for two specific actions on the Beck decision. These two steps are long overdue. It will weaken our opponents and encourage our allies if we take these two steps:

1. Order the Department to require the posting of workplace notices that specifically inform workers of their Beck rights.

2. Order the Office of Labor-Management Standards to institute changes in the LM-2 union reporting and disclosure form to provide union members with essential information on dues expenditures.

Can we set a schedule to implement these two items by the end of March?

cc: Sam Skinner
Henson Moore
Bob Teeter
Mary Matalin
Fred Malek
Robert Mosbacher

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