

marketers participating in state-regulated retail access programs apply to any release where the marketer replacement shipper is obligated to use the capacity to provide the gas supply requirement of retail consumers in the program. Even if the marketer does not itself make sales directly to the subject retail consumers, this condition can be satisfied so long as the marketer has a contractual obligation to use the full amount of the released capacity to supply gas to the retail access marketer and the retail access marketer is, in turn, obligated to supply that gas to the retail consumers pursuant to a state-regulated retail access program.

30. As stated above, in Order Nos. 712 and 712-A the Commission exempted from bidding releases "to a marketer participating in a state-regulated retail access program as defined in paragraph (h)(4) of this section * * *." ²⁴ In section 284.8(h)(4) of the revised regulations, the Commission defined releases to a "marketer participating in a state-regulated retail access program" as "any prearranged capacity release that will be utilized by the replacement shipper to provide the gas supply requirement of retail consumers pursuant to a retail access program * * *." ²⁵ This definition applies to any replacement shipper which is obligated to use the released capacity to transport gas which will be used to provide the gas supply requirement of the retail consumers, whether that shipper makes the retail sales itself or sells the gas to the retail marketer who then resells the gas to the retail consumers. ²⁶ The Commission's rationale in Order No. 712 for granting the exemptions from the tying prohibition and bidding requirements for capacity releases by LDCs to implement state-approved retail access programs applies equally to the situation where an LDC releases capacity directly to the retail marketer or to another entity which is obligated to transport the gas on behalf of the retail marketer. The essential requirement is that the replacement shipper either (1) is itself the retail marketer or (2) has a contractual

relationship with the retail marketer and/or the LDC requiring it to use up to the full amount of the released capacity to satisfy the retail marketer's obligations under the state-approved retail access program to provide the gas supply requirement of retail consumers.

31. The Commission rejects the argument that granting this clarification will allow circumvention of interstate pipeline creditworthiness standards. If a retail marketer is unable to satisfy these standards, the replacement shipper supplier will be required to satisfy the pipeline's creditworthiness criteria. If no party can meet these standards then the pipeline does not have to allow the release.

32. The Commission also grants National Grid's requested clarification that an LDC that releases to an asset manager can require the asset manager to release capacity to marketers serving under the retail choice program and that such a release will qualify for the exemptions from the tying prohibition and bidding requirements. This condition is one that can be addressed in the agreement between the releasing shipper and asset manager, and will allow LDCs and asset managers to operate efficiently to effectuate the goals of retail access programs.

33. The clarifications granted above render the various requests for waiver moot.

Termination of Dockets

34. The Commission initiated Docket Nos. RM06-21 and RM07-4 to address a petition filed by Pacific Gas and Electric Co. and Southwest Gas Corporation concerning the potential removal of the maximum rate ceiling on capacity release transactions and a petition filed by the Marketer Petitioners seeking clarification of the operation of the Commission's capacity release rules in the context of asset management services. The issues raised in the petitions have been fully addressed in the instant docket. Accordingly, the Commission hereby terminates Docket Nos. RM06-21 and RM07-4.

The Commission orders:

(A) The requests for rehearing of Order No. 712-A are denied and the requests for clarification of Order No. 712-A are granted in part and denied in part as discussed above.

(B) Docket Nos. RM06-21 and RM07-4 are hereby terminated.

By the Commission.

Nathaniel J. Davis, Sr.,

Deputy 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; delay of effective date and applicability date.

SUMMARY: This final rule delays the effective date and applicability date of regulations pertaining to the filing by labor organizations of annual financial reports required by the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA) that were published in the **Federal Register** on January 21, 2009. They revised Labor Organization Annual Report Form LM-2 and established a procedure whereby the Department may revoke, when warranted, a labor organization's authorization to file the simplified Labor Organization Annual Report Form LM-3. These regulations were to have gone into effect on February 20, 2009, but were delayed until April 21, 2009, by a final rule published on February 20, 2009 (74 FR 7814). This final rule postpones the effective date of the regulations from April 21, 2009, until October 19, 2009, and the applicability date of the regulations from July 1, 2009, until January 1, 2010. This will allow additional time for the agency and the public to consider a proposal to withdraw the January 21 regulations 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. At the same time, the Department has published a Notice of Proposed Rulemaking elsewhere in this issue of the **Federal Register**, seeking public comment on its proposal to withdraw the regulations.

DATES: The effective date of the rule amending 29 CFR Parts 403 and 408, published January 21, 2009, at 74 FR 3678, is delayed until October 19, 2009, and its applicability date is delayed until January 1, 2010.

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

²⁴ See 18 CFR 284.8(h)(1).

²⁵ 18 CFR 284.8(h)(4).

²⁶ Some of the parties requesting clarification describe an "agency" relationship whereby the agent would obtain the released capacity and then sell gas to its principal, the retail marketer. See National Fuel's request at 7. This arrangement, as well as what we understand as a traditional agency arrangement, where the principal would continue to hold title to the capacity and the gas, and thus there would be no need for a "resale" to the retail marketer (principal), are both acceptable to the Commission as releases eligible for the exemptions from tying and bidding provided the "agent" is obligated to serve the retail marketer's needs as described above under the retail access program.

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SUPPLEMENTARY INFORMATION:

I. Background and Overview

Section 201(b) of the Labor-Management Reporting and Disclosure Act of 1959, as amended (LMRDA) (Pub. L. 86-257, 73 Stat. 519), requires each covered labor organization to file annually with the Secretary of Labor a financial report, signed by its president and treasurer or corresponding principal officers, containing information in the detail necessary to disclose accurately its financial condition and operations for the preceding fiscal year. The Secretary of Labor has delegated the Secretary's authority under the LMRDA to the Assistant Secretary for Employment Standards.

The requirements of LMRDA section 201 apply to all labor organizations in the private sector including those representing employees under the provisions of the National Labor Relations Act, as amended, and the Railway Labor Act, as amended. Section 1209(b) of the Postal Reorganization Act made the LMRDA applicable to labor organizations representing employees of the U.S. Postal Service. Section 701 of the Civil Service Reform Act of 1978 (CSRA) and section 1017 of the Foreign Service Act of 1980 (FSA), as implemented by Department of Labor regulations at 29 CFR parts 457-459, extended the LMRDA reporting requirements to labor organizations representing certain employees of the Federal government.

Section 208 of the LMRDA authorizes the Secretary to issue rules prescribing the form and publication of the annual financial reports required by section 201, and to provide a simplified report for labor organizations for which the Secretary finds that by virtue of their size a detailed report would be unduly burdensome. Under regulations issued pursuant to section 208, the Secretary has prescribed Form LM-2 for labor organizations with total annual receipts of \$250,000 or more, and the simplified Form LM-3 for labor organizations with total annual receipts of \$10,000 or more, but less than \$250,000.

On January 21, 2009, the Department of Labor's Office of Labor-Management Standards (OLMS) published in the **Federal Register** (74 FR 3677) regulations making revisions to the Form LM-2 (used by the largest labor organizations to file their annual financial reports). The regulations, when effective, will 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 regulations 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.

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, OLMS published in the **Federal Register** a notice seeking comment on a proposed 60-day extension of the effective date and requesting comment on legal and policy questions relating to the regulations, including on the merits of rescinding or retaining the regulations. The notice was available for public inspection at the **Federal Register** on January 29, 2009 and was published on February 3, 2009 (74 FR 5899).

Public comment on the proposed extension was invited, with the comment period ending on February 13, 2009. The Department received 24 comments on the proposal to extend the effective date for 60 days. Public comment was also invited generally on the regulations, including the merits of rescinding or retaining them, with this comment period ending on March 5, 2009. The Department published a final rule on February 20, 2009, which postponed for 60 days the effective date of the regulations published on January 21, 2009 until April 21, 2009, for additional public comment and agency review of questions of law and policy (74 FR 7814).

On March 19, 2009, OLMS published a notice seeking public comment on a proposal to delay for an additional 180 days the April 21, 2009, effective date of the regulations published on January 21, 2009. This notice proposed to further delay the effective date until October 19, 2009. Additionally, this notice proposed to delay the applicability date of the regulations (establishing the start of the fiscal year for which the new reporting requirements would apply) set for July 1, 2009, until January 1, 2010. As discussed in that notice, the Department indicated that it would not be able to

complete its final review of the issues raised by the January 21 rule before April 21, 2009, the current effective date of the rule. Since that time, however, the Department has determined that the January 21 rule was promulgated without adequate review of experience under the Department's 2003 Form LM-2 rule, including the burden of reporting requirements and whether the requirements reflect a proper balance of the need for transparency and union autonomy. Thus, in a separate document published in this issue of the **Federal Register**, the Department is now proposing to withdraw the January 21 rule. Without further extension of the effective and applicability dates of the rule, those unions with fiscal years beginning on or after July 1, 2009, would have to begin immediate preparations to comply with the rule, preparations that may entail significant burden and expense, but which may prove unnecessary. Furthermore, the Department itself would have to expend substantial financial and compliance resources to prepare for the rule, resources that could be directed to other purposes if the rule is subsequently withdrawn. Therefore, the Department has decided to postpone, for 180 days, the effective date of the regulations published on January 21, 2009, until October 19, 2009, and delay the applicability date from July 1, 2009, until January 1, 2010, in order to review the comments on the proposal to withdraw the regulations 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.

II. Comments on the Proposal and the Department's Responses and Decision

The Department received comments from 27 individuals or associations on its proposal to postpone the effective date and applicability date of the new Form LM-2/LM-3 regulations. Five union commenters supported the extension as appropriate, arguing that it would enable effective review of the rule while avoiding the unnecessary burden on union resources in the event that the Department does rescind the regulations. One international union also offered additional comments on the merits of the regulations, and urged their rescission. Five commenters expressed general support for union transparency and the January 21 regulations, and they opposed any delay in their effective or applicability dates. Additionally, 17 commenters submitted form letters generally supporting the greater public disclosure of pay and

benefits to union officers and employees afforded under the January 21 regulations and urging implementation of the new reporting requirements without further delay.

Two Congressmen expressed concern that continued delay suggests political favoritism to a select constituency rather than regulatory integrity. They noted, as did two other commenters, that President Obama has emphasized the importance of public disclosure and financial accountability and that such accountability is no less needed for labor organizations than for the business sector.

The Department rejects the contention that a delay of the effective and applicability dates of the regulations suggests "political favoritism." Rather, the Department proposed the initial 60 day delay of the effective date of the regulations and commenced a review of their merits in consideration of guidance from the Assistant to the President and Chief of Staff and the Office of Management and Budget (OMB) that was directed to all Executive branch agencies, without regard to particular agencies or program areas, to determine whether it might be appropriate to delay the effective date of regulations to permit their review for matters of law and policy before taking effect. Most commenters opposing the extension recognized that the Department's actions were triggered by this OMB guidance, and one association acknowledged that this review was necessary to provide the new Administration an opportunity to review rules issued during the waning days of the Bush Administration in order to prevent agencies from publishing rules that fail to meet the regulatory standards that OMB articulated in its guidance. The proposal to withdraw the regulations, and the decision made in this rulemaking to extend the effective and applicability dates derive from this review of the merits of the regulations, consistent with the OMB guidance. The Department has engaged in this process in a fully transparent manner, and the instant rulemaking has been, and will continue to be, undertaken in full compliance with the requirements of the Administrative Procedure Act.

One public policy organization argued that there is no justification for the extensions that outweigh the benefits to union members from the disclosure provided by the January 21 rule and asserted that a delay would "immediately" allow unions to avoid increased disclosure. However, even if the reporting revisions published on January 21, 2009, had not been

postponed, there would have been no immediate changes in how unions report their finances. Rather, the initial applicability date for the regulations was July 1, 2009, and the first reports would not have been due until September 30, 2010. Notwithstanding the postponement of the effective date of the January 21 rule, an existing and effective labor organization reporting regime remains in place.

The Department reiterates the justification it offered in the notice proposing to extend the effective and applicability dates, namely that this additional time will enable the Department to complete a review of the issues raised by the January 21 rule, which the Department now proposes to withdraw, without exposing affected unions to undue burdens. Without the further extension, those unions with fiscal years beginning on or after July 1, 2009, would have to begin immediate preparations to comply with the rule, preparations that may entail significant burden and expense, but which may prove unnecessary. Further, since a decision has been made to propose withdrawal of the regulations, and if such proposal ultimately is effectuated, these expenses will have been incurred unnecessarily. While the Department strongly supports the need for union financial transparency, it also believes that preventing unions and the Department from incurring potentially unnecessary expenses and burdens outweighs any benefit gained from implementing the regulations a few months sooner.

A trade association defended union transparency and the January 21 regulations, and it argued against any delay or rescission of them by stressing the Administration's support of transparency, citing evidence that some individuals continue to abuse their union office by misappropriating and misusing members' money, and presenting an argument in support of the reporting of union payments made towards job targeting. The commenter also asserted that the Department's proposed extension upholds its prediction that the initial 60 day delay would be used by the regulations' opponents to justify an even further delay as a result of added administrative burdens required to implement the mandated changes, and it contended that an additional delay would only enable the labor community to have additional time to submit comments favorable to rescission. Additionally, the trade association stated its belief that, while the initial extension was understandable in light of the

Administration directives, no further delay was warranted.

The Department disagrees with these contentions. As noted above, the Department has now proposed withdrawal of the January 21 rule. Delaying the implementation of the January 21 rule enables the Department to review comments on its proposal, while simultaneously preventing unions and the Department from incurring unnecessary costs and burdens in the event the regulations are withdrawn. Moreover, the proposed rescission is based on reasons that are consistent with the OMB guidance regarding regulatory review, in that the final rule did not reflect proper consideration of all relevant facts and was not based on reasonable judgment about the legally relevant policy considerations. As stated in the Department's proposal, the withdrawal of the January 21 rule is warranted because:

* * * the rule was 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 indicate that Department may have underestimated the increased burden that would be placed on reporting labor organizations by the January 21 rule. Finally, the Department has 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.

In light of the Department's decision to propose the withdrawal of the January 21 rule and the additional reasons stated above, the Department has decided to postpone, for 180 days, the effective date of the January 21, 2009, rule, until October 19, 2009, and delay the applicability date from July 1, 2009, until January 1, 2010.

Signed in Washington, DC, this 16th day of April 2009,

Shelby Hallmark,

Acting Assistant Secretary for Employment Standards.

Andrew D. Auerbach,

Deputy Director, Office of Labor-Management Standards.

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