

that limit discovery about experts in litigation (e.g., FRCP 26(b)(4)(B)); (v) violating confidentiality agreements in settlements; (vi) revealing information about union organizing campaigns, political activities and legal strategies; (vii) affording tactical advantages to service vendors and opposing parties in contract negotiations; and (viii) endangering the lives of foreign labor activists supported by the union. In some cases, the comments viewed disclosure as the direct cause of a potential harm; in other cases, the comments contended that disclosure may provide clues from which an adverse party could educate itself about union activities, relationships, and strategic goals. Some commenters made similar arguments with respect to the proposal to require itemization of receipts.

The Department agrees that there may be some situations in which the potential harm to union interests occasioned by disclosing certain types of confidential information warrants an exception from the requirement to provide itemized information regarding major receipts that are not reported elsewhere on the form and major disbursements. These situations are likely to be far more limited, however, than suggested by some comments. Unions are not required to provide non-financial information regarding organizing strategy, notes of meetings, or names of volunteers on a Form LM-2. Rather, they are required only to provide certain information regarding financial transactions. Generally speaking, the information disclosed will indicate simply that a disbursement was made to, or money received from, a particular individual for a purpose described by the union. Although there may be certain consequences as a result of such disclosure—as where, for example, a union indicates that a payment has been made for “job targeting” that some might consider inappropriate—such consequences must be both serious and beyond the scope of consequences intended by the LMRDA to warrant consideration of overriding the interest in disclosure embodied in that statute.

The Department has decided, however, that commenters have made a persuasive argument that certain information need not be made available to the general public and that disclosure could be sufficiently adverse to union interests that the modification described below is warranted to permit labor organizations to protect certain confidential information on certain schedules. Specifically, the Department has concluded that this special

procedure should be made available for the following types of information:

- Information that might identify individuals paid by the union to work in a non-union facility in order to assist the union in organizing employees, provided that such individuals are not employees of the union who receive more than \$10,000 in the aggregate in the reporting year from the union (in which case the statute requires that it be reported, *see* 29 U.S.C. 431(b)(3));
- Information that might provide insight into the reporting union's organizing strategy; and
- Information that might provide a tactical advantage to parties with whom the reporting union or an affiliated union is engaged or will be engaged in contract negotiations.

With respect to these specific types of information, if the reporting union believes that itemized disclosure of a specific major disbursement or aggregated disbursement would be adverse to the union's legitimate interests, it may report the disbursement in the “All Other Disbursements” portion of either Schedule 15 (Representational Activities) or Schedule 19 (Union Administration) on the Detailed Summary Page. The union must also enter a notation in Item 69 (“Additional Information”) identifying the Schedule(s) from which the union excluded any itemized receipts or disbursements because of an asserted legitimate interest in confidentiality.

A union member, however, has the statutory right “to examine any books, records, and accounts necessary to verify” the union's financial report if the member can establish “just cause” for access to the information. 29 U.S.C. 431(c); 29 CFR 403.8 (2002). In the Department's view, any exclusion of itemized disbursements from Schedules 15–19 would constitute a *per se* demonstration of “just cause” for purposes of the Act. Consequently, any union member (and the Department, which need not establish “just cause”), but not a member of the public, upon request, has the right to review the undisclosed information that otherwise would have appeared in the applicable Schedule if the union withholds the information in order to protect confidentiality interests. The Department has added to the final rule a provision that clarifies the Department's interpretation of the statute in light of the specific modification of the proposed itemization requirement in response to the numerous comments received in this regard.

Some courts have held that a finding of just cause “requires balancing the

[union's] financial interest in nondisclosure against the injury to the interest of [a requesting union member] and other union members in determining how funds held in trust for them are being spent.” *Mallick v. Int'l Bhd. of Elec. Workers*, *supra*, 749 F.2d at 785. In the Department's view, this result is not required by the statute and is, in fact, inconsistent with the statutory mandate that any member be permitted to examine records to verify the union's financial report merely upon a showing of just cause, without regard to any competing interest of the union. Accordingly, language has been added to § 403.8 to make clear the Department's view that the fact that a union has chosen not to disclose the identity of an entity that has received a disbursement of \$5,000 or more, on the ground that disclosure to third parties might be adverse to the union's interests, is just cause for union members to inquire as to the identity of the recipient or donor and the reason for the transfer of funds. The statute requires no additional showing to require the union to permit a member to examine the underlying records.

Further, a reporting union will also be permitted to report amounts received or disbursed pursuant to a settlement that is subject to a confidentiality agreement, or that the union is otherwise prohibited by law from disclosing, in the “All Other Receipts” or “All Other Disbursements” portion of the applicable Schedule on the Detailed Summary Page. Similarly, the Department agrees that in the extremely rare situation where disclosure would endanger the health or safety of an individual, the information need only be reported in the “All Other Receipts/Disbursements” portion of the applicable Schedule. In these circumstances, non-itemized reporting of the information, by itself, will not constitute just cause for additional disclosure.

Finally, some commenters asserted that disclosure of itemized information regarding benefits provided to individuals, such as, for example, burial expense benefits, would invade the privacy of those individuals. This argument, while persuasive, affects only disbursements that may properly be reported in Schedule 20 (Benefits). Accordingly, as discussed below, the Department has decided to retain the previous Schedule for Benefits, rather than the one proposed in the NPRM, and to continue to permit labor organizations to report these disbursements only in the aggregate.

The Department believes that the modified disclosure procedures for