

by unions. Several commented that the proposed rule would make it easier for agency fee payers to enforce the unions' obligation to allocate between their representational and non-representational functions upon the request of agency fee payers represented by a particular union as required by *Beck*. In the current system, a union member states, union officials have a powerful incentive to classify non-representational activities as representational, and the existing reporting forms permit this to be done without detection. This problem, in the member's view, will be remedied by the Department's proposals, because they will enable an agency fee payer to identify the percentage of receipts used for non-representational activities. This member also asserted that the enhanced reporting would permit access to information without having to use a potentially adversarial process. Another commenter stated that while it generally approved of the Department's proposals, the Department should require unions to keep contemporaneous records in order to meet *Beck* standards.

Other comments challenged the Department's proposals on the following grounds: first, that they represent an attempt to impose *Beck* requirements generally on unions, even though the NLRB, not the Labor Department, is responsible for *Beck* enforcement and the *Beck* requirements only apply to unions with agency fee payers; second, they will cause an unnecessary burden on unions that already prepare *Beck* reports; and third, the Department's proposal to establish categories that do not replicate *Beck* requirements will create confusion and promote unnecessary and harassing litigation.

*Beck* requires affected unions, upon objection by an agency fee payer (a request by a member of the union does not trigger the obligation), to subtract from the amount of the dues required of members a sum that reflects the per capita share of the union's non-representational activities. In general terms, the "chargeable" representational activities have been held to include such activities as collective bargaining, contract administration, grievance arbitration, business meetings and social events open to members and non-member employees, union publications (to the extent they reflect the union's representational activities), administration of benefits available to members and non-members alike, national conventions, and expenses of litigation related to negotiating and administering the agreement, handling grievances within the bargaining unit, fulfilling its duty of fair representation,

handling jurisdictional disputes with other unions, and litigation before administrative agencies and the courts involving members of the unit. Also in general terms, the non-chargeable activities have been held to include activities such as advocating political support or opposition in elections of government officials, lobbying, including promoting or opposing legislation, advertising relating to non-chargeable matters, administration of union benefits unavailable to non-members, union building fund activities, the publication of newspapers or similar activities (to the extent they report on non-representational matters), and litigation services that do not directly concern the unit. *See generally The Developing Labor Law* (4th ed. 2001) 1970-75, 2046-54; *The Developing Labor Law* (2002 Supplement) 330-32; NLRB General Counsel Memorandum (Aug. 17, 1998), available at 1998 WL 1806351; NLRB General Counsel Memorandum (Nov. 15, 1988), available at 1988 WL 236187.

It is not and has not been the intent of the Department to collect information specific to the *Beck* requirements. The NLRB, not the Department of Labor, is responsible for enforcing compliance with *Beck*. At the same time, the partial overlap of categories under the proposed rule and those established by *Beck* is unremarkable. The Form LM-2 functional categories for reporting a union's disbursements and estimating the time expended by union officers and employees in performing various union activities were designed to capture the various kinds of disbursements and activities associated with conducting union business. *Beck* seeks to identify union activities that are not germane to the representation provided to agency fee payers and therefore not properly assessed to agency fee payers if they object to subsidizing the union's non-representational activities. The information reported in the new Form LM-2 may be helpful to an agency fee payer to roughly evaluate his or her union's *Beck* compliance, but it is not designed as a substitute for the *Beck*-specific reporting requirements, which are established by the NLRB, as guided by judicial precedent. The Department takes no position on whether disclosure of the information required by the Form LM-2 satisfies *Beck* requirements. Similarly, *Beck* reports, principally because they lack the individual and transaction-specific information required by the revised Form LM-2, do not provide a useful alternative to the Form LM-2. The Department is not persuaded that the partial overlap

between the Form LM-2 and *Beck* reports will lead to confusion among members or that such overlap will lead to an increase in litigation by agency fee payers.

### 3. Schedule 15 (Representational Activities)

The NPRM proposed a Schedule 15 (Contract Negotiation and Administration) and a separate Schedule 16 (Organizing). The proposed Schedule for contract negotiation and administration called for reporting of disbursements for preparation for, and participation in, the negotiation of collective bargaining agreements and the administration and enforcement of collective bargaining agreements, including the administration and arbitration of union member grievances. The proposed Schedule for organizing required reporting of disbursements for activities in connection with becoming the exclusive bargaining representative for any unit of employees, or to keep from losing a unit in a decertification election or to another labor organization, or to recruit new members. Based on comments received from labor organizations and others, the Department has decided to eliminate the separate category for reporting organizing disbursements and to require that disbursements for organizing be reported in combination with contract negotiation and administration disbursements in a single Schedule entitled "Representational Activities."

Several commenters expressed the view that organizing activities should be reported in the same category as contract negotiation and administration, both to avoid unduly burdening labor organizations that must meet *Beck* requirements and to avoid disclosing sensitive information regarding a labor organization's organizing strategy. Some union commenters asserted that it is inconsistent with NLRB practice and precedent to separate organizing from the category for collective bargaining/contract administration. The NLRB, they stated, recognizes that the two activities are sometimes tightly intertwined.

Several labor organizations, including most notably the Building and Construction Trades Department of the AFL-CIO (BCTD), commented that it simply is not possible in the construction industry to separate disbursements made in connection with organizing efforts from disbursements made for contract negotiations and administration. In this regard, they refer to section 8(f) of the NLRA (29 U.S.C. 158(f)). This section provides, *inter alia*, that it is not an unfair labor practice for a construction industry employer to