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MANDATORY DISCLOSURE IN THE MARKET FOR UNION REPRESENTATION

Matthew T. Bodie*

Symposium: Whither the Board? The National Labor Relations Board at 75

As we celebrate (and fret over) the seventy fifth anniversary of the National Labor Relations Act (NLRA),¹ I want to focus on one of the more famous doctrines of the Act's rich history. In *General Shoe Corp.*,² the National Labor Relations Board (NLRB or Board) established what is known as the "laboratory conditions" doctrine. Using a memorable turn of phrase, the Board stated: "In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees."³ The image of a laboratory being used to determine "uninhibited desires" has always been wonderfully incongruous to me. But the metaphor has lasted. Over one thousand Board and federal court decisions refer to the "laboratory conditions" doctrine,⁴ and it is still the touchstone for determining whether the results of a representation election are enforced. Under this doctrine, the Board may order that

* Associate Professor, Saint Louis University School of Law. I would like to thank FIU College of Law, Dean Alex Acosta, Professor Kerri Stone, and the *FIU Law Review* for the opportunity to participate in this terrific symposium. I am also grateful to Harold A. Maier, Resident Officer of the Board's Miami office, for his commentary on the paper.

¹ Brooding over the current state of labor law has become a cherished part of NLRA anniversary celebrations. See, e.g., Benjamin Aaron, *The NLRB, Labor Courts, and Industrial Tribunals: A Selective Comparison*, 39 INDUS. & LAB. REL. REV. 35, 45 (1985) ("It must be admitted that after 50 years, the Board still has not succeeded in providing adequate protection of the right to organize and to bargain collectively, in developing effective remedies against unfair labor practices, or in substantially reducing its ever-rising backlog of cases."); James J. Brudney, *Reflections on Group Action and the Law of the Workplace*, 74 TEX. L. REV. 1563, 1563 (1996) ("Sixty years after the National Labor Relations Act (NLRA) was passed, collective action appears moribund."); David L. Gregory & Raymond T. Mak, *Significant Decisions of the NLRB, 1984: The Reagan Board's 'Celebration' of the Fiftieth Anniversary of the NLRA*, 18 CONN. L. REV. 7, 8-9 (1985) ("Although neither the Board, the Act, nor labor law is irreversibly *in extremis* at this half-century crossroads, troublesome indicia are present."). The title of this conference calls to mind one of the more famous of these reflections. Michael H. Gottesman, *Wither Goest Labor Law: Law and Economics in the Workplace*, 100 YALE L.J. 2767 (1991) ("The long and steady decline in the percentage of private-sector employees represented by unions -- a decline now in its fourth decade -- preoccupies all thinking about American labor law today.").

² 77 N.L.R.B. 124 (1948).

³ *Id.* at 127.

⁴ A Westlaw search on May 21, 2010 for laboratory conditions within the same sentence as election ("laboratory conditions" /s election) returned 788 results in the FLB-NLRB database and 260 results in the ALLFEDS database.

an election be vacated and conducted anew if the winning party violated the laboratory conditions through its pre-election conduct.

The laboratory conditions doctrine suggests an active and vigorous role for the Board in providing employees with the proper election environment. After all, it seems like a fairly arduous task to provide an experimental laboratory with “conditions as nearly ideal as possible.” And indeed, the Board has an extensive list of prohibited conduct: threatening speech, interrogations, polling, surveillance, promises of improved conditions, grants of benefits, and inflammatory appeals.⁵ However, the Board has been largely reactive in its regulation, keeping out certain sources of election impurities but doing little to assist employees in their decision. . There is reason to doubt that employees are getting the information they need when making their representation decision.⁶ At present, the Board does little to ensure that such information is available.⁷ It would be well within the Board’s current role as election regulator to make sure that employees have easy access to the information they need.

In this symposium contribution, I examine how the Board could use a mandatory disclosure regime to provide information to employees when making their representation decision. In Part I, I discuss the information already disclosed through the NLRA as well as the Labor-Management Reporting and Disclosure Act (LMRDA or Landrum-Griffin Act) and

⁵ See MICHAEL C. HARPER ET AL., *LABOR LAW: CASES, MATERIALS, AND PROBLEMS* 317-62 (6th ed. 2007) (providing an overview of campaign regulation).

⁶ Matthew T. Bodie, *Information and the Market for Union Representation*, 94 VA. L. REV. 1, 4, 45-69 (2008). See also Catherine L. Fisk, *Thoughts on Treating Union Representation Processes as a Market in Need of Legally Required Disclosure of Information*, 94 VA. L. REV. IN BRIEF 1, 7 (March 24, 2008) (discussing “the substantial information problems that already exist in the [election] process”); Jeffrey M. Hirsch, *Rent-to-Own Unionism?*, 94 VA. L. REV. IN BRIEF 9, 9 (March 24, 2008) (discussing the “information deficiencies implicated by union elections”); Harry G. Hutchison, *The Market for Union Representation: An Information Deficit or Rational Behavior?*, 94 VA. L. REV. IN BRIEF 15, 16 (March 24, 2008) (discussing how information “may help workers make a free and reasoned choice”); Anne Marie Lofaso, *Toward a Foundational Theory of Workers’ Rights: The Autonomous Dignified Worker*, 76 UMKC L. REV. 1, 41 (2007) (arguing that workers must “have access to information relevant to making informed decisions” in order to be autonomous).

⁷ Jeffrey M. Hirsch, *Communication Breakdown: Reviving the Role of Discourse in the Regulation of Employee Collective Action*, 44 U.C. DAVIS L. REV. ___, Working Paper at 2 (forthcoming 2011) (noting that the value of employee communication to the representation process is “badly undervalued”).

federal securities laws. In Part II, I discuss how the Board could pair this information with a limited scheme of information disclosure to provide a base level of election-related information to employees. I conclude with thoughts on the way forward.

PART I: DISCLOSURE UNDER CURRENT LAW

A. Disclosure under the NLRA

At present, the Board places no disclosure requirements on unions or employers in the context of a union representation campaign. In fact, it has held that even extreme circumstances do not require parties to disclose. In *Florida Mining & Materials Corp.*, the only case to examine this issue at length, the petitioning union – a Teamsters local – had been placed into receivership by the International Brotherhood of Teamsters (IBT) the day before the representation election.⁸ Evidence gathered after the fact, through internal union documents as well as press coverage, indicated that the takeover was triggered by “an irreconcilable conflict between the top union officers which rendered the local unable to function.”⁹ Further, the IBT’s letter announcing the takeover stated that: “Unless immediate action is taken, it cannot be assured that the Local Union will be able to fulfill its duties as bargaining representative or to carry out the other legitimate objects of a labor organization.”¹⁰ As a result of the takeover, all officers and business agents of the local were replaced. In a newspaper interview after the takeover, the IBT-appointed trustee reported that “financial mismanagement” had left the local \$18,000 in debt, and he “expressed doubt about the continued existence of the local.”¹¹ However, the article also described picketing at the union headquarters by union members who

⁸ Fla. Mining & Materials Corp., 198 N.L.R.B. 601, 601 (1972), *enforced* 481 F.2d 65 (5th Cir. 1973).

⁹ Fla. Mining & Materials Corp. v. NLRB, 481 F.2d 65, 66 (5th Cir. 1973).

¹⁰ *Id.*

¹¹ *Id.* at 66-67.

were “greatly disturbed by both the imposition of the trusteeship and the firing of officers and agents.”¹²

The employer objected to the election under the laboratory conditions doctrine based on the union’s failure to disclose this information. The employer alleged that this receivership signified the local’s precarious financial status, and that as a result the local would be unqualified to properly represent the bargaining unit.¹³ The Board affirmed the regional director’s decision overruling the employer’s objections,¹⁴ and the Fifth Circuit enforced the order to bargain.¹⁵ Noting that an affirmative disclosure rule “has never been formulated or imposed in any reported case,” the Board argued to the court that such a rule would not make sense.¹⁶ Although it found the case to present “an extremely close question,” the Fifth Circuit found that the Board had not abused its discretion, noting that the unusual proximity between the takeover and the election likely rendered this situation “a unique problem.”¹⁷

The Board’s arguments against disclosure in *Florida Mining* follow a familiar set of concerns with any disclosure regime. First, the Board contended that setting up such a regime

¹² *Id.* at 67.

¹³ Fla. Mining, 198 N.L.R.B. at 601-02.

¹⁴ The Regional Director’s opinion and Board order affirming that opinion were not published. The Board did publish its summary enforcement of the § 8(a)(5) refusal to bargain. *Id.* at 603-04.

¹⁵ *Florida Mining & Materials Corp. v. NLRB*, 481 F.2d 65 (5th Cir. 1973).

¹⁶ *Id.* at 67.

¹⁷ *Id.* at 69. In explaining its decision, the court stated:

It appears to the court that employees should have the right to know prior to voting for a union that at least for a short time actual control of the day to day administration of the local was to be handled by a representative of the International, not by those people whom the employees had understood to be the heads of the local. On the other hand, we fully recognize the administrative difficulties which would follow from a rule designed to cover this case. Furthermore, we agree that recalcitrant employers would take advantage of the situation and file meaningless challenges in an effort to further delay implementation of the desires of the employees. Since ours is not a duty to resolve these intricate competing interests but only to review the initial decision of the administrative body, we do not feel we have to analyze and balance these competing factors in detail.

Id. at 70.

would entail “great difficulty in determining the scope and extent of an affirmative disclosure rule.”¹⁸ Once the regime was established, moreover, “losing parties would be quick to take advantage of any such rule in an effort to avoid the consequences of a free election.”¹⁹ Second, the Board fell back on its “neutral umpire” role:

Under the campaign processes as they now exist, the competing arguments pro and con on unionization are left to be presented by the parties. The employer, because of supposed financial and entrepreneurial disadvantages flowing from unionization, is assigned the role of bringing the alleged negative aspects of unionization to the attention of the electorate. Likewise, the union is to stress its advantages. The Board, as referee, steps in only in the case of low blows, and even then only when the injured party does not have sufficient time to present a response.²⁰

Essentially, the Board disclaims any duty to provide employees with the information they need to make a decision; this role is left to the parties.

Third, even if the Board were to supply the information relevant to the election, it would be unsure of what this information would be.²¹ According to the Fifth Circuit, “[t]he Board actually admits that in all likelihood the voter's choice is ‘too often inescapably non-rational.’”²² The court was left to suss out the ramifications of this view: “the Board seems to be saying that specific information is rarely, if ever, important to an employee faced with a unionization vote.”²³ Fourth and finally, the Board argued that the information in this particular case – the trusteeship – was not all that relevant to the representation decision. The Board framed the issue as one of internal union governance, and argued that “studies of employee non-participation

¹⁸ *Id.* at 67.

¹⁹ *Id.*

²⁰ *Id.* at 67-68.

²¹ *Id.* at 68 (“[The Board] argues that no one knows what diverse information the electorate might find useful in assessing the pros and cons of unionism.”).

²² For this proposition, the Board apparently relied on Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 Harv. L. Rev. 38, 65 (1964). See *Fla. Mining*, 481 F.2d at 68.

²³ *Id.*

amply illustrate that democratic participation in union affairs is not an important concern of voters.”²⁴

In my view, none of these arguments are persuasive. Yes, administrative costs could be daunting, but it all depends on how the disclosure requirement is framed. The Board could require disclosure and still remain a “neutral umpire,” in the same way agencies such as the EPA, the FDA, and the SEC face similar requirements. But more importantly, according to its own standard the Board is not really supposed to be an umpire – it is supposed to be establishing laboratory conditions.²⁵ It needs to see itself as an advocate for the employees, not a referee in a contest between union and employer.²⁶ The “irrational” trope seems nihilistic and condescending; can it really be that we don’t know anything about what information employees want? In fact, the Board seems to contradict this in its final argument, which claims that employees don’t really care if the union is going into trusteeship. I do not share the Board’s sanguinity on this. The Teamsters’ decision to take over the local demonstrates something about the ability of the local to do its job well.

Florida Mining remains a footnote to history, if that. The Board has never really seriously considered implementing a regime of information disclosure. The only required disclosure in the election context is procedural in nature. Under the Excelsior doctrine, employers must disclose the names and addresses of employees in the unit to the union after an

²⁴ *Id.* The court appears to have disagreed somewhat on the ramifications of trusteeship. *Id.* (“We do note, however, that the Board admits the revelation of the trusteeship would have brought to light all of the problems present in the administration of this local.”)

²⁵ As I have argued previously, this failure to insure that the employee receives the proper level of information “does not comport with the laboratory conditions model, where information would play a critical role in establishing the conditions for a fair and reasoned choice.” Bodie, *Information*, *supra* note 6, at 24.

²⁶ For more on the problems with the “political election” model, see Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495 (1993); Bodie, *Information*, *supra* note 6, at 31-34, 45-69.

election petition has been filed.²⁷ This *Excelsior* requirement gives the union the ability to provide information to employees, and it was justified on that basis.²⁸ However, the Board has yet to expand this requirement to include phone numbers or email addresses.²⁹ And the Board provides no formal method to channel information from unions and employers to employees.³⁰

The only other example of information disclosure relating to elections under Board law is the recent requirement imposed by *Dana Corp.*, that employees be informed of their right to file a decertification petition within forty-five days of the employer's voluntary recognition of the union.³¹ If employees never receive notice of their right to file such a petition, then the Board will not apply the "voluntary recognition" election bar to prevent employees from filing a decertification petition.³² Like *Excelsior*, this notification requirement pertains more to procedure than substance. It simply requires that employees be informed of one of the rights they can exercise under the Act before those rights can be limited through the recognition bar.³³ If they are not so informed, then those rights will not be limited.

In short, the Board has no history of mandatory information disclosure and has evinced little desire to create one. However, I would argue that this reluctance is based on outdated, overblown, and even offensive policy judgments that should be reconsidered in this new century.

²⁷ *Excelsior Underwear, Inc.*, 156 N.L.R.B. 1236, 1239–40 (1966) (requiring that the information must be given to the union within seven days of the approval of an election agreement).

²⁸ *Id.* at 1242 (“[A]n employee who has had an effective opportunity to hear the arguments concerning representation is in a better position to make a more fully informed and reasonable choice. Accordingly, we think that it is appropriate for us to remove the impediment to communication to which our new rule is directed.”).

²⁹ See G. Micah Wissinger, *Informing Workers of the Right to Workplace Representation: Reasonably Moving from the Middle of the Highway to the Information Superhighway*, 78 CHI.-KENT L. REV. 331, 342–43 (2003) (proposing that unions be given private employee email addresses as part of the *Excelsior* disclosure).

³⁰ For discussions of the limitations of employee communication and discourse, see Bodie, *Information*, *supra* note 6, at 23–24; Hirsch, *supra* note 7.

³¹ *In re Dana Corp.*, 353 N.L.R.B. 434, 434 (2007).

³² *Id.* (“[N]o election bar will be imposed after a card-based recognition unless (1) employees in the bargaining unit receive notice of the recognition and of their right, within 45 days of the notice, to file a decertification petition or to support the filing of a petition by a rival union, and (2) 45 days pass from the date of notice without the filing of a valid petition.”).

³³ *Id.*

And if the Board were interested in ensuring that employees get a baseline of information necessary to making their decision, it could bootstrap onto other disclosure regimes that provide a lot of relevant data. The Board would not have to start from scratch.

B. Disclosure under the LMRDA

Although a regime of information disclosure would be new for the union representation campaign, it would not be new for the unions themselves. The Board regulates the relationship between union and employers and creates the regulatory regime for the initial choice by employees of whether to join a union. The Department of Labor, on the other hand, oversees the management and organization of the union itself, including internal union elections and a union's relationship with its members. While the NLRB may not require disclosure in the representation election context, the Department of Labor requires unions to provide extensive disclosure to their members.³⁴ This disclosure is required under the Labor-Management Reporting and Disclosure Act (LMRDA or Landrum-Griffin Act), and covers much of the union's internal governance and finances. A system of mandatory disclosure in the representation context could piggyback off the existing LMRDA system as long as there is overlap between the two sets of disclosures.

Since 1960 the Department of Labor has provided forms through which unions meet the disclosure requirements under Landrum-Griffin. Form LM-1 provides for disclosure of dues,

³⁴ In many ways, the split between the two systems resembles the split in regulation of the sale of securities. The federal system of required disclosure for the sale of corporate securities proceeds largely in two steps. First, before a firm decides to offer a security for sale, it must proffer extensive information about itself, its finances, its prospects, the expected price, and other information deemed relevant to potential buyers. Second, once the security has been sold to initial buyers and thereafter is traded on the public markets, firms have a continuing obligation to disclose relevant financial information, insider transactions, executive compensation, and other matters relevant to the security's value. Each step is established largely by one of the New Deal securities acts: the Securities Act of 1933 is primarily about initial disclosure, while the Securities Exchange Act of 1934 primarily concerns the trading of securities on public markets. THOMAS L. HAZEN, *TREATISE ON THE LAW OF SECURITIES REGULATION* [ch. 1] (4th ed. 2002). In this respect, as in the market for union representation, there are two disclosure paradigms: one for the initial "purchase" and one for "members" after purchase.

fees, and organizational structure under section 201(a) of the Act.³⁵ Forms LM-2, LM-3, and LM-4 are the annual reports that cover a union's organizational and financial disclosure under LMRDA section 201(a) and (b).³⁶ Form LM-2 is the form for largest unions; the amounts changed over time, but 2003 amendments placed the threshold at unions with receipts of \$250,000 or more.³⁷ The Department of Labor estimates that while only twenty percent of unions meet this threshold, these unions received about ninety-three percent of the total dollars received annually by unions.³⁸ Forms LM-3 and LM-4 are simplified for smaller unions.³⁹ Along with these annual forms are specific forms for certain types of disclosures. Form LM-30 pertains to potential conflicts of interest on the part of union employees or their families. Form LM-10 requires employers to disclose payments made to unions. Unions under trusteeship must also file a specific set of forms.⁴⁰

As it happens, I am writing this contribution in the midst of administrative change. During the Bush Administration, the Department of Labor gave many of these forms their first significant overhaul in more than forty years.⁴¹ These changes were challenged in court and partially struck down.⁴² Amendments to the regulation made by the Bush Administration Department of Labor were published in the Federal Register the day after President Obama's inauguration.⁴³ The Obama Department of Labor is now in the process of undoing some of these

³⁵ 29 C.F.R. §§ 402.2-402.3 (2006).

³⁶ 29 U.S.C. § 431 (2006).

³⁷ 29 C.F.R. § 403.2(d) (2006).

³⁸ *Recent Regulation: Department of Labor Increases Union Financial Reporting Requirements*, 117 HARV. L. REV. 1734, 1736 (2004) [hereinafter *Recent Regulation*].

³⁹ Form LM-3 is a four-page report for unions with receipts less than \$200,000, 29 C.F.R. § 403.4(a)(1) (2006), and Form LM-4 is a two-page report for unions with receipts of less than \$10,000, *id.* § 403.4(a)(2).

⁴⁰ *See* Forms LM-15, 29 C.F.R. §§ 408.3, 408.4 (2006); LM-15A, 29 C.F.R. §§ 408.4, 408.8 (2006); LM-16, 29 C.F.R. § 408.8 (2006).

⁴¹ *See* 68 Fed. Reg. 58,374 (Oct. 9, 2003).

⁴² *AFL-CIO v. Chao*, 409 F.3d 377 (D.C. Cir. 2005).

⁴³ 74 Fed. Reg. 3678 (Jan. 21, 2009).

changes.⁴⁴ What follows is a more detailed discussion of the disclosure requirements provided for by the Department of Labor's current regulations. The reader is cautioned, however, that further changes may soon be forthcoming.

1. Dues and Fees

The LMRDA evinces a key interest in the regulation of union dues and fees. Section 101(a)(3) of the Act provides that local dues can only be increased through a secret ballot majority vote of the membership.⁴⁵ Section 201(a) requires unions to provide information on “the initiation fee or fees required” as well as “the regular dues or fees or other periodic payments required to remain a member.”⁴⁶ Form LM-1 requires that the union set forth its dues and fees structure as an initial matter.⁴⁷ Forms LM-2, LM-3, and LM-4 provide for the annual disclosure of the dues and fees required by the union for members.⁴⁸ The categories are regular dues and fees, initiation fees, transfer fees, and work permits.⁴⁹

2. Organizational Structure

Section 201(a) of the LMRDA requires unions to provide the Department of Labor with a copy of its constitution and bylaws.⁵⁰ In addition, the union is required to file a report providing: the names and titles of union officers; the union's dues and fees structure; and detailed statements about the union's procedures for such matters as qualifications for or restrictions on membership,

⁴⁴ See 74 Fed. Reg. 52,401, 52,402 (Oct. 13, 2009) (discussing the proposed changes).

⁴⁵ 29 U.S.C. § 411(a)(3) (2006). Dues for federation of national or international labor organizations can only be raised through a majority vote of the delegates voting at a convention, a majority vote in a membership referendum conducted by secret ballot, or as an interim matter, by majority vote of the members of the executive board. *Id.*

⁴⁶ 29 U.S.C. § 431(a)(3)-(4) (2006).

⁴⁷ Form LM-1 Labor Organization Information Report 2, http://www.dol.gov/olms/regs/compliance/GPEA_Forms/lm-1p.pdf.

⁴⁸ Form LM-2 Labor Organization Annual Report 2, http://www.dol.gov/olms/regs/compliance/lm2_blankForm.pdf; Form LM-3 Labor Organization Annual Report 2, http://www.dol.gov/olms/regs/compliance/lm3_blankForm.pdf; Form LM-4 Labor Organization Annual Report 2, http://www.dol.gov/esa/regs/compliance/olms/lm4_blankForm.pdf.

⁴⁹ Form LM-2, *supra* note 46, at 2; Form LM-3, *supra* note 46, at 2. Form LM-2 also includes a category for “working” dues and fees, as opposed to regular dues and fees. Form LM-2, *supra* note 46, at 2. Form LM-4 only requires the union to report any changes in its dues or fees structure. Form LM-4, *supra* note 46, at 2.

⁵⁰ 29 U.S.C. § 431(a) (2000).

authorization for disbursement of funds, audit of financial transactions of the labor organization, the calling of regular and special meetings, the selection of officers and stewards, disciplinary fines and suspensions, authorization for bargaining demands, ratification of contract terms, and authorization for strikes.⁵¹

Form LM-1 provides for the disclosure of this information and must be filed with 90 days of when a union becomes subject to the LMRDA.⁵² Along with its constitution and bylaws, the union must prepare a report citing to the page, section, or paragraph number of the governing documents that cover the procedures discussed in the statute itself, such as qualifications for or restrictions on membership and authorization for disbursement of funds.⁵³ The initial report also requires the union to list its officers, as well as the date of the next election.⁵⁴ In its annual financial report, the union is required to list all of its officers,⁵⁵ the date of its next election of officers,⁵⁶ and the number of members it has.⁵⁷

3. Financial Disclosure

LMRDA § 201(b) requires that unions file annual reports, signed by the president and treasurer, disclosing details about the union's financial condition and operations.⁵⁸ Specifically, the Act requires disclosure of assets and liabilities, receipts during the year and sources for the receipts, salaries, and other disbursements for all officers and employees making more than \$10,000, loans of more than \$250 to officers and employees, all loans to business enterprises,

⁵¹ *Id.*

⁵² Form LM-1, *supra* note 46.

⁵³ 29 C.F.R. § 402.1 (2010); Form LM-1, *supra* note 46, at 3.

⁵⁴ Form LM-1, *supra* note 46, at 2.

⁵⁵ Form LM-2, *supra* note 46, at Schedule 11; Form LM-3, *supra* note 46, at 3.

⁵⁶ Form LM-2, *supra* note 46, at 2; Form LM-3, *supra* note 46, at 2.

⁵⁷ Form LM-2, *supra* note 64, at 2; Form LM-3, *supra* note 46, at 2; Form LM-4, *supra* note 46, at 2.

⁵⁸ 29 U.S.C. § 431(b) (2006).

and “other disbursements made by [the union].”⁵⁹ The Secretary of the Department of Labor is given authority to prescribe the rules and regulations for filing the annual reports.⁶⁰

Prior to the 2003 changes, the Department of Labor asked unions to disclose their overall assets and liabilities, as well as their general receipts and disbursements.⁶¹ Under the 2003 changes, unions who file the LM-2 are not only required to list their general receipts and disbursements, but to itemize them as well (for amounts greater than \$5,000).⁶² Separate schedules provide for the itemization of accounts receivable,⁶³ loans receivable,⁶⁴ investments and fixed assets,⁶⁵ and other assets and liabilities.⁶⁶ Unions also must itemize individual receipts and disbursements made to support particular union functions, such as contract negotiation and administration, organizing, and political activities.⁶⁷ In addition to these itemizations, unions must break down the time each officer or employee spends on the various activities of the organization.⁶⁸

The 2003 changes to the financial disclosure forms largely remain in place.⁶⁹ However, on the day after President Obama’s inauguration, the Department of Labor published a new set of

⁵⁹ *Id.*

⁶⁰ *Id.* § 438.

⁶¹ *See Recent Regulation, supra* note 36, at 1735.

⁶² 68 Fed. Reg. 58,374, 58,429-30 (Oct. 9, 2003).

⁶³ *See* 2003 Form LM-2 (copy on file with author).

⁶⁴ *Id.* at Schedule 2.

⁶⁵ *Id.* at Schedule 3 (sales of investments and fixed assets); *id.* at Schedule 4 (purchases of investments and fixed assets); *id.* at Schedule 5 (investments); Schedule 6 (fixed assets).

⁶⁶ *Id.* at Schedule 7 (other assets); *id.* at Schedule 10 (other liabilities).

⁶⁷ *See id.* Schedule 14 covers “other receipts,” schedule 15 covers “contract negotiation and administration,” schedule 16 covers “organizing,” schedule 17 covers “political activities,” schedule 18 covers “lobbying,” schedule 19 covers “contributions, gifts, and grants,” schedule 20 covers “benefits,” schedule 21 covers “general overhead,” and schedule 22 covers “other disbursements.” *See also* Form LM-2 Labor Organization Annual Report 18, http://www.dol.gov/esa/regs/compliance/olms/lm2_blankForm.pdf.

⁶⁸ 68 Fed. Reg. at 58,471; Form LM-2, *supra* note 46, at Schedule 11.

⁶⁹ In *AFL-CIO v. Chao*, 409 F.3d 377 (D.C. Cir. 2005), the court upheld the changes to the LM-2, but struck down Form T-1, a supplemental form regarding general trust reporting. The court found that Form T-1 exceeded the Department’s authority. *Id.* at 378. The Department recently proposed rescinding the T-1 and moving some of the required disclosure into the LM-2. 75 Fed. Reg. 5456 (Feb. 2, 2010).

rules requiring even further financial disclosure.⁷⁰ The new rules required unions to disclose additional information in the context of asset and investment transactions, disbursements to officers and employees, and itemization of certain categories of receipts.⁷¹ However, this rule had been rescinded by the Department in October 2003.⁷² The Department argued that a more thorough investigation on the effects of the 2003 changes to the LM-2 was needed before additional changes to the form shwere made.⁷³

4. Conflicts of Interest.

Much of the work of the McClellan Committee – a precursor to Landrum-Griffin – focused on widespread graft and self-dealing by union officials.⁷⁴ Section 202 of the LMRDA requires union officers and employees to disclose a wide array of potential conflicts of interest.⁷⁵ These disclosures include any financial interests held by an employee in a business represented by the union, any transactions between such a business and a union employee, and any payments made by a represented business to the union or its employees. The statute is very specific: A union employee must disclose, for example, “any transaction in which he or his spouse or minor child engaged, directly or indirectly, involving any stock, bond, security, or loan to or from, or other legal or equitable interest in the business of an employer whose employees such labor organization represents or is actively seeking to represent.”⁷⁶ Similarly, all transactions must be disclosed “except work performed and payments and benefits received as a bona fide employee

⁷⁰ 74 Fed. Reg. 3678 (Jan. 21, 2009).

⁷¹ *Id.*; see also 74 Fed. Reg. 52,401, 52,402 (Oct. 13, 2009) (discussing the proposed changes).

⁷² 74 Fed. Reg. at 52,402.

⁷³ *Id.* at 52,402, 52,409. The Department also rescinded the rules regarding the Department’s ability to revoke a union’s authorization to file an LM-3 form. *Id.* at 52409-52412. The former Labor Secretary has criticized these moves. Elaine L. Chao, *Obama Tries to Stop Union Disclosure*, WALL ST. J., May 9, 2009.

⁷⁴ Benjamin Aaron, *The Labor-Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 883 (1960) (discussing “the sordid record, gathered by the McClellan Committee, of the misuse of union funds by some officers and employees”).

⁷⁵ 29 U.S.C. § 432 (2006).

⁷⁶ *Id.* § 432(a)(2).

of such employer and except purchases and sales of goods or services in the regular course of business at prices generally available to any employee of such employer.”⁷⁷

Employers have their own set of disclosures related to conflicts of interest. The LMRDA requires that employers disclose any payments made to union officials or employees – a reciprocal obligation to that of the union’s.⁷⁸ Employers must also disclose any payments made to employees or to outside labor consultants in an effort to persuade employees to exercise or not to exercise their collective rights.⁷⁹ Such payments include those designed to interfere in collective rights or to obtain information on employee or union efforts related to a dispute with the employer.⁸⁰ Courts have determined that section 203 reflects “the congressional conviction that quite without regard to the motives or methods of particular individuals engaging in it, the persuader business was detrimental to good labor relations and the continued public interest.”⁸¹

Regulations regarding the disclosure of such conflict of interest payments are in flux. Form LM-30, which covers conflict of interest disclosures for unions, was amended by the Department of Labor in 2007. The revisions increased the disclosures from two pages to nine pages and required greater detail on the nature and purpose of the transaction. However, in 2009 the Department announced rulemaking proceedings to review the changes to the form. The Department’s website currently states that “fundamental questions regarding the scope and extent of the [2007 amended] reporting obligations are unanswered, and litigation challenging some aspects of the form remains pending.”⁸² Therefore, the Department will accept either the

⁷⁷ *Id.* § 432(a)(5).

⁷⁸ *Id.* § 433(a)(1).

⁷⁹ *Id.* § 433(a)(2)-(5).

⁸⁰ *Id.* § 433(a)(4).

⁸¹ *Price v. Wirtz*, 412 F.2d 647, 650 (5th Cir. 1969).

⁸² Office of Labor-Management Standards, Form LM-30 Labor Organization Officer and Employee Report, at: http://www.dol.gov/olms/regs/compliance/GPEA_Forms/blanklmforms.htm#FLM30.

The website states:

pre- or the post-2007 form and will not bring enforcement actions based on a failure to use the new form.⁸³

5. Example: Local Union 1199, Service Employees International Union

Looking at an actual set of disclosures may assist in illuminating the nature and extent of those disclosures. The 2004 LM-2 provided by Local 1199 of the Service Employees International Union is one such example;⁸⁴ it is available online through a search of the Department of Labor's website.⁸⁵ The 196-page document provides the annual disclosure for Local 1199, one of the largest and most successful unions in the country.⁸⁶ According to the 2004 form, Local 1199 has 240,000 members, roughly \$60 million in assets, and roughly \$15 million in liabilities.⁸⁷ Dues range from \$13 to \$75, with initiation fees ranging from \$75 to \$200.⁸⁸ The union received over \$100 million in dues, and total receipts were over \$137 million.

Note: The Office of Labor-Management Standards published in the Fall 2009 Semi-Annual Regulatory Agenda notice of an intended rulemaking to revise the Form LM-30 (Labor Organization Officer and Employee Report).

See: <http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=200910&RIN=1215-AB74>. The rulemaking is intended to review questions of policy and law surrounding these reporting requirements. The rulemaking will focus on the changes resulting from a 2007 regulatory revision of the Form and instructions. This revision dramatically altered the old Form LM-30 and instructions, which had not substantially changed in over 40 years. Despite the promulgation of the new Form LM-30, fundamental questions regarding the scope and extent of the reporting obligations are unanswered, and litigation challenging some aspects of the form remains pending. In light of this uncertainty, the pending regulatory action, the pending litigation and the continuing obligation of union officers and employees pursuant to section 202 of the Labor-Management and Reporting Disclosure Act (LMRDA), 29 U.S.C. § 432, OLMS has determined that it would not be a good use of resources to bring enforcement actions based upon a failure to use a specific form to comply with the statutory obligation to report certain financial information. Accordingly, OLMS will refrain from initiating enforcement actions against union officers and union employees based solely on the failure to file the report required by section 202, using the 2007 form, as long as individuals meet their statutorily-required filing obligation in some manner. OLMS will accept either the old Form LM-30 or the new one for purposes of this non-enforcement policy.

⁸³ *Id.*

⁸⁴ Form LM-2 Labor Organization Annual Report, Local 1199, Service Employees International Union, March 28, 2005 (on file with author) [hereinafter Local 1199 Form LM-2].

⁸⁵ The Department of Labor, Office of Labor-Management Standards, maintains a website through which it is possible to obtain electronic versions of union annual reports. Department of Labor, LMRDA Reporting and Public Disclosure, *at*: <http://www.dol.gov/esa/regs/compliance/olms/rrlo/lmrda.htm>.

⁸⁶ For more information about Local 1199, visit its website at: <http://www.1199seiu.org/>.

⁸⁷ Local 1199 Form LM-2, *supra* note 82, at 2, 3.

⁸⁸ *Id.* at 2.

The LM-2 also provides a breakdown of investments, fixed assets, other assets, sales and purchases of investments and assets, and loans payable.⁸⁹

The LM-2 also provides a list of all officers as well as their total compensation. The form lists 131 officers who receive a total of over \$5 million in total compensation.⁹⁰ Union president Dennis Rivera received \$147,710 in total compensation for 2004.⁹¹ The form also itemizes all disbursements to employees; each employee is listed by name, title, and total compensation.⁹² Finally, there are schedules for benefits, contributions, gifts, grants, office and administrative expenses, and other receipts and disbursements.⁹³

C. Employer Disclosure under the Federal Securities Laws

Perhaps the most comprehensive statutory and regulatory scheme of contractual regulation is the federal system of securities regulation. Even before the New Deal, state blue sky laws placed special restrictions on the sale of securities beyond the common law.⁹⁴ The Securities Act of 1933⁹⁵ and the Securities Exchange Act of 1934⁹⁶ then completely reshaped the playing field. They put into place a comprehensive federal system premised on antifraud protection and a process of mandatory disclosure. This scheme, while fleshed out through seventy years of amendment, regulation, and judicial opinion, retains relatively the same structure with which it began.

The disclosure requirements mandated by federal regulation are considerably broad. In the context of an initial offering, section 5 of the 1933 Act requires that issuers file a

⁸⁹ *Id.* at Schedules 1 through 8.

⁹⁰ *Id.* at Schedule 9.

⁹¹ *Id.*

⁹² *Id.* at Schedule 10.

⁹³ *Id.* at Schedules 11 through 15.

⁹⁴ See Jonathan R. Macey & Geoffrey P. Miller, *Origin of the Blue Sky Laws*, 70 TEX. L. REV. 347, 348 (1991).

⁹⁵ 15 U.S.C. §§ 77a – 77aa (2000).

⁹⁶ 15 U.S.C. §§ 78a – 78mm (2000).

comprehensive registration statement with the Securities and Exchange Commission.⁹⁷ Section 7 of the 1933 Act, along with Schedule A, sets forth the basics of the disclosure requirements and also empowers the Commission to establish further disclosure regulations.⁹⁸ Schedule A sets forth thirty-two separate provisions of disclosure, including the issuer's articles of incorporation or other structural documents,⁹⁹ the general character of the issuer's business,¹⁰⁰ the amount of outstanding debt,¹⁰¹ remuneration paid to directors and officers,¹⁰² the security's price (or method of calculating the price),¹⁰³ items relating to possible conflicts of interest,¹⁰⁴ a detailed balance sheet,¹⁰⁵ and a profit and loss statement.¹⁰⁶ The Commission has further refined these requirements through a series of forms and further regulations. The Commission's forms break down what information must merely be disclosed to the Commission and what information must also be provided in the prospectus, a document provided to potential purchasers.¹⁰⁷ However, these forms generally refer to Regulation S-K to define what exactly must be provided. Regulation S-K is significantly more detailed than Schedule A, detailing precisely what types of quantitative and qualitative information must be disclosed.¹⁰⁸ For example, Regulation S-K has extremely detailed requirements on the disclosure of financial information,¹⁰⁹ including a special

⁹⁷ 15 U.S.C. § 77e (2000).

⁹⁸ 15 U.S.C. §§ 77g, 77aa (2000).

⁹⁹ 15 U.S.C. § 77aa(31) (2000).

¹⁰⁰ *Id.* § 77aa(8).

¹⁰¹ *Id.* § 77aa(12).

¹⁰² *Id.* § 77aa(14).

¹⁰³ *Id.* § 77aa(16).

¹⁰⁴ *See id.* §§ 77aa(17) (commissions paid to underwriters); 77aa(20) (amounts paid to promoters); 77aa(22) (recent issuer purchases of property held by directors or substantial stockholders).

¹⁰⁵ *Id.* § 77aa(25).

¹⁰⁶ *Id.* § 77aa(26).

¹⁰⁷ *See, e.g.*, Form S-1, 2 Fed. Sec. L. Rep. (CCH) ¶7,121, at 6,237 (Oct. 22, 2001).

¹⁰⁸ Regulation S-K, 17 C.F.R. §§ 229.10-229.702 (2010).

¹⁰⁹ *See id.* §§ 229.301-229.304.

provision on management's discussion and analysis of the firm's financial condition and results of its operations.¹¹⁰

In the context of a securities offering, federal law integrates the required disclosure within an overall process of restrictions on information dissemination. Section 5(c) of the 1933 Act prohibits all offers to sell the securities prior to the filing of the registration statement.¹¹¹ However, the Commission has given an extremely broad definition to the term "offer," holding that any communication reasonably calculated to generate a buying interest is an offer.¹¹² After the registration materials have been filed, the issue enters the "waiting period" until the Commission has made the registration statement effective. Offers to sell made during the waiting period must generally also provide all of the information required in the prospectus.¹¹³ Since some of this information may not be available until the offering price has been set, it may be impossible to furnish the required prospectus during the waiting period.¹¹⁴ The Commission thus has made a limited exception to this Catch-22 by allowing "tombstone ads"¹¹⁵ and preliminary "red herring" prospectuses.¹¹⁶ Once the waiting period has ended, all written offers for sale must be accompanied by a complete prospectus.¹¹⁷

¹¹⁰ *See id.* § 229.303.

¹¹¹ 15 U.S.C. § 77e(c) (2000).

¹¹² Carl M. Loeb, Rhoades & Co., 38 S.E.C. 843 (1959). *See also* JAMES D. COX & THOMAS L. HAZEN, CORPORATIONS 723 (2d ed. 2003). There are some exceptions to this prohibition. *See* SEC Rules 137-139, 17 C.F.R. §§ 230.137-139 (2005).

¹¹³ *See* 15 U.S.C. § 77b(a)(10) (2000) (defining any written as a prospectus); *id.* at § 77e(b)(1) (requiring all prospectuses to contain certain information once the registration statement has been filed).

¹¹⁴ COX & HAZEN, *supra* note 113, at 724.

¹¹⁵ *See* 15 U.S.C. § 77b(a)(10) (2000); 17 C.F.R. § 230.134 (2005).

¹¹⁶ 17 C.F.R. § 230.430 (2005). This document is called a "red herring" prospectus because of the legend required by Item 501(b)(10) of Regulation S-K, which traditionally was in red ink. *See* 17 C.F.R. § 229.501(b)(10) (2010) (requiring the following legend: "The information in this prospectus is not complete and may be changed. We may not sell these securities until the registration statement filed with the Securities and Exchange Commission is effective. This prospectus is not an offer to sell these securities and it is not soliciting an offer to buy these securities in any state where the offer or sale is not permitted.").

¹¹⁷ *See* 15 U.S.C. § 77e(b) (2000).

Although quite complicated, the registration process is designed to accomplish three primary purposes: (1) make material information about the issuer public, (2) require the issuer to deliver some of that information to potential investors (through the prospectus), and (3) restrict the issuer's opportunities to promote its securities outside of these channels. It does not seem a stretch to say that the 1933 Act, and by extension the Commission, are endeavoring to create "laboratory conditions" for the sales of securities. They are trying to get material information to the consumer, and at the same time they are limiting opportunities for purchase without such information.

In contrast to the 1933 Act's focus on a security's initial sale, the Securities Exchange Act of 1934 regulates the sales of securities after they have been issued and are traded on the open market. The 1934 Act establishes a registration and supervision system for national securities exchanges¹¹⁸ and requires continuing disclosure for companies whose securities trade on those markets.¹¹⁹ The mandatory disclosure comes in the form of periodic reports: Form 10-K, an annual report; Form 10-Q, a quarterly report; and Form 8-K, an interim report required in limited circumstances.¹²⁰ The 1934 Act also regulates brokers, members, and dealers of the exchanges,¹²¹ and imposes certain requirements with respect to proxy solicitations and tender offers.¹²² The SEC also enacted Rule 10b-5, its comprehensive antifraud provision, under section 10 of the 1934 Act.

The SEC has been out front in delivering its required disclosure to securities consumers and the public. In 1984 it first developed the Electronic Data Gathering, Analysis and Retrieval

¹¹⁸ 15 U.S.C. § 78f (2000).

¹¹⁹ 15 U.S.C. § 78m (2000).

¹²⁰ See Amy Deen Westbrook, *What's in Your Portfolio? U.S. Investors are Unknowingly Financing State Sponsors of Terrorism*, 59 DePaul L. Rev. 1151, 1209 n.353 (2010).

¹²¹ 15 U.S.C. §§ 78k, 78o(c) (2000).

¹²² 15 U.S.C. §§ 78m, 78n (2000).

system known as EDGAR.¹²³ EDGAR is an easily-searchable database of all disclosure filings made by companies covered by the 1933 and 1934 Acts.¹²⁴ A quick search can retrieve all of a company's registration statements, prospectuses, and periodic reports filed on Forms 8-K, 10-K, and 10-Q.¹²⁵ Since the mid 1990s, EDGAR had been an integral part of the disclosure process.¹²⁶ The SEC requires that filers provide their disclosure using the EDGAR Filer Manual, now in its fourteenth version.¹²⁷ Access to the disclosure is viewed as a critical part of the SEC's mission, and the agency frequently tweaks its systems to provide better service.¹²⁸

Passed in the midst of the bust following the boom of the 1920s, the New Deal securities acts aimed at eliminating fraud through greater disclosure and penalties for noncompliance. Required disclosure was seen as a way of bringing more “sunlight,” in Brandeis’ famous phrase, into the inner workings of corporate shares.¹²⁹ Preventing fraud was only one end of the spectrum, however. On the other end, proponents and enforcers of the New Deal acts hoped that the outflow of information would lead to better pricing and trading on the markets. The Acts, particularly the 1933 Act, were seen as a way of making sure the securities markets acted rationally. In a 1933 article supporting the legislation, William O. Douglas and George E. Bates wrote that the effects of the 1933 Act would be: “(1) prevention of excesses and fraudulent transactions, which will be hampered and deterred merely by the requirement that their deals be revealed; and (2) placing in the market during the early stages of the life of a security a body of

¹²³ Charles N. Charnas & D. Craig Nordlund, *Introduction to Operational EDGAR: An Outline for Electronic Filing with the SEC*, Practising Law Institute, 875 PLI/Corp. 429, 434 (1995).

¹²⁴ See SEC Filing & Forms (EDGAR), available at: <http://www.sec.gov/edgar.shtml>.

¹²⁵ SEC, Researching Public Companies through EDGAR: A Guide for Investors, at: <http://www.sec.gov/investor/pubs/edgarguide.htm>.

¹²⁶ Charnas & Nordlund, *supra* note 122, at 436-37.

¹²⁷ 17 C.F.R. § 232.301 (2010).

¹²⁸ See, e.g., SEC, EDGAR Search Updates, at: <http://www.sec.gov/edgar/searchedgar/edgarsearchupdates.htm>.

¹²⁹ See LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW BANKERS USE IT 92 (1914) (“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”).

facts which, operating indirectly through investment services and expert investors, will tend to produce more accurate appraisal of the worth of the security”¹³⁰ Echoing the thoughts of

Douglas and Bates, the SEC later explained the purpose of the 1933 Act as twofold:

The Securities Act, often referred to as the ‘truth in securities’ Act, was designed not only to provide investors with adequate information upon which to base their decisions to buy and sell securities, but also to protect legitimate business seeking to obtain capital through honest protestation against competition from crooked promoters¹³¹

PART II. A NEW MODEL FOR REPRESENTATION ELECTION REGULATION

This paper seeks to start the conversation about the specifics of a new model for regulating the union representation election. The current system is a strange admixture of ambiguous and heavy-handed requirements about what may be said combined with a completely hands-off approach to what must be said. As a result, unions and employers must step carefully during the campaign so as to avoid statements or conduct that violate the Board’s “laboratory conditions” doctrine. At the same time, the Board makes no effort to ensure that employees get the information they need to make an economically rational decision other than to provide unions with the names and addresses of those workers whom they are courting. In order to redesign the regulation surrounding the union representation election, I propose four facets to a new regulatory model: (a) required disclosure by unions; (b) optional disclosure by employers, if they wish to participate in the campaign; (c) a more hands-off approach to regulation, except in the case of misrepresentation; and (d) protected space for employee discourse. These four reforms are discussed in more detail below.

¹³⁰ William O. Douglas & George E. Bates, *The Federal Securities Act of 1933*, 43 YALE L.J. 171, 172 (1933).

¹³¹ 10 S.E.C. Ann. Rep. 14 (1944). *See also* Securities and Exchange Commission, *The Work of the Securities and Exchange Commission 1* (1967) (stating that the New Deal Acts require disclosure so that “investors may make a realistic appraisal of the merits of securities and thus exercise an informed judgment in determining whether to purchase them”), quoted in George J. Bentson, *The Effectiveness and Effects of the SEC’s Accounting Disclosure Requirements*, in *ECONOMIC POLICY AND THE REGULATION OF CORPORATE SECURITIES* 23, 24 (Henry G. Manne ed. 1969).

A. Required Union Disclosure

The union representation election process suffers from informational failures. Information is distributed asymmetrically, and unions and employers may lack the proper incentives to ensure that employees get the information they need to make the decision. As in the securities regulation context, as well as many other contractual contexts, a system of mandatory information disclosure would be useful in ensuring that consumers get relevant information.

What would such a system look like? My hope is that this piece will begin the debate about exactly this question. Here are a few thoughts about the content of the disclosure, as well as the means of delivering that content to employees.

1. Content

What sorts of information are relevant and material to the union representation question? The answer may vary by election, by individual, and by time period. Further empirical research would be extremely useful in determining exactly what workers want to know in making their decision.¹³² The following categories serve as a starting point in determining what data workers might want.

(a) *Dues and fees.* Obviously, employees would want to know how much their dues would be and what initiation fees would be required. The LMRDA requires disclosure of union dues in both the union's initial filings and in its annual reports.¹³³ As the Local 1199 SEIU

¹³² As discussed earlier, one empirical study discounted the importance of information received by employees during the campaign. See JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY 62-64 (1976) (finding employees generally voted as they thought they would before the campaign); *id.* at 76-80 (finding a low recognition rate for campaign issues), *id.* at 140-43 (arguing that hands-off regulation is proper, given the lack of importance to the campaign itself). However, as noted, critics have charged that the data did not support the authors' normative claims. See Bodie, *Information*, *supra* note 6, at 30 (discussing criticism). In addition, the study was focused on whether the campaign affected workers' attitudes, not whether workers were getting the information they needed to make economically rational decisions.

¹³³ Form LM-1, *supra* note 45; Form LM-2, *supra* note 46.

example demonstrates, however, the union may disclose a range of dues and fees rather than a specific amount. In such cases, employees would want to know exactly how much the union is proposing to charge in their particular case.

Employees may also want a sense of whether those dues are likely to change in the next few years. Given the difficulties of exit, employees are essentially signing up for as much as a three-year contract when they agree to union representation. Although unions may not know what their future financial needs will be, they may have information about future dues prices that would be useful to the employees' decision. The union could be required to disclose whether any dues or fees hikes are set to be voted on by the members, or whether union officials have plans for such an increase in the upcoming year.

(b) Organizational structure. Like any organization, potential members generally would want to know how the union is structured and what its policies are for members. The union must disclose its constitution and bylaws under the LMRDA. Form LM-1 asks the union to list such information as qualifications for or restrictions on membership, authorization for disbursement of funds, the types of audits the labor organization undergoes, the calling of regular and special meetings, the selection of officers and stewards, the circumstances under which fines, suspensions, or expulsions can be imposed, and the requirements for authorizing bargaining demands, contract terms, and strikes.¹³⁴ In addition, members may want to know who the union officials are, their backgrounds, and perhaps even their salaries.¹³⁵ Form LM-2 requires the

¹³⁴ Form LM-1, *supra* note 45.

¹³⁵ The question of salaries is likely to provoke some controversy. On the one hand, corporations are required to disclose salary information under federal securities law on the theory that shareholders should know what their agents are making. See 17 C.F.R. § 229.402 (2006); *cf.* SEC Release Nos. 33-8655, 34-53185 (January 27, 2006), available at <http://www.sec.gov/rules/proposed/33-8655.pdf> (proposing new rules for executive compensation disclosure). Given that union members have some of the same agency costs concerns that shareholders do, compensation information may be material. See Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 377-83. However, the purchasers of services generally do not have the right to see the executive compensation for the company from whom they are buying the services. To the

disclosure of officials and disbursements to officials. Officials could also be required to provide a short biography that includes certain specific facts, such as education, work experience, criminal record, and time with the union.

(c) Nature and Quality of Services. Perhaps the most important set of information for employees would concern the nature and quality of the representation services provided by the union. There is a distinct information asymmetry with respect to information about the union's services.¹³⁶ Employees who have never belonged to the union do not know how well the union will do in negotiating new terms, avoiding strikes, managing grievances, and keeping dues low. When buying a product, consumers can often see and handle the product, and they are often given the right to return the product if they find it unsatisfactory. Home buyers hire inspectors, tour the home, and still benefit from mandatory disclosure requirements on the part of the seller. Union consumers must base their judgment on the information provided during the campaign, along with any prior knowledge, opinions, or prejudices they may bring with them to the decision.

There may be ways to get information about performance to employees making a representation decision. The union's past and current collective bargaining agreements provide concrete facts about the terms and conditions the union has negotiated for other employees. Having access to these contracts would provide a way for workers to comparison-shop. A more speculative form of information would be union predictions about what they expect to negotiate with the employer. The union might present information about what its initial demands would be, and it could even provide information about what it expects to get. It could even disclose the

extent that employees are simply consumers of union representation services, such information could be much less relevant in comparison to the quality of the services. Cf. Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUMBIA BUS. L. REV. 501, 516-17 (arguing that for-profits unions should be allowed to provide union representation services).

¹³⁶ Bodie, *Information*, *supra* note 6, at 47-51.

risk that the union will not be able to negotiate a contract, or the likelihood that the union will call the employees out on strike.

In the world of securities regulation, firms making an initial public offering are required to disclose reams of financial information about themselves.¹³⁷ Companies are even expected to make predictions about what future events may damage their prospects of being successful in business.¹³⁸ One could envision a disclosure statement in which unions provided a richer vision of what they expected to achieve and the difficulties they contemplated facing as part of a mandatory disclosure statement. Of course, unions would generally endeavor to be as non-specific as possible in order to avoid recriminations or liability down the road. Unions could also plausibly argue that such statements would reveal too much of their strategies and would enable the employer to get an advantage in bargaining. As we consider a mandatory disclosure regime, the pros and cons of such “softer” statements should be considered alongside the disclosure of “harder” financial data.

(d) Conflicts of Interest. The corporate world places a premium on disclosure whenever a potential conflict of interest arises between a corporate officer and the corporation he or she serves.¹³⁹ Employees are entitled to know about any potential conflict of interest between the union and the employer. Evidence of such a conflict would be any overlap between union personnel and the employer’s personnel, including spouses and other close relatives, or financial ties between the union and the employer.¹⁴⁰ Current or past collective bargaining relationships

¹³⁷ See Part I.C *supra*.

¹³⁸ See 17 C.F.R. § 229.303 (2006) (requiring that the filer “[d]escribe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations”).

¹³⁹ See, e.g., *State ex rel. Hayes Oyster Co. v. Keypoint Oyster Co.* 391 P.2d 979, 986 (Wash. 1964) (“A corporation cannot ratify the breach of fiduciary duties unless full and complete disclosure of all facts and circumstances is made by the fiduciary and an intentional relinquishment by the corporation of its rights.”).

¹⁴⁰ Such ties could be quite attenuated. It would be important to identify all companies in which the employer had a significant ownership stake and to include those companies in any analysis.

between the union and the employer (or an associated company) might also be grounds for a conflict of interest. Moreover, any contracts between the employer and its affiliates and the union (or its affiliates) should also be disclosed to employees. The key here would be to have a sweep broad enough to encompass all of the potential conflicts. For example, Teri Moore may be president of the United Forever Union (UFU) and may negotiate a fairly employer-friendly contract with Blue Industries. If Teri also is the treasurer for Americans United Union (AUU), and AUU is seeking to represent employees of Aquamarine Industries, a subsidiary of Blue Industries, then Aquamarine employees should be told about and given access to the UFU contract with Blue Industries. The regulations would have to be written to prevent employers and unions from avoiding the disclosure requirements simply by creating new corporations or labor organizations.

But aside from this concern, the Board would easily be able to provide this information to employees by piggybacking on top of existing disclosure required. Unions and employers are unlikely to provide this information themselves during the course of the campaign. In fact, the incentives are inverse: the more troublesome the disclosures would be (for both union and employer), the less likely they are to be disclosed.¹⁴¹ Although industrious employees might find these disclosures on their own, the Board would provide a real service by making sure employees get this information as part of ensuring that “laboratory conditions” exist.

2. *Delivery*

Given the plethora of potentially relevant information available to disclose, the Board would have to determine the best method for selecting the disclosure and then delivering it to employees. In terms of selecting the information, the Board would face a difficult choice. On

¹⁴¹ See Bodie, *Information*, *supra* note 6; Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655 (2010).

the one hand, the Board would want to keep the information disclosure as concise as possible, in order to make it more accessible to employees. Concerns about “information overload” have led commentators to reexamine the amount of required disclosure in the realm of securities.¹⁴² On the other hand, some employees might be willing to spend the extra time to dig through a larger amount of disclosure and would find the extra information useful or even critical in making their decision. Given that union elections can be determined by one employee out of hundreds, it may make sense to give the marginal employee as much information as he or she desires.

Technology may provide the answer to this dilemma. The Board could provide for the mandatory disclosure in two steps. The first step would be a short form distributed to all employees with a few pieces of critical information included. The second step would be an Internet website, similar to EDGAR, that would provide access to all of the other information the Board required to be disclosed. In this manner, all employees would be given a set of disclosures that many would be likely to read. At the same time, the few more industrious employees would have channeled access to important information that may take much longer to absorb.

The primary issue surrounding the first step would be determining the exact scope of the information to be provided. While the Board would want to gather more information and could even consider rulemaking on this issue,¹⁴³ commentators may want to focus on determining what

¹⁴² Troy A. Paredes, *Blinded by the Light: Information Overload and Its Consequences for Securities Regulation*, 81 WASH. U. L.Q. 417, 419 (2003). Paredes notes that if a rational actor is forced to process too much data in making a cost-benefit analysis, the actor may adopt one of several decisionmaking heuristics which do not always process the information in a rational manner. *Id.* at 437-43. While acknowledging that most investors rely on expert “filters” such as mutual funds, research analysts, and the business media in making investment decisions, Paredes cites to evidence that these filters are themselves subject to information overload. *Id.* at 452-59. While making no affirmative policy proposals, Paredes counsels that “securities regulation needs to focus to a greater extent on the user of information.” *Id.* at 485.

¹⁴³ For advocacy of more rulemaking by the Board, see Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Samuel Estreicher & Matthew T. Bodie, *Review Essay: Administrative Delay at the NLRB: Some Modest Proposals*, 23 J. LAB. RES. 87, 98-99 (2002). For a discussion of

sorts of information employees most want and how to convey that information most concisely. Union dues and fees applicable to the voting employees, for example, could be specified briefly. Terms and conditions of employment in the union's other collective bargaining agreements could not. To some extent, the Board might want to use the short form to tip off employees about information they could get through the website. However, for the most part the Board would want to keep the short form as a simple summary of the most critical facts about the union and its services.

The primary issues surrounding the second step would be the design of the website, the costs in implementing the system, and the likelihood that employees would benefit from the system. In terms of the design, this again is an issue for future policy development by the Board. It should be fairly straightforward, however, to design a standard page for each election which would provide access to the additional sets of information. The Department of Labor has brought its entire LMRDA disclosure system online, making it fairly simple to link to the Department of Labor's website or even directly link to the particular union's disclosure within the Department's database.¹⁴⁴ Other documents, such as the union's past and present collective bargaining agreements, could be posted to the page as documents that could be downloaded. Moreover, the page could also link to the union's website in order to provide access to information. In terms of costs, it is fairly simple to create a webpage, and Board technicians could use the same web design for each representation election.¹⁴⁵ It would be far simpler to

the Board's antipathy towards rulemaking, see Joan Flynn, *The Costs and Benefits of "Hiding the Ball": NLRB Policymaking and the Failure of Judicial Review*, 75 B.U. L. REV. 387 (1995).

¹⁴⁴ See Final Regulations, 68 Fed. Reg. at 58,374-75; Department of Labor, LMRDA Reporting & Disclosure, at: <http://www.dol.gov/esa/regs/compliance/olms/rrlo/lmrda.htm>. Interestingly, ERISA has a requirement that the Secretaries of Labor and the Treasury work together when they are requesting similar information. 29 U.S.C. § 1204 (2000). The NLRB could similarly work with other branches of the Department of Labor to make sure that LMRDA-required information was provided to employees in the midst of a union organizing drive.

¹⁴⁵ In his commentary on my paper, Harold Maier raised a number of questions with regard to the content and mechanics of such a website. A straightforward template would be necessary to allow the Board's regional offices

post electronic versions of collective bargaining agreements on the web, as opposed to photocopying these agreements and distributing them to employees.

There is some question as to whether employees would use such a system. However, computer ownership and Internet use continue to grow across the country.¹⁴⁶ Many employees have access to the Internet at work. As many other commentators have suggested, using the web is a cost-effective, extremely accessible method of distributing lots of information to a large number of employees.¹⁴⁷ It can overcome the *Lechmere* access problems that have made it difficult for information to reach employees. Providing unions with access to the employees (electronically) together with employee access to mandatory disclosure about the union would provide an ideal mix of information to employees.

B. Employer Disclosure

This article has focused primarily on the need for employees to get information about the union offering its services. Given that unions are seeking to provide services on behalf of the employees, it makes sense to focus on their dues, internal organization, quality of services and potential conflicts of interest. However, information about the employer is also relevant to the representation decision.¹⁴⁸ Although there is ample ground for further discussion and research, this article proposes a system of employer disclosure in which employers would be given an

to get the disclosure websites operating quickly and efficiently. Certainly, there are many questions at the margins about what this template would look like. However, the Board can develop a disclosure structure that would be sufficiently mechanical for the routine use. A very rudimentary disclosure regime might make sense at the beginning; after all, it took the SEC roughly a decade (1985-1994) to develop a fully operational disclosure database. *See* Charnas & Nordlund, *supra* note 122, at 434-37.

¹⁴⁶ Polls have indicated that 73 percent of Americans use the Internet. Lawrence Rout, *Broadband: Online Audience Grows--from Different Directions*, WALL ST. J., Sept. 13, 2004, at R2.

¹⁴⁷ *See* Martin H. Malin & Henry H. Perritt, Jr., *The National Labor Relations Act in Cyberspace: Union Organizing in Electronic Workplaces*, 49 U. KAN. L. REV. 1 (2000); Susan S. Robfogel, *Electronic Communication and the NLRA: Union Access and Employer Rights*, 16 LAB. L.J. 231 (2000); Gwynne A. Wilcox, *Section 7 Rights of Employees and Union Access to Employees: Cyber Organizing*, 16 LAB. L.J. 253 (2000); Elena N. Broder, Note, *(Net)Workers' Rights: The NLRA and Employee Electronic Communications*, 105 YALE L.J. 1639 (1996); Wissinger, *supra* note 28, at 347-48.

¹⁴⁸ *See* Lofaso, *supra* note 6, at 41 .

option. The employer could provide a set of mandatory disclosures and then participate in the campaign, or the employer could remain neutral and provide no disclosure. This option would provide employers with a choice. They could contest the union's efforts by putting their own cards on the table, or they could stay out of the process entirely.

What kinds of information would the employer provide? Again, further research is necessary to determine exactly what kinds of employer information are relevant and important to making a rational union representation election. Ties to the union are certainly relevant, and it may make sense to impose a duty on the employer to make disclosures about any potential conflicts of interest between itself and the union. The company's finances are also relevant, as its financial condition may dictate what level of wages and benefits it could provide to employees. Much of the information useful to potential shareholders would also be useful to employees contemplating unionization (albeit perhaps for different reasons). In this regard, the Board could piggyback off disclosures made by publicly-traded companies to the SEC. The Board could provide a link to the employer's EDGAR disclosures through the election website, just as it would link to union disclosures at the website as well.

This system of optional disclosure would have two policy objectives. The first would be to increase the availability and accessibility of information about the employer to employees. The second objective would be to put a premium on employer participation within the campaign. As noted above, perhaps the primary justification for employer involvement in the union campaign is the employer's role in providing negative information about the union to employees. A system of mandatory union disclosure would weaken that justification. If the regime of disclosure is comprehensive enough, perhaps employers could be ushered completely out of the

election process, leading to a *de jure* system of employer neutrality.¹⁴⁹ Such a system, however, would have to overcome complicated free speech and informational concerns. A system of optional disclosure would put a price on participation – a price rationally related to representation election regulation.

C. *Reconfiguring Campaign Regulation*

The Board's regime of representation election regulation has long been criticized for its indeterminate and hair-splitting standards. Since the Board has not been all that concerned with managing the information in the campaign, the proposed system of disclosure would not necessarily affect the Board's prohibitions on coercion, bribery, or inflammatory appeals; such regimes could coexist. At the same time, a new disclosure regime might provide an opportunity for the Board to reexamine the current prohibitions and adopt a simpler, more streamlined system. If the union and employer are providing critical information to the employees up front, then perhaps employees will place less emphasis on the information they learn from the participants during the campaign. However, given the different purposes of much of the Board's regulation, perhaps there need not be any changes to the Board's efforts to regulate speech and conduct that has the tendency to coerce employees in the exercise of their choice.

However, there is one reform that would substantially supplement and strengthen the disclosure regime: penalties for misrepresentation and fraud. Unlike perhaps every other regime of commercial regulation, the Board's regulation of the union representation election does not penalize for fraud. This failure is anathema to the need for employees to trust the information they are getting from unions and employers. Required disclosures would be useless if there are

¹⁴⁹ Employer neutrality has many advocates. See James Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819 (2005) (supporting the enforceability of employer neutrality agreements); Bodie, *Information*, *supra* note 6, at 51-55 (discussing the skewed incentives of employers to participate in the election campaign); Sachs, *supra* note 142, at 680-691 (discussing the deleterious effects of employer intervention on employee choice).

no penalties for failures or misrepresentations in those disclosures. The Board should, at the least, treat material misrepresentations as grounds for overturning an election, and it should treat any error or omission in the mandatory disclosure as *per se* material. The Board could also consider stronger penalties such as monetary damages or injunctive relief. In making a union representation decision, employees should be protected against fraud as consumers generally are when making economic decisions.¹⁵⁰ Fraud should not be tolerated.

D. Providing Space for Employee Discourse

In the 1980s, the SEC saw the opportunity for a new approach to disclosure and public access to that disclosure. In developing the EDGAR system, the SEC has changed the ability of shareholders, prospective shareholders, and the markets as a whole to have easy access to critical information.¹⁵¹ The NLRB, on the other hand, has been generally reluctant to engage in changes based on new technological possibilities.¹⁵² Perhaps most (in)famously, the Board has made it very easy for employers to prohibit union email solicitations or other communication while permitting employees to engage in virtually every other kind of non-work-related exchanges.¹⁵³ Rather than using the new medium to provide for greater access to information and communication, the Board relied on traditional property law analysis to shut down a potential avenue of growth.

¹⁵⁰ Kent Greenfield has discussed the lack of fraud protection for employees in the context of the labor market more generally. Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715 (1997).

¹⁵¹ Don Langevoort, among others, saw the possibilities for EDGAR from its inception. Donald C. Langevoort, *Information Technology and the Structure of Securities Regulation*, 98 Harv. L. Rev. 747, 757-58 (1985) (discussing EDGAR's potential to "reduce investors' dependence on financial intermediaries for the collection and distribution of information").

¹⁵² I say this with regard to the Board's policies in enforcing the Act, not its internal management.

¹⁵³ *Guard Publishing Co. d/b/a The Register-Guard*, 351 N.L.R.B. 1110, 1111 (2007), *enforcement granted in part and denied in part*, 571 F.3d 53 (D.C. Cir. 2009).

Professor Jeffrey Hirsch has been a consistent and thoughtful advocate for ways in which the Board can use electronic technologies to improve the functioning of the NLRA.¹⁵⁴ In a recent paper, Hirsch argues that the Board needs to do more to encourage employee discourse.¹⁵⁵ Given the difficulties inherent in collective action, Hirsch points out that the Board cannot assume that providing a limited avenue for communication is sufficient. Instead, the Board needs to take steps to encourage employee discourse. Among his suggestions are not only striking down employer restrictions on employee communications, but also providing for more structured discourse during election campaigns as well as notices to employees about their rights.¹⁵⁶ A disclosure regime would be an important addition to Hirsch's discourse model. It would provide a baseline of information from which further discussion could spring. As Hirsch points out, "a meaningful right of collective action requires employees to have enough information to exercise that right."¹⁵⁷ I would encourage the NLRB to look to the example of the SEC in matching a system of information disclosure with the technological means to make the information easily accessible to those who need it.

As part of the disclosure websites discussed in Part II(A)(2), the Board could also provide for virtual discussion areas for employees to "meet" electronically and discuss collective employee issues. These areas could be discussion boards, blogs, or even virtual space in online worlds such as Second Life.¹⁵⁸ Such electronic meeting places would provide employees with a neutral space in which to carry on the discourse necessary to collective bargaining. Such spaces could be employees only, or unions and employers might have limited access to the space to

¹⁵⁴ See Jeffrey M. Hirsch, *The Silicon Bullet: Will the Internet Kill the NLRA?*, 76 GEO. WASH. L. REV. 262 (2008); Jeffrey M. Hirsch, *Taking State Property Rights Out of Federal Labor Law*, 47 B.C. L. REV. 891 (2006).

¹⁵⁵ Hirsch, *Communication Breakdown*, *supra* note 7.

¹⁵⁶ *Id.* at 20-62.

¹⁵⁷ *Id.* at 52.

¹⁵⁸ For a discussion of workplace issues in virtual worlds, see Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077 (2009).

facilitate the dialogue. There is ample evidence that employees are using these spaces already in the context of their work life and their personal life. It would be a natural extension for many employees to engage in workplace discourse electronically.¹⁵⁹ Employing technology creatively could give the Board an invigorated role in workplace life in the new century.

E. Intended Effects of the New Regime

In laying out a framework for reform, I wish to conclude by talking about the two general goals of these reforms – two effects they should endeavor to create. First, the disclosure regime should highlight many of the more egregious conflicts of interest between labor organizations and employers. If ties between the union and company are highlighted for employees, employees will be in a much better position to police such ties. Second, a more rational and organized system of information regulation will help employees make more informed and rational decisions. And to the extent that employees could better trust the information they are getting, they may feel more comfortable to committing themselves to union membership. Certainly, better information could lead to the result that even fewer employees decide to join unions. But whatever the result, a system of disclosure would provide employees with the tools to better evaluate the decisions before them. In the long run, more rational decisions will mean more efficient ones, which will ultimately leave society better off.

CONCLUSION

The Board, courts, and academic commentators have (with good reason) focused on employer coercion and administrative delay as key concerns in the regulation of the union representation election. However, the critical role of information – information necessary to make an efficient representation decision – has been neglected. This paper argues for a new approach to representation elections: one that creates disclosure requirements for both unions and

¹⁵⁹ For a discussion of the NLRA in the electronic workplace, see Malin & Perritt, *supra* note 146.

employers, as well as one that empowers the Board to manage the flow of information to employees. At the least, this new approach will help prevent conflicts of interest that despoil the relationship between a union and its members. However, such a process may ultimately lead to a newly invigorated market for representation driven by a wiser, more informed class of employees.